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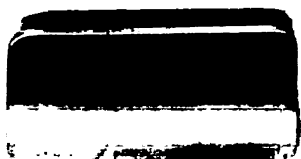
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CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON,  
COLORADO, WASHINGTON, MONTANA, ARIZONA,  
NEVADA, IDAHO, WYOMING, UTAH, NEW  
MEXICO, OKLAHOMA, AND COURT  
OF APPEALS OF COLORADO.

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# JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

## ARIZONA—Supreme Court.

HENRY C. GOODING, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

RICHARD E. SLOAN. JOSEPH H. KIBBEY.  
EDMOND W. WELLS.

## CALIFORNIA—Supreme Court.

WILLIAM H. BEATTY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN R. SHARPSTEIN.<sup>1</sup> RALPH C. HARRISON.  
THOMAS B. MCFARLAND. C. H. GAROUTTE.  
VAN R. PATERSON. J. J. DE HAVEN.  
W. F. FITZGERALD.

## Supreme Court Commissioners.

I. S. BELCHER. JACKSON TEMPLE.  
NILES SEARLS. P. VANCLIEF.  
JOHN HAYNES.

## COLORADO—Supreme Court.

CHAS. D. HAYT, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

VICTOR A. ELLIOTT. LUTHER M. GODDARD.

## Court of Appeals.

GEORGE Q. RICHMOND, PRESIDENT.

JUDGES.

JULIUS B. BISSELL. GILBERT B. REED.

## IDAHO—Supreme Court.

JOSEPH W. HUSTON, CHIEF JUSTICE.

JUSTICES.

ISAAC N. SULLIVAN. JOHN T. MORGAN.

## KANSAS—Supreme Court.

ALBERT H. HORTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

S. H. ALLEN. W. A. JOHNSTON.

## Supreme Court Commissioners.<sup>2</sup>

B. F. SIMPSON. GEORGE S. GREEN.  
J. C. STRANG.

<sup>1</sup>Deceased.

<sup>2</sup>Expired by limitation March 1, 1898.

**MONTANA—Supreme Court.**

WILLIAM Y. PEMBERTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM H. DE WITT.

EDGAR N. HARWOOD.

**NEVADA—Supreme Court.**

MICHAEL A. MURPHY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

R. R. BIGELOW.

CHARLES H. BELKNAP

**NEW MEXICO—Supreme Court.**

JAMES O'BRIEN, CHIEF JUSTICE.

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WILLIAM D. LEE.

ALFRED A. FREEMAN.

ALBERT B. FALL.

EDWARD P. SEEDS.

**OKLAHOMA—Supreme Court.**

EDWARD B. GREEN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN G. CLARK.

JOHN H. BURFORD.

**OREGON—Supreme Court.**

WILLIAM P. LORD, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

ROBERT S. BEAN.

FRANK A. MOORE.

**UTAH—Supreme Court.**

CHARLES S. ZANE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

GEORGE W. BARTCH.

JOHN W. BLACKBURN.

JAMES A. MINER.

**WASHINGTON—Supreme Court.**

R. O. DUNBAR, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

J. P. HOYT.

ELMON SCOTT.

T. L. STILES.

T. J. ANDERS.

**WYOMING—Supreme Court.**

HERMAN V. S. GROESBECK, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

ASBURY B. CONAWAY.

GIBSON CLARK.



# SUPREME COURT RULES.

## IDAHO.

[Adopted Feb. 14, 1898. Take effect May 1, 1898.]

### RULE 1.

#### ATTORNEYS—

Who Admitted.

Testimonials Required.

Roll.

Oath.

Examination Prerequisites.

Examination, How Conducted.

**PARAGRAPH 1. *Who Admitted.*** No person shall be admitted to practice as an attorney or counselor in this court unless such person shall have been previously admitted in the supreme court of the United States or the highest court of a sister state or territory, or shall have passed a strict examination in open court as to his qualifications.

**PARAGRAPH 2. *Testimonials Required.*** Every person admitted to practice as an attorney or counselor in this court must produce satisfactory testimonials of good moral character; must be twenty-one years of age; must file with the clerk of this court satisfactory evidence that he has paid to the state treasurer the sum of twenty-five dollars for the use of the state library fund; and, if admitted upon the certificate of the highest court of another state or territory, must file with the clerk of this court an affidavit showing he is still in good standing in such court; and, in case he cannot produce his said certificate, he may be admitted upon his affidavit showing the name of the state, (or territory,) county, court, and time of such admission.

**PARAGRAPH 3. *Oath and Roll.*** Every person admitted to practice as an attorney and counselor of this court must sign the roll and take the following oath of office: "I, \_\_\_\_\_, do solemnly swear that I will support the constitution and laws of the United States and of this state; that I will maintain the respect due to the courts of justice and to judicial officers; that I will be true to the court and to my client; that I will abstain from all offensive personality; and that I will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed."

**PARAGRAPH 4. *Prerequisites for Examination.*** Only bona fide residents of this

state who intend to engage in the practice of the law as a business shall be eligible for examination as attorneys and counselors of this court, and a notice of intention to apply for admission shall so state, and must be filed with the clerk of this court previous to the day set apart for the examination. No applicant will be examined unless he shall have filed with the clerk of the court, on or before the first Saturday of the regular term at which he presents himself for examination, a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such for at least four years next theretofore, stating in substance that they, and each of them, have carefully and diligently examined the applicant touching his qualifications in point of learning of the law to be admitted to practice; that it satisfactorily appeared to them, and each of them, upon examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study was prosecuted; that the applicant had during that time read certain books of law, which books shall be enumerated in the certificate; and stating any other facts tending to show the extent of the attainments of the applicant; and also that in their opinion the applicant possesses the requisite qualifications to entitle him to be admitted to practice.

**PARAGRAPH 5. *Examination, How Conducted.*** The first Saturday of every regular term of the court, or so much thereof as may be necessary, shall be set aside for the purpose of examining applicants for admission as attorneys and counselors of this court. The court shall prepare, or cause to be prepared, a series of questions embracing such subjects as the court may deem proper, and cause, upon the day before such examination, a sufficient number of such questions to be written or printed to furnish each applicant with one copy thereof. Such copies shall be deposited with the clerk of the court, who shall not communicate to the applicants, or to any other person, the substance of the questions asked, or the subjects treated, or give any information in regard thereto. At the time set for the examina-

tion each candidate for admission shall appear, and by the clerk, under direction of the court, shall be furnished with a copy of the questions so prepared, and shall then, in open court, and under the supervision of the court, and without reference to books or memoranda of any kind, and without consultation or conversation with each other or any other person, prepare written answers consecutively to the questions propounded, upon paper furnished them for that purpose. Six hours shall be allowed in which such answers may be prepared, and unless the answers are sooner prepared and placed in the hands of the clerk, no applicant will be allowed to leave the court room without permission of the court, and then only upon his promise given that he will not attempt to communicate with any one upon the subject-matter of any of the questions asked. At the end of six hours, unless all of the applicants have sooner finished, the written answers shall be surrendered to the court or the clerk, being first signed by the several applicants respectively. Thereupon, and at such time as the court may deem convenient, it shall admit such of the candidates as appear to the court to be duly qualified, satisfactory proof having been made of the good moral character of such applicants.

## RULE 2.

### APPEAL—When Dismissed.

*Appeal, When May Be Dismissed.* If the transcript of the record is not filed within the time prescribed by paragraph 3 of rule 27, the appeal or writ of error may be dismissed, on motion without notice, on the first Monday of the term during which the cause is subject to call. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party.

## RULE 3.

### APPEAL—What Showing Must Accompany Motion to Dismiss.

*What Showing Must Accompany Motion to Dismiss.* On such motion there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition; the fact and date of the filing of the notice of appeal or issuing the writ of error; the fact and date of the filing the undertaking on appeal or writ of error; the fact and time of the settlement of the statement, if there be one.

## RULE 4.

### APPEARANCE—Failure of.

*Appearance, Failure of.* When a cause is reached on the calendar, and neither side has been submitted or is represented by counsel in court, the appeal will be dismissed. When it is so submitted or represented by counsel for the respondent or

defendant in error, and not for the appellant or plaintiff in error, the judgment, order, or proceeding of the court below will be affirmed, of course without argument: provided, however, that the court may, in its discretion, examine the record and render its judgment on the merits.

## RULE 5.

### ARGUMENT—How Conducted.

*Argument, How Conducted.* No more than two counsel on a side will be heard upon the final argument, except in peculiar and important cases, upon leave of the court obtained before the argument is commenced; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant or plaintiff in error shall be entitled to open and close the argument. Each side will be allowed two hours, including the reading of papers, and each defendant who has appeared separately in the court below will be allowed two hours: provided, that for good cause shown, the court may give further time for the argument, and each party shall also have the privilege of filing a printed brief or argument. Upon the argument of preliminary motions no more than one counsel on a side will be heard, and only one hour to each counsel will be allowed.

## RULE 6.

### BRIEF—What to Contain.

How Printed.

When Served.

When Filed.

Submission on.

*PARAGRAPH 1. Brief, What to Contain.* In civil cases each party shall prepare and have printed an argument or brief of the points and authorities relied on. In citing cases from published reports, the names of the parties as they appear in the title of the case, as well as the book and page, shall be given. Briefs on both sides shall begin with a succinct statement of so much of the record as is essential to the questions discussed in them, referring to the transcript by folios. The brief of the appellant and plaintiff in error shall also contain a distinct enumeration of the several errors relied on. On the cover and first page shall be stated the title of this court, the title of the cause, and the names of counsel for appellant and respondent, and the district and county appealed from. The expense of such brief, at not exceeding one dollar per page of 7x3½ inches printed matter, and for not exceeding forty pages, shall be allowed and taxed as costs: provided, that the court may, in its discretion, order that no costs shall be taxed for any brief which does not comply with this rule, or containing a miscitation of authorities, unless corrected before the submission of the case.

**PARAGRAPH 2. Brief, How Printed.** Briefs shall be neatly and legibly printed, with black ink, on white writing paper, properly pagged at the top, with a margin on the outer edge of the page of two inches. The printed page shall be seven inches long and three and a half inches wide, and the paper page shall be ten inches long and seven inches wide. Each brief shall be signed by counsel preparing it; and shall be fastened together in a paper or cloth cover.

**PARAGRAPH 3. Brief, When Served.** The brief of appellant, or plaintiff in error, must be served within ten days after the filing of transcript, and the respondent, or defendant in error, has ten days after such service in which to serve his brief upon the opposite party.

**PARAGRAPH 4. Brief, Copies Filed, When.** Before the time of the calling of a cause for argument both parties shall file with the clerk at least five copies of their briefs for the justices of the court, the clerk, and the reporter; and when the cause is called the clerk shall furnish a copy thereof to each of the justices.

**PARAGRAPH 5. Brief, Submission of Cause on.** Causes may be submitted on either or both sides, on printed briefs actually filed at the time. But the court will order an argument, on both sides, of all cases appearing to require it.

## RULE 7.

### CALENDAR—

How Made Up.

Criminal Causes May be Heard Out of Order.

Criminal Causes Put on Calendar During Term.

Lewiston Terms.

Boise Terms.

Causes, When Heard.

Causes Put on for Dismissal.

Title of Causes.

**PARAGRAPH 1. Calendar, How Made Up.** The calendar of each term shall consist only of those cases in which the transcript shall have been filed, on or before the day preceding the first day of the term, unless, upon written consent of the parties, or for good cause shown, it shall be otherwise ordered by the court. The clerk must number and enter causes upon the calendar in the order of the date of filing the transcript, statement on appeal, application for writ of error, or application for a writ in a special proceeding, and number them consecutively, and such number shall not be changed, except by order of the court, and, if changed, the calendar must show the original number. The calendar must show the county and judicial district from which the cause is appealed. In all cases in which the appeal is perfected or writ of error issued, as provided in rule 27, paragraph 8, and the transcript is not filed as by said rule prescribed, the case may be placed upon the calendar upon motion of the respondent

or defendant in error, for the purpose of being dismissed, upon the certificate of the clerk, as provided by rules 2 and 3, or for the purpose of the case being heard upon its merits, or for the purpose of having the judgment affirmed with or without damages upon the filing of the transcript.

**PARAGRAPH 2. Criminal Causes.** The court may order the hearing of any criminal cause at any term of the court, wherever it may be held, and may order the hearing in advance of any or all civil causes, regardless of its number on the calendar.

**PARAGRAPH 3. Criminal Causes Put on Calendar During Term.** When the transcript in a criminal cause is filed, it may be placed on the calendar at any time by consent, or on motion of the defendant.

**PARAGRAPH 4. Calendar for Terms at Lewiston.** The calendar for the terms held at Lewiston shall consist only of those causes appealed from or arising in the territory comprising the counties of Shoshone, Kootenai, Latah, Nez Perce, or Idaho, and such causes will be heard there, unless the parties file a stipulation in writing to hear them at a term to be held at Boise City.

**PARAGRAPH 5. Calendar for Terms at Boise City.** The calendar for the terms held at Boise City shall consist of all causes appealed from or arising in the territory comprising the counties not named in paragraph 4 (together with all causes transferred by stipulation from the Lewiston calendar,) and will be heard at Boise City.

**PARAGRAPH 6. Causes, When Heard.** Civil causes are entitled to be, and will be, heard in the order they appear on the calendar. There will be a peremptory call of the calendar on the second Monday of the term, and all causes (not before disposed of or set for hearing) not then ready for hearing will be placed at the foot of the calendar, or continued for the term.

**PARAGRAPH 7. Causes Put on the Calendar for Dismissal.** On motion of respondent the court may order a cause placed on the calendar at any time for dismissal under the provisions of rule 2.

**PARAGRAPH 8. Title of Causes.** The original title, with the names of the parties in the same order, shall be retained in this court, substituting for the words "plaintiff" or "defendant," "appellant" or "respondent," as the appeal papers shall designate. In special proceedings where in this court has original jurisdiction the party prosecuting shall be called plaintiff and the adverse party defendant.

## RULE 8.

### COSTS—

Who First Liable for.

When Paid, and Amount.

Paid Before Remittitur Sent Down.

For Printing Transcripts and Briefs.

**PARAGRAPH 1. Liability for Costs.** When causes are placed upon the calendar



parties shall be primarily liable for costs, as follows:

First. If by the appellant or plaintiff in error, he shall be first liable.

Second. If by the respondent or defendant in error, then both parties.

Third. To entitle a transcript on appeal or on error to be filed in this court, an advance fee, to cover costs in the case, in the sum of \$15, shall be deposited with the clerk, and for a like purpose the respondent, or adverse party, upon filing their brief, shall deposit the sum of \$5. In any matter or proceeding in which the court has original jurisdiction, the party instituting the proceeding shall deposit the sum of \$10, and the adverse party the sum of \$2.50.

Fourth. In causes placed on the calendar for the purpose of dismissal under the provisions of rules 2 and 3, the respondent must deposit an advance fee of \$5 before making the motion.

PARAGRAPH 2. *All Costs to be Paid Before Remittitur Sent Down.* In no civil case shall the clerk be required to remit the final papers until the costs are paid.

PARAGRAPH 3. *Cost of Printing.* The expense of printing transcripts on appeal in civil causes, and the pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this court, shall be allowed as costs and taxed in bills of cost in the usual mode.

## RULE 9.

### DAMAGES—When Appeal for Delay.

*Damages, Appeal for Delay.* In all cases where an appeal or writ of error is manifestly for delay, damages may be allowed at the rate of not exceeding twelve per cent. upon the amount of the judgment in the discretion of the court.

## RULE 10.

### DEFAULT—Of Appellant.

*Default of Appellant.* On a call of the calendar in its order, if no counsel appear for the appellant or plaintiff in error, and no brief or statement of points and authorities on behalf of appellant or plaintiff in error be on file, the appeal or writ of error will be dismissed, or judgment affirmed, in the discretion of the court, on motion of respondent or defendant in error.

## RULE 11.

### DIMINUTION—Of Record.

*Diminution of the Record.* For the purpose of correcting any error or defect in the transcript from the court below either party may suggest the same, in writing, to this court, and upon good cause shown obtain an order that the proper clerk certify to the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel, in writing, filed with the clerk before argument. If the attorney of the adverse party be

absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

## RULE 12.

### EXCEPTIONS—

#### When Judge Below Refuses, How Proved.

#### When Judge Dies, etc., How Settled.

PARAGRAPH 1. *Exception, When Refused, May be Proved.* If any judge or referee before whom a case has been tried neglects or refuses to settle and allow a bill of exceptions or statement in accordance with the facts, within thirty days after the same is finally submitted to him, the party aggrieved may apply by petition to this court, or one of the justices thereof, to prove the same. The petition must be filed with the clerk of this court within thirty days after such refusal, and a copy of the petition served upon the adverse party. The facts may be presented by certified copies of the record, stenographers' notes, duly verified, or affidavits, and, if necessary, oral testimony.

PARAGRAPH 2. *Proceeding if Judge Dies or is Disqualified.* When a judge or judicial officer, before whom a case has been tried, dies, becomes disqualified, or is absent from the state, or when from any other reason there is no mode provided by law for the settlement of a statement or motion for new trial or bill of exceptions, the successor in office of such judge or judicial officer, or the judge of an adjoining district, may settle and sign such statement or bill of exceptions; and in settling either such judge or officer may, in his discretion, permit affidavits to be read, to assist him in settling disputed points.

## RULE 13.

### EXTENSION OF TIME—

#### To File Transcript.

#### Generally.

PARAGRAPH 1. *Extension of Time to File Transcript.* The time limited in which a transcript must be served and filed, as set forth in paragraph 8 of rule 27, may be extended by the court, or a justice thereof, upon good cause shown, or by stipulation of the parties filed with the clerk, but such extension shall not exceed thirty days.

PARAGRAPH 2. *Extension of Time Generally.* The time prescribed by these rules, for any act, except for making a motion for rehearing, may be enlarged by the court, or a justice thereof, for cause, on motion.

## RULE 14.

### HABEAS CORPUS—When Issued. How Served.

PARAGRAPH 1. *Writ of Habeas Corpus, When Issued.* The writ of habeas corpus will be issued only upon order of the court

made and entered of record while in session. The application must be by petition, duly verified, which must set forth, in addition to the necessary matter required by law, the circumstances which, in the opinion of the applicant, render it indispensable that the writ should issue from this court, the sufficiency of which circumstances so set forth will be determined by the court in awarding or refusing the application.

**PARAGRAPH 2. Writ of Habeas Corpus, How Served.** When the writ is directed to any ministerial officer of this court, it must be delivered by the clerk to such officer. If it is directed to any other officer or person, it must be delivered to the crier or bailiff of this court, and be by him served upon such officer or person.

### RULE 15.

#### MOTIONS—When Heard.

*Motions, Preliminary, When Heard.* All preliminary motions will be heard each morning before proceeding with the regular call of the calendar.

**MANDATE—See Rule 28.**

### RULE 16.

#### NOTICE—Time for, When Allowed.

*Notice of Motion.* When notice of motion is necessary, and except when adverse counsel are present, the notices shall, except when a different time is prescribed by statute or by these rules, be three days, unless, for good cause shown, the time is shortened by order of the court, or of one of the justices; and when served away from the place of holding court, one day in addition for every twenty-five miles distance.

### RULE 17.

#### OBJECTIONS—To Record, When Taken.

*Objections to the Record, When Taken.* Objections to the transcript, statement, the bond or undertaking on appeal or writ of error, the notice of appeal, or to its service, or any objection to the record affecting the rights of the appellant or plaintiff in error, to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the court before argument on the merits.

### RULE 18.

#### OPINIONS—Copy of, When to Accompany Remittitur.

*Opinion, Copy of, When Sent with Remittitur.* When a judgment is reversed or modified, a certified copy of the opinion

in the case shall be transmitted with the remittitur to the court below.

### RULE 19.

#### PAPERS—Original, How Brought Up.

*Original Papers, How Brought Up.* Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district, that original papers or exhibits of any kind should be inspected in this court, such judge may make such order for the safe-keeping, transporting, and return of such papers or exhibits as to him may seem proper, and this court will receive and consider such papers or exhibits in connection with the transcript of the proceedings.

### RULE 20.

#### PAPERS—How Taken from Clerk's Office.

*Papers Not to be Taken from Clerk's Office.* No papers filed in a cause shall be taken from the court room or clerk's office, except by order of the court or one of the justices.

### RULE 21.

#### PRACTICE—Where no Provision is Made.

*Practice Heretofore Existing.* In cases where no provision is made by statute or by these rules, proceedings in this court shall be in accordance with the practice heretofore existing.

### RULE 22.

#### REHEARING—How Made.

*Rehearings, Application, How Made.* All motions for a rehearing shall be upon petition in writing, presented within ten days after the judgment or order made by the court shall be placed on file, and no oral argument will be heard thereon.

### RULE 23.

#### RULES—When to Take Effect.

*Rules to Take Effect.* These rules shall take effect on the first day of May, 1893. And thereupon all former rules of practice in this court, heretofore adopted, shall cease to be in force, in pursuance of the following order, done in open court, and entered of record on the 14th day of February, 1893: "Ordered, that the revised rules prepared by this court be, and the same are hereby, adopted as the rules of this court, and that they be in effect on and after May 1st, 1893, and that thereafter all former rules shall cease to be in force."

### RULE 24.

#### REMITTITUR—When to Issue.

*Remittitur, When to Issue.* No remittitur to the court below shall be issued

until after the expiration of ten days from the entry of judgment.

**REVIEW**—Writ of, see Rule 28.

## RULE 25.

### SUBSTITUTION OF REPRESENTATIVE—Effect of.

*Substitution of Representative.* Upon the death or other disability of the party, pending an appeal or writ of error, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or of any party to the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

## RULE 26.

### TERMS OF COURT—

Adjourned and Special.  
Regular.

*PARAGRAPH 1. Adjourned and Special Terms of the Supreme Court.* Adjourned and special terms shall be held as the court or two of the justices may order; and the court shall cause to be entered of record from time to time when the adjourned and special terms will be held.

*PARAGRAPH 2. Regular Terms.* The regular terms of the court will be fixed at the January term of each year.

## RULE 27.

### TRANSCRIPT—

How Printed.  
In Criminal Causes.  
Arrangement and Index.  
Papers Must be Inserted Chronologically.  
Must Have Alphabetical Index.  
When will not be Filed.  
What to Contain.  
Attorney to Direct Clerk in Writing what to Put in.  
Maps, how to Form Part of.  
Appeal may be Dismissed if Rule not Complied with.  
Filing and Service of.  
Certificate to, How Obtained.  
When Clerk to Print and Certify.  
How Authenticated and where Filed.  
Number of Copies to be Filed.  
How Distributed.

*PARAGRAPH 1. Transcript, How Printed.* All transcripts of record in civil causes shall be printed on unruled white writing

paper ten inches long by seven inches wide, with a margin on the outer edge of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one half inches wide. Small pica solid is the smallest letter and most compact mode of composition allowed.

*PARAGRAPH 2. Transcripts in Criminal Causes.* Transcripts in criminal causes may be printed the same as in civil causes, but when not printed they must be plainly written with a typewriter on one side of white typewriter paper, eight inches wide and thirteen inches long, leaving a margin of one and one half inches on the left hand side of the page, and securely fastened at the top.

*PARAGRAPH 3. Arrangement of Transcript and Index.* On the first page and cover of all transcripts must be stated the title of this court, the title of the cause in the court below, (substituting for the words "plaintiff" or "defendant" the words "appellant" or "respondent," as the case may require,) the names of counsel for appellant and respondent, and the words "transcript on appeal," followed by stating the district and county from which the appeal is taken. The first paper in all transcripts must state the title of the court and cause in the court below, but from all the following papers, orders, or proceedings it must be omitted, and the name of the paper, order, or proceeding simply given; the indorsements on the back of papers and the verifications must be omitted, except the date of filing, which must be added at the end of each paper, and if the paper is verified, say "Duly verified." If some error is assigned, or some fact is necessary to be shown as to the form, sufficiency, or substance of the title, indorsements, or verification, they must be transcribed in full. In all transcripts the papers and record entries making up the same must be inserted chronologically, as indicated by the date of the filing or recording; that is, the paper or record bearing the oldest filing or recording date, which is necessary to be inserted in the transcript, must be first inserted, and follow in regular order of such dates. Each transcript must be paged at the top, and each ten lines must be numbered on the left margin of the page from the commencement to the end.

Each transcript must be prefaced with an alphabetical index referring to the page on which each separate paper, order, proceeding, and testimony of each witness commences, and specifying the first and last number on the left margin of the page embracing such paper, order, proceeding, or testimony of witness, thus:

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*PARAGRAPH 4. When Transcript not to be Filed.* Any transcript which fails to conform to the requirements of paragraphs Nos. 1, 2, and 3 of this rule shall not be filed by the clerk, except by order of the court, or one of the justices thereof.

**PARAGRAPH 5. Contents of Transcript.** When there has been a general appearance in the action by all the defendants, or when the summons is not made a part of the judgment roll by section 4456 of the Revised Statutes, the summons must not be inserted in the transcript, unless upon an exception saved thereto it is made a part of a bill of exceptions; and no paper or proceeding shall be inserted in the transcript as a part of a judgment roll unless it is made part thereof by said section. The stenographic reports, notes, or other statement of the evidence in the form of questions and answers must not be inserted in the transcript either by bill of exceptions or statement; except, when necessary to elucidate a point made or an exception saved, the questions must be omitted, and the evidence stated in a concise narrative form, avoiding all unnecessary tautology and repetitions by the same witness. When there is no question as to the weight or sufficiency of the evidence, the facts may be stated in the nature of a special verdict, or it is sufficient to state that the plaintiff or defendant introduced evidence tending to prove the issue on his part, or tending to prove certain facts, naming them. Pleadings, motions, orders, findings, instructions, files, or other papers, when once inserted in the transcript, must not be repeated unless the adverse party claims that they are incorrectly stated as first inserted; but, when found a second time in any bill of exceptions, statement, or other part of the record, it is sufficient to refer to them as having been already inserted in the transcript. The appellant or his attorney must by præcipe indicate to the clerk what of the files and records of the cause shall be inserted in the transcript.

**PARAGRAPH 6. Maps.** Whenever a map or survey forms part of a transcript it shall be necessary to furnish five copies thereof, one of which shall be attached to each of the five copies of the transcript filed with the clerk.

**PARAGRAPH 7. Compliance Enforced.** A strict compliance with the foregoing requirements of this rule will be exacted of the appellant, or plaintiff in error, in all cases by the court, whether objection be made by the opposite party or not; and for any violation or neglect in these respects which is found to obstruct the examination of the record the appeal may be dismissed, or the court may order the offending party to pay the costs of such transcript, or any part thereof, unless the matter objected to is inserted by order of the court or judge below.

**PARAGRAPH 8. Filing and Service of Transcript.** In all cases where an appeal is perfected, or a writ of error issued, transcripts of the record (showing the date of filing the undertaking on appeal) must be served upon the adverse party, and filed in this court, within sixty days after the appeal is perfected or writ of error issued, and the same must be certified to be correct by the attorneys of the respective parties or by the clerk of the court from which the appeal is taken. Written evidence of the service of the

transcript upon the adverse party shall be filed therewith.

**PARAGRAPH 9. Service and Certificate of Transcript.** After the transcript is printed, a copy thereof shall be served upon the adverse party or his attorney, and, if there be more than one adverse party, appearing by different attorneys, on each party or the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a transcript on appeal in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if it be incorrect, shall neglect or refuse for the same time to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or, upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate, the cost of procuring a certificate to such transcript from the clerk of the proper court shall be taxed against the party whose attorney so neglects or refuses.

**PARAGRAPH 10. Clerks May Print Transcripts and Certify to Same.** In case a written transcript authenticated in the mode prescribed by paragraph 9, together with sufficient funds to pay the expenses of printing the same, is transmitted to the clerk of this court, the clerk, upon the receipt thereof, shall file the same, and cause the transcript to be printed, and to the printed copy shall annex his certificate that said printed transcript is a full and correct copy of the transcript furnished him by the party, and the said certificate shall be prima facie evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file. Printed copies thereof shall be furnished as provided by paragraph 12 of this rule, and the clerk shall also immediately transmit by mail or express copies to the attorney of the adverse parties, and note such service on the original.

**PARAGRAPH 11. Authenticated and Filed.** The copy of the transcript filed with the clerk of this court shall be certified by the clerk of the court from which the appeal is taken, in the manner provided by law, or, in lieu thereof, may be stipulated in writing on said transcript by the attorneys of record in the case to be a correct transcript of such matters as are contained in it. The transcript, when properly certified and authenticated as above, shall be filed with the clerk of the supreme court.

**PARAGRAPH 12. Five Copies of Transcript to be Filed.** In all cases five copies of the transcript must be filed; provided, that in criminal causes, where the transcript is typewritten, four copies must be filed, three of which may be carbon copies. When the cause is called for hearing the clerk shall deliver a copy to each of the justices.

**RULE 28.****WRITS, SPECIAL—****How Issued.****How Presented.****How Numbered.****When Heard.****When an Issue of Fact is Raised,****How Tried.****What Affidavit Must Show.****How Served, and Upon Whom.**

**PARAGRAPH 1. Writs, How Issued.** Writs of review, mandate, and prohibition will be issued only upon the order of the court made and entered in the minutes while the court is in session.

**PARAGRAPH 2. Applications, How Presented.** All applications for writs of review, mandate, and prohibition must be upon affidavit of the party beneficially interested. The applicant must file four typewritten copies of the affidavit, three of which may be carbon copies. The same must be on white typewritten paper, eight inches wide by thirteen inches long, leaving a margin of one and one half inches on the left side of the page. The pages must be numbered, and securely fastened at the top. The answer or return must be prepared in the same manner, and the same number of copies. On the first page must be stated the title of this court, the title of the cause, the name of the proceeding, and counsel.

**PARAGRAPH 3. How Numbered and Heard.** These causes must be numbered the same as other causes, and placed on the calendar in the same manner, and

heard in their regular order: provided, upon good cause shown, they may be heard out of their order.

**PARAGRAPH 4. When an Issue of Fact is Raised.** If in such proceedings an answer be filed which raises an issue of fact essential to the determination of the application, the question of fact may, in the discretion of the court, be directed to be tried by a jury, before some district court to be designated in the order, or, when the parties agree, before a referee, and the argument will be postponed until the verdict or finding upon such issue of fact shall be duly certified to this court.

**PARAGRAPH 5. Application Must Show Real Parties in Interest.** The application for the issuance of any of the above writs must set forth, in addition to the other requisite matters, the reasons which render it indispensable the writ should issue originally from this court, and the sufficiency or insufficiency of the reasons so set forth will be determined by the court in awarding or refusing the application. In case any court, judge, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the affidavit as defendant, such affidavit must disclose the name or names of the real party in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining the order to serve or cause to be served upon such party or parties in interest a certified copy of the affidavit and writ issued thereon in the same manner as upon the defendant named in the affidavit, and to produce and file in the office of the clerk of this court the same evidence of service.

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## **RULES OF THE STATE LIBRARY.**

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**Adopted by the Justices of the Supreme Court of Idaho. November 25, 1892.**

**Rule 1.** The librarian shall allow no book to be taken from the library except upon the person so taking said book delivering to the librarian his receipt therefor.

**Rule 2.** No book shall be kept out of the library by any person for more than twenty-four hours, except upon an order of one of the justices of the supreme court; and no digest, code, statute, or text-book shall be taken from the Capitol building, except upon such order.

**Rule 3.** The librarian shall keep a complete catalogue of all books in each case in the library posted on such case.

**Rule 4.** No person other than the librarian or his assistants shall be allowed to return any book to the shelves, but such books shall be left on the table where used.

**Rule 5.** No loud or general conversation shall be allowed in the library room.

**Rule 6.** The librarian must keep the library open every day, except nonjudicial days, from 9 o'clock A. M. until 12 M., and from 1 P. M. until 4 P. M., and during the sessions of the legislature, or supreme court, from 6 P. M. until 9 P. M.

**Rule 7.** The librarian shall keep a register of all books taken from the library room by any person, in a book kept for that purpose, and shall note in said register the date when any book is returned, which book shall be open to public inspection.

**Rule 8.** That any person taking a book from the library shall be subject to the order of the supreme court or of any of the justices thereof, relative to the return of said book, which order may be enforced as orders of the court.

These rules will be strictly enforced.

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(13 Mont. 64)

**KLEINSCHMIDT v. KLEINSCHMIDT.**

(Supreme Court of Montana. Jan. 30, 1893.)

PLEADING AND PROOF—VARIANOR.

There is no variance between an answer describing an obligation due from plaintiff to defendant merely as an indebtedness or loan, and proof that such indebtedness is evidenced by note.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Suit by T. H. Kleinschmidt against Albert Kleinschmidt for money due on a contract. Judgment for plaintiff, from which, and an order denying a new trial, defendant appeals. Reversed.

The other facts fully appear in the following statement by DE WITT, J.:

In December, 1886, the defendant, Albert Kleinschmidt, and one Henry Klein were interested in a contract for the construction of the Helena, Boulder Valley & Butte Railroad. Each of said persons owned one-sixth of that contract. On December 8, 1886, said Kleinschmidt and Klein sold to J. W. Buskett the one-eighth interest of the net profits to be realized by them from said railroad contract. For that one-eighth interest Buskett delivered to them 10,000 shares of stock in the Boulder Mining & Reduction Company. This transaction was evidenced by a writing, of which the following is a copy: "Helena, M. T., Dec. 8rd, 1886. For and in consideration of (10,000) ten thousand shares of the Boulder Mining and Reduction Co. stock, delivered to us by J. W. Buskett, we agree to pay over to him all of the (1/8) one-eighth net profits realized by us out of a contract in which we are interested, in building thirty miles of the Helena, Boulder Valley and Butte Railroad. Said net profits shall be paid by us to J. W. Buskett immediately after we receive our share, which is (1/6) one sixth each. J. W. Buskett shall not advance any funds whatsoever to prosecute the construction of the railroad named. [Signed] Albert Kleinschmidt. Henry Klein." The stock was delivered by Buskett to Kleinschmidt and Klein, and the writing above set forth was signed and delivered by Kleinschmidt and Klein to said Buskett. On April 22, 1887, said Buskett, for a valuable consideration, transferred and delivered to the plaintiff, T. H. Kleinschmidt, his

right, title, and interest in the said contract, and the profits therein mentioned. On October 22, 1888, these profits mentioned were ascertained and paid to Albert Kleinschmidt and Henry Klein; and said Henry Klein paid to T. H. Kleinschmidt, as his share, the sum of \$2,997.98. The plaintiff sues Albert Kleinschmidt for an equal amount, to wit, \$2,997.98, which Albert Kleinschmidt has not paid to plaintiff.

The substantial contention in the case was as follows: The defendant's answer alleges "that after the making of such memorandum, [that is to say, the agreement transferring the one-eighth interest from Albert Kleinschmidt to Buskett,] on or about the 5th day of January, 1887," a certain other transaction took place. That transaction, as defendant alleges it in his answer, was that Buskett requested the loan of \$1,350 from defendant, Albert Kleinschmidt, to purchase more stock in the above-mentioned Boulder Mining & Reduction Company; that Albert Kleinschmidt advanced said money to Buskett, and Buskett agreed with Kleinschmidt that Kleinschmidt should retain out of Buskett's share of the net profits from the railroad contract enough of said net profits to pay Kleinschmidt the advance of \$1,350, with interest at 12 per cent. per annum; and that Buskett hypothecated said stock so purchased to Albert Kleinschmidt, as additional security for the payment of said \$1,350. The answer further states that Buskett's share of said profits in the railroad contract was \$2,947.76, which A. Kleinschmidt retained, and still retains, for the purpose of paying the obligation of \$1,350, with interest, as aforesaid, which is still due and unpaid. The plaintiff filed a replication in which he states that the \$1,350 indebtedness was not an open account, but was upon a promissory note, which was not due or payable until after April 22, 1887. The answer sets up said matter of \$1,350 as a debt from Buskett to Kleinschmidt. It does not describe that debt as being evidenced by note. Upon the trial of the case it was developed, in evidence, that on January 5, 1887, Buskett gave to Kleinschmidt his note for \$1,350, with interest at 1 per cent. a month, for the \$1,350 received from Kleinschmidt to purchase the said shares of stock described. The plain-

tiff moved to strike out all of the testimony relating to the debt of Buskett to Albert Kleinschmidt, for the reason that it appeared that there was a written instrument explaining and giving the terms and conditions of the loan,—that is, a promissory note,—which cannot be explained, varied, or diminished by oral testimony, and that this indebtedness appears to have been in the form of a note, and not a bare loan or open account of indebtedness, as alleged in the answer as new matter, and therefore is a variance between the pleadings and the proof. The court then makes the following ruling: "That motion is sustained, on the ground that there is a material variance between the pleadings and the proof." Following this ruling, defendant's counsel asked a series of questions in reference to the note, and the alleged indebtedness from Buskett to Kleinschmidt, all of which questions were excluded by the court. In this connection the court refused to allow defendant to prove whether the indebtedness of Buskett to Albert Kleinschmidt had been paid. The court, by its action, excluded from the case, and from the consideration of the jury, all evidence in reference to the indebtedness of \$1,350 by Buskett to Kleinschmidt. Defendant's defense or counterclaim being out of the way, verdict and judgment were for plaintiff for the full amount claimed. A motion for new trial was made by the defendant, which was denied, and from this order and the judgment he appeals.

Cullen, Sanders & Shelton and Henry C. Smith, for appellant. Toole & Wallace, for respondent.

DE WITT, J., (after stating the facts.) On December 3, 1886, Albert Kleinschmidt transferred absolutely to John W. Buskett one eighth of his (Kleinschmidt's) interest in the profits arising from the construction of the Helena, Boulder Valley & Butte Railroad. This was for a consideration delivered by Buskett, and received by Kleinschmidt. The transaction was evidenced by a writing signed by Kleinschmidt, and delivered to Buskett. Defendant proved that the loan of \$1,350 was on January 5, 1887, and that for this loan Buskett gave him a promissory note, at 90 days, which had been renewed by Buskett, and negotiated by Kleinschmidt, in 1887. The court refused to allow defendant to prove whether the debt had been paid. Now, in this condition of affairs, on April 22, 1887, T. H. Kleinschmidt, plaintiff, buys from Buskett, for a valuable consideration, his one-eighth interest. Afterwards, and on October 22, 1888, the money for Buskett's one-eighth interest in the contract comes into the hands of Albert Kleinschmidt, along with Kleinschmidt's own profits, which he had not transferred. Now T. H. Kleinschmidt is in court demanding from Albert Kleinschmidt that he (Albert Kleinschmidt) deliver to him that which he (T. H. Kleinschmidt) bought from Buskett. Albert Kleinschmidt declines to deliver these profits to T. H. Kleinschmidt, and says that he holds them as security for the payment of said

\$1,350, and interest at 12 per cent. per annum since January 5, 1887. The position of Albert Kleinschmidt seems to be that he claims that these alleged facts are an absolute defense to the action of plaintiff. But whether a defense or a counterclaim or a set-off, it does not here seem necessary to determine, as will appear below.

The writing of December 3, 1886, by which Albert Kleinschmidt and Henry Klein transferred the one-eighth interest in the profits to John W. Buskett, was not a negotiable instrument. Therefore, when Buskett transferred his interest so obtained in these profits to T. H. Kleinschmidt the latter took the same subject to the provisions of section 5, Code Civil Proc., which is as follows: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." Therefore, under this statute, if Buskett was indebted to Albert Kleinschmidt when he, Buskett, transferred the one-eighth profits to T. H. Kleinschmidt, then Albert Kleinschmidt could plead against T. H. Kleinschmidt said debt, as a defense or set-off, as the case might be, in an action by T. H. Kleinschmidt on the assigned Buskett claim. Therefore the \$1,350 debt of Buskett to Albert Kleinschmidt was proper matter in the answer, and was good, against T. H. Kleinschmidt, unless Albert Kleinschmidt had estopped himself from setting it up. Such estoppel was pleaded—whether well or not, need not be said—in the replication, but that point was not reached in the case, as will appear below. The court struck out the evidence as to this \$1,350 debt. This was on the ground of a variance between the allegations of the answer and the proof. The answer stated that Buskett requested the loan of \$1,350, and Albert Kleinschmidt advanced that amount to him. The proof showed that Buskett had given Albert Kleinschmidt a note for the amount. It did not appear that the note had been paid. It appeared that the note had been renewed, but it did not appear that the debt evidenced by the note had been paid, and the court declined to hear evidence as to whether it had. A promissory note is not itself the payment of a debt. It is the written evidence of the debt. If the answer pleads the fact of an indebtedness, and it appears in proof that the indebtedness is evidenced by a note, the fact is then in proof that the debt exists. It is that fact that was alleged. A debt was alleged. A debt was proved. We do not understand that there was a variance. Therefore the court erred in eliminating the testimony of Buskett's indebtedness to Albert Kleinschmidt, on the ground upon which the motion was made, viz. a variance. Such is the point before us on the appeal, and the views just expressed are decisive.

Respondent urges some other points upon which he contends that his judgment should be sustained, notwithstanding the

error above discussed. But those matters which he presents for our consideration were not reached in the case, nor were they before the lower court. For example, he contends that defendant was estopped to set up the Buskett debt. But such matter was for a replication by plea, and for rebuttal in proof. But, defendant's matter in the answer as to the Buskett debt being swept out of the case, the trial never reached the point of rebuttal. Nothing was offered to rebut that which in the defense had been put out of the case by the ruling of the court upon the question of variance. On which ruling, as above observed, the judgment and order denying the new trial must be reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

(97 Cal. 214)

SECURITY SAV. BANK & TRUST CO. v. HINTON, City Assessor. (No. 14,877.)

(Supreme Court of California. Jan. 18, 1893.)

MUNICIPAL TAXATION — CONSTITUTIONAL LAW — SAVINGS BANK — DEDUCTION OF UNSECURED DEBTS.

1. Const. art. 11, § 8, provides that any city of over 100,000 inhabitants may frame a charter for its own government, consistent with the laws and constitution of the state, which shall be submitted to the legislature; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city. Const. art. 11, § 12, provides that the legislature shall not impose taxes on cities for municipal purposes, but may, by general laws, vest such power in the authorities thereof. *Held*, that a city organized under a charter approved by legislature by resolution, and not by bill, may provide in its charter for taxation for municipal purposes, though no general law has been passed by legislature authorizing it to do so, since, the power of taxation being essential to municipal existence, such power is necessarily implied.

2. Const. art. 13, § 1, provides that all property in the state, not exempt under laws of the United States, shall be taxable; that the word "property" includes moneys, credits, etc.; and that the legislature may provide, except in the case of credits secured by mortgage, for a deduction of credits or debts due bona fide residents of the state. Los Angeles City Ordinance,

§ 4, subd. 5, (a copy of Pol. Code, § 3629, subd. 6,) provides that the taxpayer may deduct from his solvent unsecured credits his unsecured debts owing to bona fide residents of the state. Pol. Code, § 3617, subd. 6, as amended by Laws 1881, provides that credits or debts arising on account of any money deposited with savings or loan corporations shall, for the purpose of taxation, be deemed an interest in the property of such corporation, and shall not be assessed to the creditors thereof. *Held* that, if there be any conflict between such ordinance and section 3617, the latter governs, as being a "general law," and a loan and savings bank doing business in the city of Los Angeles is not entitled, for the purposes of municipal taxation on its property, to a deduction from its solvent unsecured credits of its unsecured liability to its depositors for money deposited.

3. A contention that the debts of such bank are not, for the purpose of taxation, within section 3617, on the ground that they are not ordinary deposits, but debts for borrowed money, repayable in the exact sum borrowed, with interest thereon, irrespective of the profits or losses of the bank, cannot be sustained; Civil Code, § 571, under which such bank was organized, providing that corporations organized for the

purpose of loaning funds of their depositors may loan the funds thereof, receive deposits of money, loan the same, and repay depositors, with or without interest,—the method in which such bank conducted its business.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Security Savings Bank & Trust Company against J. W. Hinton, city assessor of the city of Los Angeles, to recover a tax alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. C. McFarland, for respondent.

HAYNES, C. Appeal from a judgment rendered in favor of defendant upon his demurrer to the complaint. The complaint alleges, in substance, that plaintiff is a corporation, organized for the profit of its stockholders, exclusively, with a capital stock of \$200,000. The purposes of the corporation, as stated in its articles of incorporation, are as follows: "To receive deposits, and pay interest on the same, upon such terms and conditions as may from time to time be prescribed by its board of directors; to preserve and to safely invest the funds of its members and depositors in loans on real and personal property, and all adequate securities, public or private, or in such manner, on such terms, at such rate of interest, and for such consideration, as may be determined by the officers of the corporation under direction of the board; to sell, transfer, and assign its loans to individuals and corporations, without recourse upon the corporation; and to receive funds from private parties and corporations for the purpose of loaning the same upon adequate security." That in June, 1891, the plaintiff made out and delivered to the defendant, the city assessor of the city of Los Angeles, upon a blank furnished by the city, a statement of its property, as it existed on the first Monday of March preceding, which statement showed that plaintiff had money and personal property amounting to \$3,233; that there were owing to it solvent credits, unsecured, \$58,002.50; due from banks and bankers, \$6,424.23; and that there was due from the bank to depositors, bona fide residents of this state, unsecured debts for deposits of money with the plaintiff, \$407,926.90. Mortgages to a very large amount were returned separately. Plaintiff offered to pay the taxes upon \$3,233, its money and personal property, but declined to pay upon \$64,426.73, being solvent credits unsecured, and moneys due from banks and bankers, claiming that it was entitled to deduct from its said credits the unsecured debts to its depositors, which amounted to a much larger sum. The assessor demanded payment of taxes upon the whole sum of its personal property and unsecured credits, being \$67,659.73, amounting to \$805.12, which plaintiff refused to pay, and tendered \$38.80, the amount assessed upon the personal property; whereupon the assessor seized the amount of the whole tax,

\$805.12, in money, appellant owning no real estate; and this action is brought to recover of the defendant that sum, less the taxes admitted to be due on the personal property. Appellant presents two principal grounds upon which it contends that the action of the defendant was illegal, and which, if sustained, must require a reversal of the judgment: (1) That the city of Los Angeles has no power to levy taxes; (2) that, if it be conceded that the city has such power, the assessor had no authority to deny the deduction from its solvent credits of moneys due or owing to depositors.

1. The first of these propositions is based upon the fact that the charter of the city is what is known as a "Freeholder's Charter;" that the charter was approved by the legislature by resolution, and not by bill, and therefore, it is argued, is not a law; and that the existence of a law enacted by the legislature is essential to the exercise of the power to levy, assess, and collect taxes. It is not necessary to reconsider the case of *People v. Toal*, 85 Cal. 333, 24 Pac. Rep. 603, cited by appellant. The question there presented was whether the city of Los Angeles could create a police court, and fix its jurisdiction; and the point of the decision was that under section 1, art. 6, of the constitution, the power to establish inferior courts in any incorporated city or town was vested in the legislature, and that by section 13 of the same article it was enjoined upon the legislature to fix by law the jurisdiction of any inferior court established in pursuance of section 1. In none of the several cases appealed to this court, touching the charter of the city of Los Angeles, has it been held that the charter was not properly adopted, nor that it was invalid, though some of its provisions have been held to be inoperative because inconsistent with certain legislative acts which were declared to be "general laws." In *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652, it was said: "It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force." And this language was repeated in *People v. Toal*. *Brooks v. Fischer*, supra, was an application for a writ of prohibition to prevent the respondent, the city assessor of the city of Los Angeles, from proceeding to act as such assessor under the charter here brought in question. It was there alleged by the petitioner that the charter had been approved by resolution, and not by bill, and was not presented to nor approved by the governor; and the third paragraph of the petition alleged "that the powers and duties of the city assessor in relation to the assessment of property prescribed by the laws existing prior to the framing of the aforesaid charter, were other than, and essentially different from, the powers and duties provided in said charter;" and it was further alleged that respondent "threatens, and is now proceeding, to assess all taxable property in said city according to, and by virtue of, the provisions of said charter," etc. The petition was dismissed, and the effect of

the decision could not have been less than a determination that the respondent was authorized to proceed in the discharge of his duties as city assessor.

But appellant contends that, in the absence of a law enacted by the legislature in the constitutional mode, the city of Los Angeles has no power to levy taxes, and that no general law applicable to cities having "freeholder charters" has been passed for that purpose. If no such general law has been enacted, there can be no conflict between the charter and such law, and it is only as to such conflicts that the validity of the charter has been heretofore questioned. But counsel's argument makes such general law the essential basis of the power of the city to impose taxes for municipal purposes. This argument is based upon section 12 of article 11 of the constitution, which is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." But the authority given by the constitution<sup>1</sup> to frame and adopt "a charter for its own government," which "shall become the organic law thereof," is comprehensive enough to authorize a provision such as that contained in the charter of the city of Los Angeles, providing for taxation for municipal purposes. The legislature, however, was required by the constitution to provide by a general law for the incorporation of towns and cities that could not, for the want of sufficient population, or should not for any reason desire to, adopt a freeholders' charter, and, as to municipal corporations organized under such general law, the latter clause of the above-quoted section has full application, and as there is no act of the legislature relating to taxation for municipal purposes, except that contained in the municipal government act, and which appellant correctly contends does not apply to cities having freeholders' charters, there can be no conflict between such charters and the general laws of the state upon this subject. As above remarked, in no one of the several cases have the validity, force, and constitutional authority of the Los Angeles charter for the exercise of all municipal powers been questioned as to any provision not in conflict with some general law, except in the *Toal* case; and the decision was there based upon the constitutional provision wherein the judicial power of the state is granted to such inferior courts in any municipality as the legislature may establish. It is undoubtedly true that the legislative branch of the government has the exclusive power of

<sup>1</sup>Const. art. 11, § 8, provides that any city of over 100,000 inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of the state, which shall be submitted to the legislature for its approval or rejection; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and shall become the organic law thereof.

taxation, except so far as that power is restrained by the constitution, or delegated by the legislature or the constitution to local municipalities. But by section 12 of article 11, above quoted, the legislature is prohibited from imposing taxes upon counties, cities, towns, or other municipal corporations, for municipal purposes. It must therefore follow that in authorizing freeholders' charters, which the legislature cannot change or amend, the power of taxation being essential to municipal existence, that power is necessarily implied. In speaking of municipal corporations the supreme court of the United States said: "When such a corporation is created the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be, in express terms, prohibited." *U. S. v. New Orleans*, 98 U. S. at page 393. See, also, *Ralls County Court v. U. S.*, 105 U. S. 733; *Peoria, D. & E. Ry. Co. v. People*, 116 Ill. 401, 6 N. E. Rep. 497. The implication of this power, however, does not rest solely upon the power to create and adopt a charter, and the assent of the legislature in approving it; but by the prohibition against the imposition of such taxes by the legislature and by sections 13, 16-18 of article 11, prohibiting the delegation of power to special commissioners, private corporations, companies, or individuals, to exercise the power of municipal taxation; requiring county and city taxes to be paid into the treasury; prohibiting the making of profit out of county, city, or other public moneys; and restraining municipal indebtedness beyond the current revenue without making provision therefor,—the constitution assumes that all municipalities, however chartered, shall have and exercise the power of taxation. We have considered this point somewhat at length, because the question here presented was neither argued by counsel, nor considered by the court, in *Brooks v. Fischer*.

2. In support of its contention that appellant was entitled to deduct from its solvent unsecured credits its unsecured liability to its depositors for moneys deposited, several considerations are urged.

It is first insisted that, if the charter vests the power to levy taxes, such power must be exercised strictly in accordance with the ordinances of the city, and that the ordinance upon the subject of taxation provides that the taxpayer may deduct from his solvent unsecured credits his unsecured debts owing to bona fide residents of this state, and that appellant was therefore entitled to the reduction claimed. The fifth subdivision of section 4 of the city ordinance, which contains the foregoing provision, is a copy of subdivision 6 of section 3629 of the Political Code. Section 46, art. 4, of the charter, (Laws 1889, p. 469,) defines the duty of the city assessor, and declares that he shall "make out, within such time as may be prescribed by ordinance of said city, \* \* \* a full, true, and correct list of all the property, both real and personal, taxable by law, within the limits of said city," etc. Section 1 of article 13 of the constitution provides that all prop-

erty in the state, not exempt under the laws of the United States, shall be taxed; that the word "property" includes moneys, credits, bonds, etc. The last clause is as follows: "The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state." The legislature in 1881 amended section 3617 of the Political Code; and the sixth subdivision thereof, as amended, after defining the terms "credits" and "debts," concluded as follows: "But credits, claims, debts, and demands due, arising or accruing for or on account of money deposited with savings and loan corporations, shall, for the purpose of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof." This section and section 3629, Pol. Code, as amended, and from which the above-mentioned city ordinance was copied, were approved and took effect the same day. It cannot be contended that the latter section was intended to repeal the provision above quoted from section 3617, or that it conflicted with it; and, if that be true, it cannot be held that the ordinance above quoted could in any manner conflict with the charter provision requiring the city assessor to make a list of all the property "taxable by law." We perceive no conflict between the charter and the ordinance, nor between the charter and ordinance and the provisions of the Code; but, if such conflict existed, we should be bound to hold that section 3617, Pol. Code, declares, and was intended to declare, the general policy of the state upon the subject of the taxation of savings and loan corporations, and was therefore a "general law," in the broadest sense of the term, and as such would control. In *Dillon on Municipal Corporations*, (section 772,) it is said: "So authority in the charter of a city to 'assess all taxable real and personal property within the city' refers to the general state law to ascertain what kind of property is subject to taxation; and the corporation has power to assess, not only what was then taxable, but also whatever might afterwards be made subject to taxation by any general statute."

It is, however, contended that appellant does not come within the provisions of section 3617, Pol. Code, because the debts in question are not ordinary deposits in savings banks, but debts for borrowed money, repayable in the exact sum borrowed, with interest thereon, irrespective of the profits or losses that may accrue to the bank. The learned counsel distinguishes between savings and loan associations which distribute to depositors the net profits realized by the bank, in proportion to their several deposits, and those which pay to depositors a specified rate of interest on time deposits; that in the former class the depositors are, in effect, members of the corporation, and interested in its profits, while in the latter class they are creditors, and have no interest in the profits. The language of section 3617, however, is comprehensive enough to include both classes, and we see

no ground upon which we can say that the latter class was not intended to be included. All are organized under title 10 of the Civil Code. Section 571, Civil Code, is as follows: "Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders, and depositors may loan and invest the funds thereof, receive deposits of money, loan, invest, and collect the same, receive interest, and may repay depositors, with or without interest. No such corporation must loan money except on adequate security, on real or personal property, and such loan must not be for a longer period than six years." This section expressly authorizes such corporations to receive deposits, loan and invest the same, and repay depositors, with or without interest, which is the mode in which appellant conducts its business. We are not referred to any decision rendered since the amendment of section 3617, Pol. Code, was adopted; but it is argued that that amendment was made immediately after the decision was rendered in *People v. Badlam*, 57 Cal. 594, which involved the taxation of the San Francisco Savings Union, which was of the first class of associations above mentioned, and that the amendment was therefore intended only to apply to those savings and loan associations in which depositors shared in the general dividend. In that case an effort was made to tax both the bank and the depositors upon the same moneys; and it was held that that would be double taxation, prohibited both by the constitution and the statute. But the other provision of the constitution and statute, requiring all property to be taxed, was found to be equally imperative; and for the purpose of securing the taxation of all property of the character in question, and at the same time avoiding double taxation, the amendment of section 3617, Pol. Code, was made. So far as the depositors are concerned, these deposits are not treated or taxed as solvent and unsecured credits, and therefore are not taxable to them, and, being thus taken out of the category of credits, cannot be treated as liabilities by the bank for the purpose of reducing the amount of its solvent unsecured credits liable to taxation. As savings banks are prohibited from loaning the money of depositors except on adequate security, upon real or personal property, we must assume that the solvent unsecured credits reported by appellant were loans of its capital or profits upon personal security; and, if its contention in this case should be carried out, a savings bank, with a capital paid in by its stockholders, could always evade taxation upon its entire capital, so long as its savings deposits equaled or exceeded its capital, by covering its capital into unsecured credits. We think the demurrer to the complaint was properly sustained, and advise that the judgment be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

**LOS ANGELES SAV. BANK v. HINTON,**  
City Assessor. (No. 14,879.)

(Supreme Court of California. Jan. 18, 1893.)

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by the Los Angeles Savings Bank against J. W. Hinton, city assessor of the city of Los Angeles, to recover a tax alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. C. McFarland, for respondent.

HAYNES, C. The facts in this case are the same, except as to amounts, as in the case of *Trust Co. v. Hinton*, 32 Pac. Rep. 3, (No. 14,877, this day filed,) and the complaint, demurrer, and judgment were the same. The appeal is from the judgment, and is submitted upon the same briefs. On the authority of that case, the judgment should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the case of *Trust Co. v. Hinton*, 32 Pac. Rep. 3, (No. 14,877, this day filed,) the judgment is affirmed.

(3 Cal. Unrep. 757)

**MAIN ST. SAV. BANK & TRUST CO. v. HINTON,**  
City Assessor. (No. 14,878.)

(Supreme Court of California. Jan. 18, 1893.)

SAVINGS BANKS—TAXATION.

The fact that a corporation is engaged in a general banking business, in addition to a savings bank business, does not exempt that part of its business done as a savings bank from taxation under the laws applying to other savings banks.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

(Not to be published in California Reports.)

Action by the Main Street Savings Bank & Trust Company against J. W. Hinton, city assessor of the city of Los Angeles, to recover taxes alleged to have been illegally assessed against plaintiff's property, and collected by defendant. From a judgment for defendant on a demurrer to the complaint, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. C. McFarland, for respondent.

HAYNES, C. This action was brought by appellant to recover from the defendant the sum of \$1,075.59, the tax assessed and collected by seizure upon its solvent and unsecured credits. A demurrer was interposed to the complaint, which was sustained, and judgment rendered thereon for defendant, and plaintiff appeals. This cause is submitted upon the briefs filed in *Trust Co. v. Hinton*, the same defendant, 32 Pac. Rep. 3, (No. 14,877, this day filed,) and involves the same questions, and an additional one, which we shall briefly notice. It is claimed in this case that appellant does a general banking business, as well as that of a savings bank. We do not see that this fact materially affects any question decided in 14,877, or the correctness of the judgment rendered in this

case by the superior court. So far as its general banking business is concerned, appellant is subject to the same law, as regards taxation, as other banks not doing a savings bank's business; and, as to that part of its business done as a savings bank, it is subject to the same law that applies to other savings banks. There should be no difficulty in separating its ordinary deposits from its savings deposits, though none is found in its statement to the assessor, or in the complaint in this action. In paragraph 20 of the complaint, it is alleged that the unsecured debts due from appellant to bona fide residents of this state were debts "due depositors for sums borrowed from them upon interest;" and, that being true, no distinction can be made between this case and that of the Security Savings Bank, (No. 14,877,) and the judgments should therefore be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(97 Cal. 247)

PEOPLE v. McDERMOTT. (No. 20,921.)

(Supreme Court of California. Jan. 21, 1893.)

CRIMINAL LAW—DISMISSAL OF APPEAL—RECALL OF REMITTITUR.

Where, in a criminal cause, because of the failure of appellant's counsel to file a brief, or to appear at the hearing, an appeal from a conviction has been dismissed, and the judgment affirmed, without examination of the record, as prescribed by Penal Code, § 1253, under section 1265, providing that after the judgment has been remitted to the court below the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, such court has no power to recall such remittitur, and to reinstate such appeal, even though appellant's counsel by inadvertence had failed to file the brief, and to appear at the hearing.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Indictment against one McDermott for murder. This is a motion to recall the remittitur, and reinstate an appeal from a conviction that had been dismissed because of the failure of defendant's counsel to appear at the hearing on the appeal. Motion denied.

Blackstock & Shepherd, for appellant. Atty. Gen. Hart, for the People.

BEATTY, C. J. This is a motion to recall the remittitur, and reinstate the appeal in a cause wherein the judgment was affirmed without examination of the record by reason of the failure of counsel for appellant to file a brief, or to appear at the time set for the hearing. The facts of the case are as follows: February 18, 1892, defendant was convicted in the superior court of Ventura county of murder in the second degree. On February 23d he appealed. March 30th he filed the printed transcript of the record at Los Angeles,—5 days before the commencement of the April term at Los Angeles and 33 days before the commencement of the May term at Sacramento. The cause was not placed upon either the Los Angeles or the Sacramento calendar,

but was placed upon the calendar for the July term at San Francisco, and set down for hearing on July 27th. On that day, there being no brief on file, and no appearance of counsel for appellant, the judgment and order appealed from were, on motion of the attorney general affirmed. Pen. Code, § 1253. After the expiration of 30 days, a remittitur was issued, and was, we presume, filed with the clerk of the superior court of Ventura county, though the papers before us do not show that fact. At the Los Angeles term in October this motion was submitted upon affidavits which show that the failure of counsel for appellant to appear in his behalf on the day set for the hearing of his appeal was solely due to inadvertence upon their part. It seems that counsel, recognizing the fact that the record was filed too late for the Los Angeles calendar, requested the deputy clerk there to have the cause placed on the Sacramento calendar. In the last week of April, in response to their inquiry, the clerk informed them that the cause was not on the Sacramento calendar, whereupon they assumed that it would not be heard until the October term at Los Angeles, and never knew that it had been placed upon the San Francisco calendar until September 7th, when they learned that the judgment had been affirmed.

The question arising upon this state of facts is whether this court has any power to recall the remittitur, and reinstate the appeal; whether, in other words, we have not lost all jurisdiction over the cause by the issuance of the remittitur and its filing in the superior court. It is the settled law of this state that when a remittitur has been regularly issued and filed, when there has been no violation of law or of our own rules in ordering the remittitur, no mistake of facts, and no fraud or imposition practiced by the prevailing party upon the court or upon the losing party, our jurisdiction over the cause is at an end, and our judgment final. Rowland v. Kreyenhagen, 24 Cal. 52, and cases therein cited; People v. Sprague, 57 Cal. 147; Vance v. Pena, 36 Cal. 328; Hanson v. McCue, 43 Cal. 178. Here there was no fraud or deception, no imposition or mistake, so far as the court is concerned. The cause was regularly on the San Francisco calendar for July. It might have been placed on the Sacramento calendar for May, and at the request of the appellant ought to have been so placed; but the failure to do so only rendered it more imperatively the duty of the clerk to place it on the July calendar, (Pen. Code, § 1252;) and by rule 15 of the old rules of this court, which remained in force until July 1, 1892, and after the July calendar was made up, it was the duty of the clerk to put the case on that calendar. Being a criminal case, it did not belong to the Los Angeles calendar, by reason of the fact that Ventura is one of the counties whose civil causes are assigned to the Los Angeles district. Criminal causes are regularly placed on the first calendar made up (whether for Sacramento, Los Angeles, or San Francisco) after the records are filed, regardless of the county in which the charges were tried.



Upon these grounds the motion must be denied, and it is so ordered.

We concur: GAROUTTE, J.; McFARLAND, J.; DE HAVEN, J.; HARRISON, J.; PATERSON, J.

(97 Cal. 241)

**HICKS v. FOLKS, Sheriff.** (No. 19,087.)  
(Supreme Court of California. Jan. 21, 1893.)

**EMPLOYMENT OF CONVICTS—CUSTODY.**

Pen. Code, §§ 1613, 1614, provide that certain prisoners may be required to labor on the public works or ways in the county, by an order of the board of supervisors; and in the county government act (Laws 1891, p. 306, § 25, subd. 30) it is stated that such work shall be done "under the direction of some responsible person." *Held*, that notwithstanding Pol. Code, § 4176, which provides that the sheriff must take charge of and keep the county jail, and the prisoners therein, and section 1600, which states that a prisoner must be kept actually confined in the jail until legally discharged, it was not intended that the prisoners should be in the actual custody of the sheriff while at work, and therefore he must deliver those required to work to such "responsible person" as is duly authorized by the supervisors to direct their labor.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Petition by J. V. Hicks for a mandamus to compel John H. Folks, sheriff of the county of San Diego, to deliver to him certain prisoners required by the supervisors to work on the public road. From an order overruling his demurrer to the petition, and granting a peremptory writ, defendant appeals. Affirmed.

Copeland & Daney, for appellant. Hunsaker, Britt & Goodrich, for respondent.

**HAYNES, C.** Appeal from a judgment granting a writ of mandate. The board of supervisors of San Diego county passed an order providing for the working of prisoners thereafter committed to the jail of said county under judgment of conviction of a misdemeanor, under the direction of a responsible person, upon public roads and other places mentioned in the order, and appointing respondent overseer of such prisoners, with authority to receive them from, and return them to, the sheriff, and making him their "legal custodian" while at work, and going and returning therefrom. After respondent was appointed he demanded of the sheriff that he deliver to him such prisoners as were required by the order to perform such labor, for the purpose required by the order, but appellant refused to do so. An alternative writ of mandamus was granted and duly served, and appellant appeared and demurred to the petition. The demurrer was overruled, and, appellant electing to stand on his demurrer, a peremptory writ was granted.

Appellant's contention is that the sheriff is the only legal and proper custodian of prisoners confined in the county jail, and cites section 4176, subd. 6, of the Political Code, which provides that "the sheriff must \* \* \* take charge of and keep the county jail, and the prisoners therein."

The power of the board of supervisors

to provide for the working of such prisoners is not questioned, but appellant insists that they cannot be taken out of the custody of the sheriff for such purpose; that the words, "under the direction of some responsible person," as used in the county government act, (Laws 1891, p. 306, § 25, subd. 30,) do not mean in his custody. Appellant also cites a part of section 1600 of the Penal Code, that "a prisoner \* \* \* must be actually confined in the jail until he is legally discharged." This section prescribes the general duty of the sheriff in relation to prisoners, and whether the last clause of the section is a modification which would include the order of the board of supervisors it is not necessary to determine, inasmuch as sections 1613, 1614, of the Penal Code expressly provide that certain prisoners may be required to labor on the public works or ways in the county by an order of the board of supervisors. See, also, Laws 1891, p. 306, § 25, subd. 30. Appellant's contention cannot be sustained. These statutes do not impose any additional duties upon the sheriff. If it were intended that prisoners, while at labor, should be in immediate custody of the sheriff, it is reasonable to suppose the statute would have said so. The authority given the board of supervisors is broad enough to include the custody of the prisoners while absent from the jail; and, indeed, the custody by the "responsible person" under whose direction they are required to labor is essential to their profitable employment. It does not follow from the fact that they are such officers that the sheriff, or any of his deputies, are suitable persons to direct such labor; while it is undoubtedly competent for the legislature to commit the custody of this class of prisoners, for such special purposes, to a person selected by the board of supervisors. The authority conferred upon the board of supervisors "to provide for the working of prisoners" includes all that is required to prevent escapes, as well as the direction of their labor. Any other construction would, at the pleasure of the sheriff, defeat the operation of the statute, since the statute neither requires the sheriff to perform this duty, nor authorizes the board of supervisors to compel him to perform it. Their custody, as well as direction while at work, is confined to some "responsible person" by contract, and not by arbitrary direction. The sheriff might be selected for such purpose, but could not be required to perform the duty, except as the result of a contract voluntarily made by him. The judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 238)

**PEOPLE v. STEWART.** (No. 20,941.)  
(Supreme Court of California. Jan. 21, 1893.)

**ASSAULT WITH INTENT TO RAPE—EVIDENCE—COMPLAINT.**

1. In the trial for an assault with intent to rape, made in the nighttime, in an isolated

place on the highway, where defendant forcibly pulled the prosecutrix out of a buggy in which they were riding, and threw her down, and his conduct indicated that his mind was bent on using whatever force was necessary, the fact that he abandoned his purpose on hearing the approach of a third party does not purge him of the offense.

2. Where the prosecutrix, on the approach of such third party, jumped up, and ran to the approaching party, the fact that she remained unconscious or semiconscious for some hours thereafter was admissible in evidence.

3. The fact that prosecutrix made immediate complaint was competent evidence, but her statement of the details of the affair was properly rejected as hearsay.

Department 1. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

William Edward Stewart was convicted of assault with intent to commit rape, and appeals. Affirmed.

B. F. Howard, W. G. Dyas, and John B. Moore, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was convicted of an assault with intent to commit rape, and now insists that the evidence is insufficient to support the verdict. Like a great majority of this class of cases, the facts here relied upon to support a conviction are largely dependent upon the testimony of the prosecuting witness alone; still this court has repeatedly held that the testimony of the prosecutrix may be sufficient of itself to establish a prima facie case. The alleged assault occurred in the nighttime, while the parties were traveling upon a public highway; and, after detailing certain language that appellant addressed to her touching his desires and purposes, the prosecuting witness further testified as follows: "He told me I could scream all I chose to, because there was nobody within three miles from me, and then he stopped the buggy and got out and took the lines and whip with him, and went around in front of the horse, and spent some little time like he was fastening the lines to the bridge railing. Then he came back and asked me if I would get out without any trouble, and I told him, 'No.' Then he said he would pull me out, and I told him that he would not either. Then he started to catch hold of me. He did catch hold of me, and I got hold of the buggy, and he pulled my hands loose, and pulled me all out,—out of the buggy,—but I came down, I believe, on my feet, as near as I could remember; and when I got down on the bridge he threw me and fell with me, and just as he fell with me he heard this team coming, and he jumped up and says 'Here comes a team; get into this buggy,' and I jumped up and ran for the team that was coming." We think the foregoing evidence, if bearing the stamp of truth, fills the measure furnished by the statute. If her statement as to the occurrence is true, the assault is entire and complete, and the intent is plainly apparent from the acts of the appellant, conjoined with his menacing language. This question as to the sufficiency of the evidence necessary to support a conviction for the offense here

charged, and the principles of law applicable thereto, are quite fully discussed in *People v. Fleming*, 94 Cal. 808, 29 Pac. Rep. 647, and it is there held that the conduct of the defendant must be such as to indicate a purpose to use whatever force upon the female is necessary to accomplish the consummation of his desires. In this case the appellant's conduct indicates that his mind was bent on using whatever force the exigencies of the case demanded, but, fortunately for his intended victim, the arrival of third parties upon the scene furnished her an avenue of escape. The fact that he abandoned his wicked purpose upon the approach of other parties has not the slightest tendency to purge him of the legal consequences of his criminal conduct. If an assault with the intent here alleged is made, it is no less a crime, though the aggressor should abandon his intentions before the consummation of the act, by reason of the pains of a stricken conscience alone.

It is insisted that the court erred in admitting evidence showing that the prosecutrix remained in an unconscious or semiconscious state some hours after she escaped from the defendant. We see no objection to this evidence. It is a universal rule that evidence of physical injuries upon the person of a female are proper matters to be placed before the jury, and the evidence here disclosed partakes of that character. The fact that she made immediate complaint was material and competent evidence, and her statements as to the details of the affair were properly rejected as hearsay. *People v. Mayes*, 66 Cal. 597, 6 Pac. Rep. 691; *People v. Tierney*, 67 Cal. 54, 7 Pac. Rep. 37; *State v. Richards*, 33 Iowa, 420; *State v. Shettleworth*, 18 Minn. 208, (Gil. 191.)

Let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

(97 Cal. 244)

ELBERT v. LOS ANGELES GAS CO. (No. 19,014.)

(Supreme Court of California. Jan. 21, 1903.)

CONTRACT OF HIRING—EVIDENCE—STATUTE OF FRAUDS.

1. In an action for damages for the breach of an alleged contract of employment for two years, the evidence showed that, as the result of a correspondence by letter and telegraph between plaintiff, residing in M., and the president of defendant company, residing in L., plaintiff gave up his position in M., came to L., and entered into the employ of defendant, and that he remained in such employ over a year, receiving as salary the amount stated in the correspondence. Held evidence sufficient to warrant a finding that a contract of employment for two years, at a fixed salary, was entered into by the parties.

2. Where plaintiff, as the result of a correspondence by letter and telegraph, enters the employ of defendant for a period of two years, these letters and telegrams constitute a contract or memorandum in writing sufficient to satisfy the statute of frauds.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by V. L. Elbert against the Los

Angeles Gas Company for damages for breach of a contract by which defendant agreed to employ plaintiff. From a judgment for plaintiff, defendant appeals. Affirmed.

Cheney & Cronin, for appellant. Graft & Latham, for respondent.

McFARLAND, J. This is an action to recover damages for the breach by defendant of an alleged contract by which defendant agreed to employ plaintiff as its superintendent for a term of two years. Judgment went for plaintiff, and defendant appeals. The main points made by appellant may be condensed into the statement that the evidence does not show any contract such as is averred in the complaint and found by the court, and that, at least, it does not show a contract in writing, within the meaning of the statute of frauds. We, however, do not think that appellant's position is tenable. It appears beyond dispute, from the evidence, that in November, 1888, certain letters and telegrams passed between C. H. Simpkins, who was then president of the defendant, (a corporation,) and the respondent, concerning the employment of the latter. At that time Simpkins was in Los Angeles, Cal., which was the principal place of business of the defendant. Respondent was at Minneapolis, in the state of Minnesota. It appears further, beyond doubt, that in pursuance of said correspondence the respondent left his employment at Minneapolis, came to Los Angeles, entered upon the duties of the office of superintendent of appellant, performed said duties continuously for more than a year, and received his salary from the defendant in the amount stated in said correspondence. It appears, further, that, shortly after the expiration of the first year, the appellant, through its then president, W. B. Cline, without cause, discharged the respondent, and refused to accept further services, or to pay for the same; the only cause being that appellant desired to go out of business. Now, with respect to the question whether or not the letters and telegrams afford sufficient evidence that a contract for two years at a certain stipulated price was made, we deem it enough to say that we think said evidence was sufficient to show said facts; and we do not consider it necessary to repeat said letters and telegrams here in detail.

It is contended, however, by the appellant, further, that said letters and telegrams do not constitute a sufficient contract or memorandum in writing to satisfy the statute of frauds. It is settled law, however, that a correspondence through letters or telegrams, or both, if they show clearly what the contract was, is sufficient under the statute of frauds. In Breckinridge v. Crocker, 78 Cal. 534, 21 Pac. Rep. 179, this court said: "In order to take a contract \* \* \* out of the statute of frauds, it is not necessary that there be a formal contract drawn up, with technical exactness. A memorandum of the agreement is sufficient, and it may be found in one or more

papers, some or all of which may be telegrams." In Ryan v. U. S., 136 U. S. 68, 10 Sup. Ct. Rep. 913, the court held that "a complete contract, binding under the statute of frauds, may be gathered from letters, writings, and telegrams between the parties relating to its subject-matter, and so connected with each other that they may fairly be said to constitute one paper relating to the contract." We think, also, that it clearly appears that the respondent was employed by the appellant, and not by said Simpkins personally.

We do not think that the court erred in sustaining an objection to a question put to the respondent, by which he was asked if he had tried to get employment in a kind of business different from that for which he was employed by the appellant. The exception to the ruling of the court touching certain personal expenses of respondent is of no consequence, as in the findings and judgment no such expenses were allowed.

There are no other points necessary to be noticed. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; PATERSON, J.

(97 Cal. 182)

#### HANLY v. SIXTEEN HORSES AND THIRTEEN HEAD OF CATTLE. (No. 14,919.)

(Supreme Court of California. Jan. 13, 1893.)

##### TRESPASSING ANIMALS—PROCEEDINGS IN REM.

Act March 7, 1878, which embraces the whole subject of trespassing animals in several counties, including Santa Barbara, and which restricts the right of proceeding in rem against such animals to cases where the owner is unknown, repeals, by implication, Act Feb. 4, 1874, which applies also to Santa Barbara county, and which gives a right of action in rem, where the owner is known.

Department 2. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge.

Proceedings in rem by Peter Hanly against 16 horses and 13 head of cattle. A demurrer was sustained to the complaint, and from a judgment thereon, plaintiff appeals. Affirmed.

Wright & Day, for appellant. B. F. Thomas, for respondent.

McFARLAND, J. The court below sustained the demurrer to the complaint; and, plaintiff declining to amend, judgment, from which defendants appeal, was rendered for plaintiff. The action is in the nature of a proceeding in rem, against certain animals, under an act of the legislature approved February 4, 1874, concerning animals trespassing upon private property, which was made applicable to several counties, including the county of Santa Barbara. Afterwards, on March 7, 1878, another act of the legislature upon the same subject was approved, which was made applicable also to several counties, including Santa Barbara, although all the counties in the latter act were not identical with those named in the first act. It was held by the

court below that the first act was in conflict with the last one, and that the last act really repealed the first; and we think that the court was right in so holding. The two acts are conflicting in many points. For instance, under the first act a proceeding in rem might be commenced against the animals, although their owner was known to the plaintiff, as was the case in this action, while under the act of 1878 a proceeding in rem could be commenced only in case the owner was not known. Moreover, it plainly appears that the act of 1878 embraces the whole subject of trespassing animals in the county of Santa Barbara, and was intended by the legislature to be, and was, a substitute for the first-named act. In such a case the latter act operates as a repeal of the former, although there be in the latter act no express words repealing the former act, by name. *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. Rep. 757; *Treadwell v. Board of Sup'rs of Yolo Co.*, 62 Cal. 563, and cases there cited; *Murdock v. Memphis*, 20 Wall. 617. Judgment affirmed.

We concur: DE HAVEN, J.; PATERSON, J.

#### HILTON v. HANLY. (No. 19,071.)

(Supreme Court of California. Jan. 13, 1893.)

Department 2. Appeal from superior court, Santa Barbara county; B. T. Williams, Judge. (Not to be published in California Reports.) Action by W. H. Hilton against Peter Hanly. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Wright & Day, for appellant. B. F. Thomas, for respondent.

PER CURIAM. The judgment in this case is affirmed, upon the authority of *Hanly v. Sixteen Horses, etc.*, 32 Pac. Rep. 10, (No. 14,919, this day decided.)

(71 Cal. 224)

#### PEOPLE v. LEM YOU. (No. 20,961.)

(Supreme Court of California. Jan. 18, 1893.)

PERJURY—EVIDENCE—TESTIMONY OF STENOGRAPHER—INSTRUCTIONS.

1. In a prosecution for perjury it is competent to show what witnesses testified to in the cause in which defendant is alleged to have perjured himself, in order to show the materiality of defendant's alleged false testimony, and an objection that defendant was not present at the giving of such testimony, and had no opportunity to cross-examine such witnesses, cannot be sustained; the evidence being offered to show merely that such testimony had been given, and not to prove the facts stated therein.

2. A stenographer, who took down the evidence at a trial, may, subject to cross-examination from the adverse party, testify from his notes as to the evidence; Code Civil Proc. § 2047, providing that a witness may refresh his memory respecting a fact, by anything written by himself at the time such fact occurred, but that the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.

3. In a trial for perjury it is for the court to determine whether certain false testimony alleged to have been given by defendant was ma-

terial; a charge to the jury, defining materiality of testimony, and instructing them to find for or against defendant, according as they may determine that the facts are within or without that definition, being improper, as leaving to the jury the function of determining whether such testimony was material.

4. In the trial of A. for the murder of G. the two witnesses whose evidence was admitted to show the materiality of defendant's evidence on such trial testified that they heard gunshots, and, going in the direction of the house, found G. lying before her house wounded, and carried her in. Defendant testified that two Chinamen carried her into the house before such witnesses arrived. Held that, there being no controversy as to the fact that G. was found lying in front of her house wounded, and no issue as to such fact, it was not material to know who carried her in, and an instruction that defendant's evidence in that regard was material was erroneous.

5. Defendant testified that when he approached the spot where G. laid wounded she told him that she did not know who shot her. Another witness testified that G. told him the day after the shooting that A. shot her. Held, that an instruction by the court that if they believed that the statement, made by G. the next day, was a dying declaration, defendant's testimony was material, was erroneous, in that the court should have more particularly determined for itself whether such statement was a dying declaration.

6. It appeared that A. had been tried for the murder of G. three times. A witness, L., did not appear at the first trial, but on the second trial testified that he saw A. shoot G. Held, that it was error to refuse to allow defendant, on trial for perjury committed in that action, to ask L. who took him up to the district attorney's office, in that it appeared somewhat suspicious that he should come at so late a time to tell what he knew about the case.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Lem You was convicted of perjury, and appeals. Reversed.

F. B. Guthrie and E. M. Guthrie, for appellant. W. H. H. Hart, Atty. Gen., and James McLachlan, Dist. Atty., for the People.

McFARLAND, J. Defendant was convicted of perjury, and appeals from the judgment and from an order denying a new trial. It is charged in the information that the appellant, Lem You, gave certain false and material testimony on the trial of one Wong Ark for the alleged murder of a woman named Goot Gue, who was shot in or in front of the house in which she lived, on the night of April 26, 1891, in the city of Los Angeles. There is great conflict of evidence as to whether or not the said testimony of the appellant was false, and appellant makes no point as to the sufficiency of the evidence to justify the jury in finding that said testimony was false. But appellant contends that the court committed several errors in ruling upon the admissibility of evidence and in instructing the jury.

1. For the purpose of showing the materiality of the alleged false testimony of appellant, the prosecution offered evidence of the testimony which two witnesses named Rohn and Bevan gave at the said trial of said Wong Ark. (There were two or three trials of the said Ark, but the al-

leged false testimony occurred at the first of said trials.) To this evidence appellant objected as incompetent, irrelevant, and immaterial, because appellant, not being present when said testimony was given, had no opportunity to examine or cross-examine said witnesses, because said Rohn was living within the jurisdiction, and should have been called himself, and because, Bevan having since died, there is no rule by which his former testimony can be introduced in this cause. The court overruled the objections, and appellant excepted. The ruling of the court was right. The purpose was not to produce said testimony anew, as tending to prove the facts stated therein; it was offered merely for the purpose of showing as a fact that such testimony had been given, and it was expressly limited by the court to that purpose. The materiality of alleged false testimony does not always appear upon its face, or when simply compared with the indictment. It may be material on account of certain other testimony, which had been previously introduced on the trial of a cause. The testimony of a witness may be material when contradicting a part of the testimony given by another witness, which is material, or if going to the credit or discredit of other witnesses, etc. For instance, if on the trial of A. for a felony, B. should testify that C. was at a certain place at a certain time, this would not appear upon its face to be material; but if C. had previously testified that he was at another and remote place at said time, and had seen A. commit the criminal offense charged, then it clearly would be material. And so the previous evidence and the state of the cause in the action in which the alleged false testimony was given may be proven in order to show the materiality of the latter, (2 Russ. Crimes, 662; 3 Greenl. Ev. § 197;) otherwise the materiality of alleged false evidence could rarely be shown. The rule contended for by appellant that a defendant must be confronted with his witnesses, etc., does not apply here. All that was sought to be proven here was the mere fact that certain testimony had been given, and the appellant was confronted with the witnesses who testified to that fact. If the greater part of the testimony of appellant given in the Wong Ark trial was material at all, it was so only in connection with the said testimony of said witnesses Rohn and Bevan. The said previous testimony of said Rohn and Bevan was read by F. H. Longley, the official stenographic reporter of the court, from his transcript of notes of the testimony, which he testified to be correct; and appellant seeks to make the point that said transcript was not admissible evidence. But we do not think that the point whether or not a certified transcript of the reporter's notes would, as an independent document, have been admissible, arises in this case. Mr. Longley was sworn as a witness, and testified that he had taken such notes, and that they were correct, and he was allowed to read them, and was subject, of course, to cross-examination; and his testifying from his notes was clearly admissible under section

2047, Code Civil Proc.<sup>1</sup> None of the authorities cited by appellant are applicable to this point.

2. Appellant makes the contention that the court erred in instructing the jury, for the reason, among others, that in one part of the instructions given the question of the materiality of the alleged false testimony was left to the jury, while in another part of the instructions it was decided by the court, and taken away from the jury; and this contention must be sustained. For instance, instructions Nos. 4 and 5, given at the people's request, and instructions Nos. 8 and 11, given at request of defendant, go upon the theory that it was proper for the court to give the jury certain advice, information, and definitions upon the general subject of the materiality of the testimony, and allow the jury, under such instructions, to determine whether or not it was material; while in instructions Nos. 2 and 3, given by the court of its own motion, the court determined that two of the items of alleged false testimony were material. If the said two specific instructions had embraced all the matters charged in the information, it might perhaps be said that the general instructions did not work any prejudice to appellant, although even then the instructions would have been subjected to the charge of inconsistency. But the said two specific instructions do not embrace all the charges of false testimony made in the information, and therefore the materiality of all the other testimony alleged to have been given by appellant was left to the jury. The question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury. It usually arises in the ordinary trial of a cause where one party offers evidence and the other objects to it as immaterial, and in that case it would be clear to every one that the question was for the court. But the question is exactly the same when, on a trial for perjury, the materiality of the alleged false testimony arises. Of course, a jury, in rendering a general verdict in a criminal case, necessarily has the naked power to decide all the questions arising on the general issue of not guilty; but it only has the right to find the facts, and apply to them the law, as given by the court. And on a trial for perjury it is the duty of the court to instruct the jury as to what facts would show material testimony. 2 Whart. Crim. Law, § 1284; Cothran v. State, 39 Miss. 541; Steinman v. McWilliam, 6 Pa. St. 170; Reg. v. Southwood, 1 Fost. & F. 356; Power v. Price, 16 Wend. 448; State v. Lewis, 10 Kan. 157; People v. Clementshaw, 59 Cal. 385. There is nothing to the contrary in the case of People v. Brilliant, 58 Cal. 214. The court was there considering an entirely different question, viz. the sufficiency of the indictment; and in the language quoted by ap-

<sup>1</sup>Code Civil Proc. § 2047, provides that a witness may refresh his memory respecting a fact by anything written by himself at the time such fact occurred, but the writing must be shown to the adverse party, who may cross-examine the witness upon it if he desires.

pellant from the opinion of McKinstry, J., it is merely said that certain questions were to be determined in that "present cause," and that whether certain facts existed which would make the matter material was to be determined by the jury. In Wharton's Criminal Law, *supra*, it is said that "the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury." The same rule was substantially declared in *People v. Clementshaw*, *supra*,—the syllabus of the case being misleading. The proper course for the court to pursue in such a case is aptly stated on the kindred subject of malicious prosecution in the opinion of this court rendered by Mr. Justice Harrison, in *Ball v. Rawles*, 93 Cal. 228, 28 Pac. Rep. 937. Substituting the words "materiality of testimony" for "probable cause," the following language from that opinion is a correct statement of the duty of the court on the trial of a defendant for perjury: "It is necessary for the court in each instance to determine whether the facts that they [the jury] may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to a jury a definition of probable cause, and instruct them to find for or against the defendant, according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them, in another form, the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove and then instruct the jury that, if they found such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly." These views do not conflict with *People v. Ah Sing*, 95 Cal. 659, 30 Pac. Rep. 797. There the manner of establishing the materiality of evidence was not before the court.

It is not clear from the record whether or not appellant makes a specific objection to the correctness of said instruction No. 2, given by the court on its own motion; but, as we think said instruction was wrong, although the method pursued in it was right, and as the case may probably be tried again, we think it proper to notice it. It appears that on the said trial of Wong Ark the witness Rohu testified, in substance, that at the time the woman Goot Gue received the mortal wound, he, the witness, was about 140 yards from where she lived; that he heard a police whistle in the neighborhood of where she lived, and immediately proceeded to that place; that he found Goot Gue lying in front of the house, suffering from a gun-

shot wound; that there were only a few persons there at the time; that another man, named Roper, who was on horse-back, appeared at the scene at about the same time; and that he (Rohn) and Roper carried the woman Goot Gue into the house. Now, the appellant herein, Lem You, testified, among other things, that he heard the shot at the same time, being at another point near the place of shooting; that he, the appellant, and one Ah Tet, also went immediately to the place, and also found the woman lying on the sidewalk, shot; that when he got there there were a good many people present, but that neither Rohu nor Roper had come; that two other Chinamen carried the woman into the house, and that Rohu and Roper did not carry her in. The court, in said instruction No. 2, instructed the jury, in substance, that said testimony of the appellant was material; and in this we think that the court erred, at least upon the state of the evidence as it then appeared. There was no conflict of testimony and no issue as to the fact that the woman Goot Gue was found lying in front of the house, wounded. All the witnesses swore to that fact, and there was no controversy about it. Under those circumstances, we do not think it was material to know who carried her into the house; nor is the latter fact connected in any way with anything that was material. If the witness Rohu had given further testimony about something that was material, then the contradiction by appellant of his statement that he carried the woman into the house might have been material, for it might have affected his credibility, and lessened the weight of the additional material evidence. But the record does not show that at the first trial of Wong Ark the witness Rohu testified to any other fact material in the case, and the testimony of the appellant must have been material at the time when it was given.

It may be well also to notice the third instruction given by the court of its own motion. It seems that the appellant testified that when he approached the woman on the sidewalk he asked her who shot her, and she replied that she did not know; and it appears further that the witness Bevan testified that on the next day, about 11 o'clock A. M., the said Goot Gue told him, in substance, that Wong Ark killed her. The court told the jury that the testimony of the appellant as to what Goot Gue told him was material, if the jury believed that the statement made the next day by her to Bevan was a dying declaration; at least that is the way we construe the instruction. If the statement of Goot Gue, made to Bevan, was made under such circumstances that it was admissible as a dying declaration, then said testimony of defendant was probably material, because it might have affected in some degree the truth of the statement made by Bevan; but the court should have more particularly and clearly determined for itself whether or not the said statement, made to Bevan, was a dying declaration.

3. We think the court erred in refusing

to allow appellant to ask of the witness Ah Lung, on cross-examination, the question: "Who took you up to the district attorney's office?" although this error may not be of great importance. The said Ah Lung had testified that he was present, and saw Wong Ark shoot Goot Gue; that he was not a witness on the first trial of Wong Ark, and had told no person what he knew about the shooting until he was picked up on the street during the second trial of Wong Ark, and taken to the district attorney's office. This conduct of the witness was rather suspicious; and, for the purpose of showing how he came at so late a time to tell what he knew about the case, we think it was not improper to ask him upon whose suggestion he went to see the district attorney. The record does not disclose any other error, and we do not deem it necessary to discuss the other points made by appellant. Judgment and order reversed.

We concur: DE HAVEN, J.; GAROUTTE, J.

(4 Wyo. 56)

STATE ex rel. BENNETT v. BARBER et al.,  
State Canvassing Board.

STATE ex rel. CHAPMAN v. SAME.

(Supreme Court of Wyoming. Jan. 10, 1893.)

MANDAMUS TO STATE OFFICERS — ALLOWANCE OF ALTERNATIVE WRIT IN VACATION BY SINGLE JUSTICE OF SUPREME COURT — STATE CANVASSING BOARD — JUDICIAL DISCRETION — DECISION AS TO OFFICIAL RETURN — COUNTY CANVASSING BOARD — RIGHT OF COUNTY CLERK TO DETERMINE CORRECTNESS OF ABSTRACT OF VOTES — AUSTRALIAN BALLOT LAW — MANDATORY PROVISIONS — CERTIFICATE OF NOMINATION — FORM.

1. Const. art. 5, § 3, provides that the jurisdiction of the supreme court is original "in quo warranto and mandamus as to all state officers," and that each of the judges of said court has power to issue writs of habeas corpus to any part of the state on petition by or on behalf of a person held in actual custody, and may make the writ returnable before himself, or before the supreme court, or before the district court of the state or any judge thereof. Rev. St. § 3077, provides that "when the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a court may, in the first instance, allow a peremptory mandamus, and in all other cases an alternative writ must first be issued on the allowance of the court, or a judge thereof." *Held*, that such statute, in so far as it authorizes a single judge of the supreme court in vacation to allow the issuance of an alternative writ of mandamus, is not repugnant to the constitution, since it merely provides a method of procedure to set in motion the original jurisdiction of such court in mandamus to state officers, and such allowance is not expressly, or by fair implication, inhibited by the constitution.

2. In mandamus proceedings to the state board of canvassers, allegations of facts in the petition for the writ, as to the vote and return thereof at a particular precinct, should be stricken out, since the board can act only on the return made to it.

3. In such proceedings the petition need not show that the canvass by the state board was made in the presence of the governor, as required by the statute, since the presumption is that the officers of the law did their duty in that respect.

4. The provisions of the constitution and

statutes conferring on the house of representatives the authority to judge of the election, return, and qualifications of its members do not deny to the supreme court jurisdiction in mandamus proceedings to compel the state canvassing board, in canvassing the votes for such members, to perform the duties required of it by law, since the action of such board in canvassing the votes for members of such house cannot affect the authority of the latter.

5. The return of the vote of a certain county, sent by the clerk thereof to the state canvassing board, contained two abstracts of votes cast in such counties for members of the house of representatives. One was the abstract made by the clerk, and the other was the abstract made against his protest by two justices of the peace whom he called to his assistance in canvassing the vote, as appeared on the face thereof. The clerk's certificate to the return stated "that the foregoing is a full, true, and correct copy of the abstract of the returns of all votes cast in said county for members of the state legislature." *Held*, that the decision by such board as to which of such abstracts was the official and legal return was not the exercise of a judicial discretion, which the supreme court cannot control by mandamus.

6. Laws 1890, p. 177, § 137, provides that on the fifteenth day after the close of any county or general election, or sooner if all the returns be received, the clerk of the county, taking to his assistance two justices of the peace of his county, (one of whom shall be of a different political party from himself, if one can be found in his county,) shall proceed to open said returns and make abstracts of the votes. Section 138 provides that in canvassing the returns the vote of every precinct returned within 15 days after the election to the county clerk shall be counted, and the "canvassers" shall not throw out the vote of any precinct so returned. Section 139 provides that the county clerk, immediately after making out abstracts of the votes given in his county, shall make a copy of such abstracts, and transmit the same by mail, or by some proper person, to the office of the secretary of the territory. *Held*, that the two justices of the peace and the clerk constitute a canvassing board, the action of a majority of whom is the action of the board.

7. Where such board transmits to the state canvassing board two abstracts of the votes of the county, one made by the clerk and one made by the two justices of the peace against his protest, both duly certified, the abstract of the two justices constitutes the official and legal returns of such county which must be canvassed by the state board.

8. In proceedings by mandamus to compel the state canvassing board to canvass such official returns it is essential that it appear from the pleadings that the relators have a personal interest in the result of such canvass.

9. The provisions of the statute (Laws 1890, p. 168, § 86) known as the "Australian Ballot Law," requiring certificates of nominations of candidates for office to be made and filed to entitle the names of such candidates to be printed on the official ballot, are mandatory. Groesbeck, C. J., dissenting. Price v. Lush, (Mont.) 24 Pac. Rep. 749, followed.

10. Where the petition of each relator, in mandamus proceedings against the state board of canvassers to compel them to canvass certain returns, states that he was regularly nominated for a certain office, that his nomination was duly certified in the manner required by law, and that the certificates thereof were duly filed in the proper offices, an answer thereto which specifically denies such allegations, and alleges that the name of relator was unlawfully printed on the official ballots, in this: that no certificate of nomination had ever been made or filed in any public office presenting the name of relator as a candidate, and that no votes were cast for him in any other way than by placing a cross opposite his name where the same was printed, is



sufficient to constitute a defense. Groesbeck, C. J., dissenting.

11. Laws 1890, p. 168, § 86, provides that all nominations made by any convention shall be certified as follows: The certificate of nomination shall contain the name of each person nominated, his residence, business, the office for which he is named, and shall designate in not more than five words the party or principle which such convention represents. Section 85 provides that a "convention," within the meaning of this act, is an organized assemblage of electors or delegates representing a political party. *Held*, that a certificate reciting that "we, the undersigned, do hereby certify, that —, a resident of —, whose business is stockgrowing, has been nominated for member of house of representatives, and that the convention making the nomination is Democratic," is not open to the objection that it does not state that the nomination was made by an organized assemblage of electors or delegates representing a political party.

12. It is not a valid objection to such certificate that it does not show when or where the nomination was made, since the statute does not require that it shall show such facts.

13. Such certificate is not fatally defective because it fails to show for what house of representatives the nomination was made, since it would seem that there could be no misunderstanding in regard thereto after the same was filed in the office of the clerk of the proper county.

14. Laws 1890, p. 168, § 86, provides that the certificate of nomination shall be signed by the presiding officer and secretary of such convention, who shall add to their signatures their respective places of residence, "and make oath before an officer qualified to administer the same that the affiants were such officers of such convention or primary meeting, and that said certificates, and the statements therein contained, are true to the best of their knowledge and belief. A certificate that such oath has been administered shall be made and signed by the officer before whom the same was taken." *Held*, that such provisions, relating merely to the form of such certificate and the affidavit thereon, are directory only.

15. A certificate of nomination and the affidavits of the officers of the convention thereto, which are intelligible, and sufficient to convey to the mind of the inquirer the information required by such instruments, though defective in form, are not void, in the absence of any provision indicating an intent by the legislature that the statute prescribing what the certificate should contain, and how it should be verified, is so mandatory that a formal defect, incapable of affecting the regular and orderly conduct of an election, or its result, should invalidate it.

Original proceedings in mandamus by the state of Wyoming, on the relation of S. B. Bennett, against Amos W. Barber, Charles W. Burdick, and Otto Gramm, constituting the state canvassing board of the state of Wyoming, and the state of Wyoming, on the relation of Harry A. Chapman, against the same defendants, to compel the defendants to canvass certain returns of the votes cast for the relators for members of the legislature at the election held in the county of Carbon, Wyo., on Tuesday, November 8, 1892. An alternative writ was allowed by the chief justice in vacation, and at the final hearing a peremptory writ of mandamus was granted.

A. C. Campbell and T. C. Patterson, for relators. Lacey & Van Devanter and Charles N. Potter, Atty. Gen., for respondents.

## On Motion to Quash the Alternative Writs of Mandamus.

(December 17, 1892.)

GROESBECK, C. J. The alternative writs of mandamus in the above-entitled causes, presenting substantially the same array of facts, were allowed by the chief justice of this court during the recess and vacation of the court, and were each made returnable by him to the court at the first day of its ensuing adjourned term. On that day a motion to quash the alternative writ was interposed in each case, on the ground that a justice of this court has no power to allow and direct to be issued such writ. These motions, by agreement, were argued and disposed of together.

The power to allow the writ by a justice of this court is not expressed in the constitution of this state. The provisions of that instrument conferring the jurisdiction upon the supreme court is, "original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus." Each of the judges of said court has power, under the same section of the constitution, "to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any district court of the state, or any judge thereof." Const. Wyo. art. 5, § 3. The power and authority to issue the alternative writ of mandamus by a member of this court is wholly dependent upon the following provision of the Revised Statutes of this state, and by implication in the constitution: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a court may, in the first instance, allow a peremptory mandamus; and in all other cases an alternative writ must first be issued on the allowance of the court, or a judge thereof." Rev. St. Wyo. § 3077. The sections of the Code of Civil Procedure relating to mandamus were enacted prior to the admission of the state into the Union, and before the constitution took effect thereby, under the powers bestowed upon the supreme and district courts by congressional and legislative enactment. All laws in force in the territory of Wyoming at the time of the taking effect of the constitution of the state, not repugnant to the same, remain in force until they expire by their own limitation, or be altered or repealed by the legislature. Section 3, art. 21, Const., (Schedule.) The Revised Statutes of the territory and the Session Laws following the revision, in so far as they do not conflict with, or are not repugnant to, the provisions of the constitution of the state, were by express legislative enactment declared to be in full force and effect, and were made the laws of the state, except so far as they may have been or may be repealed, or amended and re-enacted. Chapter 35, Sess. Laws 1890-91. It is urged that the provisions of the Code (section 3077, Rev. St. supra) are repugnant to the provisions



of the constitution, as original jurisdiction bestowed upon the supreme court in cases of mandamus as to state officers prohibits any of the justices or judges thereof from exercising any such power, even to the issuance of the initial writ. It is also contended that, inasmuch as district courts and "their judges" shall have power to issue writs of mandamus, (article 5, § 10, Const.,) and the grant of judicial power to judges of the supreme court severally is only as to the issuance of writs of habeas corpus, such judges have no other judicial power except as members of the court in banc. But any powers conferred upon a single judge of the court in aid of its original jurisdiction by statute, not with a design to strip the court of its original jurisdiction, or to vest its powers in a single judge, do not seem to be hostile to the constitution. The office of the alternative writ of mandamus is merely to apprise the party to whom it runs of the command or order to be obeyed, in case he or it chooses to comply with it, and to notify him that he must allege or show cause if he disobeys it. It is in the position of a declaration at common law. This court cannot be perpetually in session, and to adopt a strict construction of our constitution in this respect would deprive the court of its original jurisdiction in a measure, and prevent the enforcement of the remedy secured by the writ in the vacation or recess of the court. At such times, under such an interpretation of the constitution, the jurisdiction of this court could not be invoked, unless there is some method prescribed to secure a footing in this tribunal so that it may exercise its original jurisdiction in mandamus as to state officers. The people of a state, in framing their constitution, committed to the legislature the whole lawmaking power of the state which they did not expressly or impliedly withhold. Plenary power in the legislature is the rule for all purposes of civil government, and a prohibition to exercise a particular power is an exception. It has never been questioned that American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except when they are restrained by written constitutions. *Cooly*, Const. Lim. pp. 88, 89, and cases there cited. The power may not be expressly inhibited, but may be implied from the frame of government, the grant of legislative authority, the organization of the judicial power, the creation of courts of justice, which create implied limitations upon the lawmaking power as sweeping as though a negative were expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature. *Id.* The statute prescribes a method of procedure by which mandamus proceedings may be directly brought into this court, and this aids, and does not destroy, its original jurisdiction, although this proceeding in its inception may be set in motion by a single judge as well as the court itself. Such justice or judge cannot

determine any matter belonging to the court except in cases of habeas corpus, and the legislature can confer no power upon a member of the court that would erect a new tribunal unknown to the constitution and antagonistic to it, or that would place him in such a position that would in effect usurp the constitutional functions, powers, or duties of the court of which he is a member. The statute does not attempt to confer such powers or duties, as he is required or permitted to issue the alternative writ only. It goes no further, and does not confer the additional power of hearing and determining the cause or proceeding, or of issuing the final and peremptory writ.

We have examined with much care the case of *In re Garvey*, 7 Colo. 502, 4 Pac. Rep. 758, where it was held that under the power conferred by the constitution of that state upon its supreme court "to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same," this clause by clear implication forbade the exercise of such authority by the justices of such court out of term. Our constitution differs somewhat from the Colorado constitution in this respect, as the jurisdiction conferred by the former is "original jurisdiction in quo warranto and mandamus as to all state officers," but the principle involved is much the same. The statute in Colorado conferred this authority to issue writs of habeas corpus upon the several judges of the supreme court, and it was held repugnant to the constitution "chiefly because the enumeration by the constitution of certain powers to be exercised by the court, and other language contained in that instrument, by clear implication forbids the exercise of such authority by the justices out of term." The case of *Ex parte Bollman*, 4 Cranch, 75, is referred to in the opinion, and it is therein stated that in the case cited, "under a statute giving the right to justices of the supreme court of the United States to issue the writ, but not to the court, it was held (Johnson, J., dissenting) that the court might do so if in the exercise of its appellate powers; but that the converse of this proposition would legally follow is far from conclusive." This reference is most unfortunate, as an examination of the opinion of the majority of the court by Mr. Chief Justice Marshall will show. In the course of the opinion in that case it was held that the court might issue such a writ in the exercise of its appellate and revisory jurisdiction under the judiciary act of 1789, which also conferred the power to grant writs of habeas corpus on "either of the justices of the supreme court, as well as judges of the district courts." That this grant to the justices of the supreme court was a grant of power that was constitutional was not doubted. It is said therein: "It has been argued that congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled. There is much force in this argument," etc. Again: "Whatever motives might induce the legislature to

withhold from the supreme court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every court of the United States; and as it is granted to all in the same sentence, and by the same words, the sound construction would seem to be that the first sentence vests this power in all the courts of the United States; but, as those courts are not always in session, the second sentence vests it in every justice and judge of the United States." Johnson, J., says in his dissenting opinion: "Let it be remembered that I am not disputing the power of individual judges who compose this court to issue the writ of habeas corpus." But the supreme court of the United States held that the statute did give the right to the court, as well as to the justices thereof, to issue the writ; exactly contrary to the statement made in *Re Garvey*. The federal supreme court has always held that it could review the proceedings of an inferior court in the exercise of its appellate and revisory jurisdiction by habeas corpus to inquire into the jurisdiction of an inferior tribunal, and the legality of the sentence or judgment. It is not necessary to cite any of these cases, as their name is legion, and the practice of the court is well known from a multitude of cases. The decision of the Colorado case on the point in question concludes as follows: "And considering the language of our own constitution touching the question, and also the nature, objects, and prime functions of our supreme court, we conclude that the justices thereof, acting singly or out of term, are without constitutional authority to issue certain writs enumerated in the constitutional provision referred to, or to hear or determine matters arising thereon." The power conferred by the Colorado constitution, as it then read, upon the supreme court of that state, was to issue writs of habeas corpus, etc., with authority to hear and determine the same. Undoubtedly, under this grant of jurisdiction, a single justice of that court could not "hear and determine" a writ of habeas corpus, but it is not clear that he could not issue the writ, and make it returnable before the court.

It was held in *Ex parte Clarke*, 100 U. S. 402, that the supreme court of the United States could proceed upon a writ of habeas corpus which was originally presented to a justice of that court, and was postponed and referred by him to the court for its determination, on the ground that such action of a single justice of the court was essential to the jurisdiction of the court; and that case was distinguished from *Kaine's Case*, 14 How. 103, where the court would not act on a writ issued by Mr. Justice Nelson, as the writ had been issued by him by virtue of his original jurisdiction, although the court was of the opinion that it could issue a new writ in virtue of its own appellate jurisdiction, and would do so if the case required it. If a justice of the supreme court of the United States could issue a writ making it returnable to his court, in aid of its appellate or revisory jurisdiction, and as essential to that jurisdiction,

it seems that a justice of this court could issue a writ in like manner returnable to the court of which he is a member, as essential to its original jurisdiction. The constitution of Missouri (article 6, § 3) provides that "the supreme court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same." This section was passed upon by the supreme court of that state in the following language: "The alternative writ of mandamus was issued by a member of this court in vacation, returnable to this term. A motion based on that ground has been filed to quash the writ. The statute authorizes a judge of this court to issue such a writ in vacation. Rev. St. § 3254. This statutory provision does not impinge upon section 3 of article 6 of our state constitution. If, however, such a writ should be issued in the manner as aforesaid, and the judges of this court should determine that it had been improvidently issued, this might result in the writ being quashed; but this result would not follow merely because the writ was issued in vacation. The motion to quash in this instance is therefore denied." *State v. Weeks*, 93 Mo. 501, 6 S. W. Rep. 266. See *State v. Rombauer*, 104 Mo. 619, 15 S. W. Rep. 850, and 16 S. W. Rep. 502. In the Missouri constitution the power to issue the writ of mandamus is lodged in the supreme court, yet a statute providing that a member of the court could issue the alternative writ was held not to violate that provision. The same ruling would apply as to the power to issue the writ of habeas corpus by a single member of the court, returnable before the full bench. We think that the Missouri case is much stronger and more directly in point than the Colorado case. Under our statute a single justice of this court, as well as the court itself, may hear an application for a writ of error in a criminal cause and allow the same, and he may order a suspension of the execution of a sentence of the court appealed from, even in a capital case, until the writ of error is heard and determined by the supreme court. Sections 3354-3356, Rev. St. Wyo. It certainly will not be contended that these statutory provisions, so essential to the right of the accused, in bestowing this necessary power upon a judge of this court, are repugnant to the constitution of this state, because that instrument confers upon the supreme court appellate jurisdiction in both civil and criminal causes, and a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law, and does not in express terms give any judge of that court any judicial power except to issue writs of habeas corpus returnable before himself or this court, or any district court or judge thereof. It seems that such powers bestowed upon a single judge of the court of last resort by statute is essential to the preservation of, and incident to, its appellate jurisdiction. So, in the case of the statute providing that the

alternative writ of mandamus may be allowed by a single judge of the court, as a means of procedure in vacation or recess of the court to bring the case before the court, it does not destroy or impair the original jurisdiction of the supreme court in such cases, but invokes it in the only manner it can be invoked when the court is not in session. It is true that the writer of this opinion has heretofore entertained a different view from that expressed herein, and refused in one instance to allow the alternative writ, stating as one ground of refusal that such a writ could not be issued in vacation; but the writ was refused on another ground, which was conclusive, and that was that the writ prayed for would run to one not a state officer. To sustain such a position as to right to allow the writ in vacation where this court has original jurisdiction, taken, as it was, on an application made by mail to the clerk, and not personally to any member of this court, and without the benefit of the assistance of counsel in the case, or time for a full examination of the authorities, would have but the merit of consistency.

On the ground that the allowance of the alternative writ is merely a method of procedure to set in motion the original jurisdiction of this court in mandamus to state officers, and is not expressly or by fair implication inhibited by the constitution, we hold that such a writ may be allowed by a justice of this court in vacation, or in the recess of the court. The only express inhibition upon the legislature as to the imposition of judicial duties upon this court or any member thereof is found in section 16 of article 5 of the state constitution. It is as follows: "No duties shall be imposed by law upon the supreme court, or any of the judges thereof, except such as are judicial," etc. This might necessarily imply that some judicial duties might be imposed by statute upon the judges of this court, as well as upon the court itself. Certainly this could be done where such duties would not exclude, interfere with, or absorb any of the functions of the court. The issuance of the alternative writ of mandamus is not such a case. The motions to quash are overruled.

CONAWAY and MERRELL, JJ., concur.

On Motion to Strike Out Certain Allegations in the Petitions and to Make the Petitions More Definite and Certain.

(Dec. 27, 1892.)

CONAWAY, J. A motion was interposed by defendants to strike out certain portions of the petition in each of these causes. These are allegations of fact as to the vote and return of the vote at Hanna polling precinct, and the action of the state board of canvassers thereon. The state board of canvassers can act only on the return made to it by the county clerk. The inquiry in this court is directed to two leading points: (1) Has this court jurisdiction to control the action of the state board of canvassers, and correct it if erroneous? (2) Was the action of the state board erroneous upon the

return as presented? We have endeavored to purge the record of matter not pertinent to either of these inquiries. The propriety of doing so is quite apparent. If such matter were allowed to remain in the petition, and were denied by the defendants, it would devolve upon both parties, as a matter of necessity, to prepare for trial upon these irrelevant issues; and a demurrer would involve the admission of the truth of irrelevant matters of fact, to the effect of which there might well be doubt. Neither court nor counsel should be employed in the consideration of such matters. Another motion has been presented to require relators to make their petitions more definite and certain. The law requires the canvass by the state canvassing board to be made in the presence of the governor. The ground of the motion is that the petition should show this fact. We think this is not necessary. The presumption is that these officers of the law did their duty, and observed the requirements of the statute in their official action. It is not necessary to allege and show affirmatively matters of fact which the law presumes from other facts which are alleged. Sections 2477, 3083, Rev. St. Wyo., (Code Civil Proc.) The motion to strike out is sustained as to paragraphs 1, 2, and 5, as indicated by counsel, and overruled as to paragraphs marked 3 and 4. The motion to make the petition more definite and certain is overruled in each case.

GRESBECK, C. J., and MERRELL, J., concur.

On Demurrer to Petitions and Alternative Writs of Mandamus.

(Dec. 27, 1892.)

CONAWAY, J. The petitions for mandamus in these cases set forth in extenso, with various matters of inducement and explanation, an instrument of writing over the certificate of the county clerk of Carbon county, entitled: "Abstract of votes cast for members of the state legislature at a general election held in the county of Carbon, in the state of Wyoming, on Tuesday, the eighth day of November, A. D. 1892." The portions of this instrument necessary to an understanding of the demurrers are as follows: "Be it remembered, that on the 23d day of November, A. D. 1892, being the fifteenth day after the close of said election, S. B. Ross, county clerk of said county, taking to his assistance Charles P. Hill and William E. Tilton, two justices of the peace of said county, (the said Charles P. Hill being of a different political party from the said S. B. Ross,) did proceed to open the returns of said election, and to make abstracts of the votes cast at said election as shown by said returns, and, continuing the same from time to time until the 29th day of November, A. D. 1892, did complete the same, and did make the following abstract of votes cast for members of the state legislature, to wit: \* \* \* S. B. Bennett received eight hundred and thirty votes for the office of member of the house of representatives from the county of Carbon, to wit, the territory embraced in the coun-

ties of Carbon and Natrona, state of Wyoming. \* \* \* Harry A. Chapman received eight hundred and twenty-two votes for the office of member of the house of representatives from the county of Carbon, to wit, the territory embraced within the counties of Carbon and Natrona, state of Wyoming. \* \* \* And be it also remembered, that the said justices of the peace, differing from the said county clerk, did, over the objection and against the protest of the said county clerk, count what the said justices of the peace held to be the returns from election district number six, Hanna polling precinct number one, in said county, which were held by said county clerk to be no returns and unauthenticated, and as wholly failing to show that they were the returns of any election held in any precinct in said county; and the said two justices of the peace, over the objection and against the protest of the said county clerk, as aforesaid, did make the following abstract of votes cast for members of the state legislature, to wit: \* \* \* S. B. Bennett received nine hundred and seventy-one votes for the office of member of the house of representatives from the county of Carbon, to wit, the territory embraced within the counties of Carbon and Natrona, state of Wyoming. Harry A. Chapman received nine hundred and sixty votes for the office of member of the house of representatives from the county of Carbon, to wit, the territory embraced within the counties of Carbon and Natrona, state of Wyoming. \* \* \* These two abstracts of votes appear in a single paper over the official certificate of the county clerk. Defendants, constituting the state canvassing board, counted the abstract made by the county clerk as the official return of the vote of Carbon county. Such count results in the defeat of relators. Relators claim that the abstract made by the two justices of the peace is the actual legal official return of the vote of Carbon county. If counted as such it results in their election. They ask the writ of mandamus of this court compelling the state board of canvassers to so count this abstract.

Defendants demur, in each case, on the following grounds: (1) The said petition and the said alternative writ do not set forth any circumstances which render it necessary or proper that a writ of mandamus should issue originally from this court. (2) It appears upon the face of the said petition and the said alternative writ that this court has no jurisdiction of the subject of this action. (3) Neither the said petition nor the said alternative writ states facts sufficient to constitute a cause of action. (4) Neither the said petition nor the said alternative writ states facts sufficient to entitle the plaintiff to the relief prayed for, or to any relief.

The first objection is merely formal, and is waived as tending to delay in presenting an amended petition; all parties desiring an early decision.

The second objection, which is to the jurisdiction, is founded upon constitutional and statutory provisions to the effect that each house shall judge of the elections,

returns, and qualifications of its own members. It is urged that this action is, in effect, to determine the election of members of the house of representatives, and so interfere with the constitutional prerogative of the said house to judge of the election of its members. If the effect of the decision of this cause could be as extensive in its scope as have been some of the discussions of counsel, this objection might be valid. In connection with vigorous strictures upon political methods, the courts have been mentioned as the last bulwark of the rights of the people. This is a high compliment to the courts, and one which they should endeavor to deserve. But in cases like the present it is hardly appropriate. In such cases the courts are not the last or the principal bulwark of the rights of the people in choosing their representatives. The final and plenary jurisdiction upon which the people must rely in the last resort in such cases is that of the house of representatives itself; and courts will not entertain the idea that other tribunals, in which the constitution and the laws have vested some small portion of judicial power, will not exercise such power with as much wisdom and justice as could the courts. But the decision of this cause can affect only the action of the state board of canvassers. The action of the state board of canvassers, whether directed by the court or not, cannot affect the authority of the house of representatives. The second ground of demurrer is not well taken.

The third and fourth grounds of demurrer are similar in their nature, and may be considered together. These grounds of demurrer are that the facts stated are not sufficient to constitute a cause of action, or to entitle relators to the relief prayed for, or any relief. The constitution of the state of Wyoming confers upon the supreme court of the state original jurisdiction in mandamus as to all state officers. The statute defining and regulating the procedure in mandamus defines mandamus as "a writ issued in the name of the territory to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." Rev. St. § 3073. This statute enacted for the territory is continued in force in the state, it not being repugnant to any provision of the constitution. The law specially enjoins it upon the defendants, as a duty resulting from their office, within 30 days after the election, and sooner if all the returns be received, to proceed in the presence of the governor to canvass the vote for all members of council and house of representatives. Sess. Laws, 1890, p. 178, § 141. Their only means of determining what is the vote for members of the house of representatives are the returns. It is clearly their duty to canvass the entire vote as shown by these returns. If they refuse or fail to do this, it is not questioned that mandamus will lie to compel them. The contention of defendants is that they have canvassed the entire vote of Carbon county as shown by the official return. The difficulty in the case arises from the fact

that the document sent up by the county clerk contains copies of two abstracts showing different results. One was made by himself, without the concurrence of either of the two justices of the peace whom he had called to his assistance. The other was made by the two justices, over his objection and against his protest. His official certificate is "that the foregoing is a full, true, and correct copy of the abstract of the returns of all votes cast in said county for members of the state legislature. It does not specify which is the full, true, and correct copy of the returns of all votes cast in said county for members of the state legislature. It was evidently intended to put the state canvassing board in possession of the facts of the Carbon county canvass, leaving it for that board to determine which canvass and which abstract was official and legal. It in effect does this. The state board was under the necessity of deciding this question. It did decide it, and it is claimed that such decision was the exercise of a discretion which cannot be controlled by mandamus. Our statute provides that this writ cannot control judicial discretion. It would seem that the discretion exercised by canvassing boards in determining questions of this nature is not a judicial discretion, and that, if they decide erroneously, their decision may be corrected by mandamus. *State v. Secretary of State*, 32 La. Ann. 579; *People v. Hilliard*, 29 Ill. 413; *Simon v. Durham*, 10 Or. 52; *State v. Garesche*, 65 Mo. 480; *O'Ferrall v. Colby*, 2 Minn. 180, (Gil. 148.); *Brower v. O'Brien*, 2 Ind. 423; *State v. Board of State Canvassers*, 36 Wis. 498; *Luce v. Mayhew*, 13 Gray, 83; *State v. County Judge*, 7 Iowa, 186, 201; *Ingerson v. Berry*, 14 Ohio St. 324; *Coll v. City Board*, (Mich.) 47 N. W. Rep. 227; *State v. Bailey*, 7 Iowa, 390; *Ellis v. County Com'rs*, 2 Gray, 370; *State v. Dinsmore*, 5 Neb. 145; *State v. Wilson*, 24 Neb. 139, 38 N. W. Rep. 31; *Morgan v. Board*, 24 Kan. 71; *In re Strong*, 20 Pick. 484; *Clark v. Board*, 126 Mass. 282; *Johnston v. State*, (Ind. Sup.) 27 N. E. Rep. 422; *Kisler v. Cameron*, 39 Ind. 488; *Moore v. Kessler*, 59 Ind. 152; *State v. Gibbs*, 13 Fla. 55; *People v. Schiellain*, 95 N. Y. 124; *State v. Peacock*, 15 Neb. 442, 19 N. W. Rep. 685; *People v. Nordheim*, 99 Ill. 563; *Hagerty v. Arnold*, 13 Kan. 367. The case of *Arberry v. Beavers*, 6 Tex. 457, is cited to the contrary. In that case special powers were conferred by statute upon the canvasser, different from the powers of ordinary canvassing officers or boards.

We now come to the principal question in the case: Did the defendants err in accepting and canvassing the copy of the abstract made by the county clerk of Carbon county as the return of the vote of that county, and in rejecting the copy of the abstract made by the two justices of the peace whom he had called to his assistance? This, under our statutes, is a question of no little difficulty. Unaided by respectable authorities, we would approach a decision with hesitation and diffidence. In the result which we have reached we are aided and guided by concurrent authorities of great weight and of the highest respectability. The law under

which the two conflicting abstracts in question were made provides that on the fifteenth day after the close of any county or general election, or sooner if all the returns be received, the clerk of the county, taking to his assistance two justices of the peace of his county, (one of whom shall be of a different political party from himself, if one can be found in his county,) shall proceed to open said returns and make abstracts of the votes. *Seas. Laws 1890*, p. 177, § 137. What is the nature of the assistance to be rendered by these justices of the peace? Is it merely by their presence to enable the clerk to open the returns and make abstracts of the votes as sole canvasser, or do they, with the clerk, constitute a board of canvassers which can act by a majority of its members? The following section (138) provides that "in canvassing the returns the vote of every precinct returned within fifteen days after the election to the county clerk shall be counted, and the canvassers shall not throw out the vote of any precinct so returned." Who are the canvassers who, but for this provision, might throw out a precinct? The next section (139) provides that the county clerk, immediately after making out abstracts of the votes given in his county, shall make a copy of such abstract, and transmit the same by mail, or by some proper person, to the office of the secretary of the territory. A copy of what abstract should he so transmit,—an abstract made by himself and by his own sole authority, or one made by authority of a board of canvassers consisting of himself and the two justices of the peace called to his assistance? It is primarily necessary to determine the character in which the two justices of the peace appear,—whether as canvassers or members of a canvassing board, or merely as attendants upon the county clerk, acting as sole canvasser.

The cases of *O'Ferrall v. Colby* and *Bryant v. Colby*, 2 Minn. 180, (Gil. 148.) were decided under a statute requiring the clerk of the board of supervisors, taking to his assistance two justices of the peace of the county, to proceed to open the returns and make abstracts of the votes. It appeared from the pleadings that in the canvass so made the return of the vote of one precinct was rejected, resulting in the defeat of the plaintiffs, whereas, had it been counted, they would have been elected. On this showing the court required the clerk, by its peremptory writ of mandamus, to issue to the plaintiffs certificates of election as state senators. The court remarks in its opinion that the "justices of the peace who were called to the assistance of the clerk were selected by the clerk himself, and their fitness to determine nice and difficult questions of law is seldom regarded in making the selection. They are chosen, rather, as witnesses of the proceedings of the clerk, to see the manner in which he performs his duty," etc. In another portion of the opinion, speaking of the clerk, the court says: "It is no excuse for him, therefore, that the board of canvassers, which he might have selected with a view to what afterwards took place, assumed powers not belonging to

that body, nor that he gave certificates of election according to abstracts made under the direction of that board." The case of *Smith v. Lawrence*, (S. D.) 49 N. W. Rep. 7, was decided under statutory provisions which, so far as material to the present inquiry, were as follows: "On or before the tenth day after the close of any election, or as soon thereafter as all the returns are received, the county clerk or auditor shall take to his assistance a majority of the county commissioners of the county, or the county treasurer, judge of the county court, and one county commissioner, none of which persons so called shall be candidates for office, unless there is not sufficient of said officers who are not such candidates, and shall proceed to open the returns from the various precincts in said county and make abstracts of the votes in the following manner." Another section provides that "if the county auditor or county clerk, as the case may be, is a candidate for office, he shall take no part in the canvass, but shall act as clerk for the said board of canvassers for the county," etc. This would seem to be a legitimate construction of the section first quoted, to the effect that the clerk or the auditor, together with the other state officers taken to his assistance, constituted a board of canvassers, and this seems to be the view upon which the court acted. The case of *People v. Hilliard*, 29 Ill. 413, was decided under a statute providing that on the seventh day after the election, or sooner if all the returns be received, the clerk of the county court, taking to his assistance two justices of the peace of his county, shall proceed to open said returns and make abstracts of the votes in the following manner," etc. The clerks and justices are considered by the court as canvassing officers, and are mentioned as "the board." In commenting upon the matter the court says: "These officers are clothed with no discretionary power. They are to open the said returns and make abstracts of the votes as they appear in said returns, and the clerk is to deliver a certificate of election to each of the persons having the highest number of votes, as manifested by the said returns. They are not allowed to reject any returns, or to decide upon their validity, if on the face they are made in compliance with the law, and in the form prescribed by the statute."

In the case of *Dalton v. State*, 43 Ohio St. 652, 3 N. E. Rep. 685, under statutes similar to ours, the court treats the clerk, and the two justices of the peace called by him to his assistance, as canvassers, and mentions them as "the board." In *Bowen v. Hixon*, 45 Mo. 340, which was decided under a statute requiring the clerk to take to his assistance two justices of the peace of his county, or two justices of the county court, and examine and cast up the votes of each candidate, the court says it is simply a plain, ministerial duty of the clerk, aided by the two magistrates, requiring sufficient knowledge of arithmetic and moral honesty to count correctly, and clerical ability to make the certificate; and the three officers are called "the board." The decision is that, having

completed their duty, they could not legally reconvene of their own motion, and make another canvass and declare a different result. The case of the *State v. Hill*, 10 Neb. 58, 4 N. W. Rep. 514, was decided under a statute requiring the county clerk, together with two disinterested electors of the county, to be chosen by himself, to open the returns, and make complete abstracts of the votes cast for each several office at said election. The court says it seems quite clear that it is the duty of the clerk and his two assistants, who are usually, though not very accurately, called the "board of canvassers," to tabulate the votes contained in each one of the returns, or, in other words, the returns received from each of the precincts, and, in ascertaining the result, to add up the votes given for each candidate, respectively, as returned from each precinct, from which a return of the votes has in fact been received. The three officers are treated as canvassers, though it is said they are not very accurately called a "board of canvassers." This case is also a crushing, if not conclusive, authority against the contention of defendants that the duties of canvassers are judicial or quasi judicial, and not to be controlled by mandamus. The court continues: "And when we come to look into the authorities and examine the adjudicated cases we find that the courts, with almost entire unanimity, agree in defining the duties of canvassers under similar statutes as ministerial, consisting in tabulating and adding up the votes and declaring the result, and in denying to the said board any judicial or discretionary power, or any right to throw out votes which have been in fact returned, for any cause whatever." After mentioning two Nebraska cases supporting the same doctrine, the court proceeds: "Judge McCrary, in his valuable work on the Law of Elections, has collated the cases, showing that the courts of last resort of fifteen of the states of the Union substantially unite in denying to boards of canvassers any discretionary or judicial power."

In the case of *Magee v. Supervisors*, 10 Cal. 576, the court refuse a writ of mandamus to compel defendants, canvassers of the county, to issue a certificate of election to plaintiff, the canvassers having declared the result of the election adversely to him. The court says: "By law it is the duty of the supervisors to canvass the returns of the votes of that county, and to ascertain and declare for whom the greater number of legal votes are cast. If they neglect this duty, the court will award a mandamus to compel them to act, but cannot control their action." If by the law of California the supervisors, as canvassers, were invested with authority to determine the legality of the votes cast, and count only legal votes, this decision is clearly correct. Such seems not to be the law of most of the states or of Wyoming. It would seem that under statutes like ours the courts are substantially unanimous in considering the county clerk and the officers whom he calls to his assistance as all acting officially as canvassers in opening the returns and making abstracts of the

votes of their county. Most of the cases term them a "board of canvassers." The Nebraska case (*State v. Hill*, supra) says they are not very accurately so called, but it is not apparent wherein the inaccuracy consists. There can hardly be a difference of opinion that the weight of authority coincides with the reason and policy of the law. The rights of the people in choosing their officers are certainly safer in the hands of a canvassing board of three persons of different political parties, when practicable, than in the hands of one man. It is easy to see how absolute authority in the important and delicate duty of canvassing the vote of the counties, respectively, vested in a single officer in each county, will result in conflicting views of law and duty and diverse practices in different counties. In one county the votes of precincts would be refused on one ground, in another county on a different ground, as affecting their authenticity. This evil will evidently be counteracted to a considerable extent by a board of canvassers organized as indicated.

It results from these views that the two justices of the peace whom the county clerk of Carbon county summoned, together with himself, constituted a board of canvassers for the county; that the action of a majority of them was the action of the board; that the abstract made by the justices of the peace was the official abstract of the votes of the precincts of the county, and the one that should have been made by the county clerk. That he did not do this must not be allowed to defeat the operation of the law, or the rights of the parties or the people. The county clerk has acted with perfect fairness from his view of the law. He has placed the state canvassing board, and through it this court, in possession of the exact facts as to the action of himself and his associate canvassers in making the canvass of the Carbon county vote. We must consider the copy of the abstract made by the two justices of the peace as the one authorized by the action of the majority of the board, and as the legal and official return to the state board of canvassers of the vote of Carbon county. It results that the state board has not canvassed the return of the vote of that county, but another apparent and unauthorized return. Their duty to canvass the true return is ministerial, and may be controlled by mandamus.

The demurrer is overruled.

GROESBECK, C. J., and MERRELL, J., concur.

On Demurrer to Answer.

(Dec. 29, 1892.)

CONAWAY, J. As this is a case of public interest, in order to avoid any possible misunderstanding as to what really has been decided, or what is now to be decided, in the case, we will state that it is not an election contest. The ultimate right of relators, or either of them, to any office, cannot be determined in this action. The question of fraud or illegality in the voting of any precinct cannot be considered in this action. Such questions could not lawfully be considered by the county can-

vassing board of Carbon county, or by the defendants, the state canvassing board, and cannot be considered by this court in this action. What has been decided in overruling the demurrer to the petition is that, the county canvassing board of Carbon county having found by a majority of its members that there was a return before it of the vote of Hanna polling precinct, it properly proceeded to canvass and make an abstract of that vote, with the vote of other precincts; and that the copy of the abstract was the proper official return of the vote of Carbon county; and that the state canvassing board should have accepted it as such; and that the state canvassing board is subject to control by mandamus in the discharge of such duty. Upon the overruling of demurrer of defendants to petition of relators, defendants filed their answer to the petition, and relators, in their turn, now demur to that answer. This answer and the demurrer thereto raise the further question, which is the question to be decided now, of the competency or standing of relators to maintain their actions.

Each of relators alleges in his petition, as part of his cause of action that he was regularly nominated by a convention of the Democratic party; that his nomination was duly certified in the manner required by law, and that certificates thereof were duly and regularly filed in the proper offices, and that his name was duly printed upon the official ballots. Defendants in their answer in each case deny that any nomination was ever duly or otherwise certified in the manner required by law or otherwise, and deny that any certificate thereof was ever duly or otherwise filed in the office of the county clerk of either of the counties of Carbon and Natrona; and defendants allege in each case that the name of relator was unlawfully printed upon the official ballots in said county, in this: that no certificate of nomination had ever been made or filed in any public office presenting the name of relator as a candidate, and that no votes were cast for the said relator in either of said counties in any other way than by placing a cross opposite the name of relator where the same was printed on the official ballots. It is not necessary to state to lawyers that a demurrer admits the truth of the pleading demurred to. In ruling on defendants' demurrer to petition of relators we were compelled to consider the statements in the petition as true. In ruling on this demurrer we are compelled to consider the statements of the answer directly to the contrary effect as true. The demurrer is general,—that is, that the facts alleged are not sufficient to constitute a defense to the action. In support of the demurrer it is urged that the only questions that can be considered have already been determined,—that is, that the state board of canvassers did not canvass the actual, legal return from Carbon county, and that they may be required by mandamus to do so; but the authorities are to the effect, with substantial unanimity, that a private individual, in order to entitle himself to a writ of mandamus in any



case, must show a legal interest in himself in the result of the proposed action. The writ of mandamus is an extraordinary remedy to be issued in the discretion of the court. The courts have never allowed the writs to run on the relation of a private individual, except such individual establish his standing in court by showing a subsisting legal interest in himself in the subject-matter of the action. It is claimed by relators that, admitting the answer to be true, such interest still appears in relators. On the contrary, it is urged by defendants that the answer, if true, shows that the election of relators is void, and consequently that they have no legal interest in the relief sought; and that the peremptory writ of mandamus asked of this court, compelling the state board of canvassers to issue to them certificates of election, would not be in aid of any legal right belonging to them, but would merely arm them with an instrument to aid them, in violation of law, to intrude into an office to which they are not entitled. Let it be understood, once for all, that this court cannot in this proceeding determine the ultimate right of relators to office as in an election contest; but this court is obliged to consider and determine, incidentally, though not finally, every question affecting the propriety of issuing its peremptory writ of mandamus.

Relators contend that the validity of their election cannot be considered in this action. In support of such contention their attorneys cite *State v. Board of Canvassers*, (Mont.) 31 Pac. Rep. 536, (decided November 19, 1892.) That was an action to restrain a board of canvassers from canvassing votes cast because of informality in the certificates of nomination of candidates. The court denied the writ. The decision is correct law according to the views already expressed by this court in this case. The canvassers, in common but expressive language, cannot "go behind the returns," and should not be compelled to do so by mandamus. But this does not touch the question of the standing of relators in this court, or their right to maintain their actions. The case of *People v. Shaw*, 133 N. Y. 493, 31 N. E. Rep. 512, is cited for relators. Relators were candidates for the several town offices of the town of Minerva, Essex county. They were voted for by means of paper ballots attached to the official ballots, as authorized by the statute law of New York; but the ballots had printed upon them the name of the candidate for excise commissioner, which the statute required to be on a separate ballot. The canvassers rejected the ballots entire. Held error. The ballots could not be counted for the candidate for excise commissioner, his name not being legally on the ballot, but should have been counted for the candidates whose names were legally on the ballots. This case is not in favor of the contention of the relators. *Allen v. Glynn*, (Colo. Sup.) 29 Pac. Rep. 670, is also cited. This was decided by a majority of the court, with a dissenting opinion by Helm, J., under the statute of Colorado known as the "Australian Ballot Law." It differs from that of Wyoming in that it contains a provi-

sion that certificates of nomination shall be valid unless objected to in writing within three days after filing. Our statute contains no such provision. The case was a proceeding to contest the election of a district judge. Held that, having failed to object to an error in the printed ballot prior to election, contestant was not entitled to do so in the contest of the election. The error complained of resulted from the fact that the People's party of the thirteenth judicial district selected a different emblem from that chosen by the state convention of the People's party. It was claimed that the ballots under one of these emblems were irregular, and should be rejected in the contest suit. The ruling was as above stated. The case of *Bowers v. Smith*, (Mo. Sup.) 20 S. W. Rep. 101, is also cited for relators. This was a proceeding by Bowers to contest the election of Smith, who received a plurality of the votes cast, to the office of sheriff of Pettis county. Contestant Bowers did not claim that defendant Smith's name was illegally printed on any official ballots. His claim was that the official ballots printed by the county clerk for use in the city of Sedalia contained, among others, the names of the nominees of the Union Labor party, and that party had not polled 3 per cent. of the entire vote at the last previous general election, as required by statute to enable them to have the names of their candidates printed on the official ballot. Contestant contended that the entire vote of the city of Sedalia for all candidates should be rejected on this account. The court declined to do this. Another point was decided not material to the present discussion. The decision was merely to the effect that some names being illegally on the official ballot would not invalidate the vote as to names legally there. These are all the authorities which the very energetic and industrious counsel for the relators have cited in their written brief. It will be seen that they affect but remotely the questions involved in the determination of this demurrer. In our investigations we have found no other authorities which seem to sustain the contention of relators.

The case of *People v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. Rep. 345, was referred to by counsel for relators in his oral argument. It is relied on by both parties. Relators rely upon the argument of the dissenting opinion. The defendants rely upon the decision of the court by a majority of its members of five to two. Sherwood was elected to an office to which he was ineligible under the constitution of New York, on account of holding a city office at the time of his election. He asked for a writ of mandamus to compel a canvass of votes and issuance of a certificate showing his election. He claimed that neither the canvassers nor the court could lawfully inquire into his eligibility in that action, but that it was incumbent on the court to compel such canvass without regard to the question of his ineligibility. It was admitted that the board of canvassers could not lawfully make such an inquiry, but it was held, in effect, that the court could and would do so in determin-



ing whether its writ of mandamus should run; and the decision of the court was to the effect that Sherwood, being ineligible to the office, had no legal interest in the canvass of the vote, and the court would not by its peremptory mandamus arm him with a certificate of election which could only aid him in intruding into an office to which he was not entitled. In *State v. Albin*, 44 Mo. 346, the court refused to compel by mandamus the issue of a commission of judge to relator, because, although elected thereto and eligible, neither his election nor eligibility being denied or questioned, his election was illegal in not being preceded by a registration of voters. *State v. Newman*, 91 Mo. 445, 3 S. W. Rep. 849, shows that the relator had been elected by a plurality of votes to the office of mayor of Pierce city. Defendants as canvassers so found by a canvass of the vote, but declined to direct the clerk to issue to him a certificate of election. The court refused its writ of mandamus to compel the certificate to issue. The court says: "As by virtue of his disqualification the relator was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election,—evidence of title to that to which he has no right." To a similar effect is the case of *State v. Williams*, 99 Mo. 291, 12 S. W. Rep. 905; *State v. McGregor*, 44 Ohio St. 628, 10 N. E. Rep. 66; *State v. Leaneur*, 103 Mo. 253, 15 S. W. Rep. 539; *Sherburne v. Horn*, 45 Mich. 160, 7 N. W. Rep. 730; *Peters v. Board*, 17 Kan. 365; *State v. Stevens*, 23 Kan. 324; *State v. Robinson*, 1 Kan. 25.

We have now to inquire, taking the statements as true that no certificate of the nomination of relators was ever made or filed, and that their names were consequently unlawfully printed upon the official ballots, and that no votes were cast for them in either Carbon or Natrona counties in any other way or manner than by placing a cross (X) opposite their names, do these facts invalidate their election? This involves the question as to what extent our statutory provisions are mandatory, to the extent that they cannot be disregarded without invalidating elections held under them. These statutes, popularly known as the "Australian Ballot Law," are of comparatively recent introduction into the United States, and the decisions upon this point are very scarce. We can only avail ourselves of such assistance as these meager authorities give us in deciding this important question. It is a duty we would gladly be excused from, but cannot evade. The cases of *Allen v. Glynn* and *Bowers v. Smith*, *supra*, have been sufficiently commented upon and distinguished from the case at bar. The case of *People v. Board of Canvassers*, 129 N. Y. 395, 29 N. E. Rep. 327, goes far in holding the provisions of the statute as to the conduct of election matters to be mandatory in the strictest sense of the word. In this case there was no question of the regularity of nominations, certificates thereof, or filing of such certificates, or of the correctness of the printed ballots; but the town clerk, in transmitting the ballots to the different

election districts, transposed those of one of the political parties so that those indorsed for one district were sent to another. It was held by a majority of the court that such ballots should be rejected, and that mandamus would lie to compel the canvassers to reject them. But the case which has discussed this matter most thoroughly in the light of the English decisions—almost the only light in the way of authority available, as well as from considerations of the policy and intent of the law—is the case of *Price v. Lush*, (Mont.) 24 Pac. Rep. 749. I cannot state the doctrine of the case in brief better than by quoting from the syllabus: "Though section 15 allows a voter to write or paste on his ballot the name of any one he wishes to vote for, the official publication of the candidacy of one whose nomination is not duly made and certified, and the printing of his name on the ballots, give him an undue advantage which will avoid his election." The strictness with which the English courts have held the provisions of the Australian ballot law to be mandatory is illustrated by a number of cases quoted in *Price v. Lush*. The case of *Queen v. Parkinson*, L. R. 3 Q. B. 11, (decided in 1867,) was a case in which a candidate's election was held void because he was nominated by one who was not a qualified elector. In the case of *Mather v. Brown*, 1 C. P. Div. 599, (decided in 1876,) it was held, under a statute requiring a nomination paper to state the surname and other names of the persons nominated, that the name of Robert Vicars Mather appearing as Robert V. Mather was a fatal objection. Many other authorities from the courts of the country from which we have transplanted the Australian ballot law are quoted from in the case of *Price v. Lush*, *supra*. They are all of similar import, constituting a strong array in favor of construing the provisions of that law as strictly mandatory. It is not necessary to repeat the quotations here. It may well be doubted whether the courts of this country will go as far in this direction as have the English courts; but it would seem that, if the more important provisions of this law for securing purity in our elections are held not to be mandatory, it will avoid the beneficial effect of the entire system. It may be that the court in *People v. Board of Canvassers*, *supra*, went further than other courts would be willing to go; but the objection to the ballots in this case is much more serious than in that. The case of *Price v. Lush* is directly in point. It is well sustained by authority, and is likely to be the leading American case on this subject. With the best light upon the matter within our reach, we feel constrained to overrule the demurrer. Demurrer is overruled, with leave to the relators to reply.

MERRELL, J., concurs. GROESBECK, C. J., dissents.

On Demurrer to Reply.

(Dec. 31, 1892.)

CONAWAY, J. This cause now assumes a new phase. The demurrers to the answer already decided were an admission

of the truth of those answers. They contain d, among other things, allegations that the names of the relators were unlawfully printed upon the official ballots, in that no certificates of their nomination had been filed. The court held, in effect, that the filing of such certificates was necessary, that the statute requiring such filing is mandatory, and that without the filing of such certificates relators' names could not lawfully be printed upon the official ballots, and, if so unlawfully printed, the election of relators would be invalidated. The demurrers of relators being overruled, they file their replies. These replies are now demurred to, and are to be taken as true in deciding the demurrers to them. These replies allege that relators were duly nominated by a Democratic convention, held at Rawlins, in Carbon county, on September 27, 1892, as candidates for election to the house of representatives to the second legislature of the state of Wyoming from said county, and that certificates of such nominations were duly filed as required by law. These certificates are exemplified by copy. They are precisely similar in form, even as to every word, letter, and punctuation mark. The following is one of them in full:

"Certificate of Nomination.

"We, the undersigned, do hereby certify, that S. B. Bennett, a resident of Baggs, Wyoming, whose business is stockgrower has been nominated for member of house of representatives, and that the convention making the nomination is Democratic.

"William Daly,                      Rawlins, Wyo.  
"Chairman.                      Residence.  
"F. P. Shannon, Secretary. Carbon, Wyo.  
   Residence.

"State of Wyoming } ss.  
Carbon County

"I, the undersigned, being duly sworn, do depose and say that I was the officer, I above represent myself to be the above named convention, and that the above named certificates and the statements therein contained, are true to the best of my belief. So help me God.

"William Daly, Chairman.  
"Rawlins, Wyo. Residence.

"Subscribed in my presence and sworn to before me this 11th day of October, A. D. 1892.

"Charles P. Hill.  
"Notary Public.

"State of Wyoming } ss.  
Carbon County

"I, the undersigned, being duly sworn, do depose and say that I was the officer I above represent myself to be the above named convention, and that the above certificate and the statements therein contained are true, to the best of my belief. So help me God.

"F. P. Shannon, Secretary.  
Carbon, Wyo. Residence.

"Subscribed in my presence and sworn to before me this 12th day of October, A. D. 1892.

"Lou R. Meyer,  
"Notary Public."

This is one of the certificates which are claimed by defendants to be no certificates, or insufficient to answer the requirements of the law. The other is precisely like it. What we say of this one ap-

plies to both. Relators, on the contrary, claim that the objections to the certificates are merely formal and technical, and that the certificates do not fall short of the requirements of the law in any essential particular. Our election law, after providing that any convention or primary meeting may nominate candidates, proceeds as follows: "Sec. 86. All nominations made by such convention or primary meeting shall be certified as follows: The certificate of nomination, which shall be in writing, shall contain the name of each person nominated, his residence, his business, and the office for which he is named, and shall designate in not more than five words the party or principle which such convention or primary meeting represents." Laws 1890, p. 168. It is objected to the certificate under consideration that it does not state that the nomination was made by an organized assemblage of electors or delegates representing a political party. This is not required to be stated in the certificate. It is sufficiently apparent from the certificate that the nomination was made by a convention. The statute defines the word "convention" as follows: "Sec. 85. A convention or primary meeting, within the meaning of this act, is an organized assemblage of electors or delegates representing a political party." When the word "convention" is used, all this is meant and understood. It is objected that the certificate does not show when or where the nomination was made. The statute does not require that it should. It is objected that the certificate does not show what house of representatives the nomination is for, or for what county. It would seem that when this certificate became public, by being filed by the county clerk of Carbon county in his office, there could be no danger of any misunderstanding on these points. The certificate might have been put in clearer terms, but it does not seem to be fatally obscure. The statute does not prescribe any form of words to be used. Speaking of the certificate the statute continues: "It shall be signed by the presiding officer and secretary of such convention or primary meeting, who shall add to their signatures their respective places of residence, and make oath before an officer qualified to administer the same that the affiants were such officers of such convention or primary meeting, and that said certificates, and the statements therein contained, are true to the best of their knowledge and belief. A certificate that such oath has been administered shall be made and signed by the officer before whom the same was taken. It is claimed that the affidavit to the certificate in question does not fulfill these requirements, but that it is seriously defective. It is true that it is seriously defective. Is this defect sufficient to render the certificate void? If it has this effect, then by the great preponderance of authority, both English and American, relators had no right to have their names upon the official ballots, and their election is invalid. This involves the inquiry to what extent the provisions of our election laws are mandatory, as distinguished from

directory. As intimated in our opinion on the demurrer to the answer of defendants, it seems that American courts are not disposed to enforce so strict a rule of construction as are the English courts. A fair summing up of the result of American decisions is found in McCrary on Elections, (section 192:) "The rule of construction to be gathered from all the authorities was thus stated in *Jones v. State*, 1 Kan. 273, and approved in *Gilleland v. Schuyler*, 9 Kan. 569: 'Unless a fair consideration of the statute shows that the legislature intended compliance with the provisions in relation to the manner to be essential to the validity of the proceedings, it is to be regarded as directory merely.' And in the latter case the court said: 'Questions affecting the purity of elections are in this country of vital importance. Upon them hangs the experiment of self-government. The problem is to secure, first, to the voter a free and untrammelled vote, and, secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. But these rules are only means. The end is the purity and freedom of the election. To hold these rules all mandatory and essential to a valid election is to subordinate substance to form, the end to the means; yet, on the other hand, to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience, and invite a disregard of all those provisions which the wisdom of years have found conducive to the purity of the ballot box. Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials should not be permitted to disfranchise a district; yet rules and uniformity of procedure are as essential to procure truth and exactness in elections as in anything else. Irregularities invite and conceal fraud.' If we keep in view these general principles, and bear in mind that irregularities are generally to be disregarded unless the statute expressly declares that they shall be fatal to the election, or unless they are such in themselves as to change or render doubtful the result, we shall find no great difficulty in determining each case as it arises under the various statutes of the several states."

These views are in no degree relaxed in more recent decisions arising under the Australian ballot law. It seems that there is a principle underlying these decisions which we have nowhere found stated in terms, but which would sound something like this: Whatever is an essential part of the system, or something without which the legislature would not have adopted the balance of the system, or is essential to the orderly working of the system according to the intent of the legislature, must be regarded as mandatory. At least this much is mandatory. It may be that some things falling short of this description are also mandatory; but it is equally clear that some things are in the statute which are merely directory. It is provided that ballots should be printed at public expense. If the printer should neglect

to collect his bill, or should donate it to the county, no one would claim that that would invalidate an election. It is provided that certificates of nomination shall be preserved for a year, and shall be open to public inspection under proper regulations to be made by the officers with whom the same are filed. If such officer should make improper regulations, no one would claim that that would invalidate an election; but it is entirely clear that the legislature never intended that county clerks should provide ballots, and have the names of officers printed in them, unless those names were certified to those clerks as required by statute. No such arbitrary power is vested in the clerk. The authority of the clerk is to "cause to be printed in the ballot the name of every candidate whose name has been certified to or filed with the clerk in the manner provided by this act." And further: "Ballots other than those printed by the respective county clerks according to the provisions of this act shall not be counted in any election." If a county clerk prints, or causes to be printed, a ballot, without having received any certificate showing the nomination of any candidate or candidates, he does so without authority and illegally. Any name of any candidate which is placed on the official ballot, without a certificate of his nomination having been received and filed by the county clerk, is placed there without authority and illegally. The official ballot is evidence to the voters that the candidates whose names appear thereon are the nominees of their respective parties, and that the evidence of such nomination is on file where it can be inspected by any voter who desires to do so. If this is not the case, it is a deception and fraud upon the voter, which is calculated to influence largely the vote and change the result of the election; and the candidate whose name is thus illegally placed upon the official ballot acquires thereby an unfair advantage, to which he is not entitled, and, however great his majority, his election is illegal and invalid. He acquires no right thereby to be protected or enforced by this court, or any court, by writ of mandamus or otherwise. This is according to the great preponderance of authorities, both recent and of earlier date. But this is not such a case. Here appears a certificate of nomination, intelligible, though not unexceptionable, in its terms, but sufficient to convey to the mind of the inquirer the information required in such an instrument. It comes from the proper source. It is made a matter of public record. It is not obscure or misleading in its terms. An election follows. There is no such defect in this instrument as could possibly affect the result of that election. There is no provision of the statute indicating an intent on the part of the legislature that the statute prescribing what the certificate should contain, and how it should be verified, is so mandatory that a mere formal defect, incapable of affecting the regular and orderly conducting of the election or its result, should invalidate an election. If such rigid and severe construction be adopted, cases will continually

arise of formal defects, harmless in their nature, insufficient to have any effect for good or ill, but which will necessitate new elections at considerable expense, which the counties can ill afford. This is a case in which not only candidates and their partisan friends are interested, but the whole people are interested. Every county and every taxpayer in the state is interested. Such rigid construction would probably necessitate a new election in Carbon county at the present time. How many other counties would be similarly affected at present or in the future we cannot conjecture. It cannot be presumed that the legislature would enact any law intending any such calamitous results. It is to be presumed that the legislature intended to accomplish only what is reasonable and just, and for the public good. An opposite result will not be allowed if it can fairly be avoided. At least, it will not be effected by any doubtful construction of statutes. It results from these views that the demurrer to the reply must be overruled. Defendants declining to defend further, a peremptory writ of mandamus will issue.

MERRELL, J., concurs.

GROESBECK, C. J., (concurring.) I dissented from the views of the majority of this court overruling the demurrer to the answer. It was sought by the answer or return to raise the question as to whether or not the nominations of the relators had been certified, or whether or not a proper certificate thereof had been duly filed with the proper officer. Although the petitions for the writ allege the nomination of the relators by a convention representing the Democratic party, as candidates for election to the house of representatives to the second legislature for the legislative district composed of the counties of Carbon and Natrona, and that the nominations were duly certified in the manner required by law, the answer or return denies these facts. I do not think that these matters were properly in issue in this proceeding. It seems to me that it was not necessary to allege that the relators were nominated at all. The answers severally set up that "the said defendants allege that the name of the said relator was unlawfully printed upon the official ballots in the said counties of Carbon and Natrona as a candidate for the house of representatives of said state for the district composed of said counties, in this: that no certificate of nomination has ever been made or filed in any public office presenting the name of said relator as a candidate or nominee for such office; and that the said defendants allege that no votes were cast for relator for said office in either of said counties, in any other way or manner than by placing a cross (X) opposite the name of relator where the same was printed on the official ballots." This allegation was probably made for the purpose of showing that no elector voting for either of the relators had written his name on the official ballot, which is permitted by statute. Suppose this fact had been denied in the reply, and an issue had

been made on this point. Can it be seriously contended that this court would have been compelled to direct testimony to be taken thereon or have all the ballots in these counties inspected? I think not. There are some limits to judicial inquiry, and some presumptions that are so conclusive as to preclude such inquiry. In a proceeding like this the inquiry should be directed to ascertain if the returns show that the relator has been elected. He has a right to have the votes cast for him returned, canvassed, and counted as provided by law, and in the manner prescribed by law. Each relator has shown himself entitled to this "clear legal right," and it was so held by this court on demurrer to the petition. Our statute defining mandamus is as follows: "Mandamus is a writ issued in the name of the territory [state] to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Rev. St. Wyo. § 3073. This court held that the legal and proper returns from Carbon county of the votes cast for relators were not canvassed by the state board of canvassers. This duty that the law enjoins upon such board, and which results from their office, trust, and station, should be performed, and the relators have shown their clear legal right to its performance. The constitution has made each branch of the legislature the judges of the elections, returns, and qualifications of their members. The court cannot invade this province. It can merely set in motion the machinery provided by law to ascertain who is entitled to the certificate of election. Dissenting opinion of Finch and Andrews, J.J., in *People v. State Board of Canvassers*, 129 N. Y. 377, 29 N. E. Rep. 345. The cases that announce a contrary opinion are based upon the ineligibility of the relator, or upon the invalidity of the election at which he was elected; but neither of these questions is presented here. It is true that in the answer to one of the petitions it is alleged that relator Chapman was not a citizen of the United States at the time of filing such answer, and never was a citizen. This allegation is insufficient, as this impediment might be removed before the time fixed for his qualification as a member of the house of representatives. The constitutional provision applicable is that no person shall be a representative who is not a citizen of the United States. Last clause of section 2, art. 3, Const. Wyo. This objection was waived by counsel for respondents as the reply filed thereafter shows that such relator has become a citizen of the United States since the election, and prior to the meeting of the legislature, by naturalization. All the cases cited bear upon the ineligibility of the relator or the invalidity of election, and consequently have no application. The only questions are as to the fact of nomination and the sufficiency of the certificate of nomination. If these questions could be raised in this proceeding, I doubt that they should be considered.

The case of *Price v. Lush*, (Mont.) 24 Pac. Rep. 749, was relied upon in a former

argument, but in that case the effect of the pleadings alone were considered in a contest for the office of justice of the peace, in a regular contest proceeding where the trial court had full jurisdiction to hear and determine the cause. If it could be followed out in the case at bar it would result in establishing the strictest rule of construction in every provision of our election law. Although our statute is a very faithful copy of the Australian ballot law, I see no reason for adopting the construction of the British courts, which appears to be most rigid. I do not see why this law should be more strictly construed than any other statute, or why different rules of construction from those invariably followed by the courts should be adopted in construing the statute. The rigid rule of construction adopted in England, as shown in the opinion in *Price v. Lush*, supra, is monstrous. No American case, with the exception of the Montana case, has gone so far as to establish the doctrine that the failure of the officers of a political nominating convention to properly certify the facts required to be certified by statute would deprive such a candidate of the office to which he was elected. The provisions of the statute in this respect is to my mind for the guidance of the officer who prepares the official ballot. The list of candidates must be published, and this is the notice to the electors at large of the nominations. While an officer charged with the duty of receiving, filing, and preserving certificates of nominations might not be compelled to place the names of the candidates not certified or irregularly certified upon the official ballot, yet if he does so, without objection, I think all inquiry should end there. Any other construction would operate to delude the unsuspecting voter, who has a right to assume, when he receives from the election judges a ballot purporting to be an official ballot, that it is official, and properly made out by the public agents designated by law for that purpose. Cases, indeed, might arise where an officer charged with this duty has acted fraudulently or corruptly in placing names on an official ballot which have no right there, but the courts are open for the redress of such wrongs. Certificates of nomination are open to inspection, and heavy penalties are provided for the infringement of the law by the official who is custodian of these certificates, and who prepares and directs the printing of the official ballot. These are sufficient safeguards against fraud, ignorance, or corruption on the part of the officers intrusted with these duties. If the law is to be rigidly construed, and all of its provisions held mandatory relating to the conduct of the officers in preparing and distributing official ballots, many electors may be deprived of their votes without any fault or negligence on their part. Dissenting opinions in *People v. Board of Canvassers*, 129 N. Y. 438, 29 N. E. Rep. 327.

The record discloses that there were 10 candidates only for the office of representatives voted for in Carbon county, which, with Natrona county, is entitled to five representatives in the lower branch of the

legislature; and it is fair to presume that these nominations were made, five from each of the great political parties, and that the electors could exercise their choice from these two lists by voting their party or personal preferences, unless they chose to write the name of some other person or persons on the ballots. In choosing between political nominations, therefore, the electors must have been restricted to these names on the printed official ballot. They had the right to do so, and they ought not now to have this right questioned. The names appearing on the two official ballots are challenged for the first time in this court, for aught we know to the contrary. In my judgment it is too late to make that objection now. The ordinary rules of waiver of legal objections, if not seasonably interposed, ought to apply here. While no provision is made by our statute for the correction or determination of the validity of certificates of nomination, there is a provision for the correction of an error or omission in the publication of names or the description of candidates nominated for office, or in the printing of ballots. The proper district court, or the judge thereof, may direct the correction to be made on application therefor or the mistakes may be corrected by the clerk on his own motion. *Elect. Law Wyo.* §§ 108, 109. In some states statutory provision is made for objecting to the certificates within a fixed period after they have been filed, but no such provision is incorporated in our law. Yet it seems but reasonable that, provisions having been made for public inspection of the nominating certificates, which must be filed a certain period before election, ample time is afforded for making objections to them, or the action of the officer in accepting or rejecting them, prior to their printing and distribution. It appears to me that all such matters would be reached in the courts where the statute is silent. If no objection is made before the printing of the ballots, and certainly if none is made before the election, I do not think it could be made after the election, and thus operate to defeat the will of the people as expressed at the ballot box. Our election law was undoubtedly designed to protect the elector from fraud, imposition, intimidation, and debauchery; to make him absolutely free while exercising his choice for public servants. It was intended to secure honesty and freedom to the voter, and to render ineffective his corruption. It was never intended to serve as a cloak for disfranchisement, and should not be so construed as to render it possible for an official to ignorantly or designedly mislead or disfranchise any elector. If such was the intention, it would have been better if the law had never been enacted. It could be no improvement on former statutes, which have been invariably construed in such manner as to arrive at the intent of the elector, to ascertain the will of a sovereign people, and to cause obedience to that mandate when ascertained. I have read with much interest and profit the cases of *Bowers v. Smith*, (Mo. Sup.) 20 S. W. Rep. 101, and *Allen v. Glynn*, (Colo. Sup.) 29 Pac. Rep. 670, and I believe that the reasoning

of the majority of the courts in those cases, fairly applied to this case, will sustain me in my views. I concur in the result.

(50 Kan. 218)

### STATE v. PALMER.

(Supreme Court of Kansas. Jan. 7, 1893.)

#### FALSE PRETENSES—INFORMATION—EVIDENCE.

1. Good pleading requires that an information charging the crime of obtaining money or other property by means of false pretenses should directly and positively negative each distinct material representation alleged to have been made.

2. To convict one charged with having obtained money or other property by means of false pretenses, the proof must show that the party complaining was actually defrauded.

3. The testimony in this case examined, and held, that it does not show that complainant was defrauded.

(Syllabus by Strang, C.)

Commissioners' decision. Appeal from district court, Shawnee county; John Guthrie, Judge.

Prosecution against Margaret J. Palmer for obtaining money under false pretenses. Verdict of guilty, and judgment thereon. Defendant appeals. Reversed.

Chesney & Ward, for appellant. J. N. Ives, Atty. Gen., and R. B. Welch, for the State.

STRANG, C. This is an appeal from a conviction in Shawnee county, on an information charging the defendant with having obtained money under false pretenses. The information alleges that the defendant, on the 28th day of August, 1891, obtained from Francis L. McClelland, at Topeka, Kan., the sum of \$200, by falsely, unlawfully, designedly, and feloniously representing to said Francis L. McClelland—First. That she was then and there the owner of a certain promissory note, bearing date November 13, 1890, due in one year after date, payable to the order of M. J. Palmer, for the sum of three thousand dollars, at six per cent. interest from date; and that the same was duly signed by Jacob S. Fege, Moses Glinrich, and Joseph Palmer; and that said note was genuine, and worth its full face value. Second. That she, the said Margaret J. Palmer, was then engaged in the business of selling silk worm eggs, and was doing a large and extensive business, amounting to thousands of dollars; that she procured her silk worm eggs from Prof. Gore, at Portland, in the state of Maine; and that she had recently sent to said Prof. Gore, through the Wells-Fargo Express Company, at its office in Wichita, Kan., large sums of money in payment for said silk worm eggs, and that she had recently sent to Prof. Gore, at Portland, Me., the money theretofore advanced by said Francis L. McClelland, through said office, for silk worm eggs. Third. That she was then receiving, from time to time, large and extensive orders for silk worm eggs, amounting to thousands of dollars, and that there had been sent to Wichita, Kan., through the Wells-Fargo Express Company, at their office at said city, to her ad-

dress, a large package of silk worm eggs; that said eggs were then needed to fill orders already in, and that to lift said eggs from the said express company's office would require a large sum of money; that she had arranged with Senator O. A. Bentley, of Wichita, to send said money and said charges for said silk worm eggs to Prof. Gore, of Portland, Me., and that said money was actually needed for said purpose; that, by the sending of said money, silk worm eggs, to the value of many thousands of dollars, would be obtained by said Margaret J. Palmer, to fill large orders already received by her, and that said package of silk worm eggs had been sent back to Prof. Gore, or were about to be sent back if said charges were not paid, and that she had received all the money necessary to pay the charges for said silk worm eggs except two hundred dollars, which she wished said Francis L. McClelland to raise; that the said Francis L. McClelland, believing and relying upon said representations so as aforesaid made to him by said Margaret J. Palmer, delivered to said Margaret J. Palmer, and for her use and benefit, and the said Margaret J. Palmer obtained from said Francis L. McClelland, the sum of two hundred dollars, lawful money of the United States, the personal property of the said Francis L. McClelland, of the value of two hundred dollars, a more particular description of which said money and personal property is unknown and cannot be given. [When] whereas, in truth and in fact, each and all of said representations were false and fraudulent, and the said Margaret J. Palmer knew them to be false and fraudulent at the time she so made them to said Francis L. McClelland; and the said Margaret J. Palmer did then and there unlawfully, designedly, willfully, feloniously, and with intent to cheat and defraud said Francis L. McClelland, make said false and fraudulent representations, and thereby, and by reason thereof, obtained said sum of two hundred dollars from said Francis L. McClelland, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Kansas." The information in this case was challenged by motion to quash, which motion was overruled. It is a very serious question whether the court did not err in overruling such motion.

There are a large number of allegations in the information which are negative in a general and somewhat indefinite manner, but the principal one relied on in the trial of the case is the allegation in relation to the \$3,000 note. In fact, on the trial the conviction was sought, and evidently had, on the ground that the defendant had obtained the \$200 from McClelland by making to him the alleged representations regarding the \$3,000 note, and delivering the same to him as security in part for whatever money he put into the business that she represented herself engaged in,—the purchasing and selling of silk worm eggs for a profit. But the information does not allege the delivering of the note to McClelland at all, and does not in any direct and specific way allege that

she was not the owner of said note, or that it was not worth its face value. The alleged representations in the information are divided into three distinct classes, and each class contains numerous separate representations, and each of these classes of representations, including all the representations of each class, are negatived with a single general allegation of falsity. We do not think this is good pleading, but, as this case is to be reversed on another ground, we will only say in this connection that in criminal cases the charges should be direct and certain, and in this class of cases good pleading requires that each distinct and material allegation should be directly and specifically negatived.

Counsel for appellant claim that there is no proof in the record that McClelland was defrauded. A careful examination of the record satisfies us that this contention is well founded. McClelland claims that he was the agent of the defendant for the entire period of time during which he let her have any money, and that the arrangement between them was that he let her have certain sums of money to put into her business, buying and selling silkworm eggs, which he was to receive back out of the first sales, with a share of the profits, and that, in the mean time, he was to be secured for the money he put in with certain notes which he was to hold as collateral security for all money he let her have. In all his testimony McClelland insisted that he would not have let the defendant have the money without the notes as security. He let her have in all less than \$1,300 that he did not get back, and the undisputed evidence shows that he received from her as security a note for \$700, one for \$1,500 and one for \$3,000. There is some evidence to show that the \$3,000 note is worthless; but there is no certain or conclusive evidence of that fact. There was never any attempt on the part of McClelland, or any one for him, to collect said note. It was never sent to the home of the makers for collection. No one of the makers was ever asked to pay it. There is no evidence that the note was not made by the parties whose names were signed thereto, nor that they were not fully able to pay it. It is true it was shown by evidence of doubtful competency that there was no First National Bank at Chambersburgh, Pa., and that a dispatch purporting to come from Chambersburgh, signed "First National Bank," saying in substance that the note was good, was manufactured here, by the defendant, with the aid of an honest, but incompetent, operator of the Western Union Telegraph Company; and yet, in spite of these things, the note might be genuine and collectible. But suppose this note was worthless; what is there in the record to show that the other two notes were not worth their face value? We discover nothing. McClelland was in possession of both of these notes when he let the defendant have the last \$200,—August 28, 1891,—and, so far as the record shows, has them still. These two notes amount to \$2,200 without any interest thereon. The only reference to either of these two

notes, except as to the fact that he received them as security, is in one of McClelland's letters to the defendant, in which he called her attention to the fact that the \$1,500 note was due, and that, to keep it good, she ought to have some of the principal or the interest paid, an indication at that time that he thought the note was good. The record shows no attempt to collect either of these notes, and no complaint that they were not collectible. If these two notes are good and collectible, McClelland has at least \$2,200 in security for less than \$1,300 that he let the defendant have and did not get back. With such a state of things, we do not see how he was defrauded. It may be said that he would not have let the defendant have the \$200 August 28, 1891, without the \$3,000 note as additional security. That may be true, but if true, and if the \$3,000 note is worthless, yet, if the collateral already in his possession was sufficient to save him from loss on the \$200, he was not defrauded; and, if not defrauded, the defendant could not be guilty of a crime in connection therewith. The mere obtaining of money under false pretenses does not alone constitute a crime. The money must be obtained to the injury of some one. Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished. In this case the defendant was undoubtedly guilty of many flagrant misrepresentations and other dishonest acts; but if all such misrepresentations and dishonorable acts did not actually result in injury to McClelland, she cannot be convicted in this state simply because, upon the face of things, she is bad. A person must be charged with, and convicted of, some specific offense, if convicted at all. It will not do to convict on general principles because the evidence shows the defendant devoid of common honesty. Many of the statements made by the defendant to McClelland concerning her business are so ludicrously extravagant that they of themselves should have warned him of the character of the person he was dealing with. We think the record wholly fails to show that McClelland was defrauded out of anything by the defendant, and that it does not satisfactorily show that even the \$3,000 note was not genuine and collectible. It is therefore recommended that the judgment of the trial court be reversed, and the cause remanded for further proceedings in that court.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 350)

#### ROBSON et al. v. SMITH.

(Supreme Court of Kansas. Jan. 7, 1893.)  
COUNTY COMMISSIONERS—CONTRACTS BY EXPIRING BOARD.

The board of county commissioners of a county, about to be dissolved under operation of law, has no power to enter into a contract designating the official newspaper of the county, and providing for the county printing for another year, so as to tie the hands of the new board, about to meet and organize, and thereby prevent the new board from selecting the official paper



and contracting for county printing for the current year after its organization.

(Syllabus by the Court.)

Error from district court, Coffey county, Charles B. Graves, Judge.

Action by C. O. Smith against W. H. Robson, Stephen Baird, and A. S. Vanordstrand, the board of county commissioners of Coffey county, Kan., and M. M. Bowman and N. S. Mounts, partners as Bowman & Mounts, to enjoin the board of county commissioners from carrying out a contract made with Bowman & Mounts to do the county printing. The temporary injunction was made perpetual, and defendants bring error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On, and for more than five years prior to, the 18th day of January, 1892, and at this time, C. O. Smith was and is the publisher of the Burlington Republican, a weekly newspaper printed and published in the city of Burlington, in the county of Coffey, in this state, and having a general circulation therein. On the 7th day of January, 1892, the board of county commissioners of Coffey county, then composed of W. H. Robson, Stephen Baird, and O. R. Tanner, (the last named being the chairman of the board,) at a regular session thereof, entered into a written contract with C. O. Smith to do all the county printing of the county from the 7th day of January, 1892, until the 1st day of January, 1893. At the time of the contract, C. O. Smith executed to the board of county commissioners of Coffey county a bond in the sum of \$2,000, conditioned for the faithful performance of his part of the contract, which was accepted and approved by the board, and filed with the county clerk. On the 13th day of January, 1892, Bowman & Mounts, editors and proprietors of the Courier, a weekly newspaper published in the county continuously since the 1st day of January, 1891, and of general circulation therein, made a proposition to the board of county commissioners of the county, then composed of A. S. Vanordstrand, Stephen Baird, and W. H. Robson, (the last named being chairman of the board,) and who were then in regular session as such board at the office of the county clerk of the county, to do the county printing for the year ending on the second Monday of January, 1893, for 5 per cent. of the price C. O. Smith was to receive under his contract. The board, by a vote of a majority of its members, A. S. Vanordstrand and Stephen Baird, accepted the proposition of Bowman & Mounts, and ordered the county printing for the county to be let to them. The order of the board was at the same time reduced to writing, and spread upon the journal by the county clerk. Bowman & Mounts then placed at the head of their newspaper, the Courier, the words, "Official County Paper," and otherwise advertised that the Courier was the official newspaper of Coffey county. On the 18th day of January, 1892, C. O. Smith commenced his action in the district court of Coffey county to enjoin the board of county commissioners from entering into or carrying out any contract

with Bowman & Mounts to do the county printing, and to enjoin them from placing at the head of the Courier the words "Official County Paper," and from otherwise advertising their newspaper as the official newspaper of the county. On the same day the district court granted a temporary injunction in the action as prayed for. On the 22d day of January, 1892, the defendants filed their motion to vacate and dissolve the temporary injunction on the grounds that the plaintiff's petition did not state facts sufficient to authorize the issuing of the temporary injunction, and that the facts alleged therein were not true, and also that plaintiff had an adequate remedy at law. The motion was, on the 27th day of January, 1892, heard by the court upon the petition and affidavits. After the hearing and argument thereof, the court took the same under advisement until the 6th day of February, 1892, at which time C. O. Smith asked and obtained leave to file, and did file, his amended petition. Immediately after the filing of the same, the court overruled the motion, to which ruling the defendants at the time excepted. On the 25th day of February, 1892, the board of county commissioners and Bowman & Mounts each filed in the action their separate demurrers to the amended petition, and each alleged as the grounds of demurrer that the amended petition did not state facts sufficient to constitute any cause of action against them, nor to entitle the plaintiff to the relief prayed for, nor to any relief whatever, as against the defendants. On the 4th day of March, 1892, the separate demurrers were each taken up and heard before the court, and overruled, to which ruling the defendants excepted at the time. The defendants declined further to plead, and each elected to stand upon their respective demurrers, whereupon, on motion of the plaintiff, C. O. Smith, the court rendered judgment against the defendants, ordering the temporary injunction to be made perpetual, and enjoining the defendants and the board of county commissioners from ordering or directing any of the county printing to be done by Bowman & Mounts or by the Courier during the year 1892, and restraining Bowman & Mounts from advertising their newspaper as the official paper of the county, and from displaying at the head of the newspaper the words "Official County Paper" during the year 1892, and perpetually enjoining the same from paying Bowman & Mounts any money or county orders for any printing or advertising for the county during 1892. Bowman & Mounts and the board of county commissioners of Coffey county excepted to the judgment, and bring the case here.

M. M. Bowman and E. N. Connal, for plaintiffs in error. Manchester & Allen, for defendant in error.

HORTON, C. J. It was decided in *Shelden v. Board*, 48 Kan. 256, 29 Pac. Rep. 759, that "on the second Monday of January after each general election at which a commissioner has been elected the board of county commissioners as an organized body is



dissolved, and the office of chairman is vacant, and, before the commissioners can transact any county business other than to elect a chairman, or fill a vacancy in the office of a commissioner, the board must be again organized; and the hands of such new board or organization, as to the designation of the official newspaper of the county, are not tied by a prior order of the preceding board of county commissioners." It logically follows from the opinion filed in that case that the board of county commissioners of Coffey county, which was about to be dissolved under operation of law, did not have authority on the 7th day of January, 1892, to enter into a contract with C. O. Smith concerning the official newspaper of the county and the county printing thereof for another year, so as to tie the hands of the new board of county commissioners, which met and organized on the second Monday of January of that year,—being only four days after the 7th of January, the date of the contract complained of. It is a matter of general publicity that in the election of county commissioners the selection of the official newspaper of the county enters more or less into the contest. The views of the candidates for commissioners as to what newspaper shall be designated the official paper of the county often determines the result. When the result of the election is legally declared, the will of the majority ought to be promptly and cheerfully acquiesced in. It does not seem fair or just for the old board, just as it is going out of office, to forestall the new board in the designation of the official newspaper of the county. There are no good reasons why the old board should be permitted to tie the hands of the new board in such a matter, and there are manifold and manifest reasons why they should not have that power. The same reasons for limiting contracts for general county expenditures do not exist as in designating the official paper of the county. We repeat what we said in *Shelden v. Board*, supra: "To avoid complications or other troubles, the designation of the official newspaper should be made as early in each January, after the board is organized, as is convenient for action to be had." In the case of *Lapham v. State*, (Kan.) 27 Pac. Rep. 997, the only material question decided was that a board of county commissioners had the power, in the absence of fraud or collusion, to make a contract to pay for the county printing at legal rates, although other parties offered to do the printing at less than legal rates. The judgment will be reversed, and cause remanded, with direction to the court below to sustain the demurrer filed to the petition. All the justices concurring.

(50 Kan. 307)

EL DORADO TP. v. GORDAN et al.

(Supreme Court of Kansas. Jan. 7, 1893.)

LIMITATIONS—ACTION ON TOWNSHIP TREASURER'S BOND.

An action to recover a balance due a township on a township treasurer's bond is barred in five years after a demand has been made for its payment by the legally qualified

successor of the treasurer who executed the bond.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Butler county; C. W. Shinn, Judge.

Action by El Dorado township, a municipal township in Butler county, Kan., against M. J. Gordan and others, on a township treasurer's bond. Separate demurrers to the evidence were sustained, and plaintiff brings error. Affirmed.

Redden & Schumacher, for plaintiff in error. Leland & Harris, for defendants in error.

SIMPSON, C. Action to recover the amount specified in the bond of a township treasurer. M. J. Gordan was elected treasurer of El Dorado township, Butler county, in February, 1885. He filed his oath of office and bond, with Ellet and Frazier as sureties, on the 18th day of February, but the bond was not approved by the board of county commissioners until the 17th day of April, 1885. Gordan acted as treasurer until some time in December, 1886. At the fall election in November, 1886, Adams was elected as treasurer of said township. He filed his oath of office and bond on the 18th day of November, 1886, but his bond was not approved by the board of county commissioners until the 4th day of January, 1887. At a meeting of the township board in the month of October, 1886, a settlement was made with Gordan that showed a balance in favor of the township of \$1,350.38. Adams, the succeeding treasurer, testified at the trial that in December, 1886, he made a demand on Gordan to pay over to him the balance due the township, and that subsequently, in January, 1887, he made another demand. This action was commenced on the 1st day of January, 1892, by the filing of a petition and præcipe, and summons was served on all of the defendants on the 2d day of January, 1892. Trial was had, and, after the township had introduced its evidence and rested, each of the defendants filed their separate demurrer, claiming that it failed to prove a cause of action in favor of the township against either of the defendants. The court sustained the demurrers. The defendants had pleaded the five-years statute of limitation. The township brings the case here for review.

The controlling question is whether the cause of action alleged in the petition of the township is barred by the five-years statute of limitation. Of course it was the duty of Gordan to pay over the money in his hands belonging to the township to his successor in office as soon as his successor was duly qualified;—that is, as soon as he had taken the oath of office, and filed his official bond. This he did not do. Adams filed his oath and bond on the 18th day of February, 1886, and on the succeeding 1st day of January, 1887, Adams was induced by Gordan to receipt to him for the full amount found due by the October settlement, to wit, \$1,350.38; but of this amount Gordan only paid, at

the time the receipt was given, the sum of \$400, and made subsequent payments, reducing the amount owing to the township to \$747.10. The amount of the bond sued upon is \$500. Adams had no legal right to receipt for the balance due the township from Gordan unless it was actually paid in money. It follows from the evidence that the conditions of the bond were violated when the demand was made in December, 1886, and not complied with, and at that time a cause of action arose in favor of the township, unless the contention of counsel for plaintiff in error that Adams was not authorized to make demand or receive the moneys of the township until his bond was approved by the bond of county commissioners is good. The logic of the case of *McCracken v. Todd*, 1 Kan. 148, is against this contention of counsel. This court say: "Todd was sheriff from the date he accepted his commission, and his neglect, or that of the court, to have his bond approved, did not vacate the office. His official acts, notwithstanding such failure, were binding and effectual." If this question was presented under a different aspect it might be a very serious one. Is an outgoing treasurer, who is responsible for a large amount of money, required to pay it over to his successor in office before the bond of the successor is approved by the proper authority? It may be that the approval relates back to the filing of the bond, but suppose the bond is not approved, and other and different sureties are required, or the bond is rejected because its conditions do not conform to the requirements of the statute? But Gordan never made any objection to pay on that account, and we are now unable to see how the township can take advantage of the fact that the bond of Adams, the successor of Gordan, was not approved until the 4th day of January, 1887. As a matter of fact, the identical bond filed by Adams on the 18th day of November, 1886, was approved on the 4th day of January, 1887; and, as a matter of law, probably that approval related to the filing of the bond in the previous November. The contention of the township is that Adams could not legally make a demand for, or was not entitled to receive, the township money until his bond was approved, and, this approval being on the 4th day of January, 1887, the suit commenced on the 1st day of January, 1892, is in time. But, as we have seen, a liability on the bond occurred in December, 1886, and the cause of action being barred by the five-years statute of limitation, all other questions are immaterial, and we recommend an affirmation of the judgment.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 378)

MIDLAND ELEVATOR CO. v. STEWART,  
County Treasurer, et al.

(Supreme Court of Kansas. Jan. 7, 1893.)

TAXATION FOR COUNTY PURPOSES—CONSTITUTIONAL LAW.

Chapter 134 of the Laws of 1887, authorizing the board of county commissioners of v.32p.no.1—3

Wyandotte county to levy and collect a tax not exceeding ten mills on the dollar of the taxable property of the county, for general county purposes, is not unconstitutional or void, but is valid, although the general law in force when said chapter 134 was enacted permitted counties such as Wyandotte to levy only five mills on the dollar for such purposes.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the Midland Elevator Company against M. W. Stewart, county treasurer of Wyandotte county, Kan., and others to recover the amount of a tax paid by plaintiff. A demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

White & Earhart, for plaintiff in error. McGrew & Watson and D. H. Morse, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Wyandotte county by the Midland Elevator Company against M. W. Stewart, county treasurer, S. S. Peterson, sheriff, and the board of county commissioners of said county, to recover the sum of \$241.44, alleged to have been illegally levied against the plaintiff as taxes for the year 1891, and paid by the plaintiff involuntarily and under protest, and to prevent a seizure of its property. A demurrer to the plaintiff's petition was sustained by the court on the ground that it did not state facts sufficient to constitute a cause of action, and the plaintiff brings the case to this court. It appears from the allegations of the plaintiff's petition that the taxable property in Wyandotte county for the year 1891 exceeded \$18,000,000; that the county board for that year, and under the provisions of chapter 134 of the Laws of 1887, levied a tax for general county purposes to the amount of ten mills on the dollar of the valuation of the taxable property of that county, although, as claimed by the plaintiff, the county board would have no authority, under section 220 (or more properly section 181) of the act relating to counties and county officers, (Gen. St. 1889, par. 1886,) to levy more than five mills on the dollar of such valuation. The plaintiff admits that a levy of five mills on the dollar of the valuation is legal and valid, and claims that the excess over and above that amount is illegal and invalid, and it attempts to recover only the excess which it paid over and above five mills on the valuation. Or, to state the question in other words, it is this: It is admitted by both parties that, if said chapter 134 is constitutional and valid, then that the entire tax levied by the officers, and paid by the plaintiff, is legal and valid; but if said chapter 34 is void, and if section 220 (or more properly section 181) of the act relating to counties and county officers governs, then the excess of the tax levied over and above five mills on the dollar of the valuation is illegal and void, and the plaintiff may recover the same back in this action. The sole question, then, as is admitted by the parties, is whether chapter 134 of the Laws of 1887 is valid or void. It reads as follows: "An act authorizing the boards of county

commissioners of Cowley and Wyandotte counties to levy and collect a tax of not exceeding ten mills on the taxable property of said counties, for general county purposes. Be it enacted by the legislature of the state of Kansas: Section 1. The boards of county commissioners of Cowley and Wyandotte counties are hereby authorized and empowered to levy and collect, annually, a tax of not exceeding ten mills on the dollar of the taxable property of said counties, for general county purposes. Sec. 2. Such levy, when so made by said boards, shall be extended on the duplicate tax rolls, and shall be collected as other taxes, and shall be in lieu of all taxes for general county purposes. Sec. 3. This act shall take effect and be in force from and after its publication in the official state paper." Approved March 1, and published March 2, 1887. Said section 220 (or more properly section 181) of the act relating to counties and county officers, so far as it is necessary to quote it, reads as follows: "Sec. 220. The board of county commissioners of any county shall not levy upon the taxable property of such county a tax for current expenses of said county, of any one year, in excess of the following amounts: Upon a valuation of \* \* \* over nine millions, one half of one per cent.; provided, that the electors of the county, by a direct vote, may order an increase on such levies."

It is claimed by the plaintiff that the said act of 1887 is unconstitutional and void for the following reasons: First. It is in contravention of section 16, art. 2, of the constitution, for the reason that it is, in effect, an amendment of said section 220, having the effect to change and alter its provisions, and yet it does not contain the entire section as amended, nor repeal the original section, nor even mention it. Second. The new act is in contravention of section 1, art. 11, of the constitution, which provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation." Third. The new act is in contravention of section 17, art. 2, of the constitution, for the reasons (1) that it attempts, by a separate act, to limit or defeat the uniform operation throughout the state of a general law; (2) that it is itself a general law, or a law of a general nature, and yet it is not to have a uniform operation throughout the state.

It can make but very little difference what might be the views of the individual members of this court, as the court is now constituted, if the questions now presented by counsel were original questions, presented to them for the first time now; for we think they have all been heretofore settled by numerous prior decisions of this court. *State v. Hitchcock*, 1 Kan. 173; *Beach v. Leahy*, 11 Kan. 23; and many other cases, which will be hereafter cited.

The first question presented by counsel for the plaintiff with regard to the new legislative enactment, (said chapter 134,) amending, changing, or modifying the old one, (said section 220,) without embodying in the new act all the provisions of the old one that are to remain the law, and without repealing the old one, is, in

effect, settled against the views of the present plaintiff by the decision of this court rendered in the case of *State v. Cross*, 38 Kan. 696, 699, 702, 17 Pac. Rep. 190. See, also, the cases there cited.

The second contention of counsel for the plaintiff, that the new act is in contravention of section 1, art. 11, of the constitution, which provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation," is wholly untenable. That provision of the constitution, as we have many times decided, requires merely that there shall be "a uniform and equal rate of assessment and taxation" only in each separate taxing district of the state. *Hines v. City of Leavenworth*, 3 Kan. 196, 201. In the case of *Commissioners v. Nelson*, 19 Kan. 234 et seq., will be found an elaborate discussion with regard to the question when an assessment or a tax is at a uniform and equal rate. Now the county of Wyandotte, for all taxes levied for county purposes, is a separate and distinct taxing district, and a rate of taxation of 10 mills on the dollar of the valuation of all the taxable property in that county is certainly a uniform and equal rate of taxation for that county, or, in other words, for that taxing district.

The third contention of the plaintiff, that the new act is in contravention of section 17, article 2, of the constitution, we think, is also untenable. Some good reasons may be urged in favor of the plaintiff's contention, and two decisions of this court seemingly, to some extent, favor it. *Darling v. Rodgers*, 7 Kan. 592; *Robinson v. Perry*, 17 Kan. 248. But some good reasons, and many decisions of this court, are against his contention. *Commissioners v. Shoemaker*, 27 Kan. 77; *Harvey v. Commissioners*, 32 Kan. 159, 4 Pac. Rep. 153; *Weyand v. Stover*, 35 Kan. 545, 551, 11 Pac. Rep. 355; *City of Wichita v. Burleigh*, 36 Kan. 34, 12 Pac. Rep. 332; *State v. Sanders*, 42 Kan. 228, 21 Pac. Rep. 1073; *Hughes v. Milligan*, 42 Kan. 396, 22 Pac. Rep. 318; *Commissioners v. Snyder*, 45 Kan. 636, 26 Pac. Rep. 21; *Commissioners v. Smith*, 48 Kan. 332, 29 Pac. Rep. 565. It will be seen from an inspection of the decisions of this court, commencing with the case of *State v. Hitchcock*, 1 Kan. 173, that this court has uniformly held that the legislature has the power, in its discretion, to pass special laws, although adequate general laws upon the same subject might be enacted, and although in fact such general laws have already been enacted, and are at the time in full force and effect, and although such special acts might have the effect to limit the operation of existing general laws or existing laws of a general nature, then having a uniform operation throughout the state. We think the statute now in question is a special law, and is not either a general law or a law of a general nature, for it relates to taxes in the counties of Wyandotte and Cowley alone. It is probably well known that the taxes of two different counties are seldom, if ever, levied upon the taxable property of such counties at the same rate. The rate is generally different in all the different counties of the state, being levied, rightfully and legally,

under said section 220, for any amount, from any small amount, up to the amount of 5, 5%, 6%, 7%, 8%, and in some counties 10 mills, on the dollar; and hence the particular rate for any particular county is special as to that county. It is never necessary that the rate should be the same in any two counties, and generally it is not. In all counties of the state, however, in which the valuation of the taxable property in the county does not exceed \$5,000,000, the county board may rightfully and legally, under said section 220, levy a tax for current county purposes at the rate of 10 mills on the dollar, the same as the tax in the present case. It is not necessary to repeat the reasons given for the various decisions heretofore rendered by this court. We shall simply follow them; and, following them, we must hold that the statute in question is not void because in contravention of section 17, art. 2, of the constitution; nor is it void at all. With the views herein expressed, it follows that the decision of the court below was correct, and its judgment will therefore be affirmed. All the justices concurring

(50 Kan. 433)

#### STATE v. CAMPBELL.

(Supreme Court of Kansas. Jan. 7, 1898.)

#### INTOXICATING LIQUORS—AMENDATORY ACT—SUFFICIENCY OF TITLE.

That portion of section 13 of the prohibitory liquor law, as amended in 1887, (Laws 1887, c. 165, § 4; Gen. St. 1889, par. 2533,) which provides that "all places \* \* \* where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage \* \* \* are hereby declared to be common nuisances, \* \* \* and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than \$100 nor more than \$500, and by imprisonment in the county jail not less than thirty days nor more than ninety days," is not in contravention of section 16, art. 2, of the constitution, for the reason that it is not contained in the title to said prohibitory liquor law as amended in 1887; nor is it void for any reason, but it is constitutional and valid.

(Syllabus by the Court.)

Appeal from district court, Lyon county; Charles B. Graves, Judge.

Prosecution against John M. Campbell for violation of the prohibitory liquor law. Verdict of guilty, and judgment rendered thereon. Defendant appeals. Affirmed.

Lambert & Dickson, for appellant. J. N. Ives, Atty. Gen., and Ed. S. Waterbury, for the State.

VALENTINE, J. This was a criminal prosecution upon information instituted by the county attorney in the district court of Lyon county, in which the defendant, John M. Campbell, was charged in 81 separate counts with 81 separate violations of the prohibitory liquor law. As to some of these counts a nolle prosequi was entered, and as to the others a trial was had before the court and a jury, and the jury found the defendant guilty as

charged in the first count, and not guilty as charged in the others, and the defendant was sentenced to pay a fine of \$100, and to be imprisoned in the county jail for the period of 30 days, and to pay the costs of suit, and from this sentence he now appeals to this court.

The first count charges, in substance, that the defendant owned, kept, and maintained a house where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and it was drawn under section 13 of the prohibitory liquor law, as amended in 1887, (Laws 1887, c. 165, § 4; Gen. St. 1889, par. 2533,) which section provides, among other things, that "all places \* \* \* where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage \* \* \* are hereby declared to be common nuisances, \* \* \* and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than \$100 nor more than \$500, and by imprisonment in the county jail not less than thirty days nor more than ninety days." It is claimed that this provision of the statute is unconstitutional and void, for the reason that it is not contained in or covered by the title to the act. Const. art. 2, § 16. The title to the act, as well as the act itself, was amended in 1887, (Laws 1887, c. 165;) and the title to the act as thus amended reads as follows: "An act relating to intoxicating liquors, and amendatory of and supplemental to chapter one hundred and forty-nine of the Session Laws of 1885, being an act entitled 'An act amendatory of and supplemental to chapter one hundred and twenty-eight of the Session Laws of 1881, being an act entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes,' and amendatory of and supplemental to chapter one hundred and twenty-eight of the Session Laws of 1881, being an act entitled 'An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.''" We think this title is broad enough to cover that provision of the statute under which the first count of the information in this case was drawn. That part of the title which says "An act relating to intoxicating liquors" is certainly broad enough to cover the provision in question. Upon this subject, see the case of *State v. Barrett*, 27 Kan. 213, 215, 219, cited in the defendant's brief. That decision was rendered in 1882, under the original prohibitory liquor law as it was first enacted, and when the title to the act read very differently from what the title to the present prohibitory liquor law now reads; but the principles enunciated in that decision control this case, and will require us to hold that the provision of the statute now in question, and the one under which the first count of the present information was drawn, is constitutional

and valid. The judgment of the court below will be affirmed. All the justices concurring.

(50 Kan. 299)

In re WHITE.

(Supreme Court of Kansas. Jan. 7, 1893.)

CRIMINAL LAW — CONVICTION OF SEVERAL OFFENSES — INDEFINITE SENTENCE — COLLATERAL ATTACK.

The defendant, who was prosecuted in three separate criminal cases in the district court of Leavenworth county, all for grand larceny, and numbered, respectively, 2,184, 2,185, and 2,193, was sentenced to imprisonment in the penitentiary as follows: In the case numbered 2,185 he was sentenced for the period of seven years from the time of the sentence; in the case numbered 2,184 he was sentenced "for a period of seven years from and after the expiration of the sentence in case number 2,185;" in the case numbered 2,193 he was sentenced "for the period of seven years from and after the expiration of the sentence in case numbered 2,184." Held, that the sentences in the cases numbered 2,184 and 2,193 cannot be considered as void when attacked collaterally in a habeas corpus proceeding, but must, in such a proceeding, be held to be valid, and that the defendant may be rightly imprisoned under them.

(Syllabus by the Court.)

Original proceeding in habeas corpus by Joseph White. Writ refused.

W. D. Gilbert and T. S. Brown, for petitioner. S. E. Wheat, for respondent.

VALENTINE, J. This is a proceeding in habeas corpus, in which it is alleged that the applicant, Joseph White, is illegally restrained of his liberty by George H. Case, the warden of the state penitentiary. The warden makes return, admitting that he does restrain the applicant of his liberty by confining him in the state penitentiary, but saying, substantially, that he does so upon three several judgments rendered by the district court of Leavenworth county in three separate actions, in each of which the defendant was charged with, tried for, convicted of, and sentenced for grand larceny, 7 years in each case, and 21 years in the aggregate; and that the aggregate time for which he was sentenced has not yet expired. It appears that the above-mentioned actions were numbered, respectively, in the district court of Leavenworth county, as follows: 2,184, 2,185, and 2,193, and that the sentences were all rendered on January 2, 1886. In the case numbered 2,185 the sentence reads as follows. "It is therefore now by the court here considered, ordered, and adjudged that the defendant, Joseph White, be, and he is hereby, sentenced to confinement at hard labor in the penitentiary of the state of Kansas for the period of seven (7) years from this time." In the case numbered 2,184 the sentence reads as follows: "It is therefore now by the court here considered, ordered, and adjudged that the defendant, Joseph White, be, and he is hereby, sentenced to confinement at hard labor in the penitentiary of the state of Kansas for the period of seven (7) years from and after the expiration of the sentence in case number 2,185." In the case numbered 2,193 the

sentence reads as follows: "It is therefore now by the court here considered, ordered, and adjudged that the defendant, Joseph White, be, and he is hereby, sentenced to confinement at hard labor in the penitentiary of the state of Kansas for the period of seven (7) years from and after the expiration of the sentence in case number 2,184." It is admitted by the warden that by allowing the applicant, White, proper deduction from his sentence rendered in case numbered 2,185 for good conduct, as provided by law, he has served out and completed the time fixed by his first sentence of seven years; but the warden claims that he is now restraining White of his liberty under the sentence pronounced in the case numbered 2,184. It is claimed by the applicant that the sentences in the cases numbered 2,184 and 2,193 are so indefinite that they are void, and, therefore, that the applicant is entitled to his liberty. We would think otherwise, however. The district court of Leavenworth county is a court of record and of general jurisdiction, and all presumptions, in the absence of anything to the contrary, must be construed in its favor. It has jurisdiction in cases of grand larceny, and may sentence a defendant for such an offense to imprisonment in the penitentiary for a period of seven years. Crimes Act, § 79. And section 250 of the Criminal Code reads as follows: "Sec. 250. When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior convictions." See, also, the cases of *State v. Carlyle*, 33 Kan. 716, 7 Pac. Rep. 623, and *State v. Hodges*, 45 Kan. 390, 396, 397, 26 Pac. Rep. 676. Section 671 of the Civil Code provides, among other things, as follows: "Sec. 671. No court or judges shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: \* \* \* Second, upon any process issued on any final judgment of a court of competent jurisdiction; \* \* \* fourth, upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." The cases from Ohio, to wit, *Williams v. State*, 18 Ohio St. 46; *Pickett v. State*, 22 Ohio St. 405; and *Larney v. City of Cleveland*, 34 Ohio St. 599,—referred to by counsel for the applicant, are not habeas corpus cases at all, but are cases taken from a lower court upon petition in error or appeal, and therefore can have but little, if any, application to this case. The judgments of the district court of Leavenworth county in the cases numbered 2,184 and 2,193, notwithstanding their supposed indefiniteness, cannot be considered as void when attacked collaterally and in a habeas corpus proceeding, and therefore it must be held that the applicant, Joseph White, is now rightly imprisoned in the penitentiary under the first-mentioned judgment, and may, when

his term expires under that judgment, be rightly imprisoned under the other judgment. The applicant must remain in the custody of the warden of the penitentiary. All the justices concurring.

(50 Kan. 302)

### STATE v. HUNTER.

(Supreme Court of Kansas. Jan. 7, 1893.)

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY—REVIEW ON APPEAL—LARCENY—VENUE—COMPLETION OF CRIME IN OTHER COUNTY.

1. A conviction may rest upon circumstantial testimony alone, but the facts and circumstances must be such as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused. However, where such testimony fairly tends to show the guilt of the defendant, the weight of the same is for the jury; and where the jury has found, after being properly instructed, that the defendant is guilty, and the verdict has been approved by the trial court, it will not be disturbed because of the insufficiency of the evidence.

2. Where property is taken by larceny in one county, and brought into another county, the offender may be prosecuted in either county. (Syllabus by the Court.)

Appeal from district court, Comanche county; Francis C. Price, Judge.

Prosecution of George Hunter for grand larceny. Verdict of guilty, and judgment rendered thereon. Defendant appeals. Affirmed.

Ben. E. Page and E. Sample, for appellant. J. N. Ives, Atty. Gen., and W. J. Jackson, for the State.

JOHNSTON, J. This is an appeal by George Hunter from a conviction for grand larceny. It was charged that in June, 1892, he stole 19 head of cattle in the county of Comanche, which were of the value of \$250, and, upon testimony that was mostly circumstantial, the jury found him to be guilty of the charge. There is no complaint of the rulings made on the trial, and no objection is taken to the instructions given to the jury. In fact, counsel for the defendant frankly say that the charge is "exceptionally correct," and "is a remarkably fair and lucid embodiment of the legal principles governing the case." The only objection urged is that the testimony is insufficient to sustain the conviction. An examination of the evidence, however, does not satisfy us that the verdict should be disturbed. Much is said about the testimony being circumstantial in character, but the corpus delicti of the gravest offenses may be established by circumstantial evidence. It is true, as claimed, that, to convict upon circumstantial evidence, it is not sufficient that the facts and circumstances create a probability that the defendant committed the offense charged, but they must be such "as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused." The jury were so

instructed by the trial court, and duly cautioned against finding a verdict of guilty unless the circumstances were consistent with each other and with the main fact to be proved. The weight of the testimony given to establish the circumstances is a question for the jury. There was conflicting testimony as to the circumstances in this case, and an attempt by the defendant to show that they were inconsistent with the guilt of the accused; but we think there was sufficient evidence to fairly take the case to the jury, and so much that we are not justified in overturning the verdict.

The theory of the state is that the cattle were taken from their feeding ground by Hunter, driven some distance, into a pasture, and held by him and his children in a ravine or hollow until they were discovered by the owners, and that he was in possession of them when they were found. There is testimony that, when the cattle were missed, a search was instituted, and a cattle trail discovered, which led from the feeding ground towards the pasture in which they were found; and from the tracks it appeared that the cattle were driven by some one on horseback. An opening had been made in the pasture fence, through which the cattle had been driven. Mrs. Rodman, a neighbor, testifies that she saw Hunter drive a number of cattle about that time past her house, and into the draw or hollow, where he and his children herded them for several days, and until about the time of his arrest. Her husband testified that at about the same time he saw Hunter and his boy herding a bunch of cattle in the pasture, and in the vicinity of the draw or ravine. Mrs. Rodman also testifies that after Hunter's arrest he called on her, and proposed to give her a cow if she would not give testimony against him. Two witnesses testify that they found the cattle in the draw, back of the hill, and that, when found, Hunter was there on horseback, and when they came upon him he rode off in another direction. Testimony is also given of other minor circumstances which it is not necessary to repeat. He denied that he was in custody of or near the cattle when they were found, and he denied most of the other statements which would tend to show guilt. To meet the testimony of their witnesses, he gave explanations about driving other cattle into the ravine, or in the vicinity of the same, and holding them there at other times; but these denials and explanations were for the jury, who, upon proper instructions, have chosen to disbelieve him, and have found, not only that the testimony offered by the state was true, but that the facts and circumstances were such as to be inconsistent with any other rational conclusion than that the prisoner was guilty of the charge. It must be admitted that the verdict would be more satisfactory to us if the testimony had been more direct and positive; but it is not for us to weigh the evidence. There were a large number of witnesses who gave testimony, including the defendant, and hence the jury had a better opportunity for determining the truth than we have; and the testimony

offered seems to have been sufficient to satisfy the understanding and consciences of the jury that the defendant was guilty. Under these circumstances, the conviction must stand. *City of Cherokee v. Fox*, 34 Kan. 16, 7 Pac. Rep. 625; *State v. Smith*, 35 Kan. 618, 11 Pac. Rep. 908; *State v. Blakesley*, 43 Kan. 250, 23 Pac. Rep. 570; *State v. McLuin*, 43 Kan. 439, 23 Pac. Rep. 651.

Our attention is called to the fact that the taking, if any, was in Comanche county, where the conviction was had, while they were driven and found in the county of Clark. It is said that the accused could not be convicted in Comanche county of a crime committed and completed in Clark county. There is testimony tending to show that the cattle were taken in Comanche county, and driven to Clark county, but, under section 26 of the Criminal Code, the jurisdiction was in either county, and hence there is nothing substantial in that objection. The judgment of the district court must be affirmed. All the justices concurring.

(50 Kan. 522)

#### STATE v. CALHOUN.

(Supreme Court of Kansas. Jan. 7, 1893.)

CRIMINAL LAW—PLEADING GUILTY UNDER DURESS—FEAR OF MOB VIOLENCE—WRIT OF ERROR CORAM NOBIS—LIMITATION OF ACTION—EVIDENCE—INSTRUCTIONS.

1. Where the accused in a criminal prosecution in the district court is forced, through well-grounded fears of mob violence, to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error coram nobis.

2. And in such a case, where the accused was sentenced to imprisonment in the penitentiary for a period of 42 years, and after having served more than 7 years of that term, he commences an action in the nature of a writ of error coram nobis to set aside such sentence and plea, his action is not barred by any statute of limitations, for the reason that no statute of limitations will operate against the remedy of a party while he is under the legal disability of imprisonment.

3. In such a case, where a deposition of the accused was read in evidence on the trial in his action for relief, and in such deposition was a statement made by him that the relation of attorney and client had never existed between himself and K., but the oral testimony of K., introduced on the trial, showed that such relation did once exist, and that a certain conversation had between them more than seven years prior to that time, and while that relation existed, was a confidential conversation had between them as attorney and client, and the state offered to show what that conversation was, but the accused, through his counsel in the action for relief, objected, and the court excluded the evidence, *held*, that the supreme court cannot say that any error was committed.

4. In such a case, where the trial court permitted the accused to show threats of mob violence, made both before and after, but on the same day of, the entering of his plea of guilty, and many of which threats were not communicated to the accused before his plea was entered, *held* not error; that the evidence tended to show that there was a real danger from mob violence, and that the fears of the accused were well founded, and that the evidence was proper to go to the jury.

5. And, further *held*, that the question of guilt or innocence of the accused in such a case is not a necessary question to be determined in the case; that a mob cannot, by compelling a person accused of a crime to plead guilty, and to be sentenced to imprisonment and hard labor in the penitentiary, so shift the burden of proof from the state to the accused as to compel the accused to prove his innocence, and to prove it by a preponderance of the testimony, and to relieve the state from proving his guilt, and from proving it by evidence sufficient to remove every reasonable doubt. The accused has the right to be placed back in the same condition as he was before he entered his plea of guilty.

6. And it is further *held* that no error was committed in refusing instructions.

(Syllabus by the Court.)

Error from district court, Marion county; Lucien Earle, Judge.

Robert Calhoun pleaded guilty to two indictments charging him with carnally knowing females under the age of 18 years, committed to his care, and was sentenced to hard work in the penitentiary for 21 years in each case. Defendant brought a writ of error coram nobis, which resulted in a verdict and judgment revoking his pleas of guilty and sentences, and ordering his release and a new trial, and the state brings error. Affirmed.

W. H. Carpenter, for the State. Frank Doster, for defendant in error.

VALENTINE, J. At the February term of the district court of Marion county, in 1895, the grand jury found two indictments against Robert Calhoun for defiling females under the age of 18 years, committed to his care and protection, by carnally knowing them. The fact of such indictments having been found became known in the community. The public mind became greatly excited and hostile to the accused. Threats of lynching were freely made, and preparations to carry out the same were apparently going on. Knowledge of these threats and preparations was communicated to the accused, who was then in jail, and the same produced in his mind such a state of fear that, to appease the passions of the community, and secure himself from bodily violence, he pleaded guilty of the charges contained in such indictments, and was sentenced to the maximum limit of punishment—21 years' confinement in the penitentiary at hard labor—in each case. In March, 1892, in the district court of Marion county, he brought proceedings in the nature of those known to the common law as writs of error coram nobis, to revoke the aforesaid sentences, and to set aside the pleas of guilty, upon the ground that such pleas had been extorted from him by duress and threats and appearances of impending and imminent mob violence, operating upon his fears, whereby he had not been allowed his constitutional rights to plead his innocence of the charges alleged against him in said indictments, to defend against the same in person and by counsel, to meet the witnesses against him face to face, and to have a public trial by an impartial jury. A trial was had in the error coram nobis proceeding at the September term, 1892, before



the court and a jury, and the jury returned a general verdict in favor of the plaintiff, Calhoun, and also returned a special verdict, which, omitting title and signature, reads as follows: "We, the jury impaneled and sworn upon our oaths, do find that in the cases numbered 1,546 and 1,547, in the district court of Marion county, Kansas, at its February term for the year 1885, wherein the state of Kansas was plaintiff and Robert Calhoun was defendant, being indictments for the offenses of carnally knowing females under the age of eighteen years, confided to his care and protection, found and returned by the grand jury of said county at said term, and to which said indictment said defendant pleaded guilty, that the said pleas of guilty were made by said defendant unwillingly and involuntarily, and under the influence and duress of his fears of death or great bodily injury being inflicted upon him by a mob if he did not so plead guilty to such indictments." A motion by the state for a new trial was made and overruled, findings of fact were made by the court in accordance with the verdict of the jury, and judgment was rendered by the court revoking the sentences and the pleas of guilty, awarding the accused a trial in each case, ordering his release from confinement in the penitentiary, directing the warden to deliver him to the jailer of Marion county, and directing the issuance of warrants for his arrest and commitment to the jail of such county pending the trials to be had. The state in various ways interposed objections to the jurisdiction of the court, and to the sufficiency of the facts alleged and proved, interposed the statute of limitations in bar of the proceedings, and objected to the admissibility of some of the plaintiff's evidence, and preserved proper exceptions to all adverse rulings.

Before proceeding to the discussion of the questions presented by counsel as being involved in this case, it would be well to state that it is admitted by counsel that the proceedings in the lower court were civil in their nature, and not criminal, and that the remedy of petition in error, and not appeal, is the proper remedy in this court.

The first question presented by the state, which was the defendant below and is the plaintiff in error, is that the court below had no jurisdiction to hear or determine any of the matters in controversy in this case, no power to set aside the aforesaid sentences or pleas, and no power to grant trials in the aforesaid criminal cases. It is admitted on the part of Calhoun—the defendant in the criminal cases, the plaintiff below in this proceeding, and the defendant in error in this court—that no express remedy is given to him or to any one else similarly situated under any express provision of any statute; but he claims that he has a remedy under the principles of the common law, and inferentially under those provisions of the statutes which recognize the existence and binding force of the common law. That the common law has existence in Kansas in some cases and to some extent we suppose all will admit. It has existence and force in all cases where the same is not incon-

sistent with the constitution or the statutes or the institutions of this country, and where, except for the common law, proper remedies for injustice and wrong and for the redress of grievances would not be furnished. The territory now occupied by the state of Kansas has belonged to the United States ever since the year 1803, and the government of the United States recognizes and enforces the common law everywhere except where it is otherwise provided by the constitution or statutes, or where it is inconsistent with the institutions of this country. This same territory was also once, and from 1804 to 1812, under the jurisdiction and control of Indiana territory, (2 U. S. St. at Large, p. 287,) and was also once, and from 1812 to 1820, under the jurisdiction and control of Missouri territory, (Id. p. 743 et seq.,) both of which territories recognized the common law. At the last-mentioned date a portion of Missouri territory was admitted into the Union as a state. 3 U. S. St. at Large, p. 545. In 1854 the territory now constituting the state of Kansas became an organized territory, and from 1855 up to 1881 it was governed by its own territorial laws and the laws of the United States, when, in 1881, it became a state. As early as 1858 the following statute was enacted by the territorial legislature of Kansas, to wit: "Sec. 603. That rights of civil action, given or secured by existing laws, shall be prosecuted in the manner provided for by this Code, except as provided in section six hundred and four. If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice." Civil Code 1858, § 603. A similar statute has been in force ever since, and is now in force. Civil Code 1868, § 727; Gen. St. 1889, par. 4841. Also the common law, by express enactment, has been in force in Kansas almost from the beginning. The present statute with regard thereto reads as follows: "Sec. 3. The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the General Statutes of this state." Gen. St. 1889, par. 7281. In the case of *Sattig v. Small*, 1 Kan. 174, which was decided in 1862, it is said in the opinion of the court, among other things, as follows: "The common law was in force here when the organic act passed." See, also, *Railway Co. v. Rollins*, 5 Kan. 175. There are but few statutory actions in this state. Nearly every right of action in this state is founded upon and given only by the all-reaching principles of the common law, and generally it is only the procedure, and not the right of action, that is furnished or regulated by statute; and even as to procedure the statutes sometimes fail, and in such cases parties must resort to and invoke the aid of the common law. That such a remedy as the one resorted to by the plaintiff in this proceeding existed at common law there can be no doubt, and we think it still exists wherever it is necessary to invoke its aid. See the case of *Sanders v.*



State, 85 Ind. 318, and the many authorities there cited. Is it possible that a person who, under fear of mob violence and of death or great personal injury, is compelled to plead guilty to a criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary, is without remedy to restore to him his lost rights? But if he has no remedy, then what becomes of the guaranties of our own state constitution? Sections 10 and 18 of the bill of rights of our constitution read as follows: "Sec. 10. In all prosecutions the accused shall be allowed to appear and defend in person or by counsel, to demand the nature and cause of the accusation against him, to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense." "Sec. 18. All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay." If any court has jurisdiction of proceedings like the present, it is the district court. Under section 3, art. 3, of the constitution, the supreme court has original jurisdiction only in proceedings in quo warranto, mandamus, and habeas corpus, and such appellate jurisdiction only as may be provided by law; and neither the constitution nor any statute has given to the supreme court, nor, indeed, to any other court, unless it is the district court, any jurisdiction in any proceeding like the present. Under section 1 of the act relating to district courts, the district court is made a court of record, and is given "general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law," (Gen. St. 1889, par. 1961,) and jurisdiction like the present has not been otherwise provided for by the constitution or by any statute. Upon the whole, we think the district court, and it alone, has jurisdiction in cases like the present; and this opinion follows from a consideration of the common law and the constitution and the statutes both of this state and of the United States, viewed in the light of history and of usage, and under the decisions of our own courts and of the courts elsewhere.

But it is claimed that, even if the district court has jurisdiction in cases like the present, still the plaintiff's present action or proceeding was barred by some statute of limitations before it was commenced. The original pleas of guilty took place and the sentence and judgments following them were rendered on March 2, 1885, and this present proceeding was not commenced until some time in March, 1892, more than seven years having in the mean time elapsed; and it is now claimed by the state that the proceeding was barred either by the two-years statute of limitations (Civil Code Pr. § 18, subd. 3) or by the five-years statute of limitations, (Id. subd. 6.) There are decisions which hold that no statute of limitations can ever operate in cases like the present. *Powell v.*

*Gott*, 13 Mo. 458; *Lafshaw v. McNees*, 50 Mo. 381. But it is not necessary, as we think, to hunt for decided cases. Our statutes govern. Section 19, Civil Code Pr. provides as follows: "Sec. 19. If a person entitled to bring an action other than for the recovery of real property, except for a penalty or a forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed." And section 1, subd. 27, of the act relating to the construction of statutes, reads as follows: "Twenty-Seventh. The phrase, 'under legal disability,' includes persons within the age of minority, or of unsound mind, or imprisoned." Gen. St. 1889, par. 6687. But it is claimed on the part of the state that if the plaintiff in this proceeding was under such a legal disability that the statute of limitations would not run against such a proceeding, then that he was under such a legal disability that he could not commence or maintain the proceeding at all; or, in other words, it is claimed that, if from fears of his life or of great personal injury, and to avoid death or great personal injury, he pleaded guilty to a criminal charge, and was sentenced thereon to imprisonment and hard labor in the penitentiary for a term of years exceeding the time prescribed by the statute of limitations within which he could commence his action or proceeding, then that he was and is wholly without remedy, for he was under such a legal disability that he could not commence any such proceeding to set aside the sentence or the plea while imprisoned, nor until the term for which he was sentenced to imprisonment should expire. Under the statute of limitations, he would have one year after the disability from imprisonment was removed within which to commence his action. Civil Code Pr. § 19. But could he not commence his action before the beginning of that year, and while he was still imprisoned? What would be the use of his commencing any action or proceeding to relieve him from the consequences of his sentence after he had served in the penitentiary the full time for which he was sentenced? The commencing of any action or proceeding would then be of no benefit to him. It must be remembered that the plaintiff's imprisonment commenced before he made his pleas in the criminal cases, and has continued without any interruption up to the present time. While we think that under the statutes the plaintiff is and has been under such a legal disability that the statute of limitations has not operated against his remedy, yet we think that he has not been under such a legal disability as would prevent his commencing or maintaining an action to restore him to his just rights, provided, of course, that some friend would commence and conduct the proceeding for him. We do not think that the plaintiff's remedy in this case is barred by any statute of limitations.

The state also claims that the court below erred in excluding certain evidence. It appears that on May 25, 1892, the deposition of the plaintiff below, Calhoun, was taken in Leavenworth county, and pre-

sumably in the penitentiary where he was confined. In that deposition he stated that the relation of attorney at law and client never existed between himself and C. W. Keller. Afterwards, and on the trial of this case, which occurred on September 12, 1892, in Marion county, the deposition was read in evidence. Also the oral testimony of Mr. Keller was introduced in evidence on the part of the plaintiff, Calhoun. It appeared from the testimony of both these witnesses that they had had a conversation about the last day of February, 1885, in the county jail of Marion county, where Calhoun was then imprisoned; and Mr. Keller also testified that at the time of this conversation he was employed as an attorney at law by Calhoun, and that the conversation then had was had between them in the relation of attorney and client. Notwithstanding this, the state offered to introduce the testimony of Mr. Keller to show what the conversation was, but Calhoun's counsel in this case, Frank Doster, objected upon the ground that the conversation consisted of confidential communications had between them as attorney and client, and the court excluded the evidence, and this the state claims was error. Calhoun himself was not present at the trial. We do not think that any error was committed in the exclusion of this evidence. Civil Code Pr. §323, subd. 4. The court below heard the oral testimony of Mr. Keller, and could determine from it and from Calhoun's deposition very much better than we can whether the conversation had between Keller and Calhoun in the county jail was a confidential conversation had between them as attorney and client or not; and if it was such a conversation, (and we must hold that it was,) then the court below certainly did not err in excluding it. More than seven years had elapsed after the conversation had occurred and before Mr. Calhoun's deposition was taken, and during all that time, except a few days, Calhoun had been confined in the penitentiary at hard labor; and it cannot be expected that his memory would be as good as that of Mr. Keller. It is probable that, if he had had an opportunity to have had his memory refreshed by another conversation with Mr. Keller, he would have made a different statement. We do not think that he was conclusively bound by his statement made in his deposition, but had the right, through his counsel, to show by the testimony of Mr. Keller that the relation of attorney and client in fact existed between them at the time of the conversation had in the county jail in 1885, and therefore that what was said during that conversation could not be given in evidence over the objections of his counsel in this case.

It is further claimed that the court below erred in permitting the plaintiff, Calhoun, to prove threats made against his life both before and after the pleas of guilty in the criminal cases, and threats not communicated to him before his pleas. We do not think that any error was committed in this respect. It was very proper to show the temper of the mob, for the purpose of showing whether any real danger existed as to the life of Calhoun,

and these threats tended to show this fact. All the threats proved that were made after Calhoun entered his pleas of guilty were made on the same day, and before the mob had completely dispersed. Of course, it was a very important fact—indeed, a necessary fact—as to whether Calhoun entertained fears of his life or great personal injury at the time he entered the pleas or not. But the fact that he had substantial grounds for such fears was another very important fact, and it was proper that evidence of that fact should also be given to the jury.

It is also claimed that the court below erred in instructing the jury, in substance, that they had no right to consider the question of the guilt or innocence of Calhoun. We would think this instruction was correct. It can scarcely be possible that a mob, by compelling a person accused of crime to plead guilty thereto, and be sentenced to imprisonment and hard labor in the penitentiary, can thereby shift the burden of proof from the state to the accused. Can a mob, by this means, abrogate all presumptions of innocence? Can the mob cast the burden upon the accused of proving his innocence, and of proving it by a preponderance of the testimony, and relieve the state of proving his guilt, and of proving it by evidence sufficient to remove every reasonable doubt? A mob has no right by any means to shift the burden of proof from the state to the accused, or to relieve the state from proving the guilt of the accused beyond a reasonable doubt, and no right to compel the accused to prove his innocence, and to prove it by a preponderance of the evidence. The accused had the right to be placed back in the same condition as he was before he entered his pleas of guilty. He had the right to be placed back in such a condition that he could avail himself of all the rights given to him by sections 10 and 18 of the bill of rights of the constitution, above quoted, and also of section 228 of the Criminal Code, and of all the other provisions of the constitution and the statutes adopted or enacted in the interest of fair trials and of liberty and justice. On the final trials in the criminal cases he can be fairly tried, and, if his guilt shall then be fairly established, he can then be sentenced according to law. At the present, and in this proceeding, he is not required to establish his innocence. We think no error was committed in this respect.

It is further claimed by the state that the court below erred in refusing to give a certain instruction that, if Calhoun entered his pleas of guilty because he was in fact guilty, and honestly desired to enter such pleas, irrespective of any fear of mob violence, then that the fact that he was threatened with mob violence was not sufficient to avoid the sentence of the court. There are at least two sufficient answers to this claim of error: First, the court, in substance, gave the instruction in its general charge; and, second, the special findings of the jury would cure any error that might have intervened in this respect.

After a careful consideration of all the points presented by counsel in this case,

we are of the opinion that no substantial error was committed by the court below. With regard to actions or proceedings in this country in the nature of writs of error coram nobis, a valuable note will be found appended to the case of *Holford v. Alexander*, 46 Amer. Dec. 257-261. Upon the points made by counsel our decision is as follows:

1. Where the accused in a criminal prosecution in the district court is forced through well-grounded fears of mob violence to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error coram nobis.

2. And in such a case, where the accused was sentenced to imprisonment in the penitentiary for a period of 42 years, and, after having served for more than 7 years of that term, he commences an action in the nature of a writ of error coram nobis to set aside such sentence and plea, his action is not barred by any statute of limitations, for the reason that no statute of limitations will operate against the remedy of a party while he is under the legal disability of imprisonment.

3. In such a case, where a deposition of the accused was read in evidence on the trial in his action for relief, and in such deposition was a statement made by him that the relation of attorney and client had never existed between himself and K., but the oral testimony of K., introduced on the trial, showed that such relation did once exist, and that a certain conversation had between them more than seven years prior to that time, and while that relation existed, was a confidential conversation had between them as attorney and client, and the state offered to show what that conversation was, but the accused, through his counsel in the action for relief, objected, and the court excluded the evidence, held, that the supreme court cannot say that any error was committed.

4. In such a case, where the trial court permitted the accused to show threats of mob violence, made both before and after, but on the same day of, the entering of his plea of guilty, and many of which threats were not communicated to the accused before his plea was entered, held not error; that the evidence tended to show that there was a real danger from mob violence, and that the fears of the accused were well founded, and that the evidence was proper to go to the jury.

5. And, further held, that the question of the guilt or innocence of the accused in such case is not a necessary question to be determined in the case; that a mob cannot, by compelling a person accused of crime to plead guilty, and to be sentenced to imprisonment and hard labor in the penitentiary, so shift the burden of proof from the state to the accused as to compel the accused to prove his innocence, and to prove it by a preponderance of the testimony, and to relieve the state from proving his guilt, and from proving it by evidence sufficient to remove every reasona-

ble doubt. The accused has the right to be placed back in the same condition as he was before he entered his plea of guilty.

6. And it is further held that no error was committed in refusing instructions. The judgment of the court below will be affirmed. All the justices concurring.

(49 Kan. 421)

**SHOWALTER v. SOUTHERN KANSAS RY.**  
CO. et al.

(Supreme Court of Kansas. July 8, 1892.)

**VACATION OF STREET — REVERSION TO ABUTTING OWNERS — CONSTRUCTION OF STATUTE.**

A street dedicated by the filing of the plat of a congressional town site on vacation reverts to the abutting owners in proportion to frontage, according to the law concerning cities of the second class, passed March 13, 1872, and paragraph 811, Gen. St. 1889; and the second proviso contained in paragraph 811 has no application to the facts in this case. *Horton, C. J.*, dissenting.

(Syllabus by Simpson, C.)

Commissioners' decision. Error from district court, Sumner county; *J. T. Herlick, Judge.*

Action by Florence M. Showalter against the Southern Kansas Railway Company and the Wichita & Southwestern Railway Company to recover damages for the permanent use of plaintiff's land by defendants. Judgment for defendants. Plaintiff brings error. Reversed.

*L. Nebeker*, for plaintiff in error. *Geo. R. Peck, A. A. Hurd, and O. J. Wood*, for defendants in error.

**SIMPSON, C.** At the time this action was commenced the plaintiff in error, Florence M. Showalter, was the owner of the west half of block No. 2, in Myers' addition to the city of Wellington, being a piece of ground 305 feet long from north to south, and 150 feet wide from east to west. At the time of the trial the plaintiff in error, with her husband, had resided on the half block for over 12 years. Their dwelling house fronted on and was located about 45 feet from First street, that ran east and west along the northern boundary of the half block. First street was a part of the original town site of Wellington entered on behalf of the occupants by the probate judge of Sumner county. A plat was made by the probate judge laying the town site off into blocks, lots, streets, and alleys, and the same was filed for record on the 13th day of July, 1872. First street separated the town site from the land of E. K. Myers, that was located immediately south and adjoining that part of the town site. On the 28th day of October, 1872, Myers filed a plat of an addition to Wellington, abutting on First street. The west half of block No. 2 in such addition was purchased from Myers by Mrs. Showalter, who erected a dwelling house and other improvements. The defendant in error railway company owned lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, and 16, in block 95, in the city of Wellington. These lots are located immediately north of the west half of block 2, in Myers' addition, the same being separated by First street.

On the 19th day of May, 1887, the follow-

ing city ordinance was passed and approved, and was duly published:

"An ordinance discontinuing and vacating First street between A street and F street, in the city of Wellington, Kansas, for the purpose of granting the right of way to the Southern Kansas Railway Company and the Wichita and Southwestern Railway Company for the construction, operation, and maintenance of lines of railroads, side tracks, switches, second tracks, depots, freight houses, and other buildings, water stations, water aqueducts or mains, material for construction, and proper drains. Be it ordained by the mayor and councilmen of the city of Wellington, Kansas:

"488. Southern Kansas and Wichita and Southwestern. (1) That the right of way be, and the same is hereby, granted jointly and severally to the Southern Kansas Railway Company and the Wichita and Southwestern Railway Company, their successors and assigns, to construct, forever maintain, and operate lines of railroad, side tracks, switches, and second tracks, depots, freight houses, and other buildings, water stations, water aqueducts or mains, material for construction, and proper drains upon, along, over, and across First street, or any part thereof, between A street and F street, in the original town (now city) of Wellington, in Sumner county, Kansas.

"489. Authorized to Build Embankments, etc. (2) That in the construction of said lines of railroad, side tracks, switches, and second tracks, depots, freight houses, and other buildings, water stations, water aqueducts or mains, and proper drains upon, along, over, through, and across said street, as provided in section one, said railway companies, or either of them, their successors or assigns, are hereby authorized and empowered to build such embankments and make such excavations as may be necessary and proper: provided, always, that whenever said railway companies, or either of them, shall construct any track or tracks, switch or switches, so as to cross or intersect any of the avenues, streets, or alleys of said city that are now, or may be hereafter, used as public highways, said railway companies shall, when requested by the city council of said city, immediately construct and maintain, so long as said highway shall remain suitable, safe and convenient approaches and crossings of its said track or tracks, switch or switches, for public use and travel through and upon such avenues, streets, and alleys.

"490. Vacation of Streets—Commissioners. (3) That all that part of First street between A street and F street be, and the same is hereby, vacated and discontinued. That W. R. Spicknall, Geo. H. Hunter, D. A. Espy, F. B. West, A. Branaman,—five disinterested householders of the city of Wellington,—be, and the same are hereby, appointed commissioners and viewers to ascertain and report damages sustained by citizens of said city of Wellington and owners of property therein by reason of the discontinuance of that portion of said First street aforesaid, as provided in this section.

"491. Duty of Commissioners. (4) Said commissioners and viewers shall meet on the 21st day of April, 1887, at 10 o'clock A. M., at the intersection of Washington avenue with said First street, in said city, and, after having taken an oath, as provided by law, shall proceed to faithfully and impartially make the assessment to them submitted, and report their action in writing to the mayor and councilmen.

"492. Report to be Filed. (5) Upon the finding of said report by said commissioners and viewers, and after the same has been examined and confirmed by the mayor and council, said city shall pay to the persons respectively entitled thereto, as shown by the report of said commissioners, the amount of damage awarded by such commissioners, and warrants shall be drawn as in other cases upon the city treasurer of the city for such respective sums.

"493. Railroads Authorized to Enter upon Said Streets. (6) Upon the filing of said report, said railroad companies, their successors or assigns, or either of them, shall be entitled to enter upon said street vacated as aforesaid, and proceed to the construction of such railroad, side tracks, switches, second tracks, depots, freight houses, water stations, water aqueducts or mains, and proper drains, as may be necessary for their use and operation.

"494. Compensation of Commissioners. (7) Said commissioners shall receive for their services the sum of two dollars per day.

"495. In Effect. (8) This ordinance shall take effect and be in force from and after its publication in the Daily Postal Card, the official newspaper."

At the trial it was admitted that the railroad company entered upon First street immediately north of the half block of the plaintiff in error, and laid their tracks along said streets, and over the strip of land 20 feet wide, described in the plaintiff's petition. First street was 40 feet wide at the place vacated. This action is to recover damages for the permanent use and occupancy of one half of the land formerly known as "First Street," abutting the lots of the plaintiff in error on the north; the theory of the plaintiff in error being that at the time of the vacation of that portion of First street abutting these lots the street reverted to the abutting owners in proportion to frontage according to the law concerning cities of the third class passed March 2, 1871, and the act concerning cities of the second class passed March 13, 1872, and paragraph 811, Gen. St. 1889. The railroad company claims under an exception in the second proviso contained in paragraph 811, that reads: "Except in cases where such street, avenue, alley, or lane shall have been taken and appropriated to public use in a different proportion, in which case it shall revert to adjacent lots of real estate, in proportion as it was taken from them." It is said on behalf of the railroad company that, as the street was originally dedicated from the land belonging to the occupants of the town site of Wellington, and never was a part of Myers' addition, it reverted

in proportion as it was taken from the town site. All being taken from the town site, it all reverted to the lots platted from the town site that abutted. We cannot agree to this construction. It seems to us that the proviso is intended to apply to cases where the city council, by the power granted it in this section, in widening a street or alley, takes land from adjacent town lots, it shall revert to them (meaning the lots it was taken from) in proportion as it was taken. The city council can lay out a new street or alley. It can widen streets or alleys already laid out. In doing this it might become necessary to take a greater part of the width of a new street, or an old one that they seek to widen, from a tier of lots on one side than on the other, and it is such cases as this that this proviso is intended to meet. The general rule that prevails in all statutes on this subject is that when a street or alley is vacated the land reverts to the abutting owners in proportion to frontage. This legislation, or some other statutory regulation, became necessary, because our statutes vest the fee to a street or alley in the county. The fee is so vested on account of the public use, and, being vested in the public, the legislature has the power to dispose of the fee when the street or alley is vacated. At common law it would revert to the owner who made the dedication, and the use was merely an easement. The general rule established by the legislature must prevail in this case, unless it clearly appears that this street comes within the exception. The view we take is strengthened by the language of the provision that seems to require that a street or alley, to fall within its operation, must have been taken and appropriated to public use. These words convey to the mind the idea that the street or alley must have been the product of the exercise of the right of eminent domain, rather than the ordinary act of dedication of streets and alleys by the original town-site proprietors. They have acquired a peculiar and technical meaning by their occurrence in the constitution and statutes of the state. First street was a dedication made by a congressional town-site company, and was not a creation of the right of eminent domain. It was a part and parcel of a congressional town site, and was not taken and appropriated for public use from town lots in different proportions. The same instrument that established the blocks and lots, with their locations, sizes, and numbers, also fixed the length, breadth, and location of the street. The lots were designated and numbered with reference to the street, and no part of the street was ever taken from the adjacent lots. Both the identity of the street and the lots abutting on it were established at the same moment by the filing of the town plat. Hence we cannot conclude that the proviso applies, but the conviction grows stronger with examination that the general rule adopted by all the various statutes applies, and that one half in width of the street abutting on the lots of the plaintiff in error reverted to these adjacent lots when the street was vacated. We recommend that

the judgment be reversed, and the cause remanded, with instructions to grant a new trial.

PER CURIAM. It is so ordered.

VALENTINE and JOHNSTON, JJ., concurring.

HORTON, C. J., dissenting upon the law as applied to the facts.

(7 N. M. 1)

**MAXWELL LAND-GRANT CO. v. SANTISTEVAN.**

(Supreme Court of New Mexico. Jan. 3, 1893.)

**EJECTMENT—NOTICE OF IMPROVEMENTS—ADMISSIBILITY OF EVIDENCE—REMOVAL OF IMPROVEMENTS—WHEN ALLOWED.**

1. Comp. Laws 1884, § 2270, provides that in ejectment, when defendant or tenant in possession shall have title "either by grant from the government of Spain, Mexico, or the United States, deed of conveyance founded on a grant, or by whatsoever authority empowered by the said governments," such defendant may file, at the time of filing the pleas in said cause, a notice to plaintiff that on the trial he will prove what improvements he may have made on the lands in dispute, and the value thereof. *Held*, that where, in ejectment, defendant was a mere squatter, the filing of such notice of improvements did not render evidence to prove the same admissible.

2. In ejectment, plaintiff put in evidence a lapsed lease of the land in dispute, from it to defendant, according to the terms of which plaintiff conceded to defendant all his improvements, with full right to sell or remove the same. The action was not commenced until six or seven years after the termination of the lease. *Held*, that defendant should be allowed three months in which to remove his improvements.

Appeal from district court, Colfax county.

Action of ejectment by the Maxwell Land-Grant Company against Jacinto Santistevan. From a judgment for defendant, plaintiff appeals. Modified.

Frank Springer, for appellant. Lee & Fort, for appellee.

SEEDS, J. This was an action in ejectment, brought by the plaintiff and appellant, to oust the defendant and appellee from a portion of what is known as the "Maxwell Land Grant," in the county of Colfax, and for damages for rents and profits. To the declaration the defendant filed a plea of not guilty, and also gave notice that he would prove the value of his improvements made while upon the land. The case was tried to the court, a jury having been waived; and he found in favor of the plaintiff, as to the right of possession, but also found that the defendant was entitled to \$350 for his improvements, "over and above all benefits and profits which had accrued to him from the use of said land, or the occupation thereof." The plaintiff appeals from this finding of the court.

When the testimony was offered to prove the improvements upon the part of the defendant, the plaintiff objected, for the reason that there was no issue raised by the

pleadings under which such testimony was allowable, and after its admission moved to strike it all out, for the further reason that the defendant was shown not to be a bona fide claimant of title to the property in question. The objection and motion were both overruled, to which plaintiff excepted. It may be remarked, preliminarily, that we have not been favored by either a brief or an oral argument upon the part of the appellee, although time has been given him in which to file a brief. Having failed, however, to take advantage of the extension of time, we do not feel that we are justified in further delaying the decision of the case. We think that the decision of the court in allowing proof of the defendant's improvements, upon the pleadings, and giving judgment therefor, was erroneous. Section 2270, Comp. Laws 1884, reads as follows, so far as the merits of this case are concerned: "Hereafter, in all actions of ejectment which are now pending, or which may hereafter be brought, when the defendant or tenant in possession in such suit shall have title of the premises in dispute either by grant from the governments of Spain, Mexico, or the United States, deed of conveyance founded on a grant, or entry for the same, such defendant or defendants may file, at the time of the filing of the pleas in said cause, a notice to the plaintiff that, on the trial of said cause, he or they will prove what improvements he or they may have made on the said lands in dispute, and the value thereof." It appears that this statute was originally passed in the Spanish language, and in its interpretation or construction that language must govern. Section 2615, Comp. Laws 1884. By a proper translation it appears that the clause, "or entry for the same," would read, rather, "or by whatsoever authority empowered by the said governments." By that section, properly translated, in all ejectment suits, the defendant may file a notice, when he files his plea, of his intention to prove the value of his improvements. Now it is quite certain that by the rules of pleading, at common law, under the issue raised by the plea of not guilty to a declaration in ejectment, the defendant could not have introduced evidence as to the value of his improvements, even admitting that at common law he could have recovered for the same, under any possible issue properly raised by the pleadings. As, then, he has given him by this section a new right,—a statutory right,—he must follow it strictly. It can only apply to the matters therein enumerated. By that section, then, it is provided that when he (the defendant) "shall have title of the premises in dispute either by grant from the governments of Spain, Mexico, or the United States, deed of conveyance founded on a grant," or, as it is more properly translated, "or by whatsoever authority empowered by the said governments to make a grant," it shall be lawful for him to give his notice, and prove the value of his improvements. But the testimony conclusively shows that the only right or title or claim which the defendant had was that growing out of his squatting on the prop-

erty, and improving it. He says himself that his claim was founded simply upon his labor. He had no claim of any kind growing out of a grant from any of the three governments named, or by means of any conveyances from them, or from any authority traceable to them. That being true, we are unable to see how, under the provisions of the section in question, there could have been admitted any proof of the improvements by reason of the notice filed. We do not say that if a proper pleading had been filed the evidence might not have been admissible. There was admitted in evidence a paper purporting to be a lease of the land in question from the plaintiff to the defendant. This lease showed that the defendant recognized the title of the plaintiff. According to a portion of its terms, the Maxwell Land-Grant Company conceded to the defendant all his buildings and other improvements upon the land, with full right to sell or remove the same. It is true that this action was not based upon the terms of that lease, which had evidently been allowed to lapse. But they introduced it in evidence, and it is no more than proper that the defendant should have the benefit of its terms, as the plaintiff waited six or seven years after the termination of the lease before commencing this action. The judgment of the lower court will be so modified as to give the defendant three months to remove his improvements, when a writ of possession will issue in favor of plaintiff, without paying the \$350.

FREEMAN and McFIE, JJ., concur.

LEE, J., being of counsel in the case, took no part in the decision.

(7 N. M. 5)

#### HUNEKE v. DOLD.

(Supreme Court of New Mexico. Jan. 3, 1893.)

JUDGMENT CREDITOR OF ADMINISTRATOR — BILL AGAINST HEIR OF DECEDENT TO SUBJECT LAND TO PAYMENT OF JUDGMENT—NECESSARY PARTIES.

1. An action by a judgment creditor of an administrator, in the nature of a creditor's bill, will not lie against an heir of the intestate, to subject land of which the latter died seized to the payment of plaintiff's judgment, since the statutes relating to the administration of estates, and the enforcement of the payment of claims against the same, afford a legal remedy.

2. Where, in such action, plaintiff seeks to subject to the payment of his judgment land, the legal title to which was in a third person at the time of intestate's death, and which the administrator fraudulently caused to be conveyed to defendant, such third person and the administrator are necessary parties.

Appeal from district court, San Miguel county; James O'Brien, Judge.

Action by Henry Huneke against Mary Dold to subject certain land to the payment of a judgment against the administrator of defendant's ancestors. From an order granting a motion to quash the process, and service thereof, and dismiss the proceedings, plaintiff appeals. Modified.

The other facts fully appear in the following statement by LEE, J.:

This is a suit in equity brought by a

judgment creditor of decedents' administrator against one of their heirs, a nonresident of the territory, to subject the real estate in the territory, which such heir inherited from the decedents, to the payment of their (decedents') debt. The bill of complaint, which is sworn to, is in the nature of a creditor's bill. It recites that decedents, at the time of their death, were indebted to complainant; that in December, 1884, an administrator was appointed by the probate court of San Miguel county; that said administrator failed to pay complainant's claim, and he instituted suit against him in the district court of San Miguel county, at the March term, 1887, and recovered judgment for the amount of said claim, with interest and costs; that the said administrator then promised to pay the said judgment, but failed to do so, and in November, 1887, resigned his trust as administrator, and an administrator *de bonis non* was appointed by the probate court to succeed him; that in April, 1890, the said judgment still remaining unpaid, complainant, by proceedings of *scire facias* in the district court of San Miguel county, revived the same against the administrator *de bonis non*, and judgment was then and there rendered against the said administrator *de bonis non*, by default, for the amount of said judgment; that on April 26, 1890, complainant sued out an execution on his said judgment, and placed the same in the hands of the sheriff of San Miguel county, which, after being duly served as required by law, was returned *nulla bona*; and that the personal estate of decedents is wholly exhausted, leaving said judgment still in force, and wholly unpaid. The bill of complaint further recites that decedents, at the time of their death, were lawfully seized, in fee simple, of certain specific real estate in the county of San Miguel and territory of New Mexico, and gives a full and complete description of the same; that all of said real estate, since the death of decedents, became, by descent, the property of their three sole heirs,—one of them the defendant to this bill; that prior to the bringing of the present action the separate interests of the other two heirs in all of said real estate had passed by involuntary alienation into the hands of innocent purchasers, and beyond the reach of decedents' creditors; and that the interest of the defendant, which is an undivided one-third part of all said real estate, is now all that remains in the hands of said heirs, or any or either of them, to be subjected to the payment of complainant's judgment. The bill of complaint further recites that one specific piece of real estate, which is also fully described, was by one of the decedents, prior to his death, sold and disposed of, and a mortgage upon it taken back for a large part of the purchase money; and that after his death, the mortgage debt still remaining due and unpaid, it was agreed between such grantee and mortgagor in said mortgage, and the administrator, to take a conveyance of said real estate in satisfaction of the mortgage debt, and that the said administrator, in pursuance of such agreement, and contrary to law, authorized

and directed such reconveyance to be made to and in favor of the defendant; and that such real estate thereby became, and is claimed by defendant to be, her sole and separate property, and she refuses to allow the same to be applied to the payment of complainant's judgment. The bill of complaint also recites that a lis pendens was duly filed in the probate court of San Miguel county, as required by law, against all of said real estate. Then follows the prayer of the bill, for an accounting of the amount due complainant under said judgment; the establishment of a lien against all real estate descended to defendant, and particularly against that portion fraudulently conveyed to her in satisfaction of the mortgage debt due decedents' administrator, to the full amount found due upon such accounting; and that defendant be decreed to pay the full amount so ascertained, and, upon her failing to do so, her interest in all the lands and premises so descended, or so much thereof as may be necessary, be sold under a decree of the court for the satisfaction of the same. An affidavit showing defendant to be a nonresident of the territory was filed with the bill of complaint, and upon this the clerk published the usual notice to the defendant of the pendency of said cause, and service upon defendant was thereupon obtained by publication. At the term of court to which said process was made returnable, defendant appeared by her solicitors, but whether generally or specially the record does not clearly disclose, and moved to quash the process and service of process, and dismiss the proceeding, for the reason that the court had no jurisdiction of the defendant or subject-matter; that the complainant had no lien upon the real estate of the defendant; that the cause of action set up in said bill was a personal one, and no personal service of process had been made on defendant; and that a court of equity had no jurisdiction to grant the relief prayed for in the bill of complaint. This motion, after argument, was sustained by the court, and the proceeding dismissed, and an order entered to that effect. Complainant thereupon appealed from such order, and it is that which this court is now asked to review.

J. D. W. Veeder, for appellant. A. A. Jones, for appellee.

LEE, J., (after stating the facts.) This court has held that the equity jurisdiction conferred upon it by the general government is the same as the high court of chancery of England possesses, and is subject to neither limitation nor restraint by state legislation. "The court is bound to exercise the jurisdiction, if the bill, according to the received principles of equity, states a case for equity relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction." *Garcia y Perea v. Barela*, (N. M.) 27 Pac. Rep. 507. The power applicable to this case has been defined by the supreme court of the United States to be as follows: "The rule requiring the existence



of special circumstances, bringing the case under some recognized head of equity jurisdiction, should not only be insisted upon with vigor, whenever the property sought to be reached constitutes, as here, assets of a deceased debtor, which have already been subjected to administration and distribution; but some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution." "In England, the courts of chancery took jurisdiction of bills against executors and administrators for discovery and account of assets, and to reach property applicable to the payment of the debts of deceased persons, not merely from their general authority over trustees and trusts, but from the imperfect and defective power of the ecclesiastical courts. It was sufficient that a debt existed against the estate of a decedent, and that there was property which should be applied to its payment, to justify the interposition of the court; but, when a distribution of the fund had been made, another creditor could not ask for a return of the moneys from the distributees, or for a proportional part, if he had received notice of the original proceedings, and had been guilty of lax or unreasonable neglect." "In this country, there are special courts established in all the states, having jurisdiction over estates of deceased persons, called 'probate courts,' 'orphans' courts,' or 'surrogate courts,' possessing, with respect to personal assets, nearly all the powers formerly exercised by the court of chancery and the ecclesiastical courts in England. They are authorized to collect the assets of the deceased; to allow claims; to direct their payment, and the distribution of the property to legatees or other parties entitled; and, generally, to do everything essential to the final settlement of the affairs of the deceased, and the claims of the creditors against his estate." *Public Works v. Columbia College*, 17 Wall. 521. Unless special reasons are set forth in the bill, creditors must first comply with all the requirements of the statutes for the collection of their claims, and exhaust their remedy at law, before resorting to equity. Sections 2228 and 2229 of the Compiled Laws of 1884 provide as follows: "2228. Whenever, after inventory and appraisement therein as herein provided, it shall appear that the personal estate of any decedent is insufficient to discharge the just debts allowed against his or her estate, and the legacies charged thereon, resort may be had to the real estate, and the same may be sold, mortgaged, or leased by the executor or administrator, in cases where power to that end is contained in the will, or otherwise upon the order of the court, as follows, to wit: 2229. The executor or administrator shall present to the district court of the county in which letters testamentary or administration were issued, his petition, setting forth the amount and value of the personal estate according to the inventory and appraisement thereof, and, if sale has been made of such personal estate, the amount received from

such sale; the amount of debts and claims allowed against the estate, and the amount still existing and not allowed, so far as the same may be known; the amount of legacies, if any, for the payment of which resort must be had to the real estate; and describing particularly the whole of the real estate whereof the decedent died seised, or in or to which he or she, at the time of his or her decease, had any interest, claim, or right; the nature of his or her claim, right, or title; the nature and value of the several parcels of such real estate, respectively; and, if the same or any thereof is incumbered, the nature and amount of such incumbrance, —and pray the aid of the court in the premises. To such petition the widow or husband and heir at law of such decedent, and the devisees of such real estate, if the same or any thereof be devised in the will of the decedent, and the guardians of such of them as may be minors, shall be made defendants."

Real estate of decedents, in this territory, descends to the heir; and whether it could or could not be reached by a creditor's bill, under the rules of the common law, it is not necessary for us to determine. The legislature of the territory has provided in the foregoing sections that it may be done, and the mode of doing it, and the means that shall be adopted in its enforcement. It was clearly in the power of the legislature to prescribe the proceedings by which courts should be governed in cases of that kind, and it has been so held by the supreme court of the United States. In the case of *Hornbuckle v. Toombs*, 18 Wall. 656, it has said "that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdiction, subject, as before said, to a few express or implied conditions in the organic act, were intended to be left to the legislative action of the territorial assemblies." The act does not circumscribe or limit the power of the court, but opens up a remedy to a creditor, by which he may be able to reach, as a security for his debt, the real estate of his deceased debtor in the heirs,—a remedy which, if it existed before, was of doubtful authority. The act requires to be brought before the court all the parties who may be interested in the proceedings, and such showing as to the condition and circumstances of the estate, and its administration, as will enable the court to adjust and determine the rights of all parties according to the rules of equity. This suit was not brought under the provisions of the above act, but under the general rules of equity by which a creditor's bill may be sustained. A creditor's bill, in American practice, is a proceeding to enforce the security of a judgment creditor against the property or interest of his debtor. The action proceeds upon the theory that the judgment is in the nature of a lien such as may be enforced in equity, or by means of which a party seeks to remove a fraudulent conveyance out of the way of his execution. The lien has been defined by the supreme court of the United States as follows:



"The filing of a creditor's bill, and the service of process, creates a lien in equity upon the effects of the judgment debtor. It has been aptly termed 'an equitable levy.'" *Miller v. Sherry*, 2 Wall. 248. The judgment in this case, as set forth in the bill, is against an administrator. Administrators are not invested with title to the real estate of their intestates. Judgments against them, even in their official capacities, are not liens on real estate. Such judgments can be satisfied out of the lands of the deceased only in the same manner in which satisfaction of other demands may be procured,—by an application to the court directing the administrator to sell real estate. On this application the judgment is neither entitled to be treated as a lien, nor as conclusive evidence of the debt. Guided by these considerations, the court of chancery will protect the equitable right of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. *Freem. Judgm.* §§ 357, 358. This suit is not against a judgment debtor. Therefore the filing of the bill and the service of process would not create a lien against the property of the judgment debtor. It therefore lacks the essential requirements of a creditor's bill.

It is charged in the bill that the decedents, during their lifetime, conveyed certain specific parcels of real estate to one M. Romero, in part payment of which he gave a mortgage; that, after the death of the decedents, Henry Dold, their administrator, procured a deed, in settlement of the mortgage from M. Romero, to the defendant; that the conveyances then made were in violation of the rights of the complainant; and it is prayed that they be set aside, and the lands thus conveyed be decreed subject to besold to pay his debts. Neither Henry Dold nor M. Romero are made parties to the suit. In *Gaylords v. Kelshaw*, 1 Wall. 81, it is held: "In a bill to set aside a conveyance as made without consideration, and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill." Also, in *Miller v. Sherry*, 2 Wall. 250, where there was a lis pendens set up, as in this case, the court said: "There is another reason why the bill could not operate as a constructive notice. Williams, who held the legal title, was not a party. 'We apprehend that, to affect a purchaser pendente lite, it is necessary to show the holder of the legal title was impleaded before the purchase which is to be set aside.'" Further on the court says: "It was gross irregularity to take a decree against Miller without Williams being before the court, and if the attention of the court had been called to the subject the amended bill must have been dismissed. The decree against Miller, as to the premises in controversy, is a legal anomaly." The case as made by the bill under consideration is open to the same objection. M. Romero, the alleged fraudulent grantor, was the holder of the legal title at the time of the death of Andres Dold, the original debtor, and would be a necessary

party in a proceeding to reach the real estate conveyed by him to the defendant; and to bring the case within the requirements of a creditor's bill, so as to subject the real estate of the decedent debtor to be sold to pay the debts of the estate, it would be necessary that the administrator of the estate be a party thereto,—as well, also, the legal heirs. While the courts of chancery in this territory hold supervisory jurisdiction over the administration of estates, which power they have derived from general equity jurisdiction, yet it will be exercised only in accordance with the requirements and provisions of the statutes, when they are plain, adequate, and sufficient. Therefore, in a bill by a creditor, in the nature of a creditor's bill to sell the real estate of a deceased person, it is necessary to set forth and comply with the essential requirements of the statute for the sale of real estate by administrators for the payment of debts of the estate. Under the circumstances and facts as set forth in the bill of complaint in this case, this court is of opinion that the bill should have been amended in accordance with the view herein expressed. The case will be remanded to the court below, with leave to the plaintiff to amend his bill generally, and, if he fails to do so, that it shall be dismissed without prejudice.

SEEDS, FREEMAN, and McFIE, JJ., concur.

(8 Utah, 380)

WOOD v. FOX et al.

WHITNEY v. SAME.

(Supreme Court of Utah. Jan. 13, 1903.)

EQUITY—ENFORCEMENT OF TRUST—LACHES—WITNESS—TRANSACTIONS WITH DECEDENT.

1. In a suit brought in 1898 to enforce a trust, it appeared that in 1872 plaintiff, the owner of some shares of mining stock, placed them with defendant's decedent for sale; that the stock was sold, and part of the proceeds invested in real estate, the title to which was taken by decedent, and part used in liquidating the indebtedness of the mining company; and that the decedent, in writing, acknowledged that plaintiff was entitled to an interest in this real estate and in the indebtedness. The evidence showed that the decedent, in 1880, repudiated the trust, which fact was known to plaintiff, and that plaintiff made no claim on decedent for his interest in the trust property until 1898. *Held*, that plaintiff's right of recovery was barred by his laches and the statute of limitations. *Miner, J.* dissenting.

2. In a suit against executors to enforce a trust against the estate of their decedent, the testimony of plaintiff was properly excluded, under Comp. Laws 1888, § 3877, providing that a party to an action against an executor is not a competent witness as to any matter occurring before the death of decedent, equally within the knowledge of the witness and decedent.

Appeal from district court, Salt Lake county; T. J. Anderson, Justice.

Suits by William H. Wood and John N. Whitney against Moylan C. Fox and another, as executors, to enforce a trust against the estate of their decedent. From a judgment for defendants, plaintiffs appeal. Affirmed.

Rehearing pending.

J. G. Sutherland and Brown & Henderson, for appellants. Bennett, Marshall & Bradley and W. H. Dickson, for respondents.

**BLACKBURN, J.** This suit is brought to enforce a trust, and claim a large amount of money, of many thousand dollars, due the plaintiff from the estate of said decedent,—accumulations from the trust property while in the hands of said decedent. Judgment for defendants, and plaintiff appeals, and assigns for error that the evidence does not support the judgment. The complaint is as follows:

"The said plaintiff complains of the defendants, and alleges that the deceased, Joab Lawrence, died in the city and county of Salt Lake, territory of Utah, on or about the 28th day of December, 1888. That he died testate, leaving a will, which has since been probated in the probate court of the county of Salt Lake, and that the defendants, Moylan C. Fox and Sarah M. Lawrence, have been appointed executor and executrix of the said last will and testament of Joab Lawrence, and have qualified and entered upon the discharge of their duties as such executors, and are now the acting executors of said estate. Plaintiff further alleges that on or about and prior to the 7th day of October, 1872, he was the owner of 250 shares of the capital stock of the Eureka Mining Company of Utah. That the said deceased, Joab Lawrence, was the owner of at least 1,500 shares of the capital stock of said mining company. That prior to said day this plaintiff delivered to the said deceased, Joab Lawrence, certificates of his stock, representing 250 shares of said stock, standing in his name on the books of the company,—said Eureka Mining Company of Utah; said certificates being indorsed in blank. That he delivered the same to the deceased to be disposed of with the stock of the said deceased, and for their joint benefit. That the said deceased, Joab Lawrence, on or about the day and year aforesaid, did sell and dispose of the said stock of his own, and of this plaintiff, to one Eber B. Ward, of Detroit, Mich. That, as a part of the consideration for said sale, he received certain real property situate, lying, and being in the city of Detroit, Mich., consisting of three city lots, and a building, or hotel erected thereon, commonly known and designated as the 'Mansion House Property.' That the said deceased, Joab Lawrence, procured the deed to said real property to be taken to him, (the said Lawrence,) individually, in his own name. That the same has since been recorded, and that the said deceased now stands the owner of record of the title to said Mansion House property. That in truth the consideration for the said Mansion House property was the sale of the said shares of stock, of which the said plaintiff was a part owner. That the said plaintiff was the owner of one eighth of said shares of stock thus traded to the said Eber B. Ward. That the said sale and exchange was really, although not appearing of record, in trust for this plaintiff, to the extent of one eighth interest,

and the said deed, although absolute on its face, was in truth and in fact secretly charged with a trust in favor of this plaintiff, to the extent of his one eighth interest therein; he having furnished purchase money to that amount for the purchase of the said Mansion House property. That the said Lawrence, deceased, also received for the said shares of stock large amounts of other property,—among other things, a large amount of cash in hand, a part of which was invested in taking up an indebtedness against the said Eureka Mining Company, which was a corporation existing and doing business under and by virtue of the laws of the territory of Utah. That the said amount of cash thus used was \$23,587.50, so that, of the said proceeds of the said sale of stock, the said Lawrence received the amount of \$23,587.50 in the form of an indebtedness against the said company, one eighth of which belonged to, and was the property of, this plaintiff. That in recognition of the said trust in favor of this plaintiff in the said Mansion House property, and of the said \$23,587.50, the said Joab Lawrence executed and delivered to this plaintiff on the 9th day of November, 1872, the following declaration of trust, to wit: 'Salt Lake City, Nov. 9, 1872. William H. Wood: This is to certify that you are entitled to one eighth interest in the real estate, mining and rolling-mill stocks, and in the \$23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of 160 acres, which was given to A. A. Griffith. I have received of you twenty shares of Eureka stock, your one eighth of the 160 shares, which was given to Messrs. Griffith & Mayhue. Joab Lawrence.' Plaintiff further alleges that afterwards said Eureka Mining Company of Utah executed a certain mortgage to secure the said indebtedness, viz. the \$23,587.50, and also other \$20,000, the total amount of said mortgage being \$43,587.50, to one Theodore F. Tracey, trustee; the said Tracey holding the said mortgage, and the promissory note connected therewith, as trustee for the said Joab Lawrence. That the note was dated September 15, 1872, and the said mortgage the 9th day of November, 1872. Plaintiff further shows that the other said \$20,000, which the said mortgage was given to secure, was for \$20,000, voted by the directors of the Eureka Mining Company for services to the said Lawrence, deceased, to one John N. Whitney, and to this plaintiff. That the amount thus voted was to Joab Lawrence, \$9,000, to J. N. Whitney, \$5,500, and to plaintiff, W. H. Wood, \$5,500, who had been a director and secretary of said company, and having rendered its services for which the said money was voted. That the said three items of salary account, amounting to \$20,000, and the other, \$23,587.50, constituted the consideration and face of the said mortgage, or \$43,587.50. That the said account was never paid by the said company, in money, to this plaintiff, but was included in the said mortgage to Theodore F. Tracey. That

the said mortgage was afterwards, and prior to the 26th day of August, 1874, assigned by said Theodore F. Tracey to the said deceased, Joab Lawrence, who received the same in trust for plaintiff to the extent of his interest therein, to wit, for one eighth of \$43,587.50, and for the said \$5,500. Plaintiff further alleges that on the day and year last mentioned the said deceased, Joab Lawrence, took proceedings to foreclose the said mortgage in the first district court of Utah territory, where the property upon which the said mortgage was a lien was situate, and such proceedings were had in said cause. That on the 27th day of July, 1876, a decree was duly made and entered, foreclosing the equity and redemption of the said mining property and said premises, and decreeing a sale thereof. That thereafter, in pursuance of the said foreclosure and decree, the said property and premises were sold on the 9th day of September, 1876, and conveyed to the said Joab Lawrence, deceased, individually, by deed dated the 13th day of March, 1877, and recorded in the office of the county recorder of Juab county, Utah, on the 27th day of March, 1877, Book C. That thereafter such negotiations were had that all the right, title, and interest which the said deceased, Joab Lawrence, had acquired by reason of such decree of foreclosure and sale therein, and as a beneficial owner in said trust deed, was conveyed by the said deceased to the Eureka Hill Mining Company, a corporation organized and doing business under and by virtue of the laws of the territory of Utah. That such conveyance was by deed dated the 14th day of March, 1877, and recorded in the office of the county recorder of Juab county, Utah, on the 27th day of March, 1877, in Book C, and that the consideration for the transaction was three tenths of the entire capital stock of said Eureka Hill Mining Company, to wit, 3,000 shares of the capital stock of said company; its entire capital stock being 10,000 shares, of the par value of \$100 each. That said 3,000 shares were issued by the said company to the said deceased in compromise and consideration of the conveyance to it of all the rights acquired by the said deceased under and by virtue of the said mortgage of \$43,587.50. That through all these transactions the said deceased was acting, not only in his own behalf, but also in behalf and for the use of this plaintiff, to the extent of the interest of this plaintiff in and to the said mortgage, which was the amount of one eighth of the said \$43,587.50, and the amount of said salary, \$5,500, making a total of \$8,198.43; and the said Lawrence, deceased, held the certificate as trustee for the said plaintiff to the extent of said interest, amounting to 564 and 216-1000 shares. Plaintiff further alleges that he is informed and believes that the said Eureka Hill Mining Company has from time to time declared dividends upon its capital stock. That the dividends declared since the said Lawrence received the said shares of stock aforesaid, and prior to his decease, amounted to \$94 per share. That the same have been declared on the following dates, to wit:

1879—August 2 .....	\$1 00 per share
September 15 .....	1 00 "
October 15 .....	1 00 "
1882—February 23 .....	3 00 "
October 11 .....	2 00 "
1883—March 17 .....	2 00 "
June 4 .....	2 00 "
July 17 .....	2 00 "
August 1 .....	2 00 "
August 25 .....	2 00 "
August 22 .....	2 00 "
November 1 .....	2 00 "
December 5 .....	2 00 "
1884—January 8 .....	2 00 "
February 1 .....	2 00 "
March 1 .....	2 00 "
June 5 .....	2 00 "
September 24 .....	2 00 "
November 12 .....	2 00 "
December 10 .....	2 00 "
1885—January 6 .....	5 00 "
February 3 .....	5 00 "
April 6 .....	2 00 "
June 1 .....	2 00 "
September 7 .....	2 00 "
1886—February 16 .....	4 00 "
September 5 .....	2 00 "
December 6 .....	2 00 "
1887—February 7 .....	3 00 "
April 4 .....	2 00 "
July 6 .....	2 00 "
September 5 .....	2 00 "
October 6 .....	2 00 "
November 7 .....	2 00 "
December 5 .....	2 00 "
1888—January 2 .....	2 00 "
February 6 .....	5 00 "
March 5 .....	2 00 "
May 7 .....	2 00 "
August 6 .....	4 00 "
September 3 .....	2 00 "

Total dividends declared .....\$94 00

"That plaintiff further alleges, on information and belief, that the said Lawrence, deceased, received the said dividends that were declared prior to the 1st day of April, 1888, and that he had right to, and his executors now claim, the remainder of the said dividends. That they are now in the hands of the said company, and have not yet been paid over to the said deceased, or to his executors. Plaintiff further alleges that the said Eureka Hill Mining Company is very prosperous, is doing a large business, has a large amount of property, and that the shares are very valuable, to wit, of the value of at least \$100 per share, and that the said company are now so conducting the business that dividends will be continually accruing, and will be declared in the future. Plaintiff further alleges that there never has been any accounting, settlement, or examination of the affairs of the trusteeship between said deceased, Joab Lawrence, and this plaintiff, prior to his decease. That the said plaintiff had never demanded a settlement of the said trusteeship until the spring of 1888. That he then demanded a settlement of the said trust matters, which was denied, and suit brought to enforce the same in the supreme court of the city and county of New York. That said suit was undetermined at the time of the death of the said Lawrence, and abated by his death. Plaintiff further shows that he did not for many years know of the value and business done by the Eureka Hill Mining Company, or the amount of dividends that had been

declared by them, and it was only recently that he heard that they were declaring large dividends, and then, at his first opportunity, he demanded a settlement thereof. Plaintiff further shows that the said deceased, up to the time of his death, received all the rents, issues, and profits of the said real estate situate in the city of Detroit, Mich., and that the amount thereof is unknown to this plaintiff. That the title to the said real estate at the time of his said decease stood in the name of the said Lawrence; and plaintiff is fearful, unless restrained by this court, that the said executors may dispose of the said real estate, and of the said shares of stock. Plaintiff further shows that the said defendants, the executors of the estate of said Lawrence, deceased, deny that the said land and the said shares of stock are, or ever were, held in trust by the said deceased, in whole or in part, for this plaintiff, and have caused the same to be inventoried as the property of the said deceased, and threaten to settle the said estate, and divide and distribute the said property, in violation of the said rights of this plaintiff, as if the whole thereof belonged to the said Lawrence, deceased, and as if this plaintiff had no interest therein. That on or about the 10th day of September, 1889, this plaintiff presented his claim, in writing, to the said executors. That on or about the 10th day of September, 1889, the said executors rejected the said claim. Wherefore, this plaintiff demands judgment: (1) That this plaintiff be decreed to be the equitable owner, and entitled to one eighth ( $\frac{1}{8}$ ) of the said Mansion House property, in Detroit, Mich., and to the rents, issues, and profits thereof, and to the 564 and 216-1000 shares of the said 3,000 of the Eureka Hill Mining Company stock, and to all the dividends that have heretofore been declared thereon. (2) That the said executors be required to account to this plaintiff for all the rents, issues, and profits received by the said deceased upon the said Mansion House property, since the said 7th day of October, 1872, and for all the dividends received by the said deceased, Joab Lawrence, on the said 564 and 216-1000 shares of stock of the Eureka Hill Mining Company, and the interest thereon. (3) That the said executors be required to convey to this plaintiff, by good and sufficient deed, one eighth undivided interest in the said Mansion House property, in the city of Detroit, Mich. (4) That the said executors be required to assign to this plaintiff, of the said shares of stock of the Eureka Hill Mining Company, the amount belonging to him, in pursuance of the said trust, to wit, 564 and 216-1000 shares. (5) That a receiver be appointed of the entire amount of the said shares of stock held in trust, in part for this plaintiff, by the said deceased, Joab Lawrence, to wit, the said 3,000 shares of stock, to receive the dividends thereon, and to hold the same for the satisfaction of any decree that this plaintiff may be decreed to be entitled to recover; and that the said receiver may be also authorized to receive the rents, issues, and profits of the said Mansion House property, in the city of Detroit. (6) That during the pend-

ency of this action the defendants, the said executors, their agents, servants, and employees, may be enjoined and restrained from selling or disposing of, or parting or interfering with, the said real property or the said personal property, the shares of stock in the said Eureka Hill Mining Company, until otherwise ordered and directed by this court. (7) That the plaintiff have such other and further relief as this court may deem just, together with the costs of this action."

The answer is a substantial denial, and a plea of the statute of limitations and the statute of Michigan as to the Detroit property.

It is seen by an examination of the complaint that in March, 1877, the 3,000 shares of the Eureka Hill Mining Company were received by the decedent, and the other property claimed to be held in trust before that time, and the plaintiff made no claim to the decedent of any interest in the shares of stock, or in the real estate in Michigan, until in the year 1888, and not until after the decedent had become an imbecile, and wholly incapable of doing any business, as is fully shown by the evidence in the case. And no sufficient reason is given why the plaintiff slept in his rights all this time, and made no claim to the decedent for his interest either in the Detroit property or the mining stock. It is no excuse for his neglect to say that he did not know that dividends were being paid on such stock, and that is the only excuse he gives for not demanding his share of the Detroit property, and his share of the mining stock. He could have found out by inquiry, and he says he did not make any. He could have had his share of the stock set off to him, if he was entitled to any, and his interest in the Detroit property deeded to him, if, indeed, he had any interest. This has the appearance of being a very stale claim. It is a principle of courts of equity that every case is to be decided on its own merits, and is a direct challenge to the conscience of the chancellor, and precedent and authority are only valuable to educate the chancellor in what are the true principles of equity jurisprudence, and what rules and doctrines should govern the conscience of the chancellor. His decision should not be governed by his own private notions of right and wrong, but by the principles of justice formulated and declared by a long line of decisions of courts of chancery. It is a well-settled principle of equity jurisprudence that courts of equity will not enforce stale claims.

This suit is based upon a declaration of trust, as follows: "Salt Lake City, Nov. 9, 1872. William H. Wood: This is to certify that you are entitled to one eighth interest in the real estate, mining and rolling-mill stocks, and in the \$23,587.50 of which the Eureka Mining Company of Utah are indebted to me, of the property acquired by me of E. B. Ward, of Detroit, Michigan, October 7th, less the farm of 160 acres, which was given to A. A. Griffith. I have received of you twenty shares of Eureka stock, your one eighth of the 160 shares, which was given to Messrs. Griffith & Mayhue. Joab Lawrence."

The important facts are as follows: In 1872 Wood and Whitney each owned 250 shares of stock in the Eureka Mining Company, which they placed in the hands of the decedent to be sold. He went to Michigan, and sold the stock along with 1,600 of his own, to one E. B. Ward, and received for the stock a good deal of money, and the Mansion House property in Detroit. He took the deed to the Detroit property in his own name, and this title is still in his heirs. The money he brought home to Salt Lake, and \$2,000 he divided with Whitney and the plaintiff, and with \$23,587.50 he paid off debts of the Eureka Mining Company, with the consent of the plaintiff and Whitney, and took a mortgage or trust deed for the same, and for \$20,000 additional he claimed to have advanced to the company. Afterwards the mortgage was foreclosed, and the property of the company sold to pay the debt; and the decedent became the purchaser, and acquired the title to the property of the company. Afterwards a new company, the Eureka Hill Mining Company, was organized, and the decedent deeded to it the property, and received therefor 3,000 shares of the new company, excepting a mill which he afterwards sold. This transaction was completed in the spring of 1877. The decedent afterwards sold the mill, and in the year 1879 commenced receiving dividends on the stock, and continued to receive the same up to his death, until he had received a large amount of money. The sale of the mill and the receipt of dividends were known to plaintiff. After 1877 the plaintiff had frequent meetings with the decedent, and made no claim on him for his interest in the trust property until in the fall of 1888. In 1886 the decedent's health began to fail, and it continued to grow worse until, in 1888, he had become entirely imbecile. After the trade with Ward, he (Ward) claimed he had been badly swindled, and commenced suits against Lawrence, Whitney, and Wood, the plaintiff, for swindling him. These suits were managed by Lawrence, and the expenses thereof paid by him, amounting to somewhere in the neighborhood of \$20,000. There is no evidence that Lawrence, after 1877, acknowledged the existence of any trust funds in his hands belonging to the plaintiff. On the contrary, he acted in every particular as if he was the sole and only owner of the 3,000 shares of the Eureka Hill Mining Company, and the property in Detroit. It appears, also, that as early as 1876 Lawrence had repudiated the trust, and the plaintiff knew of it; for on July 18, 1876, among other things, he said, in a letter to Whitney: "July 18, '76. \* \* \* How are things in Utah, and does Lawrence and you get along? You know you and myself have about \$17,000 of our money in the mortgage, besides our portion of the Detroit real estate, and, if necessary, have some money left to present my claim in court for a fair and honest judgment. It seems we should commence and claim our rights very soon by a suit, if in no other way. All I wish is what is justly due me. Yours, very truly, Wm. H. Wood." Also, on March 1, 1880, the plaintiff wrote Whit-

ney, among others: "What course is best to take with Lawrence, to bring him to a settlement? Will the law work, this late day? \* \* \* I think something should be done, and done promptly and fearlessly, and a full exposure made, if necessary. \* \* \* No other way but to take the bull by the horns. I fear him not. I closed in one to-day, and he gave down his milk, and came to time. Yours, in haste, Wm. H. Wood." These letters clearly show that Lawrence had repudiated the trust prior to that time, and the plaintiff knew it. In 1877 all the trust had been performed, and nothing remained to be done but divide the proceeds; and the plaintiff, knowing all the facts, made no claim on Lawrence for his share until 1888, after he had become imbecile, and entirely incapable of doing business. Another fact is that the declaration of trust was not in the hands of the plaintiff, but was found among the papers of Lawrence after his death, and no explanation is made why the declaration of trust was not in the hands of plaintiff; for by its very terms it is his property, if it is still in force. This would seem to point to an abandonment or a settlement and end of the trust relation. We think the evidence clearly supports the judgment. It is unaccountable that the plaintiff would have slept in his rights, where so many thousand dollars were involved, from 1877 to 1888, and until the trustee had become imbecile, without making any demand, or claim of any kind, of or against the alleged trustee, when he was aware in 1880 that the trustee practically denied the trust, considering the further fact that the trustee was financially able to respond to any just claim the plaintiff had against him. In equity a long lapse of time destroys remedies for rights, when no explanation is made for the neglect to attempt their enforcement. I think, also, that the evidence clearly shows that Lawrence had repudiated the trust as early as 1880, and the plaintiff knew of it. I refer to plaintiff's letter to Whitney dated March 1, 1880. The law is that the statute of limitations begins to run against a claim growing out of a trust from the time the trustee repudiates the trust and the cestui que trust has notice. These views are fully sustained by the following authorities: *Prevost v. Gratz*, 6 Wheat. 504; *Lansdale v. Smith*, 106 U.S. 391, 1 Sup. Ct. Rep. 350; *Hammond v. Hopkins*, 143 U.S. 273, 12 Sup. Ct. Rep. 418; *Phillippi v. Phillippe*, 115 U.S. 157, 5 Sup. Ct. Rep. 1181. If it be true, therefore, that Lawrence denied the obligation of the trust, and the plaintiff had notice, the statute of limitations of the territory of Utah bars this suit. 2 Comp. Laws 1888, § 3150. As to the claim of interest in the personal property, and in the real estate in Detroit, and the rents and issues and profits thereof. Id. § 3132. So, if I have construed the evidence rightly, this suit is barred both on account of the laches of the plaintiff and the statute of limitations.

As the evidence in the record very clearly supports the decree it is not necessary to consider the errors assigned as to the finding of facts. But there is another error assigned that should be passed upon.

The plaintiff offered himself as a witness, and the trial court excluded his testimony, as to all matters equally within his knowledge and that of the decedent. This is claimed to be error. We think not. This testimony comes clearly within the terms of the statute. It is not only a claim against an estate, but one for many thousand dollars, and I think the trial court held rightly on that point.

Considering the staleness of the claim; the fact that the claim had not been pressed for more than 11 years; that the decedent practically denied the trust, and which the plaintiff knew as early as 1880, and from that time the statute of limitations began to run,—the judgment must be affirmed.

The foregoing opinion is applicable to the case of John N. Whitney against the same defendants. Therefore the judgment in that case is affirmed.

ZANE, C. J., concurs.

MINER, J., (dissenting.) I cannot concur with my brethren. In my opinion, there is no testimony found in the record of either case tending to show that Lawrence had repudiated the trust, or that Wood or Whitney had any notice of such repudiation. To my mind, the testimony leads to a contrary conclusion. Nor had the statute of limitations run against either claim at the time of the commencement of these actions.

(3 Idaho [Haab.] 438)

CRONIN et al. v. BEAR CREEK GOLD-MIN. CO.

(Supreme Court of Idaho. Dec. 15, 1892.)

APPEAL BONDS—UNCERTAINTY.

Where two appeals are taken,—one from a judgment, and the other from an order denying a new trial,—an undertaking, promising, in consideration "of such appeal," to pay all damages and costs which may be awarded against appellant "on the appeal," not specifying which one, is void for uncertainty as to both appeals, and both will be dismissed. *Eddy v. Van Ness*, (Idaho,) 6 Pac. Rep. 115, followed.

Appeal from district court, Elmore county; C. O. Stockslager, Judge.

Action by Michael Cronin, Thomas Finnegan, and Jacob Reeser against the Bear Creek Gold-Mining Company to determine adverse claims to mining property. From a judgment in defendant's favor, and from an order denying a new trial, plaintiffs appeal. Appeal dismissed.

Wyman & Wyman, for appellants. R. Z. Johnson & Sons, for respondent.

MORGAN, J. This action was brought in the district court of Elmore county, by plaintiffs against defendant, upon an adverse claim to mining property. The cause was tried before the court without a jury November 4, 1891, and a judgment of nonsuit and for costs was rendered on the above date. Motion for new trial, having been made, was heard before the judge of said court, at chambers, on the 7th day of October, 1892, and overruled on

said date, as appears by the record. On October 21, 1892, plaintiffs gave notice of appeal both from the judgment and from the order overruling motion for new trial. Undertaking on said appeal was duly filed, in the following form: [Title of court and cause.] "Whereas, the plaintiffs in the above-entitled action are about to appeal to the supreme court of the state of Idaho, from a judgment rendered against them in the above-entitled court on the 4th day of November, 1891, and in favor of the defendant, for the sum of eighty and 25/100 dollars, and also from the order denying the motion for new trial made and entered on the 7th day of October, 1892: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the state of Idaho, do hereby, jointly and severally, undertake and promise, on the part of the plaintiffs and appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeal, or a dismissal thereof," etc. Respondent moves to dismiss both appeals on the ground that the undertaking therein is void.

This bond is, in form, precisely like the bond in *Mathison v. Leland*, 1 Idaho, 712, and in *Eddy v. Van Ness*, 6 Pac. Rep. 115, in both of which cases, decided in this court, the court held that the bond being but for one appeal, and not specifying either, is void as to both. On the authority of the above cases, both appeals are dismissed. Costs awarded to respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

(1 Okl. 178)

BEATTY et al. v. WALKER et al.

(Supreme Court of Oklahoma. Jan. 27, 1893.)

SCHOOL BOARD—ELECTION OF MEMBERS.

1. The election of members of the school board in cities of the first class will be governed by the provisions of St. c. 79, relating specifically to school matters, and not by chapter 15, relating to the election of city officers generally; the insertion of "members of the school board" in article 1, § 8, of the latter chapter, (the clause providing for the election of all city officers,) being ascribed to inadvortence on the part of the legislature.

2. An election of members of the school board in a city of the first class held in pursuance of chapter 15, providing for the election of city officers generally, is invalid, as the election of a school board must be held in pursuance of chapter 79, providing for such election.

3. St. c. 79, providing for the election of members of the school board in cities of the first class, is not in conflict with chapter 33, providing for elections generally.

Appeal from district court, Oklahoma county; John G. Clark, Judge.

Submission without action of a controversy between John H. Beatty and others and Delos Walker and others as to whether plaintiffs or defendants are the legally qualified school board of Oklahoma City. From a judgment dismissing the proceedings entered upon a finding for defendants, plaintiffs appeal. Affirmed.

Reddick & Wilkerson, for appellants. A. B. Hammer, for appellees.

BURFORD, J. This case was submitted to the court below upon an agreed statement of facts, which is as follows: "John H. Beatty, W. H. Richardson, G. W. Jackson, J. A. Ryan, N. Z. Hurd, and H. J. Smith, and Delos Walker, D. D. Leach, A. S. Sherwood, A. V. Francis, and J. M. Housel, respectively present to the court a submission of the following controversy between them, without bringing an action, and agree upon the following, to wit: The plaintiffs claim to be the duly elected, qualified, and acting members of and to constitute the school board of Oklahoma City. The defendants claim that they are the duly elected, qualified, and acting members of and constitute said school board of Oklahoma City. It is agreed—First. That Delos Walker was elected president of said school board on the first Tuesday of April, 1891, at a school meeting held in the city of Oklahoma City. Second. That D. D. Leach, A. S. Sherwood, A. V. Francis, and J. M. Housel were each and all elected members of said board from their respective wards on the first Tuesday in April, 1892, at a school meeting held in said city of Oklahoma City. Third. That each and all of the defendants took the oath of office, and qualified, as required by chapter seventy-nine (79) of the statutes of Oklahoma. Fourth. That the city of Oklahoma City is a municipal corporation, and ever since the 25th day of December, 1890, has been a city of the first class, having two thousand five hundred (2,500) inhabitants. Fifth. That the first annual election in said city was held on the first Tuesday in April, 1892. Sixth. That it was proclaimed that at said election, in addition to other officers, there should be elected one member of the school board from each ward who should hold their offices for one year, and one member of the school board from each ward who should hold their offices for two years. Seventh. That in pursuance of said proclamation, the qualified voters of said wards and said city met in their respective wards, and elected the plaintiffs and one Williams and one Wyatt members of said board of education from their respective wards. Eighth. That certificates were issued in pursuance of chapter fifteen of the Oklahoma Statutes to the plaintiffs and said Williams and Wyatt, certifying that they had been respectively elected members of said board; and thereupon and prior to the first Tuesday in May, 1892, the plaintiffs, and each of them, appeared before the county clerk of Oklahoma county, and took and subscribed the oath of office to perform their duties faithfully, and ever since have been claiming to act as members of and to legally constitute said board. Ninth. That it is intended by the words "school meeting," in speaking of the election of the defendants, to mean "mass meeting" of all those entitled to vote in the city of Oklahoma City, in contradistinction of a regular election in said wards and city at regular polling places in each ward, such as herein referred to in describing the election of the plaintiffs; and all the parties to this submission are and were qualified

to act as members of said school board from the respective wards of said city; were residents and electors of the respective wards from which they were respectively elected. Tenth. Chapter 79 of the Oklahoma Statutes was at the time of its passing known as "Council Bill No. 2," and was passed by the legislature and became a law prior to the passage of chapter 15 of the Oklahoma Statutes, which was known at the time of its passing as "Council Bill No. 76." Eleventh. That the defendants ever since their election have been acting as the regularly elected school board, said Walker as president, and said Leach as secretary. Having full control of all school matters, and the books and papers belonging to said board, and notwithstanding a demand has been made on them as said board to turn over their respective offices to the plaintiffs, and upon Delos Walker to turn over the papers, etc., of his office as president to John H. Beatty, and upon the said Leach to turn over the papers, etc., of his office as secretary to W. H. Richardson, they, and each of them, have refused so to do, and are now in possession of everything pertaining to said board and said offices. Twelfth. That the plaintiffs, prior to the first Tuesday of May, duly met, and organized, by electing John H. Beatty president, and W. H. Richardson secretary, of said school board. The court is at liberty to draw inferences of fact, and none of the admissions herein are to affect either party, or be used except for the purpose of this submission. The questions desired to be submitted herein are as follows: 'First. Is chapter 79 or chapter 15, or both, to govern elections of the school boards in cities of the first class? Second. Are the plaintiffs or the defendants duly elected and qualified members of the school board of Oklahoma City? Third. Are the plaintiffs or the defendants entitled to act as such board? Fourth. Is Delos Walker president of the board, or J. H. Beatty?' It is agreed between the parties hereto that the judgment of the court upon the case here submitted may be the same in form, practice, and proceed with like effect, as if this was a proceeding in the nature of information or 'quo warranto,' wherein the plaintiffs were relators and the defendants were respondents; and that, if judgment of the court should be for the plaintiffs, a writ of ouster shall issue thereon against the defendants, and each of them; and, if the judgment of the court shall be for the defendants, it shall also be for the dismissal of this proceeding. Delos Walker, J. M. Housel, D. D. Leach, A. V. French, A. S. Sherwood, J. H. Beatty, N. Z. Hurd, G. W. Jackson, H. F. Smith, W. H. Richardson." Upon the above stipulation the district court found for the defendants, and judgment was entered dismissing said proceedings. From this judgment the plaintiffs appeal to this court, and we are called upon to determine which of the school boards claiming the right to govern the schools of Oklahoma City are in law entitled to have that privilege.

The plaintiffs claimed their right by virtue of an election held pursuant to the



provisions of chapter 15 of the Oklahoma Statutes. If they are not entitled to the offices, then it becomes immaterial, so far as their rights are concerned, whether the defendants are elected in manner and form as prescribed or not; for it is admitted that the defendants are in possession and control of the several offices, and are performing the duties imposed by law upon such school boards, and are conducting the schools and school affairs of said city; hence they are de facto officers, and their acts are binding upon the public, and they are entitled to continue in such custody and control until some persons having a better right secure their removal in a proper manner. The legislature which passed the laws in question were limited in time, and were overburdened with work; and, when we contemplate the vast amount of work accomplished by them, it is not surprising that many conflicts and inharmonious provisions crept in; and, knowing the general history of said legislation, it is not always proper that we should apply the ordinary rules of construction and interpretation to their acts. It is evident that in many instances they did that which was never intended, by oversight, and the lack of time to fully consider and compare all the several enactments. Then, again, the adoption of laws from other states, without first harmonizing the same with provisions of laws already enacted, has led to great confusion, litigation, and expense. About the only safe rule that we can rely upon in the interpretation of these laws is that legislative intent and purposes must govern; but we are left in many instances largely for speculation and conjecture as to what was in the legislative mind, or what the legislative purpose was.

Chapter 15 of the Statutes of Oklahoma is entitled "An act providing for the incorporation and government of cities of the first class." This act provides for the manner of incorporating cities of the first class, creates the several city offices, provides for the election of officers to fill such offices, and defines their several duties. It defines and prescribes the corporate powers, and the manner of raising revenues and expending the same, and is complete in every particular in so far as it relates to the powers, duties, franchises, and privileges of municipal corporations of this class. The chapter contains 5 subdivisions, and 102 sections, and nowhere in the entire chapter is the subject of schools or school officers mentioned, except in section 8 of article 1, which provides for the election of mayor, city clerk, police judge, city treasurer, attorney, city assessor, treasurer of the school board, two councilmen, and two members of the school board of each ward. The powers and duties of all municipal officers are defined, but the school officers here mentioned are not referred to in any other section of the entire act. Under this act, all revenues collected are required to be paid to the city treasurer, and paid out only on the order of the common council. No authority is given the municipal officers to levy school taxes, to build schoolhouses, or furnish school supplies. They are empowered to condemn real

estate for city buildings, hospitals, cemeteries, etc.; to contract debts for such buildings and purposes; but they have no control over the schools, school buildings, or school revenues. It is very clear that the legislature never intended that this act should provide a school system for cities of the first class. This, it is claimed, is an adopted act, and the school officers mentioned in section 8 are evidently the result of oversight, and the fact that such mention is made is not to be interpreted as evidence of any intent on the part of the legislature to change, modify, or repeal any portion of the school system. Chapter 79 is entitled "An act establishing a system of public schools in the territory of Oklahoma, and providing for the maintenance thereof." This act is intended to furnish a complete system of public schools for the territory. It provides for high schools, city schools, graded schools, and normal institutes. It provides for a territorial superintendent of public instruction, a territorial board of education, county superintendents, city superintendents, township and city school boards. It defines the duties and prescribes the powers of these several officers. It provides for their election or appointment, and defines their qualifications. It provides the mode and procedure of raising revenue for the maintenance of schools, purchase of school property, and supplies. It provides who may teach in the public schools, and the manner of determining the qualifications of teachers. It provides who may vote for school officers, and confers the right to vote at school elections on females who have the qualifications of electors. Section 1, art. 8, of this act provides for a special election to be held within 30 days after the approval of the act, at which election the qualified voters of each township shall elect by ballot from the township at large one person as president of the school board. Also, at the same voting precinct in each township, on the same day, and in the same manner, the qualified voters of each district are required to elect one member of the school board for each district. Also, in the same manner, on the same day, and for the same length of time, a president shall be elected in every city, and one member of the school board for each ward; the members in the odd-numbered wards to serve to the end of school year, and those in even-numbered wards to serve two years. Section 2 provides for a regular general school election on the first Tuesday of April, 1891, and annually thereafter, to fill vacancies in the school boards that shall occur by reason of expiration of term of office; the president to serve three years, and the members elected from districts and wards to serve two years, respectively. Section 3 provides for filling vacancies by appointment by the county school superintendent. Section 4 provides for the organization of the boards by electing one of their members secretary, and taking the prescribed oath of office. Section 6 makes each township and its board a body corporate, with the right to sue and be sued, make contracts, buy and sell real and personal estate, as the interests of the school or



city may require. The act further defines the powers and duties of the several officers and members of the boards; and the act, standing alone, without the aid of any other statutes, (excepting the statute defining who are electors generally,) provides all the machinery for operating a complete system of free schools in the territory, and was evidently intended by the legislature to control and govern in all matters pertaining to the public schools. It is contended that this act is in conflict with chapter 33, St. Okla., which is "An act concerning elections, and providing penalties for the violation of the provisions thereof." This act is an adopted act from the statutes of Indiana, and is what is generally termed the "Australian Election System." It is intended to govern all elections held in the territory other than school elections, which are specially provided for. They are independent acts, and each can stand and be operative in its proper sphere. It would be impracticable to attempt to apply this system to the school elections. The regular election for cities of the first class is by law fixed on the same day as the school elections. Under the school law females are allowed to vote for school officers. Under the general election law they are not permitted to vote. The judges are not allowed to examine the ballots. Females, if permitted to vote for school officers at the same election, might vote the entire ticket, as all city candidates are required to be printed upon the same ticket. There would be no means of preserving the purity of the ballot, or of determining what tickets were voted by legal, and what by illegal, voters. Doubt and confusion would follow, and the entire election be vitiated. The two propositions are utterly inconsistent and impracticable. The presumption is that the legislature acted intelligently, and with these incompatible provisions in view, and that one was never intended to take the place of or aid the other. The school system may be imperfect; it may be incomplete; but that is a question for the legislative branch of the government, and not of the courts. It is the duty of the courts to so construe and interpret the laws, if possible, as to give them force and effect, and make them operative.

Whether the defendants were elected in the manner as prescribed by the school laws we need not decide. The plaintiffs are not the school board of Oklahoma City, nor is John H. Beatty the president of said board, and they have no right, title, or claim to the offices they seek to secure, nor are they entitled to the custody of the school property. The judgment of the district court is affirmed, at the costs of the appellants.

(1 Okl. 225)

THOMPSON et al. v. RUSSELL.

(Supreme Court of Oklahoma. Jan. 27, 1893.)  
EQUITY PRACTICE—SPECIAL FINDINGS — REFUSAL TO MAKE.

Code Civil Proc. art. 1, c. 70, § 1, abolishes all distinction in pleading and practice between actions at law and suits in equity. Ar-

ticle 19, c. 70, § 2, provides that on trial of questions of fact by the court it shall not be necessary for the court to state its findings except generally, "unless one of the parties request it with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be rendered accordingly." *Held*, that it was error in an equity case to refuse a request of defendants that the court state the facts in writing and the conclusions of law thereon.

Appeal from district court, Canadian county; A. J. Seay, Judge.

Action by Thomas Russell against James Thompson and Edward Burhart to cancel a deed, and for the specific performance of a contract to convey land. From a judgment for plaintiff, defendants appeal. Reversed.

C. O. Blake, for appellants.

BURFORD, J. The appellee, Russell, brought his action in the district court of Canadian county to enforce the specific performance of a contract for the conveyance of real estate as against the appellant Thompson, and to procure the cancellation of a deed from Thompson to appellant Burhart. The defendants, the appellants here, filed their answer, in which they set up failure of consideration, fraud, and rescission of contract. Issues were joined, trial had by the court, and judgment rendered for the appellee, and a decree entered canceling the deed from Thompson to Burhart, and directing Thompson to convey the real estate in question to the appellee. From this judgment Thompson and Burhart appealed to this court.

It appears from the bill of exceptions that immediately after the evidence was closed, and before the court had begun to state his findings or conclusions, the defendants filed their request in writing that the court state the facts in writing, and the conclusions of law thereon. This request the court refused, and proceeded to render judgment generally for plaintiffs. Exception was saved, and this action of the trial court is properly assigned as error. Section 2, art. 19, c. 70, Code Civil Proc., provides that, "upon trials of question of fact by the court, it shall not be necessary for the court to state its findings except generally, for the plaintiff or defendant, unless one of the parties request it with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be rendered accordingly." This statute is mandatory, and leaves the court no discretion when the request is made at the proper time. Section 1, art. 1, c. 70, abolishes all distinction in pleading and practice between actions at law and suits in equity. In the case at bar, while it was a suit in equity, the same rules of practice prevail as in actions at law; and, as a trial was had by the court of questions of fact, it was the duty of the court, when requested, to first state the facts in writing, and then the conclusions of law upon the facts found. When a re-

quest is properly made it is the imperative duty of the court to comply with the request by making such special finding. *Smith v. Uhler*, 99 Ind. 140. Section 290 of the Civil Code Pr. of Kansas is identical in its provisions with our statute on this subject, and the supreme court of that state has repeatedly held that the right of a party to have the court make separate conclusions of fact and of law is a substantial right. *Major v. Major*, 2 Kan. 337; *Lacy v. Dunn*, 5 Kan. 567; *Ulrich v. Ulrich*, 8 Kan. 409; *Briggs v. Eggan*, 17 Kan. 590. A judgment should be reversed for a refusal to grant such right. *Briggs v. Eggan*, 17 Kan. 590; *Russel v. Armador*, 2 Cal. 305; *Stansell v. Corning*, 21 Mich. 242; *Evans v. Kappes*, 10 Iowa, 586; *Ogden v. Glidden*, 9 Wis. 47. For the error of the court in refusing the request of the defendants to make special findings of fact and conclusions of law, this case must be reversed. Some other errors are assigned, but, inasmuch as they may not necessarily arise on another trial of the cause, we need not review them here. The judgment of the district court of Canadian county is reversed at the costs of the appellee, with directions to grant a new trial.

PENNOYER, Governor, et al. v. WILLIS.

(Supreme Court of Oregon. Jan. 16, 1893.)

MORTGAGES TO SCHOOL FUND—BOARD OF COMMISSIONERS—LOCAL AGENTS—FALSE CERTIFICATE AS TO TITLE OF LAND OFFERED AS SECURITY—AGENCY—COUNTY TREASURER—EVIDENCE—INSTRUCTIONS.

1. Const. art. 8, § 5, provides that the governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom. *Held*, in an action by such officers, as such board, against a local agent, for damages sustained by reason of a false certificate as to the title of land offered as security for a loan, that the petition need not allege the legal capacity of plaintiffs to sue.

2. Where, in such case, the complaint alleges "that plaintiffs are now, and have been since the 10th of January, 1897, the duly acting and qualified board of land commissioners for the sale of school and university lands, and of the investment of the funds arising therefrom," it is sufficient, though it cannot be ascertained from the title or the complaint which of the plaintiffs is governor, secretary of state, or state treasurer, since such facts are immaterial to defendant.

3. In such action a complaint that alleges that plaintiffs retained defendant to examine and report on the condition of the title to property offered as security; that he accepted the retainer; that he neglected his duty, and represented that security offered was good; that plaintiffs, induced by defendant's representations, advanced money on the security offered; and that the security was bad, by means of which plaintiffs sustained damage,—states a good cause of action.

4. Rule 1, adopted by such board, provides that such of the county treasurers of the state "as may, from time to time, be designated" by the board, shall receive, receipt for, and safely keep separate, such funds, and securities therefor, loaned in their respective counties, subject to the order of the board. Rule 9 requires the treasurer so designated to report monthly the

condition of such funds. *Held*, that notice to such treasurer of the condition of the title to land offered as security for a loan was not notice to such board, since his position made him the representative of the state treasurer, and not the agent of the board.

5. Under Hill's Code, § 2724, providing that the county treasurer, if so requested, should act as the general agent of the board, such treasurer would not be the agent of the board unless he was in some way requested to act as such, or unless, from his and the board's acts, such relation could be inferred.

6. In the absence of evidence in such action of such acts, or that such treasurer was requested to act as such agent, knowledge by him of the condition of the title to lands offered as security for a loan would not constitute notice thereof to such board.

7. In such action it appeared that, besides the certificate to the title by defendant, there was attached to the application for the loan the following statement, signed by the county treasurer as "local agent": "I would recommend to your favorable consideration the within application for a loan, as I deem the same a desirable one, and the security offered ample." *Held*, that an instruction that this "certificate is not required to be made by the local agent, and could not have been relied upon by the plaintiffs, and is not evidence in this case for any purpose," was not erroneous, in the absence of any rule of the board, or any statute, requiring such affidavit.

8. Such certificate, giving it the legal effect to which it is entitled, was merely corroborative of the certificate given by defendant as to the value of the security offered, and not as to the condition of the title to the land.

9. Where defendant contends that he was not the agent of the board, he has no grounds to complain of an instruction that there is evidence that defendant never did act for plaintiffs in searching titles, but for the applicant for loans, and that in this instance he made the said certificate for one F., and not for plaintiffs, and if that was the fact he would not be liable to plaintiffs for negligence.

10. It was not error to exclude as evidence copies of the monthly reports of such county treasurer, made in pursuance of a rule of the board requiring him to report once a month the condition of the funds in his hands, giving a full statement of the receipts and disbursements for the month.

11. It was not error to exclude all evidence that defendant notified the county treasurer of the prior mortgage on such land, on the ground that such treasurer's agency had not been established, or attempted to be shown, except by written evidence held to be insufficient, since the court could exercise its discretion as to the order of the presentation of evidence.

12. The evidence showed that an applicant for a loan from the state funds went to the county treasurer, who made out his application, and went with him to defendant's office to have the title to the property examined; that F., a member of a firm holding a prior mortgage on the land, accompanied them; that defendant examined the title, and found a school mortgage and the mortgage to said firm; that in making out the certificate he noted the school mortgage, which filled the blank space reserved for that purpose, and was about to note the other mortgage by interlineation, when F. represented to him that it was fully paid, and would be satisfied on the record; that, relying thereon, he omitted to note the mortgage, but told the county treasurer not to advance any money to the applicant till the firm's mortgage had been satisfied; that when the order came from the board, approving the loan, the county treasurer drew up the note and mortgage, which the applicant and wife executed; and that defendant had no knowledge thereof until some time thereafter. *Held*, that a judgment against defendant was not erroneous.

Appeal from circuit court, Douglas county; Martin L. Pipes, Judge.

Action by Sylvester Pennoyer, governor, and others, holding the offices, respectively, of secretary of state and state treasurer, as the board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, against W. R. Willis, to recover damages sustained by reason of a false certificate as to the title to land offered as security for a loan from said funds made by defendant while acting as the county agent of such board. From a judgment for plaintiffs, defendant appeals. Affirmed.

The other facts fully appear in the following statement by MOORE, J.: This action was brought by the plaintiffs against the defendant to recover \$2,873.48 damages in consequence of defendant's negligence in certifying to the title of real property offered as security for a loan from the state school fund. The material facts are as follows: That at a meeting of the board of school-land commissioners held May 27, 1879, plaintiffs' predecessors in office appointed the defendant their local agent and attorney for Douglas county, whose duty it was to ascertain the value of, and the state of the title of, any lands offered as security for any loan, and to report the same to the board. That the defendant was notified of his appointment, and on June 17, 1879, he wrote a letter to the board, accepting the same. That on November 28, 1882, the board of commissioners, in pursuance of the statute authorizing them to adopt rules and regulations for the management of the school, university, or agricultural college funds, duly adopted the following rules and regulations in reference to the loan of the school funds of the state: "Rule 1. Such of the county treasurers of the state as may, from time to time, be designated by the board of commissioners for the sale of school and university lands, and for the management of the funds arising therefrom, shall receive, receipt for, and safely keep separate, any school, university, or agricultural college funds or notes, or other securities for such funds, loaned in their respective counties, subject to the order of the board. Rule 2. In order to effect loans of the irreducible school fund, university fund, or agricultural college fund, the board shall appoint in such of the counties as it shall deem necessary a suitable and proper person, to be designated and known as the 'Local Agent' of the board in the county for which he shall be so appointed, whose duty shall be to ascertain the value of, and the state of the title of, any lands offered as security for any loan, and report the same to the board. Rule 3. Any person or persons in any of the counties in which a local agent shall have been appointed, desirous of negotiating a loan of any of the funds referred to in the foregoing rule, shall present his or their application to such agent, who shall, if he deem such loan a desirable one to be made by the board, forward the application, with his opinion as to the value of the property offered as security, and the condition of the title, to the

board, with such recommendation as he may deem proper; but the applicants shall pay to such agent his reasonable charges for examining the title and ascertaining the value of the property proposed as security, and for preparing the proper note and mortgage: provided, further, that no application for the loan of any sum less than two hundred and fifty nor more than five thousand dollars shall be entertained. Rule 4. The security required for a loan of any of the funds mentioned above shall consist of real estate, of this state, of not less than three times the value of the loan desired, exclusive of perishable improvements, of unexceptionable title, and free from all liens or incumbrances, or a deposit of United States bonds, or the bonds or treasury warrants of this state, of a face value of not less than twenty-five per cent. in excess of the amount of the loan desired. Rule 5. The rate of interest on all loans hereafter made shall be eight per centum per annum, payable semiannually, on the first day of January and July of each year. Rule 6. All loans herein provided for shall be made for a period of one year: provided, that in case the interest is promptly paid, and the security remains unimpaired, the board may, in their discretion, permit the loan to stand for a period not longer than ten years. All notes and mortgages of more than ten years' standing shall be collected or renewed at once. The same care and formality must be used in the renewal of any mortgage as in making a new loan. Rule 7. All mortgages which are not adequate security for the debt, or upon which there is more than one year's interest in arrears, shall be placed in the hands of the local agent appointed by the board for the county in which the security lies, or, if no such agent has been appointed, then they shall be placed in the hands of the prosecuting attorney of the district, with instructions to foreclose the same immediately. Rule 8. The board shall meet on the second and fourth Tuesdays of each month to pass upon all applications to purchase lands; to hear and decide all questions about priority of settlement, and other disputes between applicants; to consider applications for loans; and to transact such other business as may properly come before it. Rule 9. It is hereby made the duty of the several county treasurers of the state in whose custody there shall be at any time any of the funds herein mentioned to report to the board once a month the condition of said funds, giving a full statement of the receipts and disbursements of said funds for that month; and the local agents shall from time to time advise the board as to the condition of the various securities in the county for which he is appointed." That one Joseph Roberts made application to the board to borrow \$2,000 of the school funds of the state, and offered as security therefor lands in Douglas county. This application was presented to the defendant, who made and signed the following certificate: "I hereby certify that I have thoroughly examined the records of Douglas county, Oregon, to ascertain the condition of the title to, and the

lien upon, the above-described real estate; and it appears from said records, and I believe, that Joseph Roberts is the owner thereof, in fee, and the same is free from all liens and incumbrances, except a mortgage by D. W. Nerney, Jr., to school board, of \$600. And I further certify that I have used due diligence to ascertain the actual cash value of said real estate, and believe the same to be six thousand dollars, excluding perishable improvements. Wm. R. Willis, Local Agent." That this certificate was false, in this: That at that time the real property described in the application was subject to the lien of a mortgage to S. Marks, Asher Marks, and W. I. Friedlander, doing business as S. Marks & Co., and of record in that county, of which fact the defendant had knowledge and notice. That on February 12, 1884, the application of Joseph Roberts for this loan was presented to the board of commissioners, and by them approved, and one W. N. Moore, then county treasurer of that county, and custodian of the school funds therein, was by order of the board directed to advance to Joseph Roberts the amount for which he had applied. That the mortgage to S. Marks & Co. and the mortgage to the board were foreclosed, and upon a sale of the mortgaged premises under a decree in favor of the board, and against Joseph Roberts, \$200 was realized upon the amount loaned, and that \$2,873.43 was lost to plaintiffs in consequence of defendant's false certificate, and that Joseph Roberts is and was at all times insolvent.

The complaint alleged the facts, of which the foregoing is the substance, and the answer denied all of the material allegations thereof, except that plaintiffs constituted the board of school-land commissioners, and the application of Roberts for the loan. The defendant then alleged that he was employed by W. I. Friedlander, one of the mortgagees of the S. Marks & Co. mortgage, to examine the condition of the title to the property described in Roberts' application, and that the certificate was given to Friedlander; that he knew that the Marks & Co. mortgage was a lien upon the property, but that Friedlander represented to him that it had been paid, and that it would be satisfied of record; that he notified W. N. Moore, the county treasurer, and custodian of the school fund for that county, and whom he alleges was then the agent of plaintiffs, that the Marks & Co. mortgage should be satisfied of record before any loan could be made, or before the premises would be free from incumbrance. The reply denied the allegation of new matter alleged in the answer.

A trial was had, and when plaintiffs rested the defendant moved the court for a nonsuit, which was denied. The defendant then offered his evidence, and the jury found for the plaintiffs in the amount claimed, whereupon defendant moved the court for a new trial, which was denied, and judgment rendered upon the verdict, from which the defendant appeals, assigning as error the overruling of the demurrer to the complaint; the failure to grant the motion for a nonsuit; the admission of testimony and exhibits offered by plain-

tiffs; the exclusion of testimony and exhibits offered by defendant; the giving of instructions by the court, and the refusal to give instructions asked by defendant.

A. M. Crawford and W. R. Willis, for appellant. Geo. E. Chamberlain, Atty. Gen., for respondents.

MOORE, J., (after stating the facts.) The first objection urged by the appellant is that raised by the demurrer to the complaint,—that it does not state facts sufficient to constitute a cause of action, and that it does not allege any legal capacity in plaintiffs, as a board of commissioners or otherwise. The complaint alleges "that plaintiffs are now, and have been since the 10th of January, 1887, the duly acting and qualified board of land commissioners for the sale of school and university lands, and of the investment of the funds arising therefrom," which is not denied in the answer. Section 5 of article 8 of the constitution provides that the governor, secretary of state, and state treasurer shall constitute a board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom. At common law, in addition to suits by individuals and corporations, there are some collective bodies which, although not strictly corporations, have been invested by law with certain corporate powers, and may sue in respect to the matters specifically committed to their charge; and in general all public officers, though not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties. When a suit is brought by a public officer, it is brought in the proper name of the individual, with the addition of his name of office. *Supervisor v. Stimson*, 4 Hill, 136. The only allegation that is at all vague is the one with respect to the office held by each of the parties plaintiff. It cannot be ascertained from the title of the case, nor from the complaint, which is governor, which is secretary of state, nor which is state treasurer; but it can be determined that the three persons named constitute this board, and hence it follows that one is governor, one secretary of state, and one state treasurer. Nor can it make any difference to the appellant, so far as this case is concerned, which of the persons named as plaintiffs, constituting the board, is governor, secretary of state, or state treasurer. This action is one for damages in consequence of the alleged negligence of the defendant in failing to properly ascertain the condition of the title to lands offered as security for a loan from the state school funds. In such action the material allegations that the plaintiffs retained the defendant to examine and report upon the condition of the title to property offered for security; that he accepted the retainer, neglected his duty, and represented that the security was good; that the plaintiffs, induced by defendant's representations, advanced the money upon the security offered; that the security was bad, and by means of which plaintiffs sustained damage,—state a good cause of action. *Weeks*, Attys. at Law, § 311. The complaint in

this action state all these material allegations, and therefore states a good cause of action, and the court committed no error in overruling the demurrer to the complaint.

The respondents contend that this state of facts clearly makes the appellant liable for the amount loaned to Roberts by them, which was lost by reason of the unsatisfied incumbrance, while the appellant contends that inasmuch as W. N. Moore, the county treasurer of Douglas county, was custodian of the school fund of that county, he was also the agent of the plaintiffs, knew that the Marks & Co. mortgage was a lien upon the premises, and that notice to him was notice to the plaintiffs, and therefore he is released from liability on account of the loss sustained by plaintiffs. The county treasurer, under rule 1 of the board, might have been designated the custodian of the school, university, and agricultural college funds of Douglas county. Under this rule he was obliged to receive, receipt for, and safely keep these funds, notes, and other securities subject to the order of the board; and under rule 9 he was required to report monthly the condition of such funds. This would not make him agent of the board, so that notice to him would be notice to the board. His position as custodian of this fund would but make him the representative of the state treasurer, and not the agent of the board. Section 2724 of Hill's Code, then in force, provided that the county treasurer, if so required, should act as the general agent of the board. He could be appointed only by their will. Under the statute, he must have been requested to act as their agent. This will or request may have been exercised in many ways, such as a written commission, an oral request, or his appointment may be inferred from the conduct of the board and of the county treasurer. The principal is bound only by the authorized act of the agent. This authority may be established by the instrument creating it, and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having authority which will embrace the particular act in question. *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 632. In *Walsh v. Insurance Co.*, 73 N. Y. 10, the court says: "The authority of an agent is not only that conferred upon him by his commission, but also, as to third persons, that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority; but this is only true between the principal and third persons, who, believing, and having a right to believe, that the agent was acting within, and not exceeding, his authority, would sustain loss if the act was not considered that of the principal." This is the utmost limit to which the doctrine of making the principal liable for the act of the agent has been or can be carried. Two things are necessary to make the principal liable for such acts of the agent in excess of his authority: The principal must have held the agent out to the world, in other instances, as possess-

ing sufficient authority to embrace the particular act in question; and the party dealing with such agent must have had reason to believe, and must have believed, that the agent possessed the necessary authority. These two facts must always exist, in order to hold the principal liable for the act of the agent in excess of his authority, since any person dealing with an agent does so at his peril, and the burden falls upon him to show that the agent possessed the requisite authority. When the agency is created by a written commission, the court is the sole judge of the measure and extent of the power granted; but where the authority is not conferred by a written instrument, and the facts are disputed, it is for the jury to determine, under proper instructions from the court, not only whether the agency exists, but, if so, what is its nature and extent. *Mechem, Ag.* § 106. Any evidence, therefore, that tended to show that plaintiffs had held the county treasurer out to the world as possessing sufficient power and authority to make and certify the condition of the title to real property offered as security for loans from these funds, or any other acts that tended to show that they had conferred upon him greater power or authority than that granted him as custodian of such funds, would have been admissible in evidence. No evidence was offered that tended to show that the board had ever held the county treasurer out to the world as possessing greater power or authority than that required of him as custodian of these funds, nor that the county treasurer had ever exercised any greater power or authority in connection therewith.

The Roberts application had another certificate, as follows: "To the honorable board of commissioners for the sale of school lands, and the management of the funds arising therefrom: I would recommend to your favorable consideration the within application for a loan, as I deem the same a desirable one, and the security offered ample. I now have on hand sufficient school funds to meet the loan, if ordered. W. N. Moore, Local Agent." Appellant insists that this certificate proves the agency of Moore, and that the board relied upon it in approving the application and ordering the loan. Upon this question the court charged the jury as follows: "On the same paper upon which is the certificate of the defendant, there is a certificate of W. N. Moore, recommending the loan, and that the security was ample; and the words 'Local Agent' are written after the name. That the certificate is not required to be made by the local agent, and could not be relied upon by the plaintiffs, and is not evidence in this case for any purpose,"—to which instruction the defendant excepted. Rules 1 and 9, *supra*, prescribe the duties of the county treasurer when acting as the custodian of these funds. The certificate of W. N. Moore was not required by the statute nor these rules. To give it the legal effect intended, and to which it was entitled, would be to make it corroborative of the certificate of the local agent as to the value of the security offered, and

not as to the condition of the title to the lands embraced in the application. We can see no error in giving this instruction.

The defendant also contended that he was not the agent of the board, and that the certificate was made at the request of Mr. Friedlander, for his use, and not for the purpose of advising the board upon the condition of the title to the land described in the Roberts application. This was an issue made by the pleadings. Evidence was offered in support thereof, and the court gave the following instruction thereon: "But there is evidence tending to show, on behalf of the defendant, that he never did act for plaintiffs in searching or reporting titles, but for the applicant for loans, and that in this instance he made the said certificate for Mr. Friedlander, and not for plaintiffs. If you find that to be the fact, defendant would not be liable to plaintiffs for negligence." This charge was certainly broad enough to suit the defendant, and, while he could not object thereto, it was in conflict with rule 3, supra; and the jury, by their verdict, said that the defendant was not the agent of Friedlander in making the certificate.

The court excluded from the jury copies of the monthly reports of W. N. Moore, made to the board in pursuance of rule 9, supra, upon the condition of the funds in his possession, to which the defendant excepted. These reports were in writing, of which the court was the sole judge, as a question of law, of their competency. We can see no error committed in excluding them. The court excluded all evidence that tended to show that the defendant notified the county treasurer of the Marks & Co. mortgage, for the reason that the fact of his agency had not been established or attempted, except by the written evidence, of which the court was the sole judge, and had the right to exercise his discretion as to the order of the presentation of the evidence, and could preclude the introduction of any evidence tending to show notice to Moore till the fact or some circumstance had been introduced, tending to establish such agency.

The testimony shows that, when Roberts applied for a loan, he went to the county treasurer, who made out his application, and went with him to the defendant's office to have the title to the property examined; that Friedlander, one of the mortgagees of the Marks & Co. mortgage, went with them; that defendant examined the title, and found the Nerney mortgage for \$600, and the Marks & Co. mortgage for \$28,000; that in making out the certificate he noted the Nerney mortgage, which filled the blank space reserved in the printed application for that purpose; that he was about to interline the certificate, and note the Marks & Co. mortgage, when Friedlander represented to him that this mortgage had been fully paid, and would be satisfied on the record; that, relying upon these representations, he did not enter that mortgage in the certificate, but told Moore not to advance any money to Roberts till the mortgage had been satisfied; that when the order came from the board, approving the loan, Moore drew up the note and mortgage,

and Roberts and wife executed the same, and that defendant had no knowledge of the execution of this mortgage till a long time thereafter; that, while the certificate was not true, it was not fraudulent, nor made with any intent to deceive any one; and that he acted upon the honest belief that the Marks & Co. mortgage had been fully paid, and would be satisfied on the record. The loss grows out of the defendant's overconfidence in the representations of Friedlander. We cannot see, from the instructions given or refused, nor from the evidence admitted or rejected, that the court erred, and therefore the judgment of the court below must be affirmed.

BEAN, J., expressed no opinion herein.

(18 Colo. 164)

### SHANNON v. DODGE et al.

(Supreme Court of Colorado. Jan. 17, 1893.)

APPEAL—EFFECT OF DISMISSAL OF JUDGMENT APPEALED FROM—SURETIES.

1. As a general rule, the dismissal of an appeal to the supreme court operates as an affirmation of the judgment of the trial court; and this rule applies to judgments against sureties on appeal undertakings under the act of 1885, subject to the statutory proviso.

2. The act of 1885, providing for rendering judgment against sureties upon the undertaking on appeal from county to district courts, is not to be regarded as providing another mode of commencing civil actions; but, by executing the undertaking, the sureties are deemed to consent that they shall, under the contingencies specified in the undertaking, be considered parties to the original suit, and liable to judgment for the original cause of action against their principal.

3. In case of successive appeals of the same cause, as from the county court to the district court, and thence to the supreme court, the first set of sureties are not released by the mere taking of a second appeal with new bond and new sureties, in pursuance of statutory authority existing at the time the first appeal was taken.

(Syllabus by the Court.)

Error to district court, Lake county.

Suit in equity by Perley Dodge and M. J. Walsh against Margaret A. Shannon to enjoin the collection of a judgment. Plaintiffs had decree, and defendant brings error. Reversed.

The following provisions, concerning appeals from county to district courts, from the act of 1885, (pages 158-160,) are considered in the opinion: From section 2: "In case the judgment be for the payment of money, and against the party appealing, the undertaking shall be in double the amount of the judgment or decree appealed from, conditioned for the prosecution of the appeal, with effect and without delay, and for the payment of all costs, and whatever judgment may be awarded against the party so appealing, on the trial or dismissal of said appeal in the appellate court, and for the payment of the judgment appealed from, in case said appeal shall be dismissed." From section 5: "In all cases where the judgment of the county court is affirmed, or judgment is rendered against the appellant, such judgment shall be rendered and entered, as well against the sureties of the

appellant upon his undertaking as against the appellant, and execution shall issue on such judgment, as well against such sureties as against the appellant: provided, further, that no execution shall issue on such judgment against the sureties until a writ of scire facias shall issue and be served on such sureties, requiring them to show cause before the court, by a day to be named therein, not less than five days after the service of said writ, why execution should not be issued against them."

N. Rollins, for plaintiff in error. A. J. Sterling and H. P. Krell, for defendants in error.

ELLIOTT, J. Final judgment was rendered in the district court in favor of Dodge and Walsh, plaintiffs below, perpetually enjoining Margaret A. Shannon, defendant below, from collecting a certain judgment against said plaintiffs. The decree was rendered upon overruling the demurrer to the complaint. The facts stated in the complaint, so far as the same are necessary to an understanding of the opinion, are as follows: In April, 1887, Margaret A. Shannon obtained a judgment against Warren Mingus and Anna Mingus in the county court of Lake county for \$198.50 and costs. From this judgment an appeal was taken to the district court, Dodge and Walsh becoming sureties on the appeal bond or undertaking. In September, 1887, upon the trial of said appeal, Shannon again succeeded in her suit against Mingus and Mingus, recovering \$150 and costs, and thereupon the district court rendered judgment against said Dodge and Walsh jointly with said Mingus and Mingus for the amount so recovered. From the judgment thus rendered in the district court, Mingus and Mingus took an appeal to the supreme court. Dodge and Walsh did not join in the latter appeal. It was a separate appeal by Warren and Anna Mingus, with other sureties upon their appeal bond. The appeal to the supreme court was dismissed in March, 1888.

1. As a general rule, the dismissal of an appeal by the supreme court operates as an affirmance of the judgment of the trial court. Code, §§ 397-399. Shannon, therefore, in the absence of any law to the contrary, was entitled to enforce her judgment against Dodge and Walsh, as well as against Mingus and Mingus, subject only to the conditions of the statute in respect to the issuance of a scire facias. Sess. Laws 1885, p. 160, § 5.

2. Two grounds of objection are urged against the enforcement of the Shannon judgment. In the first place, it is contended that said judgment was illegal as to them because it was rendered without the bringing of any suit upon the undertaking executed by them as sureties. The instrument executed by Dodge and Walsh as sureties conformed in all substantial particulars to the requirements of the statute. Section 2, Act 1885, supra. It is true the undertaking did not in form provide that judgment should be rendered against them as well as against their principals, but it did provide for the payment of whatever judgment might be rendered against

their principals; and, furthermore, the statute in pursuance of which the undertaking was executed expressly provided that, in case judgment should be rendered against appellants in the appellate court, such judgment should also be rendered against them as sureties of appellants upon such undertaking. The undertaking being executed in pursuance of the statute, and for the purpose of obtaining its benefits, the provisions of the statute are to be considered as part of the undertaking, and construed accordingly. The provision of the act of 1885 providing for the rendering of judgment against sureties upon the undertaking on appeal was not repealed by the Code of 1887, either in express terms or by necessary implication. The act of 1885 is not to be regarded as providing another mode of commencing civil actions. It does not provide for introducing a new cause of action into the suit in which the undertaking is given; but the true construction of the statute is that, by executing the undertaking, the sureties are deemed to consent that they shall, under the contingencies specified in the undertaking, be considered parties to the original suit, and liable to judgment for the original cause of action against their principal. *White v. Prigmore*, 29 Ark. 208; *Callahan v. Saleski*, Id. 216; *Ex Parte Miller*, 1 Yerg. 435; *Brandt*, Sur. § 398.

3. Again, it is contended that the taking of the second appeal operated as a release of Dodge and Walsh as sureties. The argument is that the second appeal suspended the district court judgment, and that Dodge and Walsh were thereby precluded, during the pendency of such appeal, from exercising their rights as sureties to protect themselves against their principals; that they should, at all times, have enjoyed the right of paying said judgment, and thereafter enforcing the same against Mingus and Mingus. Where there have been successive appeals in the same case, with different appeal bonds and different sureties, the decisions have not been uniform as to which set of sureties are bound. It has been held that the latter sureties are primarily liable, and that a secondary liability only rests upon the first sureties. *Chester v. Broderick*, 131 N. Y. 549, 30 N. E. Rep. 507. In the present case there were two appeals, but the first appeal bond or undertaking was merged in the judgment rendered by the district court before the second appeal bond was executed. As the judgment against Dodge and Walsh was valid when it was rendered, it would seem idle to contend that it became invalid in consequence of proceedings in the supreme court resulting in its affirmance. Considering the case as though no judgment had been rendered upon the first appeal bond, the better reason would seem to be with those authorities which hold that the first set of sureties are not released by the mere taking of a second appeal, with new bond and new sureties. It is true, while the appeal to the supreme court was pending, the privileges of Dodge and Walsh were temporarily suspended in respect to the district court judgment,—that is, they could not, during that time, exercise the privilege of payment and subrogation; but



this suspension was not occasioned by any fault or act of the obligee in the bond which they had signed. The taking of the second appeal was the act of Mingus and Mingus, and not the act of Shannon. It was the act of the principals of Dodge and Walsh in the first appeal bond or undertaking. Shannon was powerless to prevent the second appeal, and it does not appear that she could have sooner dismissed it. The appeal to the supreme court was in pursuance of statutory authority existing at the time Dodge and Walsh signed the first appeal undertaking. They must therefore be held to have anticipated, or at least to have known, that such an appeal might be taken when they signed the first undertaking. Having knowingly and voluntarily placed themselves in this position, they must bear the consequences. *Rockwell v. District Court*, 17 Colo. —, 29 Pac. Rep. 454; *Robinson v. Plimpton*, 25 N. Y. 484; *Evers v. Sager*, 28 Mich. 47; *Ashby v. Sharp*, 1 Litt. (Ky.) 156; *Marquette Co. v. Ward*, 50 Mich. 174, 15 N. W. Rep. 70; *State v. Bradshaw*, 10 Ired. 229; *Brandt, Sur. § 397*; *Murfree, Off. Bonds, § 81*. It is said that the contract of a surety is *strictissimi juris*. The saying is liable to abuse in its application. Considering the situation of the obligee in an appeal bond, it would seem that his rights should be regarded equally with those of the surety. An appeal bond may be executed and approved, and thus accepted for the judgment creditor, without his consent or knowledge; and thereby the enforcement of his judgment is stayed. It is the act of the surety which enables the judgment debtor to accomplish such result. The surety, having thus prejudiced the judgment creditor, and having thus obtained for his principal, (the judgment debtor,) the benefit of an appeal, should not, upon the breach of the condition of the bond, be allowed to escape liability except for the most substantial reason. Certainly the mere taking of another appeal under statutory authority, without the consent of the obligee, should not absolve the surety. The demurrer to the complaint should have been sustained. The judgment of the district court is reversed.

(18 Colo. 170)

## GRAVES v. PEOPLE.

(Supreme Court of Colorado. Jan. 17, 1893.)

MURDER—EVIDENCE—HEARSAY—DYING DECLARATIONS—RES GESTÆ—SUFFICIENCY OF OBJECTION TO EVIDENCE—INSTRUCTIONS.

1. In a criminal case it is the duty of the court to see that the trial is conducted according to law, and the jury properly instructed.

2. Hearsay evidence is generally inadmissible, but to this well-established rule there are some exceptions.

3. In a trial for murder by poisoning, the statements of the deceased in narration of past events, voicing her suspicions as to the sender of the poison, are incompetent.

4. Where it is shown that the deceased, at the time of making certain statements, expected to recover, such statements are not receivable in evidence as dying declarations.

5. *Res gestæ* are events speaking for themselves through the instinctive words and

acts of participants, not the words and acts of participants when narrating the events.

6. Where the record shows that at the time a certain class of evidence was first offered its admission was vigorously opposed, the objections to its introduction then fully argued, and renewed upon a motion to strike out, held sufficient to reserve the point, without a renewal of the objection to each question thereafter propounded.

7. Where the evidence in a criminal case is wholly circumstantial it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt.

(Syllabus by the Court.)

Error to district court, Arapahoe county.

T. Thatcher Graves was convicted of murder in the first degree, and brings error. Reversed.

Wells, Macon & Furman, for plaintiff in error. Joseph H. Maupin, Atty. Gen., R. W. Steele, J. B. Belford, Lafe Pence, I. N. Stevens, and H. B. Babb, for the People.

HAYT, C. J. Josephine A. Barnaby died in the city of Denver upon the 19th day of April, 1891, under circumstances indicating that her death was caused by arsenical poisoning. Plaintiff in error, T. Thatcher Graves, was indicted for the murder of the deceased, convicted of murder in the first degree, and sentenced accordingly. Mrs. Barnaby, at the time of taking the supposed poison, which the evidence indicated produced death, was stopping temporarily with friends in the city of Denver. She had, immediately prior to this, been traveling in the state of California, and was then on her return to her home in the city of Providence, in the state of Rhode Island. The plaintiff in error, a practicing physician in the city of Providence, was the confidential friend of the deceased, and for some time previous to her death had the entire control and management of her estate, amounting in the aggregate to something over \$100,000. The major portion of this property is shown to have consisted of stocks and bonds, standing at the time in the name of plaintiff in error. He had never been required to give security for this property, and none was given. The testimony shows that at least up to a period shortly before her death the deceased had held the defendant and his family in the highest esteem as friends, and that she had unbounded confidence in his business sagacity and integrity. She had been for years a sufferer from partial paralysis of one side of her body, plaintiff in error being her sole attending physician. When at home in Providence, she was often a visitor in his family, and while traveling was in the habit of writing him upon business and other matters frequently. Her letters, introduced in evidence, are couched in language breathing a spirit of respectful regard and concern for Dr. Graves and his family, which consisted of a wife and his aged mother. Her regard for this convicted man is further shown by two wills introduced in evidence, in each of which he is left a legacy of \$25,000, and made her sole executor without bonds. In general,



Dr. Graves' letters to Mrs. Barnaby are of like character as those from her to him, although two, written at a time when she was contemplating the purchase of property in the Adirondack mountains, and for the purpose of preventing such investment, are of a different nature. A favorite resort of Mrs. Barnaby in the Adirondack mountains of New York was sometimes called "The Woods." It was under the management of her friends, referred to by the witnesses as "the Bennetts." It was near this place that she proposed to invest. In the two letters mentioned, Dr. Graves stated that the executors of her late husband's estate were much displeased with her conduct, and would take steps to have a guardian appointed for her if she persisted in her intention to purchase. He admitted, upon cross-examination, that he knew at the time of writing these letters that some of the statements therein made were unfounded and false. Gain is ascribed as the motive for the crime. It is claimed that Dr. Graves had squandered a portion of Mrs. Barnaby's estate, and was apprehensive lest his agency might be revoked, and an accounting demanded; that he desired her death so that detection would be improbable, and also that he might thereby come into possession of the benefits conferred upon him by her will.

The circumstances surrounding the fatal illness of the deceased, in brief, are as follows: In Denver she was the guest of Mr. and Mrs. Worrell. Shortly before her arrival in this city a package came by mail to her address. It was directed in care of Mr. Worrell, and taken from the post office to his office. This package was deposited on the top of a desk in a downtown office occupied by Mr. Worrell and others, and there allowed to remain for several days. Upon Mrs. Barnaby's arrival, Mr. Worrell put the package in his buggy for the purpose of taking it up to his residence. It was, however, forgotten, and taken with the buggy to the livery stable, where it remained for a brief period. It was then found, and given to Mr. Worrell, and by him in turn handed to the deceased. It appears that this package was opened by Mrs. Barnaby in the presence of several parties, before it was removed from the downtown office. It contained a bottle of sufficient capacity to hold about one half pint, filled with a dark fluid, which some of those present took to be blackberry wine. This bottle, although not mailed until the latter part of March, and not received until some time in the month of April, bore this peculiar inscription: "Wish you a happy New Year. Please accept this fine old whisky from your friends in the woods." The package arrived in Denver April 4th. After it reached Mrs. Barnaby's hands at the Worrell residence it was placed by her in her trunk, which was locked. On Monday, April 13th, Mrs. Worrell, Sr., and Mrs. Barnaby made a trip to the country, returning in the evening. Feeling exhausted upon their return, Mrs. Barnaby proposed to make a couple of "toddlies" from the contents of this bottle. For this purpose she took it from the trunk, and pre-

pared a drink for herself and one for Mrs. Worrell, in different glasses, using about two teaspoonfuls of the contents of this bottle for each. Mrs. Barnaby drank one and Mrs. Worrell the other. Soon after drinking, both were taken sick, exhibiting symptoms of arsenical poisoning. Mrs. Worrell recovered, and was a witness for the state upon the trial in the district court. Mrs. Barnaby, after lingering several days in great agony, died. An examination of the contents remaining in the bottle, by chemists of undoubted repute, disclosed a strong solution of arsenite of potassium, and arsenic was subsequently detected in the viscera of the deceased. As the decision in this court rests upon matters of law, a fuller statement of the facts is deemed unnecessary.

It was the duty of the district court trying the case to see that the trial was conducted according to law, and the jury properly instructed. It was the peculiar province of the jury to weigh the evidence, and return such a verdict as in the judgment of the jurors the evidence required. The innocence of every accused person must be presumed until his guilt is established according to the law of the land, and beyond all reasonable doubt. The rules governing the trial of criminal cases are the outgrowth of experience, and embody the wisdom of centuries. A conviction obtained in cases where a substantial compliance with these rules has not been had cannot be allowed to stand. Did the defendant have such a trial as the law guarantees? His counsel contend that he did not. They claim that certain well-established rules of the law of evidence were not observed at the trial; that the jury were not properly instructed, and that the defendant was greatly prejudiced thereby. The evidence of guilt is entirely circumstantial. Of that claimed to have been improperly admitted the following may be mentioned: Mrs. E. S. Worrell, a witness for the state, was allowed to testify as follows, with reference to a conversation with the deceased, which occurred the day after she partook of the contents of the bottle: "The next morning she seemed a little brighter. She knew she had taken poison at that time. I asked if she supposed the Bennetts could have sent that. \* \* \* I asked her if she thought the Bennetts could have sent the stuff. She said, 'No.' I asked her, 'Do you think Dr. Graves could have sent it?' and she did not answer me." This testimony was received against objection, and after its exception the court overruled a motion to strike it out. Mrs. Nancy B. Allen, another witness for the state, testified to a conversation had by the witness with Mrs. Barnaby, as follows: "The next morning she seemed more quiet. Had become partially warm, and seemed inclined to talk. Edward Worrell, Jr., came into the room, and asked her how she felt, and took hold of her hand; and after he went out she says: 'How good that boy is to me. He's like my own son in his kindness to me. You have all been so good. If I had been at an hotel I would have died before morning.'" This evidence was objected to, which objection was overruled by the

court, the court using this language: "Everything said by her at the time is part of the *res gestæ*, and is admissible." This witness was further permitted to testify as follows: "She (Mrs. Barnaby) said: 'Keep this still. I want, just as quick as I am able to travel, to go east. I will put this in the hands of detectives. I know somebody.' \* \* \* We felt satisfied somebody was seeking her life. I said, 'Have you any enemies that would do such a deed as this?' She said, 'I don't know that I have an enemy in the world.' Then she thought a moment, and said: 'I don't know but the last maid was angry at me. She wasn't a lady, and I didn't care to keep her.' I said, 'Did you employ her?' and she said she was employed by Dr. Graves. 'He was very anxious for me to spend the winter in Cuba with this companion, and I didn't want to go. I wanted to go to the California coast.' I said, 'Is there any one you can think of who knows that they will be benefited by your death?' She said, 'I left Dr. Graves \$50,000 in my will, and he knows it.' I said, 'That is a good, big sum.' She said it was too much, and in a later will she had changed it. She had two lovely daughters, she said; good girls; one traveling in Europe. She said she thought she put about two teaspoonfuls in each tumbler. That she hadn't as much confidence in Dr. Graves as she had had. That the medicine that he had sent her lately hadn't seemed to do her the good it used to. That she was not suited with the way she had been treated while she was in California. That she had been very much discommoded by not getting money when she wanted it. At one time, she said, they had 50 cents between them."

Of this evidence it is to be observed that it consists of statements alleged to have been made by Mrs. Barnaby during her lifetime, detailed upon the witness stand by third parties. It is mostly hearsay. By a familiar rule of law, hearsay evidence, on account of its intrinsic weakness, and its incompetency to satisfy the mind as to the existence of any fact, and the fraud which may be practiced under its cover, is generally held inadmissible. To this well-established rule there are some exceptions, recognized from necessity, on account of the absence of better evidence. The exceptions may be divided into four classes: (1) Evidence of matters of public and general interest; (2) evidence of ancient possessions; (3) declarations against interest; (4) evidence of dying declarations; and a few others of a miscellaneous nature. 1 Greenl. Ev. (14th Ed.) 127. It is apparent that the statements of Mrs. Barnaby do not fall under the first three exceptions named; so their admissibility must be upheld under the fourth exception, if at all. It is only necessary for us to state briefly the principle under which dying declarations are admitted, to show that this exception does not permit the evidence here objected to. Dying declarations are admitted from the necessity of the case, in order that manslaughter may be brought to justice; experience having shown that frequently no third party was an eyewitness to the homicide. They are

only admitted when it is shown that the party making them was in extremis at the time, and when all hope of this world had passed; "when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." *Rex v. Woodcock*, 1 Leach, 502. In this case it affirmatively appears that at the time the statements were made to these two witnesses Mrs. Barnaby expected to recover. This, of itself, would exclude the application of the exception permitting evidence of dying declarations, and it is therefore unnecessary to specify other objections. Among the miscellaneous exceptions referred to, the one permitting evidence of the *res gestæ* is here relied upon. "*Res gestæ* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participants in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself." *Whart. Crim. Ev.* (9th Ed.) § 262. Any statement made by Mrs. Barnaby at the time of taking the fatal dose, or so soon thereafter as to make the declarations a part of the transaction, and explanatory of that act, was admissible. But, with a single exception, the statements are not of this character, and consequently the evidence should not have been allowed as part of the *res gestæ*. It is not only hearsay, but hearsay evidence of the most objectionable kind. Under claim that it was part of the *res gestæ*, witnesses were permitted to detail statements made by Mrs. Barnaby, that would not have been receivable in evidence if she had recovered and appeared as a witness upon the stand against the defendant upon a charge for a lesser offense. Under the rulings of the trial court, suspicions voiced by the deceased were admitted, whether the same originated with her or emanated from some one of the numerous persons admitted to the sick chamber. In this indirect mode the statement was permitted to go to the jury that, in the opinion of Mrs. Barnaby, the Bennetts did not send the contents of the bottle. The court also permitted a question put by Mrs. Worrell to Mrs. Barnaby, which cast a suspicion upon Dr. Graves, although the deceased did not answer such question. In the statements detailed by Mrs. Allen, the deceased was also allowed to reflect upon the character of a witness for the defense, Sallie Hanley, and thus, in advance, prejudice her evidence before the jury. Suspicion was permitted to be cast upon the defendant by the introduction of declarations of the deceased tending to show that this maid was employed for her by Dr. Graves under circumstances which would indicate that such employ-

ment was not only without her consent, but against her wishes, and for a sinister purpose. So, also, in this indirect way, the statement was introduced to the jury that she had left Dr. Graves \$50,000 by a former will, and that he knew of it, although by other evidence it is conclusively shown that this statement was not in accordance with the fact; and at best it is a narrative of a past transaction, in no way connected with the taking of the poison, and therefore not admissible. It is contended that this evidence was competent to show that Mrs. Barnaby's confidence in plaintiff in error had been shaken, and that she had lost regard for him. The statements having been made after the alleged crime had been committed, they were incompetent for this purpose. Aside from this, as we have seen, the evidence was not properly limited. Statements purporting to have emanated from the deceased during her last sickness, at a time when her body was racked with suffering, were well calculated to unduly prejudice the defendant's cause with the jury.

A large part of the evidence of the witness Addie A. Carrier is still more harmful and equally as objectionable as the evidence of either Mrs. Worrell or Mrs. Allen. This witness testified, in part, as follows: "Tuesday morning I had a conversation with Mrs. Barnaby. She seemed to want to talk. I sat down by the side of the bed, and the first thing she said was, 'Somebody evidently wants to kill me.' I said, 'It looks that way.' She said: 'Keep still about it, because whoever sent that bottle sent it with the intention of taking my life, and is watching the result. Just as soon as I am able, I shall take the bottle, and put it in the hands of the best criminal lawyer I can find in New York city, and ferret this out, if it takes every dollar I have.' I was there perhaps two hours. \* \* \* I went in almost every day, but didn't have any special conversation with her until Friday morning before her death. That morning it was very hard work for her to breathe. She felt very sick. I asked her, 'Do you think the Bennetts sent that dose?' She says: 'Oh, no, no. We are the best of friends. I am going to spend the summer with them.' Then she says: 'Can it be possible Dr. Graves would do such a thing?' I says: 'I don't know. Did you remember him in your first will to a large amount?' She said, 'Yes, \$50,000; and that he knew it; that he saw the will. My mother told me that Mrs. Barnaby had informed her to the same effect.' Although the evidence of this witness was not objected to at the time, in view of a new trial of the cause we deem it incumbent upon this court to notice it. After the previous ruling of the trial court, admitting, against objection, the same character of evidence from other witnesses, and the declaration that "everything said by her [Mrs. Barnaby] at the time is part of the res gestæ, and is admissible," the failure of the counsel to renew the objections to evidence of Mrs. Barnaby's statements should not cause wonder. *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. Rep. 612. A constant repetition of the same objection

would have unnecessarily delayed the trial, and might have prejudiced the defendant's cause before the jury. When a certain class of evidence is offered, such objection as counsel have to its admission should be fully stated. After this has been done, and the objection argued, overruled, and the evidence received, the attention of the court again called to its objectionable character by a motion to strike out the evidence, and exceptions to the adverse rulings duly taken, as in this case, counsel may well desist from renewing fruitless objections. The representations made by Mrs. Barnaby, while sick, of the nature, symptoms, and effects of her sickness, were properly admitted as original evidence, but the rule permitting this requires the evidence to be limited to exclamations of present pains, or statements of present symptoms, and other like matter.

Error is also assigned upon the ruling of the court whereby two certain receipts were excluded. These were given by C. M. Van Slack to Dr. Graves for property turned over by the latter to the former. It was in evidence on the part of the state that Van Slack had been appointed, by the proper court, custodian of the property after Mrs. Barnaby's death, and that stocks and money had been turned over to him as such custodian by Dr. Graves. The defendant testified that Van Slack had receipted for this property, and offered in evidence such receipts, but the court excluded the same as immaterial. The receipts, as they appear in the record, embrace an itemized list of a large amount of personal property said to have belonged to Mrs. Barnaby. The court was in error in declaring these receipts immaterial. The state having been allowed to prove every item of property belonging to Mrs. Barnaby traceable to the hands of the defendant, he in turn should have been permitted to show the items turned over by him to the proper custodian, and these receipts were competent evidence for this purpose, and should have been admitted as tending to disprove one motive ascribed for the commission of the crime. By their exclusion the jury was left uninformed as to the particular nature of the property described therein. It was likewise an error to exclude the evidence offered by plaintiff in error, tending to show that his office in Providence had been surreptitiously entered during his absence, and his accounts destroyed or carried away. He was entitled to have this evidence considered by the jury in connection with the charge that he had squandered the estate, and had preserved no sufficient record of his transactions in connection therewith. As to whether such evidence was entitled to much or little weight, it was for the jury, and not the court, to determine.

Error is assigned upon the following instruction given to the jury trying the cause: "(7) The court instructs you that the law requiring you to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied

upon to establish the defendant's guilt. It is sufficient if, taking the testimony altogether, you are satisfied beyond a reasonable doubt that the defendant is guilty." This instruction appears in Sack, *Instruct. Juries*, p. 647. In support of the instruction the author cites the following cases: *Houser v. State*, 58 Ga. 78; *Jarrell v. State*, 58 Ind. 293; *State v. Hayden*, 45 Iowa, 11; *Bressler v. People*, 117 Ill. 422, 8 N. E. Rep. 62. In *Houser v. State*, supra, the indictment charged the defendant with the crime of burglary, and the instruction which was sustained upon appeal is in this language: "The state must make out the case beyond a reasonable doubt, but that it is not necessary for the state to show that it is impossible for the crime to have been committed by anybody else, or that it might not, by bare possibility, have been done by some one else." This instruction is so unlike the one under review that the indorsement of the former by the Georgia court cannot be considered as any authority in support of the instruction of which complaint is here made. So, also, in the case of *Jarrell v. State*, supra, the instruction approved is entirely dissimilar from that given in this case. The indictment in that case charged the defendant with an assault with intent to murder. The evidence of the crime charged was direct; no charge was given upon circumstantial evidence. The court instructed the jury that "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon that conviction, without hesitation, in their own most important affairs." This instruction states the law correctly, but why it should be cited in support of the text is not apparent. In *State v. Hayden*, supra, the following instruction was asked by defendant and refused: "As the evidence in the case is wholly circumstantial, you must be satisfied beyond a reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt." The jury were, however, instructed as follows: "The defendant is presumed to be innocent of the crime charged until proved guilty beyond a reasonable doubt, and, as the evidence in this case is circumstantial, it is your duty to give all the circumstances a careful and conscientious consideration, and if, upon such consideration, the minds of the jury are not firmly and abidingly satisfied of the defendant's guilt, if the conscientious judgment of the jurors wavers and oscillates, then the doubt of the defendant's guilt is reasonable, and you should acquit." Certainly the instruction there given was as favorable to the defendant as the law would permit, and, as we shall show hereafter, the instruction refused was properly refused, as the metaphor of a chain of circumstances is inaccurate, and calculated rather to mislead than to enlighten a jury, and ought never to be used in an instruction. The only case cited, and the only one which we have been able to find, in which the giving of an instruction like the one under consideration has

been held not to constitute reversible error is the case of *Bressler v. People*, supra. Bressler was indicted for the larceny of a promissory note. The state claimed that the note was stolen from a justice of the peace by the name of Smith, who held it, with other notes, for collection. Direct proof was introduced showing that the defendant obtained the note from Smith; the only question being as to the manner by which he acquired possession thereof. The defendant testified that he paid the note, and that Smith thereupon voluntarily delivered it to him. Smith, in his testimony, denied that the note had been paid, and that he had voluntarily delivered it to the defendant. He said the defendant took the note against his consent, and without his knowledge. It will be noticed that the testimony of neither of these witnesses can be classed under the head of circumstantial evidence. It was apparent that one witness testified truthfully and the other falsely. Circumstances were then introduced in support of the testimony of each, this latter evidence being all the evidence there was in the case to which the jury could have applied the instruction. Under these circumstances the court held that the instruction did not warrant a reversal of the judgment. As we understand the opinion, it holds simply that, under the peculiar circumstances of that case, the judgment would not be interfered with, although the instruction is not commended as a model. It is said that the metaphor of a chain and links could only be applied where there is a series of facts, one succeeding another, and each connected with and depending upon the other; and the evidence in the case under consideration was not of that character.

From the foregoing it will be seen that the cases cited to uphold this instruction either do not support the same, or do so in a qualified manner. We are not, however, without direct authority upon the erroneous nature of the instruction, the identical language here under consideration having been before the supreme court of Nebraska in the case of *Marion v. State*, 16 Neb. 349, 20 N. W. Rep. 289. The court in that case condemned the instruction, and said that it did not state the law correctly. The judgment was reversed for other reasons, and it does not appear with certainty whether or not it would have been reversed solely by reason of this instruction. The opinion, however, strongly condemns the language of the instruction, and declares that it should not have been given. In the case of *Leonard v. Washington Territory*, 2 Wash. T. 381, 7 Pac. Rep. 872, the instruction was under review by the supreme court of that territory. The court held that the giving of this instruction was error, stating that the metaphor was inaccurate and misleading; that a guilty person is more commonly hemmed in by a throng of circumstances than inclosed by the facts arranged chainwise; the fault of the instruction being in its tendency to lead the jury to regard all the facts as displayed in a chain, every link of which, if such were the case, would have to be proved beyond a reasonable doubt. We also have au-

thority upon the question under consideration in our own state. In *Clare v. People*, 9 Colo. 122, 10 Pac. Rep. 799, it received the condemnation of this court in language that does not admit of misconstruction. The opinion, as prepared by Mr. Justice Helm, will be found a clear and able exposition of the law. The learned judge, in the course of the opinion, says of this instruction: "The proposition which the court doubtless intended to announce is that it was not necessary for the state to have proven beyond a reasonable doubt every circumstance offered in evidence, and tending to establish the ultimate facts or circumstances on which a conviction depended. This would have been, in our judgment, good law. But, while such was the purpose which the court sought to accomplish, it is exceedingly doubtful if the language employed did not mislead the jury. The metaphor used is inaccurate, and liable to misconstruction. It is incorrect to speak of a body of circumstantial evidence as a chain, and allude to the different circumstances as the links constituting such chain; for a chain cannot be stronger than its weakest link, and, if one link fails, the chain is broken. \* \* \* The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half dozen strands may part, yet the cable still remain so strong that there is scarcely a possibility of its breaking." The judgment was reversed solely for error in the charge in this respect.

These are all the cases that we have been able to find in which this instruction has been under consideration by the higher courts. An examination of the cases discloses that in no instance has the instruction been commended as a model of accuracy, and in several it has been unqualifiedly condemned. Upon principle, we think the instruction should be condemned, its tendency being to confuse the jury. The jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a reasonable doubt to warrant conviction, as to those evidentiary matters which go to prove such facts, and one or more of which may fail, while the ultimate fact might still be sufficiently established. Counsel for the state claim that this instruction was cured by others given by the court, but a careful examination of the entire charge fails to show that the evil which might have been, and probably was, worked by this instruction, was elsewhere cured. When an erroneous instruction is given, it must be shown that it did not work harm to the defendant; otherwise the judgment cannot be allowed to stand. This is not shown in this case. The instruction, having received the unqualified disapproval of this court in the case of *Clare v. People*, supra, should not have been given.

Evidence of statements alleged to have been made by Mrs. Barnaby, tending to show loss of confidence on her part in Dr. Graves, and an intention to change the management of her affairs, was incompetent to show a motive for the commis-

sion of the crime, unless such statements were brought to his knowledge prior to the time at which it is claimed that the bottle was sent; and the jury should have been instructed to disregard all such evidence, unless satisfied from the whole evidence in the case that Dr. Graves had such knowledge at that time. The fifteenth instruction given was intended to cover this point, but we are of the opinion that it does not contain the necessary limitation as above stated.

We deem it unnecessary to discuss other errors assigned. But the argument of counsel for the state, urging this court to allow the judgment of the district court to stand, notwithstanding the manifest errors in this record, demands a word of reply in concluding this opinion. In all criminal prosecutions the law of the land guarantees to every accused person a fair trial, and a right to meet the witnesses against him face to face. This plaintiff in error has not had such a trial. Suspicious and statements of the deceased not even having the sanction of her oath were put in evidence against him by third parties, in violation of fundamental principles. Take away any one of these guarantees, and a precedent would be established which, if followed to its legitimate end, would lead to arbitrary punishment, which is inconsistent with our institutions, and utterly incompatible with the safety of the citizen. It is conceded that not every error occurring upon a trial will warrant a reversal. If it be shown that a substantial compliance with the law has been had, even a capital sentence may be allowed to stand; but in this case the jury were allowed to consider evidence, on the one hand, of a character that has been universally condemned as improper,—evidence violative of fundamental and long-established principles; while on the other, evidence was excluded which the defendant had an undoubted right to have considered. The error in this regard being aggravated by error in the charge to the jury, prejudicial to the rights of the accused, the duty of this court to set aside the conviction is plain. The judgment will be accordingly reversed, and the cause remanded.

(18 Colo. 158)

#### ISRAEL v. ARTHUR.<sup>1</sup>

(Supreme Court of Colorado. Jan. 17, 1893.)

MARRIAGE—WHAT CONSTITUTES—ESTOPPEL.

In the county court, petitioner asked to be recognized as the widow of one A., deceased. The evidence showed that she had repeatedly declared that she was married to a second husband before the death of A., her first husband. Petitioner and her second husband admitted on the trial that they had lived and cohabited with each other, and held themselves out to the public, as husband and wife, in the communities where they had so lived, prior to the death of the first husband. *Held*, that the proof was sufficient to warrant the trial court in finding that plaintiff in error had actually contracted and consummated the marriage between herself and the second husband before the death of the first, and so was debarred from

<sup>1</sup>Rehearing denied January 30, 1893.

claiming as the widow of her first husband. The case of *Arthur v. Israel*, 25 Pac. Rep. 81, 15 Colo. 147, followed as the law of this case. (Syllabus by the Court.)

**Error to Larimer county court.**

Action by Abbie A. Israel against James B. Arthur, administrator of the estate of John Arthur, deceased, to establish her right to the estate of deceased, as widow and sole surviving heir at law. Defendant had decree, and plaintiff brings error. Affirmed.

For former reports, see 1 Pac. Rep. 438, 7 Colo. 5; 25 Pac. Rep. 81, 15 Colo. 147.

Decker & O'Donnell, for plaintiff in error. Robinson & Love, V. D. Markham, and E. A. Bullard, for defendant in error.

**PER CURIAM.** This cause, in different phases, has been several times before this court. In *Israel v. Arthur*, 7 Colo. 5, 1 Pac. Rep. 438, the decrees of the county court whereby John Arthur undertook to obtain a divorce from his wife, Abbie, were held to be void for want of jurisdiction. The matter then considered by the court was limited to the question of the validity of said decrees, as they appeared of record; and upon the face of the record, without more, the decrees were held insufficient to debar Mrs. Israel from asserting her claim as widow and heir to John Arthur, deceased. The next time the controversy came before this court (*Arthur v. Israel*, 15 Colo. 147, 25 Pac. Rep. 81) the question presented arose upon the demurrer by Mrs. Israel to the amended answer of the administrator, James B. Arthur, resisting her petition to be recognized as the widow and heir of John Arthur. The amended answer set up a new state of facts in connection with said decrees of divorce. The new facts showed Mrs. Israel in a new light, and, in the opinion of the court, gave her a different legal status in relation to the controversy. Upon mature consideration, the amended answer was held to be sufficient in law to debar or estop her from claiming any property rights as the widow of the said John Arthur, deceased. The court did not change its views of the law as to the facts appearing of record in 7 Colo. and 1 Pac. Rep., supra, but simply declared the law applicable to the new state of facts introduced into the record by the amended answer, as admitted by the demurrer. *Johnson v. Bailey*, 17 Colo. —, 23 Pac. Rep. 81; *Dodge v. Gaylord*, 53 Ind. 369. Upon the remanding of the cause to the county court, Mrs. Israel filed a replication to the amended answer; and upon the issues thus formed a trial was had, resulting in a finding and judgment adverse to her petition. She now brings the record to this court, and assigns error, to the effect that the finding and judgment of the county court are against the evidence, and contrary to the law.

Upon the record now presented, according to the plainest principles governing appellate procedure, the only question for us to determine is whether the evidence upon the last trial was competent to prove the allegations of the amended answer. The court having, by its opinion in 15 Colo.

and 25 Pac. Rep., supra, held the amended answer sufficient in law, and the cause having been again tried by the county court in accordance with that opinion, this court, as well as the county court, must regard that opinion as "the law of the case," so far as the matters and things alleged in said amended answer were established, by competent evidence, to be the true facts of the case. *Lee v. Stahl*, 13 Colo. 174, 22 Pac. Rep. 436; *Routt v. Cemetery Co.*, 18 Colo. —, 31 Pac. Rep. 858.

From the record the following facts appear to be undisputed, (the dates are material to the understanding of other portions of the evidence:) In 1859 plaintiff in error was married to John Arthur. For some years, and up to 1873, she lived with Arthur at or near Ft. Collins, Colo. James H. Israel was in the employ of Arthur for about three years prior to 1873, when he went to Iowa. In the latter part of 1873 plaintiff in error left her husband, and joined Israel, and thereafter lived and cohabited with him in Iowa, Missouri, and Kansas, and in southern Colorado, several hundred miles from Ft. Collins. On February 9, 1875, a decree of divorce was entered by the probate court of Larimer county in favor of said Arthur, against the present plaintiff in error; and on June 12, 1877, a second decree of divorce, of like import, was also entered in the same court. John Arthur died April 16, 1878. Other evidence was produced, as follows: Mrs. Elizabeth Sweeney, of Ft. Collins, wife of the former sheriff, testified that in 1881 Mrs. Israel told witness that she had been married to Israel three times; that the first was a sham marriage, that the second time was after she heard that Arthur had got a divorce from her, and that the third time was after Arthur died. Witness testified that these statements were made at her house, in Ft. Collins, in 1881, during the occasion of the first trial of this cause, but that witness did not communicate them to counsel for the administrator for some years afterwards. Mrs. Duncan, mother of Mrs. Sweeney, testified that, during the occasion of said first trial, Mrs. Israel told witness that she had been married twice to Mr. Israel. Witness did not remember having communicated this statement of Mrs. Israel to any one but her daughter, Mrs. Sweeney. Mrs. Elizabeth Rogers, of Weld county, an aged lady, testified that she had been acquainted with John Arthur and his wife, Abbie, for many years; that she saw Mrs. Israel at Ft. Collins in 1881, when she came to attend the trial; that Mrs. Israel stayed at the house of witness for several weeks during that time; that Mrs. Israel told witness that she had been married twice to Mr. Israel; that the marriage was after the divorce took place. Witness understood that Mrs. Israel, instead of her first husband, was the applicant for the divorce. Witness further testified that Mrs. Israel said on that occasion that "she thought she had forfeited her right or claim to the estate of John Arthur, and would never have undertaken it [the suit] if other parties had not come, and undertaken to carry it through." The testimony of Mr. and Mrs. James H. Israel was taken by depositions.

They concurred in testifying that they never were married to each other until after the death of John Arthur. The following is from the testimony of Mrs. Israel, as set forth in her own printed abstract of the record: "I was informed by John Arthur in January, 1876, of divorce proceedings to dissolve the marriage relation between him and me. He merely told me that the divorce that he had was not legal, and that I was still his wife, as much as ever I was. I never heard of any other divorce proceeding prior to his death."

"\* \* \* In 1873 I ceased to live in Larimer county. Since then I have lived in Adair county, Iowa, about one and a half years. I lived in Canon City about a year before going to Adair county. The conversation I had with John Arthur was at Canon City. After leaving Larimer county, besides the places I have mentioned, I lived in Ft. Scott, Kan., about three months, and traveled across the plains to Del Norte, Colo., and lived there until I went to Canon City. During all these years I lived with James H. Israel as his wife, and was not known to people with whom I formed acquaintance other than his wife. During that time Mr. Israel and I held ourselves out as husband and wife. This suit was not brought in the name of Abbie A. Israel. There never was any other marriage ceremony performed between Mr. Israel and myself than that on June 18, 1881."

"\* \* \* The reason why this marriage between Mr. Israel and me was deferred until June was because I did not think we could be legally married before, not having heard of the second divorce."

"\* \* \* I know Mrs. Elizabeth Rogers. I met her in Fort Collins in 1881. I did not say to her that I had been married to Israel during the lifetime of Arthur. I have a present interest in this suit. I don't remember that I said to Mrs. Rogers then that I would not have brought the suit if other parties had not come forward, and agreed to carry it through. \* \* \* During all the time I lived with Mr. Israel, as I have stated, I performed and discharged all the usual and ordinary duties of a wife to him, and cohabited with him as such." The following is the testimony of Mr. Israel, as shown by said printed abstract: "I became acquainted with petitioner, in Larimer county, in 1869. I worked for John Arthur about three years before she left his home. I was working for him when she abandoned his home. I never had illicit intercourse with her before she left him. The first illicit intercourse was in December, 1873. We lived together from 1873 to June, 1881, pretty much the same as we have since. I slept and cohabited with her part of the time. After she returned from Iowa we did not cohabit until we reached Ouray county. She was in Iowa one year or more. She came to Ouray county as Abbie A. Arthur. We had lived in Ouray a very short time when she was called Mrs. Israel. I met her in Winterset, Iowa, in 1873, when the relations of husband and wife began. I consulted with Mrs. Israel first, about her leaving her husband and living with me, only by letter. The correspondence was from the latter part of September, 1873. The mat-

ter was not talked or considered between us until after she went to Iowa, in August, 1873. Mrs. Arthur began the correspondence. We remained in Winterset City one night. Was four or five days in Kansas City. I arrived in Ouray county June 4, 1877."

From the testimony of Mr. and Mrs. Israel, it appears that their cohabitation was broken off for about a year and a half prior to June, 1877. It was fair for the trial court to infer that this was because Mrs. Arthur was informed in January, 1876, by her husband John Arthur that the first divorce was not legal. Israel's testimony upon this point was: "After she [petitioner] returned from Iowa, we did not cohabit until we reached Ouray county. She was in Iowa one year or more. She came to Ouray county as Abbie A. Arthur. We had lived in Ouray a very short time when she was called Mrs. Israel. I arrived in Ouray county June 4, 1877." This testimony is most significant when it is remembered that the second decree of divorce was entered on June 12, 1877. In view of all the circumstances of the case, the conduct of the parties, and bearing in mind the repeated declarations of plaintiff in error that she had been married to Mr. Israel more than once, the inference is almost irresistible that they assumed the relation of husband and wife at Ouray in June, 1877, in consequence of learning of the second decree of divorce. It is not strange that the trial court did not consider their denial sufficient to rebut such inference. Though there was no express proof of a formal ceremony of marriage, in face ecclesiae, or by a civil magistrate, yet, from all the evidence and circumstances of the case, the court was warranted in finding that plaintiff in error had actually contracted and consummated a marriage with Israel before the death of her first husband; and so the substance of the issue formed upon the amended complaint was proved. By the brief and argument of counsel for plaintiff in error, we are now asked to reconsider the decision announced in 15 Colo. and 25 Pac. Rep., supra. It is urged that the decision is contrary to sound legal principles, and in violation of rights guaranteed by the constitution of the United States. These views were fully presented when that decision was announced, but, upon due consideration, were not approved. As before stated, we regard the former opinion as controlling in this particular litigation. Hence we shall not enter upon a further discussion of the questions therein considered. The judgment of the county court is affirmed.

(18 Colo. 153)

#### DAVIS v. HOPKINS.

(Supreme Court of Colorado. Jan. 17, 1893.)

#### SPECIFIC PERFORMANCE—EVIDENCE—WARRANTY.

1. A motion to strike out evidence must be specifically confined to the parts objected to, and where testimony, taken as a whole, is material and pertinent to the issue, a general motion to strike it out will not be considered, though some parts of the testimony are objectionable.

2. Plaintiff alleged that under an oral agree-



ment between himself and defendant, whereby defendant agreed to loan him money to purchase land, and a certain ditch and water right appurtenant thereto, the deed to the property was taken in defendant's name, in order to secure the money loaned by him, defendant agreeing to convey the property to plaintiff on repayment of the loan. Defendant claimed that the sale of the land was an absolute sale to him. Held that, on the issue thus arising, testimony of the grantor's agent as to negotiations between plaintiff and himself leading up to and consummating the sale, though defendant was not present at the time, was properly admitted to show to whom the sale was in fact made, and the property included in the sale, and intended to be conveyed by the grantor.

3. An objection to such evidence as to the contract of purchase, on the ground that it contradicts the terms of the contract between plaintiff and defendant as evidenced by the deed, is untenable, in that the contract vested entirely in parol, and the deed had nothing to do with it further than to carry it out, and the effect of such evidence is to establish an equity superior to and outside of the deed, and in no sense varies or contradicts its terms.

4. Evidence that defendant did advance money to plaintiff, and that, on repayment of the same, he gave plaintiff a quitclaim deed of the land, reserving to himself the ditch and water privilege, and further evidence of the grantor and her agent that the sale was made to plaintiff, is sufficient to warrant a finding that the money advanced by defendant was a loan, and that the deed was taken by him merely as security for its repayment.

5. Where it clearly appears from the testimony of the grantor that she intended to convey the ditch and water right as well as the land, and that she did so convey them, without additional consideration, a contention by defendant that the ditch and water right were not included in the contract to purchase between the grantor and plaintiff cannot be sustained, and plaintiff is entitled to a reconveyance of the entire property.

6. A decree requiring defendant to insert in such reconveyance covenants of warranty, as against persons claiming through or under him, is proper.

Appeal from district court, Weld county.

Action by Lewis A. Hopkins against Joel E. Davis to compel defendant to convey him certain land. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by GODDARD, J.:

The complaint in this action states, in substance, that on or about March 1, 1885, Lewis A. Hopkins, plaintiff below, purchased from Annie E. Roberts the E.  $\frac{1}{4}$  of the W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 34, township 6 N., range 65 W., together with a ditch known as "Sand Creek Lateral," and all her right, title, and interest to a share of the water derived therefrom, for the consideration of \$375; that he borrowed the purchase money from Joel E. Davis, defendant below, with the understanding that it should be repaid in about three years; that to secure the repayment of the money so borrowed, together with the interest thereon, at the rate of 10 per cent. per annum, and upon a verbal agreement with Davis that, on the payment of the same, he would deed the property so purchased to Hopkins, a deed conveying the land, together with the lateral and water right, was executed by Mrs. Roberts to Davis on March 4, 1885; that, in pursu-

Hopkins entered into possession of the property so conveyed, and has remained in the exclusive possession ever since, and has paid the taxes thereon and the interest on the money annually; that on April 4, 1888, he paid Davis the money borrowed, and thereupon he executed a quitclaim deed to Hopkins for the land only, and omitted therefrom the ditch and water right derived therefrom, and has and still does refuse to convey the same to appellee; prays, among other things, that Davis be compelled to execute a deed conveying the entire property as conveyed to him by Mrs. Roberts. Davis denies that he loaned the money to Hopkins; denies that the deed of Mrs. Roberts was taken as security; but alleges that it is, as it purports to be, an absolute deed, and executed in pursuance of a purchase of the property by himself. Decree as prayed for. To reverse this decree, Davis brings this appeal.

McCreery & Bates and A. C. Patton, for appellant. H. M. Look and J. E. Garrigue, for appellee.

GODDARD, J., (after stating the facts.) From the foregoing statement it will be seen that, to entitle Hopkins to the relief sought, it must appear by proper and sufficient evidence that the verbal agreement alleged was entered into by the parties, and that the deed executed by Mrs. Roberts to Davis was in fact a mortgage. Counsel for appellant contend that the court below erred—First, in admitting certain evidence; and, second, that, taken as a whole, the evidence is insufficient to sustain the findings of the court and the decree rendered. The negotiations resulting in the sale of the property in controversy were carried on, in the absence of appellant, by H. C. Watson, acting in behalf of Mrs. Roberts, on the one part, and by the appellee, Hopkins, on the other; the appellant and Mrs. Roberts not appearing personally in the transaction until the execution of the conveyance by her to him. It is insisted that the evidence of Watson detailing these negotiations is inadmissible, because irrelevant to the issue, and not had in the presence of appellant. While the statement by the witness of what Hopkins said as to Davis furnishing the money with which to pay for the property is obnoxious as hearsay, the motion to strike out was too broad, and challenged the entire evidence of this witness, and failed to call the court's attention to this objectionable statement. If the evidence of this witness, aside from this, was pertinent and material, "a general motion to strike out cannot be granted, nor will the court, upon such general motion, search the whole evidence, with the view to ascertain if any testimony was improperly admitted. The motion should be specifically confined to the objectionable evidence." *Webber v. Emmerson*, 3 Colo. 248. The inquiry, therefore, is limited to the relevancy of this witness' evidence as a whole. Wharton, in his *Law of Evidence*, defines relevancy as "that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue." Section



20. "Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less improbable." Section 21.

The controlling question being the character of the conveyance by which the legal title was vested in appellant, the fact as to whom the property was actually sold is certainly a very pertinent and material inquiry, and one which tends strongly to corroborate or contradict the claim of the respective parties; and hence evidence of the negotiations between Watson and the appellee which led up to and resulted in the consummation of the sale was admissible to show, not only to whom the sale was in fact made, but, as well, the property included in the sale, and intended by Mrs. Roberts to be conveyed in pursuance thereof. While conceding the rule that "the fact of a deed being a mortgage in effect may be proved by oral testimony," counsel for appellant object to this evidence, and also the evidence of Mrs. Roberts and Hopkins, as to the contract of purchase, upon the further ground that it varies and contradicts the terms of the contract between the parties, as evidenced by the deed. This objection is predicated upon the assumption that the deed contains the contract between the parties; but such is not the fact. The contract of purchase rested entirely in parol, and the deed has nothing whatever to do with it further than to carry it out. "The deed is evidence of the final consummation of some contract previously made, but it is not evidence of what the contract was, and has nothing to do with it further than to carry it out." *Trayer v. Reeder*, 45 Iowa, 278. The effect of this evidence is to establish an equity superior to and outside of the deed, and in no sense varies or contradicts its terms.

To invoke equitable relief in this character of action, it is well settled that the evidence must be "clear, certain, unequivocal, and trustworthy," and such as to establish the ground therefor beyond any substantial doubt. "Such kind of evidence, whether documentary, circumstantial, or from the mouths of credible witnesses, may well be accepted as convincing beyond a reasonable or substantial doubt, unless there be material and reliable evidence to the contrary." *Perot v. Cooper*, 17 Colo. — 28 Pac. Rep. 391. Counsel for appellant insist that the testimony on behalf of appellee is insufficient when tested by this rule, and that the evidence, taken as a whole, does not constitute the necessary kind and quantum of proof to entitle appellee to the relief demanded. Assuming that the trial judge, with the opportunity of determining the credibility of witness regarded the parties in interest as of equal credibility, still the circumstances surrounding and accompanying the transaction, the acts and conduct of the respective parties in relation to the property, the statement of account furnished by appellant upon which a final settlement was had, the testimony of Mrs. Roberts (a disinterested witness) as to the declarations of appellant at the time of the execution of the deed, are so inconsistent with appellant's claim, and so strongly cor-

roborative of appellee's, that there remains no substantial doubt that the money advanced by appellant was a loan, and the deed taken by him a security for its repayment.

The acceptance of the deed from appellant by appellee is of no moment, except in so far as it may be an evidence of his acquiescence in appellant's construction of the agreement to reconvey, and for this purpose it is of slight significance, in the light of appellee's conduct immediately upon learning of appellant's claim to the property in question; and this being the only effect of such acceptance, if the admission of appellee's statement as to his understanding of the clause reserving all water rights was error, it was necessarily without prejudice.

We can see no merit in the claim interposed by appellant, if his version of the agreement be sustained. He admits the agreement to convey the land to appellee upon the repayment of the amount advanced, with interest, but reserves the lateral and water right, solely because they were not included in the contract of purchase between Mrs. Roberts and appellee, and were specifically negotiated for by him, and included in the deed, at his request. The testimony of Mrs. Roberts, Watson, and Hopkins is that the lateral and water right were included in, and constituted the principal inducement for, the purchase. It is also clear that it was the intention of Mrs. Roberts to convey them with the land, as a part of the subject-matter of the sale, and that she did so convey them, without any additional consideration. Therefore, having obtained title to the land, lateral and water right, through and in pursuance of the same transaction, and for the same consideration, and for the same purpose, the obligation to reconvey the entire property is as binding as the obligation admitted by appellant to convey a part. We cannot agree with counsel for appellant that the court erred in the form of the deed it ordered appellant to execute. It only requires him to insert covenants of warranty against persons claiming through or under him; and this, we think, he should do. The decree of the court below is affirmed.

(2 Colo. App. 571)

**HUMMEL et al. v. FIRST NAT. BANK OF CENTRAL CITY.<sup>1</sup>**

(Court of Appeals of Colorado. Nov. 14, 1892.)

**BANKS AND BANKING—DEPOSITS—DEATH OF BANKER—ACTION AGAINST ADMINISTRATOR—RES JUDICATA.**

1. One H. having agreed to loan money to R., it was arranged between R., H., and E., a banker, that R. should draw on E. at sight for the amount of the loan, and that on receipt of the draft H. should provide money to meet it. H. then surrendered to E. certificates of deposit in E.'s bank to the amount of the draft, and his account was credited therewith. Plaintiff sent the draft to E., with directions to remit the proceeds to another bank for plaintiff's credit, and H. gave E. a check for the amount. E. charged the check to H., and

<sup>1</sup> Rehearing denied January 13, 1893.

marked the draft as paid, but, before remitting as directed by plaintiff, he died. *Held*, that though the surrender of the certificates of deposit did not add to the general funds of the bank, H. thereby parted with credit, and the fund thus arising did not become a part of E.'s estate, but became a trust fund in plaintiff's favor, and was recoverable by him as such.

2. In an action against E.'s administrator to recover the fund, defendant set up as a defense that when E. died there was no money in the bank, except a deposit made by one T., and that a trust therein existed in T.'s favor. *Held*, that it having been adjudged that the money paid in by H. was a trust fund, which could not be diverted by E. to any other purpose, and therefore did not become a part of E.'s estate, such fund was held by defendant merely as a bailee, and it was no defense for him to say that, when the money came into E.'s hands, it became liable to the assertion of a superior equity by T., but that such defense could only be made by T.

3. Successive administrators are not privies, in legal contemplation, and a judgment in favor of an administrator is not a bar to an action against his successor by the same plaintiff, for the same cause.

4. A national bank doing business within the limits of the state, and organized there, is not a foreign corporation, within the principle which requires proof of its corporate existence under a general denial, and the issue which that plea raises.

Appeal from district court, Arapahoe county.

Action by the First National Bank of Central City, Colo., against John C. Hummel, as administrator of F. E. Everett, deceased, and John S. Risdon, to recover a fund deposited with Everett for plaintiff's benefit. Judgment for plaintiff. Defendant Risdon appeals. Affirmed.

A. H. De France, for appellant. Hugh Butler, for appellee.

BISSELL, J. The very learned and elaborate opinion delivered by Mr. Commissioner Pattison, (14 Colo. 259, 23 Pac. Rep. 986,) when this controversy was before the supreme court, determines this case, unless the proofs which were taken on the trial in some way limit the application of the doctrine which the court laid down in that opinion. After a very exhaustive review of all of the authorities, the court held that the funds which were deposited by Heatley in Everett's bank for the payment of the draft which had been drawn by Risdon became trust funds, applicable only to the payment of the bill. The broad principle was asserted, that under the circumstances of the payment the funds could not be diverted from the purposes to which they were to be applied, and that they did not lose their character by being commingled with the general deposits of the bank. The present opinion must be read in conjunction with the one delivered at that time, to properly apprehend the limitations under which it is rendered. The facts will not be retated, except in so far as they are varied by the evidence. Generally, it may be said that the proof showed that, under the arrangement which he made with Heatley, Risdon, on the 15th of July, drew a draft on him and indorsed it to the present plaintiff, the First National

Bank of Central City, which paid him the money, less the regular discount. This bank transmitted the bill to Everett, a banker at Golden, with directions to collect it, and remit the proceeds to the German National Bank of Denver. On receipt of the bill, Everett's bank presented it to Heatley, on whom it was drawn, who paid it in this wise: He was the holder of two certificates of deposit, of \$1,000 each, and had to his general credit in the bank a little more than \$200. He surrendered the certificates of deposit, which were placed to his credit. He then drew a check on the bank for the amount of the draft, which was marked "Paid," and the amount was charged to his individual account on the ledger. The banker, under his instructions, turned over to Heatley a note and deed of trust on certain property which had been executed by Risdon to secure the payment of the loan. In the forenoon of the day on which this transaction occurred, and shortly thereafter, Everett died, and left his institution in a hopelessly insolvent condition. It was proven that one Charles T. Clark was the county treasurer of Jefferson county, and had deposited the county's money in Everett's bank. On the 17th of July, when the draft was paid, there was standing to Clark's credit, under the general heading in the bank's books of "Clark, Charles T., County Treasurer," \$6,898.84. It also appeared that McGee, the city treasurer of Golden, had a balance on the same date, as treasurer, of \$4,909.14. The daily balance book of Everett's bank showed the amount of cash on hand at the close of business, July 16th, to have been \$5,583.19, and on July 17th to have been \$6,763.29. Aside from these proofs, the case shows that the administrator attempted to defend by setting up that Everett died on the 17th of July, 1884, leaving a last will and testament, which was admitted to probate on the 4th of August, in the county court of Jefferson county. By the will, James M. Manahan, together with Gregory Board and Clara B. Everett, were named as representatives. On the 21st of July, according to the allegations, Manahan took possession of the bank, of which he had been cashier for five or six years prior to Everett's death. He remained in possession until the 22d day of August following, when Hummel, the present defendant, was appointed administrator with the will annexed, and proceeded to wind up the estate. The allegations of the defense are probably broad enough to necessitate the inference that Manahan qualified as executor, and as such legal representative went into possession of the estate. It will not be so assumed, however, for the purposes of this decision, since it was conceded on the argument that Manahan never qualified as executor, nor gave the bond required of him, although he, in a manner, went into possession, probably by virtue of his nomination. It will be assumed that he was not a qualified executor, in legal contemplation. This latter defense was excluded on demurrer.

The facts put in evidence, and those stated in the plea, are without complexity.

The substantial difficulties arise from the attempt to apply to them some very difficult legal propositions. It has been very elaborately argued that the bank was not entitled to recover against Hummel, because there were no moneys in the institution at the time that Heatley attempted to pay the draft drawn on him by Risdon, other than the funds which belonged to the treasurer of Jefferson county and the treasurer of Golden City. The doctrine which was laid down in *National Bank v. Insurance Co.*, 104 U. S. 54, and likewise stated in the opinion of 14 Colo., 23 Pac. Rep., before referred to, is, by argument, used to support the defendant's contention. These cases clearly hold that when a depositor puts the money of another into a bank, and his title is such as to impress it with a trust character, of which the bank has knowledge, the fiduciary may follow it, and recover it from the bank, although it be money, and wanting in respect of the earmarks formerly essential to this right. On principle, and according to those very eminent authorities, the rule cannot be so far extended as to enable the cestui que trust to pursue the funds beyond the custody of the bank, or into the hands of innocent parties. The Insurance Case simply held that the company had a right to recover from the bank, as against its officers, stockholders, and directors. The bank had full knowledge of the character of the deposit. It was made by the agent, in the interest of the insurance company, and had only disappeared because of the bank's attempt to divert it to the payment of a private debt which the agent owed that corporation. On the theory that trust funds might be pursued, even though they lack the distinguishing earmarks, the court adjudged the bank responsible. In the case in 14 Colo., 23 Pac. Rep., it was decided that the money which was paid in by Heatley for the payment of the draft drawn on him through Everett's bank was likewise a trust fund, which could not be diverted for the benefit of the general creditors of the institution. The sole question is whether the proof of the manner of payment prevents the application of the doctrine therein established. No such result seems necessary. It is quite possible that Heatley added nothing to the general funds of the bank, in the shape of money, when he surrendered his certificates. He parted with the credit, and he received as security that to which otherwise he would not have been entitled, unless the payment was made.

I do not understand any of the cases to go so far as to hold that, where the relations of banker and depositor are proven to exist, none of the consequences ordinarily resulting from that relation can be held to follow. Whenever a public official, who has the absolute control of money, deposits it in a bank, without condition, he so far parts with the title that he cannot pursue it in the hands of those to whom it is paid in the regular course of the bank's business, at least without proof that the payee had knowledge of the trust, and that the money he received was a part of that fund. The same legal result ought to follow in a case like the present. Heat-

ley drew a check to pay the draft, which was charged to his individual account. The draft was marked "Paid," and surrendered; and at the same time, and as a part of the transaction, the banker, in pursuance of his instructions, delivered to him a note and trust deed evidencing the debt, and securing its payment. The note and trust deed are outstanding, or they have been paid. In either event, to permit this defense to prevail must subject one or the other of these innocent parties to grave loss. It is not easy to see how Risdon can be compelled to pay again what he may have already liquidated, or how Heatley can be adjudged to look to his debtor for further security, when the original has been destroyed by this judgment, since neither of them have had their day in court, and been heard in defense of their rights and equities. There is likewise lacking an element of proof which would in any case be essential to the application of the doctrine. While the evidence showed that there were less moneys in the bank than stood to the credit of Clark as treasurer, and McGee as treasurer, yet there was no evidence as to the date of those deposits, nor was it made to appear to a certainty that the moneys deposited by the respective treasurers had not long been paid out, in the regular course of business, by the bank, and the moneys on hand were the aggregations of deposits by other persons, between whom and the banker the relation of debtor and creditor existed. The importance and great bearing of these suggestions is manifest when the circumstances of the payment by Heatley are recalled. At that time he was a general depositor of the bank, with money to his credit on the books. He held two of the bank's certificates of deposit for more than the amount called for by the draft, and these he indorsed and surrendered in payment of the bill. It does not transpire that the treasurers' deposits either antedated Heatley's, or that they had not been loaned out by the banker, and were yet in the hands of the borrowers. Were this the condition of affairs, manifestly, as to such loans, the officials were remediless, and as to all such funds they sustained no other relation to the bank than that of simple contract creditors. According to the evidence, whatever deposit was made by the two treasurers was a general one, subject to check. It passed into the general funds of the bank, and was paid out to the customers in the usual course of business. Such circumstances must be held, as to third persons obtaining the money without knowledge of its character, to create no other or different rights than those which spring from the relations sustained by the bank to its customers. The case is then left subject to the ordinary presumptions which may be indulged in when the rights of persons who are without preferential claims are weighed and measured. Heatley had on deposit upwards of \$2,000 when he attempted to pay the draft with his certificates. It is as fair to presume that his \$2,300 was a part of the \$6,763.29 in the bank when it ceased to do business, as to contend that it was all money which had

been deposited by the county and city treasurers. If it was, then, under the ruling in 14 Colo., 23 Pac. Rep., it was a trust fund, which could not be subject to the statutory scheme of distribution regulating the settlement of estates, nor to the claims of other creditors. The testimony is not sufficient to permit the application of any other principle to the case than what was laid down in that opinion. Whatever might be our own ideas, we are controlled by the principles therein enunciated. We are not hampered in our announcement by a conviction that they are wrong in theory, or that they are inaccurately applied. We think the law was correctly stated, and is quite as controlling on the case as made by the proofs as it was on that made by the pleadings. Another and perhaps as strong a reason for refusing to adjust the principle to the present controversy is found in the fact that the defense was set up by Hummel, who was simply a representative of the decedent, and not by the treasurer of the county in whose favor the trust ran. It is difficult to see what right Hummel has, as a representative of the deceased banker, to insist that what Heatley did amounted to no payment because his intestate had theretofore converted moneys properly represented in those accounts. The right and duty of an administrator to protect the estate which is committed to his care are conceded. But it was solemnly adjudged that what Heatley paid in was a trust fund, which might not, by the banker, be diverted to any other uses than those designated at the time of the payment. It then follows that they never became the property of the banker. Lacking this, they likewise formed no part of the estate, as such, which passed into the custody of the representative. His possession was not as the representative of the decedent holding and protecting an estate, but it was as a kind of bailee for the true owner. So far as he is concerned, he is without title, and on judgment must turn over. What his responsibility might be in case he should fail to pay, having commingled the money, need not be here passed on. It is enough to show that his contention constitutes no defense. If he occupies this relation to the fund and to the Central City Bank, how can it be any defense to say that, when the money came into the hands of the banker, it became liable to the assertion of a superior equity by a third person? Hummel is in no sense holding in the right of that other. He is without any title to the money, as regards the Central City Bank. Neither does he have or represent the title of the county treasurer. It has never been transferred to him. The general creditors of the estate, and the heirs, have no claim to the money. How, then, does it concern Hummel that the county treasurer may possibly have some claim to the money? If it is because he may be twice holden for the money, his remedy was to bring the treasurer into the litigation, and have the question settled. Without this, he is simply a volunteer, having no such title or claim, derivative or otherwise, as will admit a defense of this sort. Even though

the right existed in favor of the county, or its treasurer, to pursue these funds, this defense cannot be open to the representative without some proof that a claim has been made on him for the money which he has received, and that the funds which he holds are certainly those on which he seeks to impress the trust character; and then only by bringing in the one in whose favor the title is asserted. The relations between Everett, the banker, and the Central City Bank, were not such as to charge that bank with Everett's knowledge concerning the character of the deposits in his hands. Everett's position, as the correspondent of the Central City Bank for the purposes of collection, brought him into no such relations to that corporation as would make him either the general agent, or an agent other than a special one to do a particular thing. It was formerly held that a principal was only chargeable with the knowledge which the agent acquired while engaged in the transaction of the principal's business. This doctrine has been much modified of late years, and it is now probably true that the principal is chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business, or otherwise, providing the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of the principal. *Story, Ag. § 140; Armstrong v. Abbott*, 11 Colo. 220, 17 Pac. Rep. 517; *The Distilled Spirits*, 11 Wall. 356; *Bank v. Campbell*, (Colo. App.; April term, 1892,) 30 Pac. Rep. 357.

It would be a novel application of the principle that notice to an agent is notice to the principal to hold that a banker who receives a draft for collection, and to remit, is so far the agent of his correspondent as to charge that correspondent with the knowledge which the banker has of the character of his deposits. To carry this doctrine to its legitimate conclusion would enable the county treasurer of the county of Jefferson to pursue all moneys which may have been paid out by Everett in the liquidation of the various collections which he made for other banks and bankers, into whosoever of their hands the money may have gone. The impracticability of extending the doctrine to any such limit, and the immense disturbance which it would occasion to the monetary affairs of the country, must prevent the application of the doctrine. In one sense, Everett was the agent of the Central City Bank, for the purposes of collection. The money paid to him would undoubtedly be a discharge of the obligation of the debtor. But he was not an agent in such a sense as to bind his correspondent with the knowledge which he may have had as to the character of the moneys on deposit in his bank, and out of which the foreign banker may have been paid. Whether any such exception has ever been ingrafted on the law of agency by an express adjudication is not apparent to the court, but it is evident that the rule must exist, as between banks and bankers, in a case like the present. A case was cited in support of counsel's contention in this respect.

**Third Nat. Bank v. Stillwater Gas Co.**, 36 Minn. 75, 30 N. W. Rep. 440. If this case holds any different doctrine from the present, this court would decline to follow it. It is impossible to determine, from a careful examination of that decision, the ground upon which it rested, or the facts involved in the decision. It is true that the bank in that case had been defrauded of its money by the misrepresentation and deceit of Kerr, who placed the money with his brother for ultimate disposal. It is likewise true that the gas company, in some manner not disclosed by the case, induced the brother to part with the money, and that the bank was permitted to recover from the gas company that particular fund. On what principle the gas company was charged with knowledge of the character of the fund, and therefore held, is not clear. It is very evident that that court did not intend to go so far as to hold that funds charged with a trust, because of the circumstances under which they were received, could be followed into everybody's hands, unless there were some special circumstances binding the conscience of the defendant, or out of which a liability in regard to the fund might have arisen in favor of the original cestui que trust. It is conceded—and would be, regardless of that authority—that the fund may be followed into the hands of a third person whenever requisite knowledge can be brought home to the party, or any other circumstances are apparent which will charge him with the responsibility. It must be conceded, however, that something besides the fact that the trust character was impressed upon the funds must be proven, to sustain a recovery in such a case.

Another defense on which considerable reliance is placed springs from the fact that the First National Bank of Central City brought suit against Manahan to recover \$1,200, which they claimed Everett held for them when he died. The complaint in that case was in all essential particulars like the one in the present suit, with the exception, of course, of the omission of the allegation which charged the appointment as executor to have been made by the court, and a qualification, as such, under the statute. This, it is assumed, must be true, since any other conclusion would not be supported by the fact. To that complaint a demurrer was interposed, and a judgment of dismissal entered. Much learning has been expended in the brief of counsel for the appellant to demonstrate the sufficiency of a plea setting up this fact as one containing the defense of *res adjudicata*. It will be conceded that a judgment of dismissal of a bill in equity, unless there be a reservation that the dismissal is to be without prejudice, will be assumed to have been made upon the merits, and, as between parties and privies, will be a bar to any further litigation on the same subject-matter. However true this is, the judgment in that case is no bar to the present suit, since there is lacking one element essential to the bar, viz. privity. "Privity" is defined by Greenleaf as a term which "denotes mutual or successive relationship to

the same rights of property." 1 Greenl. Ev. § 189. That learned authority well illustrates the different sorts of privies which may exist, and classes them, generally, like all other law writers and jurists, as privies in estate, in blood, and in law. He gives the usual illustrations of donor and donee, lessor and lessee, executor and testator, administrator and intestate. In general, these classes embrace all the privies which are known to jurisprudence. It will be observed that the privity only exists because of the relationship between the parties, or because of the derivative character of their title. It would require a great stretch of the doctrine, and the definition of the authorities on this subject, to hold that successive executors, and successive administrators and representatives of other sorts, were privies, in legal contemplation. Yet it was held by a very learned court, in *Stacy v. Thrasher*, 6 How. 44, that the administrator *de bonis non* did so sustain that legal relation to his predecessor in the same trust as to be bound, probably, by any judgments rendered against that predecessor. It was put in that case, however, on the principle and reason of an "official succession or privity." The rule cannot be extended beyond the doctrine of that case. Nothing but the very high respect accorded to the decisions of that very distinguished tribunal would ever lead me to adopt that conclusion. The administrator *de bonis non* in no manner derives his title from his predecessor in trust, nor is there between them any sort of relationship, save what may be said to spring from the fact that they both represent the same estate, and have been appointed by the same judicial authority. It is possible to justify the holding on the ground that since the predecessor was a representative of the intestate, whose estate ought to be bound by the adjudication, the successor in representation, coming in, as he does, in place of the decedent, shall be bound, because the estate which he represents ought to be concluded by the adjudication. To render the judgment conclusive, however, the present defendant, against whom it was rendered, must have held an official relation to the estate which he was found in possession of. The facts in the present suit prevent the adoption of this conclusion. Manahan, while he was named as an executor in the will of Everett, the decedent, never qualified as such; nor did he become, in any sense, the official representative of the deceased. He may have incurred some legal responsibility for the wrongful taking possession of the assets, but he did not so become the representative as to make a judgment obtained against him, or in his favor, conclusive for or against the estate. Between Manahan and Hummel, there was no such official succession as to create the privity absolutely essential to the plea of *res adjudicata*.

The present suit was brought by the First National Bank of Central City against the administrator. A denial was interposed to the various allegations of the complaint, and it is insisted that this put in issue the corporate character

of the plaintiff, because it is a national bank doing business, under the federal statutes, within the limits of this state. The point was not raised in argument, nor does much reliance seem to be placed on it in the brief. These banks doing business within the limits of the state, and organized there, are not believed to be foreign corporations, within the principle which requires proof of their corporate existence under a general denial, and the issue which that plea raises in this state.

No other questions were argued or relied upon in the briefs or at bar, and the preceding discussion has disposed of all questions remaining unsettled by the decision in 14 Colo., 23 Pac. Rep., supra. The record presents no errors which necessitate a reversal of the judgment entered in favor of the bank, and it will accordingly be affirmed.

(3 Colo. App. 117)

AYRES et al. v. PEOPLE.

(Court of Appeals of Colorado. Jan. 23, 1893.)

BAIL—LIABILITIES AFTER SURRENDER OF PRISONER.

1. Gen. St. § 969, provides that sureties on the recognizance of a person charged with a criminal offense may, at any time before judgment is rendered against them on such recognizance, seize and surrender such person to the sheriff of the county in which such recognizance was taken; that the sheriff shall take such person into custody, and acknowledge, in writing, his surrender; and that the sureties shall thereupon be discharged from the recognizance, on payment of all costs occasioned thereby. *Held*, that the word "costs" includes, not only the costs taxable by the clerk, and the fees the sheriff is entitled to receive for the service and return of the papers, but also all expenses the law officers might legitimately pay out, or have a right to charge, in connection with the capture and return of the criminal for trial.

2. In an action against sureties to recover the amount of a forfeited recognizance, defendants claimed that the sheriff had captured the person on whose recognizance they were bound, under a contract with them, and that they had a written receipt from the sheriff, acknowledging their surrender of such person. *Held*, that evidence illustrative of the circumstances which led to the going of the sheriff after the prisoner is admissible to show that the capture was not under a contract with the defendants, but under an arrangement with the governing body of the county, ratified and made legal by proper official action.

3. Where the only issue triable under the pleadings was whether the expense of capturing and returning the prisoner for trial was properly taxable as costs against the sureties, an assignment of error by such sureties, that the court erred in entering judgment against them for such expense, instead of for the whole amount of the bond, could not be sustained.

Appeal from district court, Logan county.

Action by the people of the state of Colorado against H. D. Ayres and R. W. Wood to recover the amount due on a forfeited recognizance. From a judgment for the people, defendants appeal. Affirmed.

Charles L. Allen, for appellants. S. A. Burke, for the People.

BISSELL, J. George M. Parkins was indicted by the grand jury for the crime of killing stock. Having been arrested un-

der the indictments, he entered into a recognizance in the sum of \$600, according to the statute, conditioned as provided by law, with the appellants, Ayres and Wood, as his sureties. He afterwards left the country, and failed to appear, as required by the order of court, and the recognizance was duly forfeited. The present suit was brought to recover its penalty,—\$600. In the earlier stages of the suit, various questions were raised, but these were all eliminated by the subsequent answer which the sureties filed, and it left but one proposition in the case. The answer substantially alleged that, notwithstanding Parkins' failure to appear according to the terms of the bond, the sureties, prior to any recovery of judgment against them, caused the principal to be seized and surrendered to the sheriff of Logan county, and received from him a written receipt acknowledging the surrender. They announced themselves ready and willing to pay the costs, and averred that they employed a messenger to go for Parkins, on a promise to pay the actual expenses, and that the messenger received from Logan county \$330. This was all the substantial portion of the answer, although there was an immaterial averment that the county acted as a volunteer in making the payment, and that the controversy was as to whether these expenses were legitimately taxable as costs against the sureties, which they were obligated to pay, under section 969 of the General Statutes,<sup>1</sup> in order to escape a liability for the full amount of the bond. This is really the only legal proposition presented to the court which requires either discussion or analysis. There was considerable controversy on the trial as to the circumstances connected with the going of the sheriff of Logan county to Ohio, to bring Parkins back. The appellants contended that he went under their employment, while the people asserted that he went as the officer of the county, under an arrangement with the board of county commissioners, who were obligated to pay him a definite compensation for his labor, which they subsequently discharged by giving him a warrant therefor, which was paid. The trial court found this fact with the people, and the finding is so well justified by the evidence that this court, whatever its opinion might be, would be disinclined to disturb the judgment in that particular. It is undoubtedly true that the sheriff went at the

<sup>1</sup>Gen. St. § 969, provides that, in all cases of bail for the appearance of any person or persons charged with any criminal offense, the security or securities of such person or persons may, at any time before judgment is rendered upon scire facias to show cause why execution should not issue against such security or securities, seize and surrender such person or persons, charged as aforesaid, to the sheriff of the county where such recognizance shall be taken, and it shall be the duty of such sheriff, on such surrender, and the delivery to him of a certified copy of the recognizance by which such security or securities are bound, to take such person or persons so charged as aforesaid into custody, and by writing acknowledge such surrender, and thereupon the security or securities shall be discharged from such recognizance, upon payment of all costs occasioned thereby.

instigation of the sureties. Possibly this was essential to their defense that they were entitled to be released from the bond upon the production of the receipt of the sheriff for the body of their principal, providing they paid whatever expenses were incident to the capture of the fugitive. It is not clear, however, that the sheriff went by virtue of their employment, or accepted their responsibility. It remains manifest that the sheriff went to Ohio after Parkins as an officer of the law, of Logan county, under an employment and an agreement with the properly constituted government of that organization, and that what he was to receive as compensation, and what he disbursed, were legitimate costs connected with the return of the fugitive. It must be true that these expenses and disbursements, and this compensation, were the costs provided for by section 969 of the Statutes, which these sureties must pay, if they would escape an absolute liability for the entire amount of their obligation. What the result would have been had they employed a private messenger, and succeeded in bringing the fugitive within the custody of the sheriff without any expense to the governmental officers, leaving unpaid only the ordinary taxable costs of the clerk and sheriff, it is wholly unnecessary to determine. Parkins was brought back through the instrumentality of the officers of the county, who were requested to act by the sureties in respect of this matter. It was entirely legitimate to use the process of the law for the purpose, and to secure a requisition from the governor, which would be a sufficient legal warrant to authorize the officer to act in a foreign country. So long as the county was willing to proceed to secure the return of the fugitive by the means at its disposal, and this proceeding was had at the instance and request of the sureties, they must be held to be liable for all legitimate disbursements and costs attending the proceeding, if they desire to invoke the statute in order to escape liability for the sum total represented by the obligation into which they voluntarily entered. Having pleaded as a defense simply that they were not liable upon the bond, because they had secured the return of the escaped prisoner into the custody of the sheriff of Logan county, and could not be held for the penalty, provided they paid the costs, as to which they offered to reimburse the county, they cannot now be heard to insist that the one thing chargeable against them is the costs which the clerk might tax, and the fees which the sheriff might be entitled to receive, on the service and return of the papers. The phraseology of the statute is broad enough to warrant the interpretation that it intended to impose on the sureties a liability for whatever might be expended in securing the return of the escaped criminal, if their liability was to be measured, not by the bond, but by the costs of the return. It could not have been in the contemplation of the legislature that the fugitive should be returned through the acts of the sure-

ties, other than what might be essential to set the law in motion, since, as individuals, they would be powerless legitimately to bring the fugitive within the sovereignty from which he might have escaped. Under these circumstances, the term "costs," as used in that section, must be adjudged to include whatever the law officers might legitimately pay out, or have a right to charge, in connection with the return of the criminal for trial. It does not lie with the appellants to complain of this interpretation, since thereby they escape the greater liability of a voluntary obligation, which could otherwise be enforced as to its entire penalty.

This court is entirely disinclined to disturb the judgment on that assignment of error which insists that the court's finding with reference to the contract is unsupported by the testimony. In the first place, this court would not feel warranted in reaching a different conclusion, unless the result was manifestly unsupported by the evidence. Not only is this not true, but it is fairly certain that the court's conclusion concerning the original arrangement under which the sheriff went to Ohio after the prisoner is fully justified by the testimony.

The assignments of error which are based on the alleged errors of the court in receiving the testimony offered on the hearing do not seem to be well supported. That which is complained of is clearly illustrative of the circumstances which led to the going of the sheriff for the prisoner, and was evidently admissible as tending to show, not only the circumstances under which the officer went, but to demonstrate that his going was not the result of a contract between him and the sureties, but an execution of the law, under an arrangement with the governing body of the county, afterwards ratified and made legal by legitimate and proper official action. It is complained that the court erred in entering judgment for \$330, instead of for \$600 which was the amount of the bond. It is not easy to see how this gives the sureties the right to complain. Possibly, if the judgment had been entered on an erroneous legal basis, they might be justified in contending that it was improperly entered, although the amount was less than that for which they were liable. However this may be, it cannot, in this instance, be successfully used as an assignment of error, since, under the pleadings, the only issue to be tried was as to what costs were properly taxable against them, and as to what was included in the term "costs," for the purposes of a proper judgment. The court's conclusions in respect of these matters were in harmony with the law, and the judgment, as entered, correctly held the sureties liable for the sum found to be due. The court committed no error during the progress of the trial, and entered a judgment which accords with both the law and the facts. There being no error in the record on which the judgment should be disturbed, it must be affirmed.



(3 Colo. App. 22)

HALLOWELL et al. v. LEAFGREEN.

(Court of Appeals of Colorado. Nov. 28, 1892.)

## GARNISHMENT—LIABILITY OF GARNISHEE.

In order to charge a garnishee, there must be such a liability on his part to defendant as would enable defendant to maintain his action directly against the garnishee in his own name, and for his own use, and to recover a judgment.

Appeal from Arapahoe county court.

Action by N. P. Leafgreen against Charles Hallowell and others, garnishees. From a judgment in favor of plaintiff, defendants appeal. Reversed.

The other facts fully appear in the following statement by REED, J.:

Appellee was a contractor for brickwork in the construction of buildings. D. R. McCurdy and one Geiger, doing business under the name of McCurdy & Co., made a contract with appellee to do the brickwork on two residences by them being built, for \$1,375. The work was performed, and some extra work done, making the aggregate \$1,660, which included \$80 in money lent to D. R. McCurdy, individually, of which it was claimed \$212 was left unpaid at the completion of the work, and remains so. Appellants had a contract with McCurdy & Co. whereby they were to furnish the money to build the houses, paying upon the estimates as the buildings progressed, and the balance of the contracted amount at their completion. By an agreement between all parties, appellee waived, in writing, the right to a builder's lien upon the property, and delivered the waiver to appellants. Before the matter was settled and adjusted, appellee entered into a contract to do the brickwork on three other residences at a different place. It was claimed by appellee that the last contract was made by D. R. McCurdy, and not by McCurdy and Geiger, who made the former contract. It was claimed by appellants that the contracting parties for the last three buildings were Clementina McCurdy and one Frank Mayo, that D. R. McCurdy and Geiger had no interest whatever in the transaction, and that D. R. McCurdy only participated as agent for Clementina. At the completion of the work on the last three buildings, the balance against McCurdy & Co. on the first two remained unpaid. Appellee brought suit against McCurdy & Co., sued out an attachment, and had garnishee process served upon appellants. Appellants (garnishees) answered that on October 8, 1891, there was a balance in their hands of \$275.81 due Mayo and Clementina McCurdy, which after that date was accounted for in payment of different items to complete the buildings, which it was alleged should have been done by the contractors; that there was nothing due David R. McCurdy, and had not been since the commencement of the suit. The answer was traversed; a trial had to a jury, resulting in a verdict and judgment against garnishees (appellants) for \$212 and costs.

Benedict & Phelps, for appellants. Geo. F. Dunklee and O. E. Jackson, for appellee.

REED, J., (after stating the facts.) There may have been some juggling between the parties in regard to the two contracts, but the facts are conclusively established by the evidence that the transactions with appellants were separate and distinct contracts,—the first, with Geiger and McCurdy, (D. R. McCurdy & Co.;) the second, with Mayo and C. McCurdy. It is not claimed that Geiger, of McCurdy & Co., had any connection with the second contract. Whatever money was due appellee upon building contracts was upon the first contract, and was due by McCurdy & Co., while a part of the claim for which judgment was given was for borrowed money due by D. R. McCurdy individually. The money sought to be reached in the hands of garnishees was admitted to be money due upon the second contract. It is contended that D. R. McCurdy was the real party in interest, but the position is not sustained by the evidence. The lots upon which the last three houses were built were in Mayo and McCurdy, and they conveyed to a purchaser. Although D. R. McCurdy may have participated in the last contract, as agent or otherwise, appellee was not misled as to the real contracting parties. He admits that vouchers or orders to draw money from appellants on the first contract were executed by D. R. McCurdy & Co., while upon his first estimate on the last building, and subsequently, they were drawn by Mayo and C. McCurdy. The contracts of appellants, by which they were to furnish money, were shown to have been separate and distinct, and made with entirely different parties. The answer of appellants was fully sustained by the evidence, nor was there any evidence that could change their legal status, and allow them to pay money arising out of, and due upon, the second contract, upon the first. Judgments, in order to be valid, must be based upon legal principles, and warranted by evidence. Judgments resting entirely upon whim, caprice, suspicion, and inference of court or jury, cannot be sustained. There may have been fraud and collusion between D. R. McCurdy, Clementina McCurdy, and Mayo; but, to affect the legal liability of appellants, it must have been shown, and the money shown to have belonged to D. R. McCurdy; otherwise, garnishees would have no protection against a liability to pay twice.

Several errors are assigned upon the ruling of the court in admitting and rejecting evidence, which we do not think it necessary to consider. Under the evidence there were no questions to be determined by the jury, and the court should have instructed it that under the proof plaintiff could not recover. It follows that the instructions given were faulty, and that the court erred in refusing to give the following instruction asked by appellants: "In order to find for the plaintiff and against the garnishees in this case, you must find that there is such a liability on the part of



Hallowell & Co. to D. R. McCurdy as would enable him to maintain his suit or action directly against Hallowell & Co. in his own name, and for his own use, and recover a judgment against Hallowell & Co.; and, if there is no such liability on the part of Hallowell & Co., then your verdict must be for the garnishee." It is a well-settled rule of law that the garnishee is not chargeable unless the defendant could recover of him what the plaintiff seeks to secure by garnishment. Wap. Attachm. 202; Drake, Attachm. § 458. It is the rule in the federal courts, and has been so held in most of the state courts, and is the well-settled rule in this state. *Sickman v. Abernathy*, 14 Colo. 184, 23 Pac. Rep. 447; *Railway Co. v. Gibson*, 15 Colo. 300, 25 Pac. Rep. 300; *Marks v. Anderson*, 1 Colo. App. 4, 27 Pac. Rep. 168; *Railway Co. v. Smeeton*, (Colo. App.) 29 Pac. Rep. 815, (not yet officially reported.) It is clear from the evidence put in by both parties that neither D. R. McCurdy & Co. nor D. R. McCurdy had any claim against appellants that could have been collected by a proceeding at law. Appellee could not occupy a better position than the defendant. The judgment must be reversed, and cause remanded.

(3 Colo. App. 90)

#### JAIN v. GIFFIN.

(Court of Appeals of Colorado. Jan. 9, 1893.)

GUARANTY OF NOTE—FRAUD—CONSIDERATION—ACTION AGAINST PRINCIPAL.

1. Where, in a suit against the guarantor of a note, he alleges as a defense that, misrepresenting the facts to him, and intending to defraud him, plaintiff's agent stated that his signature was desired by his brother-in-law, the maker of the note, this allegation is not sufficient to render admissible evidence of fraud.

2. Where the note which defendant had guaranteed was given in renewal of another note on which defendant was an original promisor, and which the holder refused to surrender until defendant became bound on the renewal note, the guaranty must be considered as executed concurrently with the original undertaking, and therefore as requiring no new consideration to support it.

3. Where the guaranty states that it is for a valuable consideration, and it is in terms an undertaking to pay, and not that the original promise shall be collectible, there is a sufficient recital of consideration, and it warrants a suit against the guarantor, without any proceeding against the principal primarily.

Appeal from district court, Boulder county.

Action by S. A. Giffin against Miles Jain to recover the amount of a promissory note on which defendant was guarantor. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Whiteley, for appellant. J. M. O'Neill, for appellee.

BISSELL, J. Early in 1886, W. S. Case and Miles Jain jointly executed to the order of S. B. Austin a promissory note for \$650, payable at a date named, and bearing a fixed rate of interest. It would appear from the record that Case was the borrower, and Giffin, the appellee, was

the loaner, of the money; Austin acting as the broker to procure it, and to accomplish the negotiation of the paper. Giffin declined to loan the money except upon the guaranty of Jain's name, who was supposed to be financially good. Some chattel security seems to have been given, but with this we have no concern. After the paper matured, Case, who was apparently the principal debtor, failed to pay it, and the original broker, Austin, received from him another note in August, 1886, for \$804.50, running for a like period and for the same rate of interest, and secured in the same manner. This note bore date on the 6th of August. When it was presented at Giffin's office, with a request for an extension, he declined to receive it or surrender the original paper, stating that he relied on the financial security afforded by Jain's name. Thereupon, and on the 18th of August, the appellant, Jain, indorsed on the back of the note, "For value received, I hereby guaranty \$650 of the within note, and I hereby agree to pay \$650, as aforesaid, in case said Case fails to pay the same, together with interest thereon, according to the tenor of this note," and signed it. The note not having been paid at maturity, this suit was brought on the guaranty. Giffin recovered judgment, from which Jain prosecutes this appeal.

There is really but one question in the record deserving much attention. In his answer Jain alleged that he was induced to sign the guaranty by the misrepresentations of the persons concerned in the transaction. He offered evidence touching this defense, which the court excluded, and properly declined to hear. The trouble was Jain failed to so allege fraud as to entitle him to introduce any evidence on the subject. The whole allegation respecting the fraud was in a single sentence. Substantially it was that, misrepresenting the facts to him, and intending to defraud him, Austin stated that his signature was desired by his brother-in-law, Case. The well-settled rule that fraud must be pleaded to warrant the introduction of evidence concerning it is too deeply rooted in all systems of jurisprudence to need either elucidation or anything more than a cursory statement of the rule itself. The defendant's plea in no manner came within the requirements of the most lax decisions upon this question. Having failed to allege the fraud which he asserted, he should not have been permitted, as he was not, to introduce testimony on the subject.

There are a number of collateral questions presented in the briefs of counsel which hardly arise on the record, but which present but little difficulty under the present circumstances. It is doubtless true that a guaranty executed subsequent to the original undertaking must rest on a new and adequate consideration in order to bind the guarantor, because his promise is a collateral one, whereby he undertakes to answer for the debt or default of another. It is equally true, under some circumstances, the principal debtor must be proceeded against before the guarantor can be compelled to pay. The

present case, however, comes within the scope of none of these principles. Jain most certainly was an original promisor on the first note, and bound for the entire sum. When he executed the guaranty upon the back of the present instrument, that note was still an outstanding obligation, which the holder, Giffin, declined to surrender until Jain signed and became bound on the renewal note. When he signed it, and not till then, was the note accepted and the original note surrendered. Under these circumstances, the guaranty must be held as having been executed concurrently with the original undertaking, and therefore a promise requiring no new consideration to support it. So, too, when the guaranty is examined, it will be found that on its face it is expressed to be for value received, and is the guaranty of a note due at a specified and fixed time; and is an undertaking to pay, and not that the original promise shall be collectible. Under these circumstances there is a sufficient recital of consideration, and it warrants a suit against the guarantor without any proceeding against the principal primarily. *Brandt, Sur. c. 3, § 86; Campbell v. Knapp, 15 Pa. St. 27; Parkhurst v. Vall, 73 Ill. 343; Bickford v. Gibbs, 8 Cush. 154.*

No other questions have been urged by counsel for the appellant, and, since the court below decided correctly as to all these propositions, the judgment must be affirmed.

(3 Colo. App. 93)

#### MILLER v. STAPLES.

(Court of Appeals of Colorado. Jan. 9, 1893.)

PRINCIPAL AND AGENT—NEGLIGENCE OF AGENT—LIABILITIES TO THIRD PERSONS.

Where a mare which is given into a party's keeping for breaking is killed by the negligence of such party's servant or agent while attempting to break her, both the principal and agent are liable, and the owner may sue either or both.

Appeal from Larimer county court.

Action by Charles Staples against Edward Miller for damages resulting from the killing of a mare which defendant, as agent or servant of another, was attempting to break. From a judgment for plaintiff, defendant appeals. Affirmed.

Robinson & Love, for appellant.

**BISSELL, J.** If the servant or agent can be held liable for the misfeasance resulting from the improper doing of an act otherwise lawful while engaged in the service of the master, or the transaction of the business of his principal, this judgment must stand. In June, 1889, one Mellon was engaged in the business of raising and handling horses in North Park, Colo. At that time the appellee, Staples, placed four mares with him for breaking and service. It appears that the mares were aged animals, requiring some trouble and care to fit them to use. In the following August, Edward Miller, the appellant, was working on Mellon's ranch, as a

hand for current wages. On the 17th of the month, while the stock was running with other animals, Miller was directed by his employer to separate two of Staples' mares from the balance of the herd, and to put them in another part of the corral, for the purposes of handling and breaking. There is a little uncertainty whether Miller was at that time directed to rope the mares, or simply ordered to separate them. In any event, after he had cut them out of the herd, and driven them into the corral, he proceeded to rope them, that they might proceed with the breaking. Who threw the rope to catch the horses is not clearly shown, but this is immaterial. The rope was thrown over the head of one of the mares, and Miller undoubtedly had hold of it, seeking to handle and manage her. The animal was thrown to the ground, and, according to Mellon's testimony, within two or three minutes from the time the horse was on the ground, he was there, attempting to put a hackamore on her head. When this was done, and they attempted to let the mare up, it was discovered that she was dead. According to the testimony, it not infrequently happens that in roping an aged horse the horse is killed by breaking its neck; but it would seem that a fatality does not otherwise occur in that method of catching horses, except by the inexcusable negligence and carelessness of the roper. It will be assumed from the record that the mare was killed by choking, and that this resulted from Miller's negligence. This would subject both Mellon and Miller, or one of them, to legal responsibility for the loss of the stock. This statement clears the way for an easy settlement of the query propounded at the commencement of this opinion. The frequent attempts of agents to escape responsibility for their negligent acts by shielding themselves behind the principal whose business they may be transacting when the injury is done has led to many discussions as to the proper limits of the defenses based on the employment. The rule is pretty well settled that, while both principal and agent are liable for the injuries which may come to a third person from the agent's misfeasance or malfeasance, the injured party may elect to sue one or the other, or both, at his pleasure. Doubtless, the primary responsibility rests on the principal as to the agent's misfeasance, and he should be called upon to answer for the damages resulting from the negligent performance of his agent; yet the servant or agent may likewise be sued, and he cannot escape by asserting that what he did was done while working for his master. *Harriman v. Stowe, 57 Mo. 93; Bell v. Josselyn, 3 Gray, 309; Paper Co. v. Dean, 123 Mass. 267; Horner v. Lawrence, 37 N. J. Law, 46; Phelps v. Wait, 30 N. Y. 78; Feltus v. Swan, 62 Miss. 415; Powell v. Daveney, 3 Cush. 300.* Since it is established by these authorities that the agent is liable for the damages resulting from his negligent doing of the acts proven against him, it is manifest that the judgment entered against him was right, and that it must be affirmed.

(3 Colo. App. 37)

**ZOOK v. ODLE et al.**

(Court of Appeals of Colorado. Jan. 9, 1893.)

**PAYMENT — DELIVERY OF NOTE OF THIRD PERSON — RECEIPT — ORAL EVIDENCE.**

1. In an action by the maker of a note and trust deed to enjoin a sale under the deed for nonpayment of certain interest, on the ground that plaintiff delivered to the mortgagees a note of a third person in payment of such interest, plaintiff must establish that the delivery and acceptance of the note constituted payment by a preponderance of testimony to the satisfaction of the court.

2. Where the evidence is conflicting, and a finding that such note was not accepted as payment is sustained by testimony, it will not be disturbed on appeal.

3. Where, on the trial of such issue, oral evidence is introduced without objection, the question as to whether or not the parties are concluded by the terms of the receipt given for such note, stating that it is "in payment of interest due on" the mortgage, cannot be determined on appeal.

**Appeal from district court, El Paso county.**

Action by Eliza C. D. Zook against Graham Odle, Alvin A. McGovney, and Edward F. Wright to enjoin the sale of certain real estate under a trust deed. From a judgment for defendants, plaintiff appeals. Affirmed.

W. W. Anderson and Daniel Prescott, for appellant. J. L. Williams, for appellees.

**BISSELL, J.** If this judgment could in any manner have been successfully assailed, the right was not preserved to the appellant by the record which she presents to this court. Some time in the year 1888 or 1889 the appellant, Mrs. Zook, was indebted to the appellees in the sum of about \$2,000, evidenced by her promissory note, which was secured upon certain property in the vicinity of Colorado Springs. In 1889 the note had not matured, but considerable interest had accrued, which Mrs. Zook was bound to pay. To liquidate this portion of her debt, she offered, through her husband, who acted in her behalf, to the holders and owners of the paper, a note which had been given by one Mrs. Hatch for \$200, to the order of Zook, Riddock & Co. At the time that this note was turned over to the holders of Mrs. Zook's paper they delivered to her a writing which, in terms, stated the receipt of the note "in payment of interest due on loan on the Herman Hotel property." Subsequently Mrs. Zook paid the principal of the note, and all the interest, save this \$200, and insisted that her entire obligation was discharged. It appeared that the Hatch note was not paid at its maturity, and that no steps had been taken to enforce its collection other than the sending of notices to the maker of the nonpayment. The holders of the security thereupon commenced an advertisement to sell the property covered by the trust deed to collect the sum represented by the Hatch note. The appellant, Mrs. Zook, then brought this suit, setting up these facts in her complaint, alleging the liquidation of the entire indebted-

ness, and praying a perpetual injunction to restrain the appellees from selling her property. After hearing, the bill was dismissed, and the appellant assigns error as to the judgment. During the progress of the trial considerable testimony was introduced pro and con on the only question at issue, and that is as to whether the Hatch note was received by the appellees in payment of the then accrued interest, or whether it was taken as collateral security for the unpaid money, whereby Mrs. Zook would remain liable in case of the nonpayment of the Hatch paper. On this issue the court found with the defendants, and evidently concluded that the note was not taken in payment, and that Mrs. Zook was still obligated for the unpaid interest. There are many reasons why this judgment cannot be disturbed. It is the settled law of this state that the delivery of a note of a third person to meet an antecedent indebtedness is not payment, nor does it furnish prima facie evidence that the note has been paid. The supreme court holds that, even though the creditor executes a receipt in full, it is only to be construed as payment in case the paper which is delivered shall be liquidated at its maturity. If the debtor contends that what was done amounted to a payment, he must establish it by a preponderance of testimony, to the satisfaction of the court or jury which tries the case. *Bank v. Newton*, 10 Colo. 161, 14 N. W. Rep. 428. On this issue the finding was against the appellant. It must be taken as conclusive of the case, so far as this court is concerned, under the well-settled rule governing appellate proceedings, since the finding was apparently well sustained by the testimony, and lacked none of the elements essential to satisfactory proof. The appellant contends, and on that point cites some very reputable authorities, that, wherever the receipt contains any of the expressions and elements of a contract, it is not open to construction or examination, but must be taken in its literal terms, and to that extent is conclusive as to the rights of the parties. Whatever the law may be on that subject, as to which an expression of opinion is entirely unnecessary, no such proposition is open to the consideration of this court. The case was tried and the evidence introduced without objection, nor was the question saved in any such way as to give this court the right to determine it. On the only propositions presented by the record the judgment accords with the law and with the proof, and it is accordingly affirmed.

(5 Wash. 1)

**PARKE v. CITY OF SEATTLE.**

(Supreme Court of Washington. Jan. 14, 1893.)

**CITIES — CHANGE OF STREET SURFACE — LIABILITIES.**

A city is not liable to a lot owner for consequential damages arising from the change of surface of a street by the improvement thereof. Per Hoyt, J., dissenting.

For majority opinion, see 31 Pac. Rep. 310.

HOYT, J., (dissenting.) It is possible that the complaint to which the court below sustained the demurrer could be held good upon the ground that it sufficiently charged that the city, in prosecuting the work of grading the street, did so negligently and carelessly, and that for that reason it was liable to the plaintiff. But the majority of the court does not seem to have given any force to this particular language in the complaint, and have, in their discussion, treated it as having simply charged that the city had, in grading the street, removed the lateral support from plaintiff's lots, to such an extent that the soil thereof, in its natural state, slid or fell into the excavation thus made, and that the city was liable for the injury occasioned thereby, by reason of its having thus removed such lateral support. The majority of the court decides that the right of a city to improve its streets, and in so doing change the surface thereof, is governed by the same rules, as to liability for injury to adjoining property, as is a private owner in changing the surface of his lot. This is the principal question discussed, and upon which the case is decided. I am unable to agree with this conclusion. I therefore deem it necessary to express my dissent therefrom, and, as I view the question thus decided as one of the most important ones that has been presented to this court for decision, shall at some length state my reasons for thus dissenting.

The majority of the court seems to hold that the injury to property of a private owner, resulting from the removal of its lateral support, is a direct, and not a consequential, one. With this proposition as a basis, an argument of much force has been built up in favor of holding cities liable for the removal of such lateral support. But even with this basis the argument is not conclusive, as will be hereafter more fully stated. Many considerations must control the action of courts in establishing the proper rule in regard to the question under consideration; and it by no means follows that, even if the injury in question is the direct, and not the consequential, result of the act of the city in bringing the street to grade, the city ought to be held liable for damages occasioned thereby. In my opinion, however, the injury thus done to the lot is a consequential, and not a direct, result of the grading of the street. As I understand the rule, a direct result is one which immediately and necessarily follows the act; that a consequential result is one which does not thus follow the doing of the act. If in every case the falling of the soil of the adjacent lot followed immediately and necessarily upon the removal of the supporting earth in making the excavation, there would be a greater reason for holding that it was a direct, and not a consequential, result of such removal. If at the time any excavation was made the adjoining soil necessarily and immediately slid or fell into the excavation, it would, in effect, be the same as though the one making the excavation had directly removed the soil on the adjoining lot. Such, however, is not the ordinary result of making

an excavation. The soil may be such that, if the excavation extends to the extreme limit of the street, that of the adjoining lot may never slide into the excavation; and, when it does slide, it seldom or never does so to the full extent that it eventually will, immediately upon the earth being removed in making the excavation. It is no doubt true that in some instances the nature of the soil might be such that that of the adjacent lot would fall immediately upon the support being removed, but such is not usually the case; and the nature of the injury done to the adjoining lot cannot be controlled by such exceptions to the general rule. It would not do for courts to hold that in most cases the injury occasioned by grading was consequential, for the reason that it did not immediately and necessarily follow from the act done, and in special cases, where it did so follow, that it was direct. The rule established in regard to the matter must be uniform, or questions of fact, in each particular case, of such nicety and difficulty, would be presented, as greatly to embarrass corporations and courts. In my opinion, simply as a question of principle, uninfluenced by the decisions of courts, which will be hereafter noticed, the injuries resulting to a lot from the removal of the lateral support to the soil thereof must, under the general rule applicable to the subject, be held to be consequential, rather than direct. Under the old rules of pleading, if the result could be said to be direct and necessary, an action of trespass could be maintained. Yet in my opinion no lawyer familiar with the common law, and the rules of pleading thereunder, would have thought of bringing trespass against one who had removed the lateral support of the land of his client, but, instead thereof, would, without hesitation, have brought an action in case.

In the brief examination which I have been able to give to this particular question, I have found numerous actions in cases which have gone to judgment, for injuries of this nature, without any question as to the proper remedy having been sought, and have not found a single case where, for such injuries, an action of trespass has been maintained. If the injury in question is consequential, and not direct, then it is clear that under the provisions of the constitutions of most of the states, and of the constitution of the United States, the city would not be liable, if the injury resulted from work done by the city in pursuance of authority conferred upon it by the legislature. It is universally held that such corporations, when so proceeding, are not liable for consequential injuries. They are held liable, if liable at all, by virtue of a provision in the constitution of the state where the question arises that private property shall not be taken for public use; and it has never been held that an injury to private property, consequent upon, but not directly flowing from, the acts of the corporation, constitutes a taking, within such constitutional inhibition. If the city is liable it must be by reason of the rule at common law, or of some provision in the constitution of the state or of the United States. That

no such liability existed in England at the time we took from her the common law, is too clear for argument, and is in fact conceded by all. There is no constitutional or legal provision that has any tendency to create such liability, except the one that prohibits the taking of private property for public use without compensation. It must follow that, whenever the injury is such that it does not constitute a taking, within the meaning of such provision, there can be no compensation had therefor. To hold that a city, in changing the grade of its streets, is governed by the same rule as to resulting damages as a private owner, would be to deny the city the usual protection awarded an agent of the state acting in pursuance of a public law. A private person is held liable in numerous instances for acts which would create no liability on the part of the public at large, or one acting under their authority. If a private person takes another by the arm, and compels him to go with him, against his will, he must respond in damages; but an officer acting under the authority of the law may do exactly the same thing with impunity. Why is this? Simply because in one instance a person is acting in his own behalf, and is held responsible for any interference with the rights of another, whereas in the other case he is acting as the agent of the state, and for the good of the public generally. This single illustration will show the distinction, which is always acknowledged and enforced by courts, by which one acting under public authority is protected, where one acting without such authority would be clearly liable. When a city proceeds, in pursuance of law, to grade one of its streets, it is acting as the agent of the state, and in pursuance of public authority, and cannot be held liable for any injuries done to a private person, unless he is protected against such injury by the action of the legislature or by the constitution of the state. That this rule works individual hardship in special cases is unquestioned, but so does every rule for the benefit and protection of the public. The public, as a whole, have a right to interfere just so far with individual rights as, in its judgment, is necessary for the public good; and such public is in no manner responsible to private persons for damages resulting from such acts. Under our form of government, this public is represented by its legislature, and whatever it deems necessary for the public good must be presumed so to be. Its decision may interfere more or less with private right; but, so long as the constitution is not violated, there is no other remedy than that which the legislature itself may provide. Instances of the invasion of private right for the good of the public, under authority of law, for which there is no redress, are very numerous, and need not be cited, as they will occur to all who give the matter thought. It may be stated, as a general proposition, that private rights must yield to public requirements, and it rests entirely with the public at large to say whether or not the damages resulting from such yielding shall be compensated for. The recognized existence of this pow-

er in the public at large, as represented by their legislature, unless controlled, has led to the adoption of constitutions; and to the extent that these constitutions protect private rights the legislature is restricted from interfering therewith, and to no greater extent. The improvement of roads and streets is an absolute necessity. The state, in providing therefor, may do so directly, or may delegate its power to various municipalities created for that and other purposes, in aid of proper government. In the prosecution of such work by the state, or by its properly constituted agents, it has a right to proceed in a reasonable manner; and private persons whose rights may be injuriously affected by such action are absolutely without remedy, excepting such as may be furnished by the constitution, or legislation had thereunder. And when we look at the consequences of an application of the contrary rule, the necessity for such a construction, in the public interests, will be made clear. If the doctrine be once established that the same rule applies, as to responsibility for lateral support, to excavations made by the public in the grading of streets or highways as would obtain in the case of an excavation made by a private owner upon his property, it must follow that, wherever an excavation is so made that any appreciable amount of the soil of the adjoining lot slides or falls into the same, an action for damages will lie; and, if an action for damages will lie, it would follow, almost as a necessary conclusion, that until the same had been regularly ascertained, and tendered or paid, the work could not be proceeded with. This would compel the proper authorities, who had control of the streets within the cities, or of the highways outside thereof, whenever they desired to do any work thereon which might by any possibility require such an excavation to be made that the soil of an adjoining proprietor might fall therein, to determine beforehand, by the most careful surface survey, the extent to which such excavations would be made, and the amount of soil which would fall from the adjoining lots on account thereof, and show the same by the most exact profile and figures, and have the damages on account of such falling soil determined and paid before they proceeded at all with the improvement, or else place it within the power of any one, the soil of whose lots might fall into such excavation in the least material degree, to stop the work until such proceedings and compensation could be had. Such a course would be practically impossible, even in cities; and, as regards highways situated outside, it would make it impossible to improve the same at all in the way that it is now ordinarily done, excepting at the peril of having the work arrested, at such a time during its progress as to very greatly interfere with the rights of the public, by any private owner who, in good faith or bad faith, might desire thus to take advantage of the fact that a wagon load or so of soil from his lot had slid, or would slide, into the excavation made, or to be made, in the progress of the work. The results following from

the enforcement of such a rule would be so burdensome upon the public that it would not be adopted by the courts unless compelled so to do by an expression of the will of the public, in the constitution or legislation thereunder, so clear that it would admit of no other possible construction. It is one of those cases where private interests must yield to those of the public. As a general rule the private interests which would be thus affected are very small, as compared with the burdens which would be put upon the public by their protection. As we have said above, cases of great individual hardship will no doubt happen, but that is ever incident to a state of society where the rights of the public must be held to be paramount.

What I have said above has been upon the theory that the private owner had received no compensation whatever for the injuries which he might sustain by reason of the grading of the street. In my opinion, however, he must be held to have received full compensation for all the damages incident thereto. If the street was dedicated to public use by the owner, he must be held to have so dedicated it for the use of the public as such street, and must have contemplated such a reasonable improvement thereof as would adapt it to the purposes for which it was designed. This, of course, would include such a change in the surface as would best adapt it to the public use. If it was purchased of a private owner, he knew the purposes for which it was so purchased, and in fixing his price therefor could protect himself for injuries incident to the proper use thereof for the purposes for which it was purchased. If it was taken by virtue of the right of eminent domain, the damages awarded upon such taking must be held to cover, not only the valuation of the land taken, but also the incident damages resulting from its proper use for the purposes for which it was taken. It will thus be seen that, in whatever manner the public has obtained the right to the use of the street, the owner has been, or might have been, fully protected from damages incident to the improvement thereof, and if, whenever the surface is changed, he is allowed to recover damages, it will be for the same elements which were, or might have been, taken into consideration at the time the property was originally acquired for public use. Upon principle, then, I am of the opinion that a private owner should be held to have no remedy, as against the public, proceeding diligently in the matter of the improvement of a street, for injuries done to his property by removal of its lateral support.

I shall now proceed to discuss the question in the light of the authorities upon the subject. They are very numerous, and I shall not attempt to review all of them; but the importance of the question is such that I deem it proper to call special attention to some of the leading cases. However, before proceeding to a detailed examination of the cases bearing upon the question, I desire to say a few words in reference to the cases cited by the majority of the court as sustaining the doctrine an-

nounced by them. And first as to what is therein said in reference to the language used by Judge Dillon in his work on Municipal Corporations, and the authorities cited by him to sustain the text. If it is meant by what is said in regard to this matter that a large number of the cases so cited by Judge Dillon were not lateral support cases, then the criticism is true; but if, in what is said, it is meant that the cases thus cited were not of such a nature as to fully warrant their citation in support of the text, then I must respectfully dissent from the conclusion in that regard. I have carefully examined every case so cited, and shall hereafter summarize some of them. I desire, however, to here state, generally, that, as I read these cases, several of them are exactly in point, as they were lateral support cases. The others fully support the principle announced by the learned writer in the text. Those of them that were not exactly in point cite those that are, and in none of them is there the least intimation that a different rule would have been announced had the injuries been from a deprivation of such lateral support, instead of the consequent injuries under discussion; and, in view of the fact that lateral support cases were so cited, it is clear that, if there had been any intention on the part of the courts deciding such cases to distinguish as between them and those under consideration, something would have been said upon the subject. The majority of the court rest their decision upon this criticism of the authorities cited by Judge Dillon, and upon the authority of the case of *Stearns' Ex'r v. City of Richmond*, (Va.) 14 S. E. Rep. 847, which seems to fully sustain their views; upon the cases in Ohio, some of which likewise sustain them; and upon the two cases, by the United States supreme court, of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, and *Transportation Co. v. Chicago*, 99 U. S. 635. As to the last two cases, it is not claimed that either of them is exactly in point, but simply that they have a tendency to sustain the views expressed. In the general review of the cases upon the subject under consideration, my conclusions as to what the supreme court of the United States has decided will appear. These are the only cases cited which tend to support the contention that the public is liable for the removal of lateral support in the improvement of a street, and, with the exception of the two Minnesota cases cited hereafter, are, I think, all that can be found in the books. Three or four other cases are cited, but they all go to the question of the liability of a private party. The case of *City of St. Louis v. Gurno*, 12 Mo. 414, is also cited, but only for the purpose of stating that the same had been overruled by the case of *Thurston v. City of St. Joseph*, 51 Mo. 510. But that such is not the case, so far as the question at bar is concerned, will, I think, fully appear in the course of my examination of the Missouri cases.

I shall now proceed to a somewhat full review of the authorities upon the subject, as I find them. As to those from England, it is not necessary that a review should be had, as it is conceded that they assert

to the fullest extent the doctrine of nonliability of a city for injuries like those under consideration. In this country the cases are so numerous that it will be impossible to review all of them. I shall therefore state somewhat fully those from the supreme court of the United States, from the state of New York, and from a few of the other states, and content myself with a simple reference to some of the others.

The majority of the court recognize the special application of the decisions of the supreme court of the United States to the question under consideration. I also think such decisions not only of special force, but, in view of the fact that this controversy arose during our territorial period, I think that such decisions should absolutely control ours. From my investigation of such cases, I think the doctrine of nonliability, as I am contending for it, has been fully recognized and decided by said court. The case of *Pumpelly v. Green Bay Co.*, supra, is relied upon as establishing a contrary doctrine, but I am unable to so interpret this case. If the question at bar had never been decided by this court at the time the opinion was rendered, there might become ground for such contention, but the language used in that opinion must be interpreted in the light of decisions theretofore rendered by the court. If it had been intended in any manner to overrule the former decisions, it would have been so stated in the opinion. In the case of *Gozler v. Corporation of Georgetown*, 6 Wheat. 593, this question was before the court; and with very slight discussion the court held that for damages like those in the case at bar the city was not liable; and the main discussion in the case was as to the question whether or not the city, in doing the work, was proceeding under proper authority. In the case of *Smith v. Corporation of Washington*, 20 How. 135, there was a full discussion, and the facts in the case called for a decision of the exact question at bar; and the court, in refusing any relief to the plaintiff, go into a general discussion of the principles involved, and cite numerous authorities in support of their conclusion, among which are the leading ones from New York and Massachusetts, which specially apply to the doctrine of nonliability of a city for the removal of the lateral support to adjoining property in the course of the work of reducing its streets to a proper grade. In view of what has been decided in these cases, the decision in the case under consideration must be confined to the facts before the court, and to the holding necessary to the decision of the case, which was that the actual invasion of the property of the adjoining proprietor by the flooding thereof was a taking, within the meaning of the constitution of the state of Wisconsin. This would be clear, in my opinion, if we had no further light upon the question; and when examined in the further light disclosed by the opinion of said court in the case of *Transportation Co. v. Chicago*, supra, I cannot see how there can be left any doubt as to such having been the full extent to which the court, in that case, intended to go. In the last-named case the court lays down the general doctrine that

in grading its streets the city is the agent of the state, and performing a duty imposed upon it by the legislature, and that if it acts within its jurisdiction it is not liable for consequential damages, and cites, among other cases, several, where the question of lateral support was the only one involved, without any attempt to discriminate as between such cases and those where the injury complained of is conceded to have been consequential. In said case, the former one, of *Pumpelly v. Green Bay Co.*, is to a certain extent reviewed; and it is stated that the doctrine announced in said last-named case presents the extremest qualification of the doctrine of nonliability to be found in the books. If to hold the corporation liable for the actual flooding, and thus substantially taking the lot of the private owner, is the extremest qualification, it must follow that the liability for lateral support is not within the qualification of the rule of nonliability, as recognized by this court.

In the state of New York this question was first decided by the court of appeals in the case of *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195, which was an action for lowering the grade of a street, and thus removing the lateral support to plaintiff's lot, by reason of which the surface, in its natural state, fell into the excavation. The opinion of the court was pronounced by that distinguished jurist, Chief Justice Bronson; and after a most elaborate review of the authorities upon the subject, both English and American, the conclusion was reached that for such an injury no action would lie. The decision was based upon two grounds. First, that the damages complained of were but an incident to the exercise of legislative authority, and that as such an injury was not a taking of the property of the private owner, within the meaning of the constitution of the state of New York, no remedy existed; second, that the land of the street belongs to the corporation, and that it has a right to use it as it sees fit, and is not liable, as a private owner would be, for consequential damages. In such opinion there is a full recognition of the occasional hardship of the rule; and it is evident, from a reading thereof, that the court gave the matter consideration from every standpoint, and without hesitation arrived at the conclusion above stated. In *People v. Green*, 64 N. Y. 606, there was a further discussion of the question, and the general rule that injuries from a change of grade by the proper authorities were *damnum absque injuria* was fully recognized. But damages were allowed in that case upon the ground that there had been special legislation authorizing such damages to be recovered. In *Benedict v. Golt*, 3 Barb. 459, the rule afterwards laid down in *Radcliff's Ex'rs v. Brooklyn* was fully recognized and declared, and the doctrine was so extended as to apply the rule to a turnpike company, which, under the statute, had been authorized to acquire the right of the public in the highway. The case of *St. Peter v. Denison*, 58 N. Y. 416, presented the question of the liability of the public, in the prosecution of its work, for the casting of stones and earth upon the premises of an



adjoining proprietor. The opinion specially recognizes the doctrine theretofore announced by the court, and by fair inference extends the rule of nonliability to acts of the kind for which damages were claimed in this case, but holds that the contractor for the work, in the prosecution thereof, was not an agent of the state, and therefore was not entitled to protection under the rule. The case of *Waddell v. Mayor*, etc., 8 Barb. 95, presented substantially the same question as to the nonliability of the city for work done upon its streets in pursuance of legislative authority. The court confirms its former rulings upon the subject, and cites with approval the case of *Callender v. Marsh*, 1 Pick. 418. In fact it is clear from the opinion in this case that it was practically conceded by all parties that the city was not liable for any change in the surface incident to bringing the street to the first grade established by proper authority; the whole discussion going to the question as to whether or not it was liable for a change from such first established grade, and it was upon this question that the case from Massachusetts was cited. In the case of *Clemence v. City of Auburn*, 66 N. Y. 334, the court allowed a judgment for damages for injuries to the plaintiff caused by an irregularity in the sidewalk to stand, but did so upon the express ground that the sidewalk had been improperly built, and not in accordance with the direction of the proper authorities, and in thus deciding fully recognized the authority of the cases above referred to, and distinguished this from them. The case of *Cogswell v. Railway Co.*, 103 N. Y. 10, 8 N. E. Rep. 537, presented a somewhat different question; but the court, in deciding the same, referred with approval to the case in 4 N. Y., and distinguished the one at bar therefrom. In the case of *Heiser v. Mayor*, etc., 104 N. Y. 68, 9 N. E. Rep. 866, the general doctrine of nonliability was fully recognized and reiterated.

In Massachusetts the doctrine of nonliability for such injuries as those under discussion is fully established. The first case upon the subject was that of *Callender v. Marsh*, *supra*. This was an action for damages for lowering the grade of the street, by reason of which the lateral support was taken away from plaintiff's lot, and the soil thereof caused to fall or slide into the excavation. In a most exhaustive opinion, in which the question is discussed upon principle and in the light of the authorities both in England and America, the court holds that the action would not lie. The broad doctrine is announced that, so long as the authorities are proceeding properly in the amending of the grade of a street, they are not liable for consequential damages, and that damages of the nature set out in the complaint in that action were consequential, and therefore not actionable. The argument of the opinion seems unanswerable, and shows clearly that any other rule than that thus laid down would be destructive of the rights of the public, as enjoyed from the remotest time. The opinion further shows that, though there may be instances where the rule will work hardship, yet that such will not be the

fact, as a general proposition. It holds that as a general rule those who purchase lots bordering upon streets calculate the chance of such elevations and reductions as may be required to prepare such street for use, and to maintain the same in such a condition as the public exigencies may require, and that the price which may be paid for such lot is usually influenced by such considerations, and hence no injustice is done in refusing to allow compensation for acts which must be held to have been fairly contemplated at the time of such purchase. It is true that in this case a part of the claim for damages was for injuries to a building situate upon the lot, but that fact does not seem to have had any influence upon the opinion of the court, as its decision is general, that for removal of lateral support plaintiff has no remedy. The rule established by this case has continued to be the rule of decisions in said state. This is evident from several cases found in its Reports. In none of them, so far as I have been able to see, was the question again directly decided, for the reason that the legislature, soon after the decision of that case, enacted a law which changed the rule. However, in the case of *Benjamin v. Wheeler*, 8 Gray, 409, the principle of such nonliability is fully recognized and affirmed. This was an action for injuries occasioned to the land of an abutter by acts done by direction of the surveyor of highways in digging a water course in the highway; and throughout the whole case it is assumed, rather than decided, that, if such surveyor was acting within the authority of the law, no liability would exist. The question mooted, and directly passed upon, was as to whether or not he was, in the prosecution of such work, acting within the line of his authority as a public officer. In *Brown v. City of Lowell*, 8 Metc. (Mass.) 172, the claim of the plaintiff was for damages occasioned by the change of the grade of the street in front of his lot; and the court decides that for his remedy he must look to the statute upon the subject, and proceeds to discuss at some length under what statute, and to what extent, he is protected.

In the state of Missouri the doctrine which I am contending for has always been recognized and applied by the courts. In the case of *City of St. Louis v. Gurno*, *supra*, the question was fully examined by the court, and the doctrine of nonliability extended so as to cover the flooding of the lot of the adjacent proprietor. That this case was carefully considered is evidenced by the opinion of the majority of the court, as well as by the fact that there was a strong dissenting opinion by one of the judges. In *Taylor v. City of St. Louis*, 14 Mo. 20, the question was again before the court, and the case above cited affirmed, and the case of *Callender v. Marsh*, *supra*, cited with approval. In *Lambar v. City of St. Louis*, 15 Mo. 410, the doctrine was approved and extended to the case of a ditch being dug, under the authority of the city, to carry off water which otherwise would accumulate to the detriment of the city. In the case of *Hoffman v. City of St. Louis*, 15 Mo. 651, the general



doctrine is announced and applied to the case of a regrade of the street. In *Schattner v. City of Kansas*, 53 Mo. 162, the court again asserts the general doctrine of nonliability for work done by authority of law, and applies it, in general, to the work of grading streets. The particular case was one of great individual hardship, but the court held itself unable to relieve the plaintiff. In the case of *Imler v. City of Springfield*, 55 Mo. 119, the doctrine is extended so as to hold that plaintiff could not recover when, by reason of a change in the grade of the street, the surface water had been cast upon his lot. In the decision of this case the court seems to have substantially gone back to the doctrine of the case of *City of St. Louis v. Gurno*, supra, or, at least, to only have qualified that doctrine to the extent of holding that, where a stream was so dammed up as to flood the lot of an adjoining proprietor, it might be held to be a taking, within the meaning of the constitution, but that such was not the case where simply the ordinary surface water was cast upon his lot. The case seems to have so qualified the decision of the court in 51 Mo. 510, heretofore mentioned, as to show clearly that in deciding that case the court did not intend in any way to qualify the general rule theretofore established in the state,—that for damages such as those in the case at bar the city was in no sense liable. In *Wegmann v. City of Jefferson*, 61 Mo. 55, the court announces the doctrine of nonliability as having been so well established in that state as to require no further discussion. In the case of *Broadwell v. City of Kansas*, 75 Mo. 213, the doctrine is again announced; but it is held that the actual covering of the lot of the plaintiff by the city with earth, so as to deprive him of the use thereof, is a taking, within the meaning of the constitution, and therefore outside of the rule of nonliability.

In the state of Pennsylvania the rule has become too well established to require further adjudication. In the case of *Green v. Borough of Reading*, 9 Watts, 383, it was directly decided that the city was not liable for damages of the kind in question, unless upon an allegation and proof of malice, or wanton disregard of private right, in the prosecution of the work. In *O'Connor v. Pittsburgh*, 18 Pa. St. 187, the facts were that the city established a grade in a certain street. Plaintiff, acting upon such grade, constructed a church. The city then changed the grade in such a manner as to make it necessary to take down and rebuild the church. The particular hardship of the case was such that the court desired, if possible, to find a remedy for the plaintiff, and for that reason, as shown by the opinion, directed a reargument. Yet, notwithstanding such wish of the court, it was forced to the conclusion, after the most elaborate consideration of the entire question, in which a large number of cases upon the subject were cited,—many of which were pure lateral support cases,—that no liability was incurred by the city. In *Re Ridge Street, Allegheny City*, 20 Pa. St. 391, it was decided that for the cutting down of

the street consequent upon the reduction of the grade, and thus depriving plaintiff of the lateral support to his lot, no action would lie. It is true that this case presented the question of the lot burdened with a certain structure; but that fact does not seem to have impressed the court at all, and its decision is put upon the same ground as that of the cases where the question was presented of the falling of the soil in its natural state. In the case of *City of Pontiac v. Carter*, 32 Mich. 164, Judge Cooley, with his usual thoroughness and wealth of knowledge and research, rendered a most elaborate opinion, covering this whole subject, and therein announced the doctrine of nonliability, not only as applicable to the original grade, but as to any change thereof made in pursuance of proper authority. He discusses the question both upon principle and in the light of authority, and specially affirms the soundness of those cases which directly announced the doctrine of nonliability for the removal of lateral support, like those of *Radeliff's Ex'rs v. Brooklyn*, and *Callender v. Marsh*, supra. From this opinion it is clear that in Michigan this rule obtains in its fullest extent. The case of *Buskirk v. Strickland*, 47 Mich. 389, 11 N. W. Rep. 210, has been cited as tending to show that the contrary rule prevailed in Michigan, but an examination of the opinion will show that the case may be properly enumerated among those supporting the rule, for, although it was held in that case that plaintiff could recover, it was solely upon the ground that the place in which the excavation was made was not a public street.

It will only be necessary to refer to one or two cases to show that the rule, in its fullest force, obtains in Illinois. The case of *Murphy v. City of Chicago*, 29 Ill. 279, was most elaborately briefed by the respective counsel; but the court contented itself with the simple statement of the principles applicable to such cases, which were that the city could do anything with its streets which was not incompatible with the ends for which the streets were established, and that if, in so doing, it acted with prudence, it would not be liable for damages. In the case of *Roberts v. City of Chicago*, 26 Ill. 249, the general doctrine is announced, and extended to the regrade of the streets, and, further, that the courts cannot interfere for the purpose of determining as to whether or not the grade adopted is the best. The only ground which is recognized as a foundation for a liability upon the part of the city is the want of reasonable care and prudence in the prosecution of the work.

In Indiana the rule is the same. *Macy v. City of Indianapolis*, 17 Ind. 267, decides, in general terms, not only that the city is not responsible for consequential damages in grading its streets, but that it may change such grade, at pleasure, without incurring any liability for so doing; and, to show that the consequential damages which it is talking about include those for taking away the lateral support to adjoining lots, it cites a large number of cases in support of its decision, many of which were cases where the question of

lateral support was directly involved. *City of Lafayette v. Bush*, 19 Ind. 326, decides, generally, that the city is not liable for consequential damages to an adjoining proprietor. *City of Vincennes v. Richards*, 23 Ind. 881, reaffirms the general doctrine of the prior Indiana cases, and cites in support thereof, with approval, among others, the case of *Radcliff's Ex'rs v. Brooklyn*.

In Georgia the principle for which I am contending has always been the rule. *Mayor, etc., v. Omberg*, 28 Ga. 46, was an action for damages for removing the lateral support to such an extent as to cause the lot of the plaintiff, in its natural state, to slide into the excavation; and the court, in most direct terms, holds that for such an act on the part of the city no action will lie. The only ground of liability, under the decision, would be that the work was done maliciously, or in wanton disregard of the rights of the plaintiff. *Roll v. City Council of Augusta*, 34 Ga. 326, announces the general doctrine of nonliability very broadly, and directly approves of the case of *Mayor, etc., v. Omberg*, supra, and extends the doctrine so as to hold that the city is not liable for permitting a railroad company to construct and use a railroad track along the street. In *Mitchell v. Mayor, etc.*, 49 Ga. 19, the court approved the charge of the lower court, that "the mayor and city council of Rome may grade down the street whenever, in their judgment, the public interest requires, and go even to the line of the street, but they must do their work in a skillful and careful manner, so as not to unnecessarily endanger the property of contiguous land-owners. If the work is thus done, no liability is incurred."

In Connecticut the rule is unquestioned. In the case of *City of New Haven v. Sargent*, 38 Conn. 50, the court fully considered the question, after elaborate argument, and held that the doctrine extended to the improvement of highways in the country, and, for obvious reasons, more clearly to that of streets in cities. The case of *Skinner v. Bridge Co.*, 29 Conn. 523, though not exactly in point, fully recognizes the principle afterwards announced in the case above cited.

The case of *Benden v. Nashua*, 17 N. H. 477, shows that the rule was recognized at an early date in the state of New Hampshire. The exact point decided in this case was that no action would lie against the city for damages arising from the raising of a highway, but the cases cited by the court show clearly that a like rule would have been applied if it had been a case of the removal of lateral support. This rule may have been qualified by subsequent decisions in that state. One of the later cases we shall hereafter review, as being among those which may be fairly cited as against the proposition for which we are contending.

A single case from Maine will clearly show the recognition by its courts of the rule. In *Hovey v. Mayo*, 43 Me. 322, the court not only decided that, without the aid of a statute, no action would lie for the removal of lateral support by the city, but further decided that the statute in

that state authorizing the recovery of damages in the case of the alteration of the street did not apply to a change of grade.

In Wisconsin the rule obtains to its fullest extent. In the case of *Alexander v. City of Milwaukee*, 16 Wis. 264, the court, after a careful consideration, arrived at the conclusion that for consequential injuries resulting from the improvement of the street there was no remedy. In the course of the decision the rule existing in Ohio is commented upon, and it is said that such rule seems to be founded upon considerations of natural justice, but that the law is too well settled to the contrary to justify the court in following the rule there laid down. See, also, *Pettigrew v. Village of Evansville*, 25 Wis. 223, and *Wallich v. City of Manitowoc*, 57 Wis. 9, 14 N. W. Rep. 812. This rule has been fully recognized in many of the other states of the Union. See *Plum v. Banking Co.*, 10 N. J. Eq. 256; *Methodist Episcopal Church v. City of Wyandotte*, 31 Kan. 721, 3 Pac. Rep. 527; *Bennett v. City of New Orleans*, 14 La. Ann. 120; *Rounds v. Mumford*, 2 R. I. 154; *Mayor, etc., v. Willson*, 50 Md. 138; *Creal v. City of Keokuk*, 4 G. Greene, 47.

Cases might be found in nearly all the other states supporting the same proposition. In fact, this rule has been so universally recognized in the United States that until very recently a case to the contrary could not be found, outside of the state of Ohio. This is apparent, not only from the investigation of the cases upon the subject by the different courts which have had the matter before them, but also from the briefs of counsel in the presentation of such cases. In some of them counsel of great learning and diligence have appeared and filed briefs; and in nearly or quite all of them it has been conceded that the rule of nonliability was universal in this country, with the single exception above stated. The contention of such counsel has been confined to attempting to show that the Ohio rule was more consonant with natural justice than the other, and that for that reason the court should follow it in the decision of the case at bar, though in so doing it would concededly be deciding against an almost universal course of decision. At the present time the courts of but three states in the Union recognize a doctrine which will support the conclusion of the majority of the court, and in two of said states the rule which now seems to prevail there is of recent adoption. In Ohio, as we have before seen, this rule was announced at an early day; but the first case in which it was so announced bears evidence of but slight consideration on the part of the court, and has been justly criticised in very many of the cases in the other states for that reason. The other cases seem to have been more fully considered; but they, to a great extent, rest themselves upon said first-named case, which did not go to the full extent of some of the later cases which rely upon it as the reason for their decision.

The supreme court of Minnesota, in two cases, has decided, generally, that the public, in such matters, have no greater

rights than private persons; but the cases are brief, and give evidence of but slight consideration. See *O'Brien v. City of St. Paul*, 25 Minn. 331; *Dyer v. City of St. Paul*, 27 Minn. 457, 8 N. W. Rep. 272..

The case of *Stearns' Ex'r v. City of Richmond*, supra, is a recent case, and may well be said to now rank Virginia upon this side of the question.

I have not overlooked the case of *Eaton v. Railroad Co.*, 51 N. H. 504, but do not range that case upon the side of the Ohio rule, for the reason that the question decided in that case was as to the liability of a railroad company for flooding the land of an adjoining owner; and for that reason the opinion, so far as it discussed the question at bar, was pure dicta. Great learning and ability are shown in such discussion, and it is entitled to weight, but, being dicta, cannot be said to establish a rule for the state.

It will therefore be seen that as against the array of authorities above cited, and many others that might be cited to the same effect, on the one side, there are cases from three states upon the other, and that even in these states the rule does not seem to be any too well established. Especially is this true as to Ohio, which may be said to be the father of the rule, as in the later cases from that state there has been a tendency to somewhat modify the earlier ones, and to hold that for the first establishment of the grade damages could not be recovered under the same circumstances as upon a change thereof. Not only is the case law thus nearly all upon one side; but, when we come to examine the views of text writers, we shall find that those favoring the rule of nonliability are greatly preponderate as do the cases. Judge Cooley, in his work on Constitutional Limitations, and Judge Dillon, in his work on Municipal Corporations, with their usual ability, maintain the rule of nonliability. In fact, such seems to be the view of nearly all the text writers. The most notable exception is that of Judge Elliot, in his work upon Streets. He lays down directly the contrary rule from that announced by Judge Dillon. The weight of his statement is greatly lessened, however, by the fact that the citation of cases in support of the text shows conclusively that the learned author did not give the matter full consideration. He so cites five cases. Two of them—the Minnesota cases above referred to—sustain the text. The other three not only do not sustain the views expressed in the text, but may fairly be cited as directly opposed thereto. See *Richardson v. Railroad Co.*, 25 Vt. 465; *Buskirk v. Strickland*, supra; *Transportation Co. v. Chicago*, supra. The want of full consideration is shown, not only by what he does cite, but more fully by what he does not. If full consideration had been given to the question, it is not possible that the Ohio cases would have escaped the attention of the learned author. Yet not one of these cases is cited.

I think that a careful review of all that has been said by the courts and by learned authors will clearly show that an overwhelming weight of authority is in favor

of the rule of nonliability. Such an examination will further show that such rule does not, in the opinion of the courts, rest entirely upon authority, but is fully consonant with correct principles applicable to the subject-matter. Besides, in this state, there has been full legislative recognition of the rule. If the existence of the rule had not been so recognized, there would have been no occasion for the enactment of the law making cities responsible for damages occasioned by a change in the grade of their streets after the same had been once established. This legislation not only recognizes such rule, but shows an intention to leave it in full force, so far as the grade first established is concerned. In my opinion, the judgment of the lower court should be affirmed.

(5 Wash. 303)

#### WILSON v. BEYERS, Town Marshal.

(Supreme Court of Washington. Dec. 1, 1892.)

#### CONSTITUTIONAL LAW—CITY ORDINANCES—ANIMALS IN STREETS.

1. A town ordinance directing the marshal to seize stock running at large in the streets, and to advertise and sell the same if not claimed, and charges paid, within 48 hours after the posting of a notice to that effect, does not violate Const. art. 1, § 3, declaring that no person shall be deprived of property "without due process of law."

2. Such ordinance, if authorized by statute, is a valid exercise of police power, for the protection of public health, safety, and comfort.

3. Hill's Ann. St. §§ 558, 636, subd. 20, authorize towns of the second and third classes to enact all such ordinances not inconsistent with the constitution and laws of the state as may be necessary for the government of the towns. Section 673, subd. 16, confers the same authority on towns of the fourth class. Sections 558, 636, subd. 2, expressly authorize towns of the second and third classes to prevent and regulate the running at large of animals in the city limits, but such authority is not expressly conferred on towns of the fourth class. *Held*, that towns of the fourth class have no authority to enact an ordinance prohibiting the running at large of animals in the streets.

Appeal from superior court, Douglas county; Wallace Mount, Judge.

Replevin by W. C. Wilson against Robert Beyers, town marshal of the town of Waterville. Judgment for defendant. Plaintiff appeals. Reversed.

The ordinance referred to in the opinion authorizes the town marshal to seize stock running at large; to post a notice to that effect; and if the stock is not claimed, and charges paid, in 48 hours, to advertise and sell the property. The question presented is, does this constitute due process of law?

Geo. Bradley, for appellant. Pendergast & Malloy, for respondent.

DENBAR, J. This cause was submitted to the court on an agreed statement of facts, which involved the validity of a certain town ordinance of the town of Waterville, (a town of the fourth class,) providing for the impounding and sale of cattle running at large upon the public streets of said town. Plaintiff brought his action in replevin for certain cattle sold by defendant, and said to be unlawfully de-

tained by respondent, who, as city marshal of said town of Waterville, seized the cattle under the provisions of said ordinance. Defendant moved for judgment upon the agreed facts, and judgment was rendered upon said motion in his favor, and plaintiff appeals. The contention of the appellant is that the ordinance in question is void, for two reasons: (1) That it is in violation of section 3, art. 1, of the constitution of the state of Washington;<sup>1</sup> (2) that said ordinance is invalid because the said town had no authority under the statute to pass it.

So far as the first proposition is concerned, there can be no doubt that the overwhelming weight of authority is opposed to the contention of appellant, and that the right to restrain cattle from running at large, under the provisions of the ordinance passed in conformity with the grant of such power by the legislature, is a valid exercise of police power, and is not violative of any constitutional provision. Such power has been conferred on municipal corporations from time immemorial, and is founded on public necessity, protection of public health, safety, and comfort; and but few courts have questioned its validity. There have been many contentions over the reasonableness or unreasonableness of the notice given by the provisions of the ordinance, and many decisions holding the notice unreasonable, but they did not go to the right of the city to pass an ordinance of this character. In other cases the ordinance provided for the collection of the damages which the stock may have done, and some courts have decided that the question of damages should be submitted to a jury. This was the question decided in *Bullock v. Gamble*, 45 Ill. 218, cited by appellant. In *Willis v. Legris*, 45 Ill. 289, cited by appellant on this point, the question of a penalty was involved, which is not involved in the case at bar. Sustaining the validity of this and kindred ordinances, we cite: *Dill. Mun. Corp.* §§ 308, 350; *Cooley, Const. Lim.* § 588; *McKee v. McKee*, 8 B. Mon. 433; *Jarman v. Patterson*, 7 T. B. Mon. 644; *Brower v. Mayor*, 3 Barb. 254; *Milbau v. Sharp*, 17 Barb. 435; *Van Wormer v. Mayor*, 15 Wend. 262; *Mayor v. Lanham*, 67 Ga. 753; *Com. v. Bean*, 14 Gray, 52; *Brophy v. Hyatt*, 10 Colo. 223; *Spitler v. Young*, 63 Mo. 42; *Folmar v. Curtis*, 86 Ala. 354, 5 South. Rep. 678; 10 Amer. & Eng. Enc. Law, 187, and cases cited. So far as the question of notice is concerned, as not being due process of law, proceedings under the ordinance are proceedings in rem. It is only the property that is dealt with; no personal liability attaches to the owner; and in an action in rem constructive service by publication is sufficient to give validity to the judgment obtained.

The second proposition, however, is more troublesome. The statute does not, in express terms, grant the power to the city council of cities of the fourth class to pass ordinances for the impounding of cattle or other stock, or to restrain them

from running at large within the city limits. The question, then, is, has this power been conferred by necessary implication? As a general proposition it may be said that the city corporation is an inferior body, and has no other powers than those which have been expressly delegated to it, and their appropriate incidents. But what the appropriate incidents of expressly conferred powers are, is a question exceedingly difficult to determine, and one which has provoked the announcement of many conflicting opinions by the courts; and the text writers, while assuming to lay down rules for the construction of the statutes in such cases, leave the meaning of the rule so clouded as to render it of little assistance to the courts. Thus, in *Horr & B. Mun. Ord.*, it is announced in section 18 as follows: "The charter or statute granting powers to municipal corporations usually enumerates those which may be exercised. It is a general rule that all powers not mentioned in the enumeration, and not incidental to those enumerated, are not intended to be included in the grant. All other powers are impliedly excluded." All the force of the rule of construction thus laid down is, however, annulled by the following proviso: "But enumeration of special cases does not, unless the intent be apparent, exclude the implied power, any further than necessarily results from the nature of the special provisions." These oracular announcements, when construed together, contain no rule of construction whatever. The rule of strict construction against the corporation is, however, thus laid down by Judge Dillon in his work on *Municipal Corporations*, (section 89 and notes:) "Corporate power, being delegated, must be strictly construed and plainly conferred. Whenever a genuine doubt arises as to the right to exercise a certain power, it must be resolved against the corporation, and in favor of the general public. This rule is most strictly observed in construing powers that may lead to an infringement of personal or property rights." In *Smith v. Calloway*, 7 Ind. 86, it is held that the application of the above rule could not be made to defeat the right to exercise powers which are incidental to the good government of the community. In *City of Waco v. Powell*, 32 Tex. 258, under the provisions of the statute granting to a city government general control over the streets, similar to the provisions of our statutes relating to cities of the fourth class, it was held that such power authorized the enactment of an ordinance for the impounding of cattle; and it was further held that the authority to pass such an ordinance existed not only under the general powers granted, but by reason of the power granting control of the public streets to the city. "The right of individuals," said the court, "to convert the public streets into a hog, cow, or horse ranch, by allowing or compelling their stock to run there, cannot exist, compatible with the right of the board of alderman to control the same streets. The two rights are inconsistent, and cannot exist together." The same doctrine is stated in several other cases. While other courts have gone

<sup>1</sup>Const. art. 1, § 3, provides that "no person shall be deprived of life, liberty, or property without due process of law."

still further, and held that under a general legislative provision that the city or town shall have the right to make all necessary laws, not repugnant to the laws of the state, such city has power to pass ordinances to restrain cattle from running at large. *Com. v. Bean*, 14 Gray, 52. While many other courts have held that such power could not be legally implied. *Varden v. Mount*, 78 Ky. 86; *Collins v. Hatch*, 18 Ohio, 523. It is pretty well conceded by the authorities that the term "general welfare," used in legislative grants of power to municipal corporations, is of broader scope, and confers greater powers on corporations, than such expressions as "peace and good order" and "peace and good government," and that many things are essential to the public welfare which belong neither to the preservation of peace and good order, nor to the exercise of good government. The general authority conferred by our statute is as follows: "To make all such ordinances, by-laws, rules, regulations, and resolutions, not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government, and welfare of the town, and its trade, commerce, and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter."<sup>1</sup> So that it will be seen that the statute not only contains the "peace and good government" provision, but also contains the "general welfare" provision; for the word "welfare" is fully as comprehensive as the term "general welfare." And under this provision we might be constrained to give it the liberal construction contended for by respondent, were we called upon to construe the powers granted to any particular city, independent of its relations to any other provisions of the statute. But under our law cities are divided into four classes, and their organization, classification, incorporation, and powers are all provided for in one act; and to arrive at the intention of the law-makers the act must be construed together. It will be observed from the perusal of the act that the same general powers are granted to cities and towns of the third and fourth classes as are granted to cities of the second class, yet the statute expressly confers upon cities of the second and third classes power to prevent and regulate the running at large of any and all domestic animals within the city limits, while this power is not specified in the specific grants of power to cities of the fourth class. It also appears that many other powers are granted to large cities which were not granted to the smaller ones, and it was the evident intention of the legislature to confer many powers on the larger cities which were withheld from the smaller ones. Considering the act together, as we must, we must conclude that this provision being made as to one class of cities, and not as to the other, it was not the intention of the legislature to confer the power by implication, and that the

ordinance is therefore invalid. The judgment is reversed.

ANDERS, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

(6 Wash. 333)

HAMILTON-BROWN SHOE CO. v. ADAMS et al.

(Supreme Court of Washington. Dec. 7, 1892.)  
ASSIGNMENT FOR BENEFIT OF CREDITORS—CUSTODIA LEGIS—RIGHT OF CREDITOR TO ATTACH ASSIGNED PROPERTY.

Where an assignee for the benefit of creditors has accepted the trust, and is in possession of the debtor's property, the latter is in the custody of the law, and is not subject to attachment by a creditor on the ground that the assignment is fraudulent and void.

Appeal from superior court, Lewis county; Edward F. Hunter, Judge.

Action of attachment by the Hamilton-Brown Shoe Company against Adams, Hart & Co., in which J. H. Mallory intervened, and claimed the attached property as assignee of defendant for benefit of creditors. From a judgment for the intervenor, and dissolving the attachment, plaintiff appeals. Affirmed.

Herren & Elliott, for appellant. Leroy A. Palmer, Lundrum & Landrum, and J. R. Buxton, for respondents.

DUNBAR, J. On the 2d day of November, 1891, the respondents executed a deed of assignment purporting to be for the benefit of all their creditors, appointed J. H. Mallory assignee, and on the same day placed him in possession. On the 11th day of November, 1891, the appellant, schedule creditor, commenced an action against respondents J. A. Adams, A. E. Hart, and G. L. Hart, alleging the assignment, alleging the indebtedness, which is not disputed; alleging the fraud of the assignment, and the fraudulent transfers by the assignors of certain real estate deeded and conveyed just prior to the assignment, and the fraudulent execution of a certain chattel mortgage prior to the assignment; and praying (1) for judgment in the sum of \$980.55, with interest; (2) that the said deeds mentioned be set aside, revoked, and held for naught; (3) that the said chattel mortgage be set aside, revoked, and canceled; and (4) that the said assignment be set aside, revoked, and canceled. At the same time the appellant sued out a writ of attachment, and caused the same to be levied upon the property alleged to have been fraudulently conveyed, and upon the goods and merchandise in the possession of the assignee, Mallory, and took from his possession all the property which he held as such assignee. On the 21st day of November, 1891, Mallory, the assignee, intervened in the action, and applied to the court for an order against the appellant to show cause why its attachment should not abate. The order was issued. The appellant set up and pleaded the fraud on the part of the assignors and assignee. The assignee replied, denying the fraud, and alleging the bona fides of the assignment.

<sup>1</sup> Hill's Ann. St. § 673, subd. 16.

Upon the hearing the court sustained the petition, and dissolved the attachment as to the property in the hands of the assignee. After judgment the appellant appealed to this court, alleging as error the action of the court dissolving the attachment. Other errors were alleged in the notice of appeal, but this is the only revision asked for by the brief of the appellant.

If this is to be regarded as an action to set aside a fraudulent conveyance, the complaint is plainly insufficient; for it is neither based upon a return of nulla bona, nor an allegation that there was no other property out of which plaintiff's claim could be satisfied. Courts will not enter into an investigation of the merits or demerits of a conveyance, at the instance of any petitioner, until it appears that he has some interest in the determination of that question, and he cannot have any practical interest if the debtor has other property which will respond to his execution. His right is limited to the satisfaction of his claim. It does not extend to enforcing its satisfaction out of some particular property of the debtor. See *Wagner v. Law*, 3 Wash. St. 500, 28 Pac. Rep. 1109, and 29 Pac. Rep. 927.

But, considering the complaint to be sufficient to sustain a judgment, the main question at issue here is, can property be taken from the possession of an assignee of an insolvent debtor by virtue of a writ of attachment? Or, in other words, is such property in custodia legis? It is broadly asserted by Wait, in his work on *Fraudulent Conveyances*, (section 316,) that it is not, for the alleged reason that the assignee is not an officer of the court, but is a trustee bound to account according to the terms of the instrument, and his authority depends upon the validity of the assignment, and is not conferred by the court. The cases cited by the learned author to sustain this declaration are *Lehman v. Rosengarten*, 23 Fed. Rep. 642, and *Adler v. Ecker*, 1 McCrary, 257.<sup>1</sup> Both of these cases were tried in federal courts, and involved, to a certain extent, a conflict of authority between the state and federal courts; and it is noticeable that the decision in *Adler v. Ecker*, which is a Minnesota case, is in direct conflict with the holdings of the supreme court of that state. *Adler v. Ecker* was decided in 1880, while in *Bank v. Schranck*, 44 N. W. Rep. 524, (decided in 1890,) the supreme court of Minnesota decided that "when the assignment is perfected, and to some extent, at least, prior thereto, its entire subject-matter,—all that is involved,—including the assigned estate, passes under the jurisdiction of the district court, ipso facto. Immediately, and without any further act, the assigned property is in the custody of the law." The court further said: "The correctness of this practice has never been questioned, and as a consequence it has not been decided, although it was held in *Lord v. Meachem*, 32 Minn. 66, 19 N. W. Rep. 346, the assignment being, in fact, valid, that the assignee could not be gar-

nished, for several reasons; the insuperable one being that the assigned property was in custodia legis." And such, we think, has been the great weight of decision under statutes similar to ours. Of course it depends entirely upon the authority given by the statute to the court. It is conceded by all the cases that property in the hands of a receiver appointed by the court is property in the hands of the court, but it is claimed that the assignee derives all his power from the assignment, which, says Mr. Wait, is both a guide and measure of his duty. But the trouble with this theory is that the premises are misstated, or rather that the subject-matter of dispute is stated as a conclusion. An investigation of our particular statute convinces us that the assignee does not derive all his power from the assignment, and that it is not the exclusive guide and measure of his duty. It is true that he obtains, primarily, his authority to act from the deed of assignment. But the deed of assignment simply inaugurates the proceedings, and when the court obtains jurisdiction of the proceedings it obtains complete jurisdiction. Authority and control over the property are conferred by law upon the court. The insolvent yields to the jurisdiction of the court when he files his deed of assignment. From this time until the final settlement of the estate the court makes orders concerning the control and distribution of the property which are judicial in their nature. Under our statute the assignor cannot invest the assignee with discretionary powers to such an extent that he can distribute the estate in such a manner as to defeat the rights of the creditors. The object of the law is to insure a rightful distribution, and the court will see that such distribution is made. The assignee does not, as Mr. Wait says, distribute the proceeds of the estate under the sole guidance of the assignment. If that were true, it would be an idle thing to bring the estate into court at all. But he must distribute according to the edicts of the law, under the direction of the court. The law provides that the assignment shall be made for the benefit of all the creditors, and the appointment of the assignee in the first instance is simply an initiatory step necessary to turn the property manually over into the custody of the court; and the simple fact of his appointment emanating from the assignor does not particularly distinguish him from an officer appointed by the creditors or by the court. The law provides that upon the filing of a deed of assignment the creditors may make application to choose an assignee in lieu of the assignee named by the debtor in assignment, whereupon the judge directs the clerk to order a meeting of the creditors to elect an assignee, and in the event the creditors cannot elect by the majority required the court appoints an assignee, who upon qualifying is clothed with all the authority of the assignee appointed by the debtor. As still further limiting the discretion of the assignee, the law provides that from the time of the pending of an application to elect an assignee by the

<sup>1</sup>2 Fed. Rep. 126.

creditors, and until the time shall be terminated by an election or appointment by the court, no property of the debtor, excepting perishable property, shall be sold or disposed of by the assignee, but that the same shall be safely and securely kept until the election or appointment of an assignee. Section 7 confers upon the court absolute jurisdiction and control over the estate. It provides that "any person interested may appear within three months after filing such report, and file with said clerk any exceptions to the claim or demand of any creditor, and the clerk shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of summons, returnable at the next term; and the said court shall at such term proceed to hear the proof and allegation of the parties in the premises, and shall render such judgment therein as shall be just, and may allow a trial by jury thereon." Section 8 gives the court jurisdiction in the distribution. It is as follows: "If no exception be made to the claim of any creditor, or if the same has been adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands, in proportion to their claims, and as soon as may be to render a final account of said trust to said court, who may allow such commissions to said assignee, in the final settlement, as may be considered just and right." And section 9 provides: "The assignee shall at all times be subject to the order of the court or judge; and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this act." Section 10 provides: "No assignment shall be declared fraudulent or void, for want of any list or inventory as provided in this act. The court or judge may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, or at the next term, to answer under oath such matters as may then and there be inquired of him; and such debtor may then and there be fully examined under oath, as to the amount and situation of his estate, and the names of the creditors, and amounts due to each, with their places of residence; and the court may compel the delivery to the assignee of any property or estate embraced in the assignment." Thus it will be seen that the court has full and complete power over the property of the estate, to such an extent that it can compel the delivery of any of the property of the estate to the assignee. The law certainly does not intend that one of its provisions shall render another provision nugatory; and yet how futile would be the action of the court, compelling the delivery to the assignee of the property for the purpose of distributing its proceeds, if the same could be taken from the assignee by a writ of attachment, or any other process. Such a practice would certainly lead to

interminable confusion, creating fraud and endless trouble. The Iowa statute seems to be substantially the same as ours, and the supreme court of Iowa, in *Shoe Co. v. Mercer*, 51 N. W. Rep. 415, a leading case, (decided February 2, 1892,) the plaintiff in that case being the plaintiff in the case at bar, and the cases being practically identical, held that the property in the hands of the assignee was not subject to attachment. And the court says: "The primary authority of the assignee is derived from the assignment, for it is voluntary; but, when made, it puts in operation the provision of the law, which, through the agency of the court, guides, guards, and controls the entire administration of the estate."

But, in addition to what has been said, section 1 of the insolvency act provides, in direct terms, that such assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment. Certainly the very strongest implication is that an attachment could not be levied after the date of the assignment. It would be both ridiculous and unjust to destroy a lien which was rightfully in existence before the property was assigned, and supplant it with one asked for after the assignment. Appellant asserts that under the provisions of section 10, which provides that the court may compel the delivery to the assignee of any property or estate embraced in the assignment, there is no method provided in the act of reaching any property which should have been, but was not, conveyed by the assignment. If this were true it could not affect the standing of the property that was in the hands of the assignee. That property is safe in the hands of the court,—placed there by the act of the assignor; and it will be distributed by the court, regardless of the bona fides of the assignment. That is a question which only affects the discharge of the assignee. Such is evidently the scope and meaning of section 15. But we do not understand that the provision in the latter part of section 10 is restricted to the property set forth in the inventory; for, notwithstanding the provisions for the inventory, the law especially provides that no assignment shall be declared fraudulent or void for want of any list or inventory. And the court, under the provisions of section 10, can reach out its arm, and compel the delivery to the assignee of any property embraced in the assignment, whether in the inventory or not; for, if not embraced in the inventory, it will be inserted in an additional inventory provided for in section 11. And, if the court can compel the bringing in of all the property, no injustice can be done. So far as the allegations of fraud are concerned in this case, the ascertainment of which would tend to defeat the discharge, we have not considered them, for there is no proof whatever submitted. The judgment is therefore affirmed.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.



(5 Wash. 294)

**MT. TACOMA MANUF'G CO. v. CULTUM**  
et al.

(Supreme Court of Washington. Nov. 30, 1892.)

**MECHANIC'S LIEN — SUFFICIENCY OF NOTICE — DESCRIPTION OF PREMISES.**

A lien for materials furnished in the construction of a house will not be enforced when the description in the notice of claim is so defective that the premises cannot be identified by it.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by the Mt. Tacoma Manufacturing Company against August Cultum, contractor, and J. W. Kennedy and Marie H. Kennedy, owners, to enforce a material man's lien. Defendants had judgment, and plaintiff appeals. Affirmed.

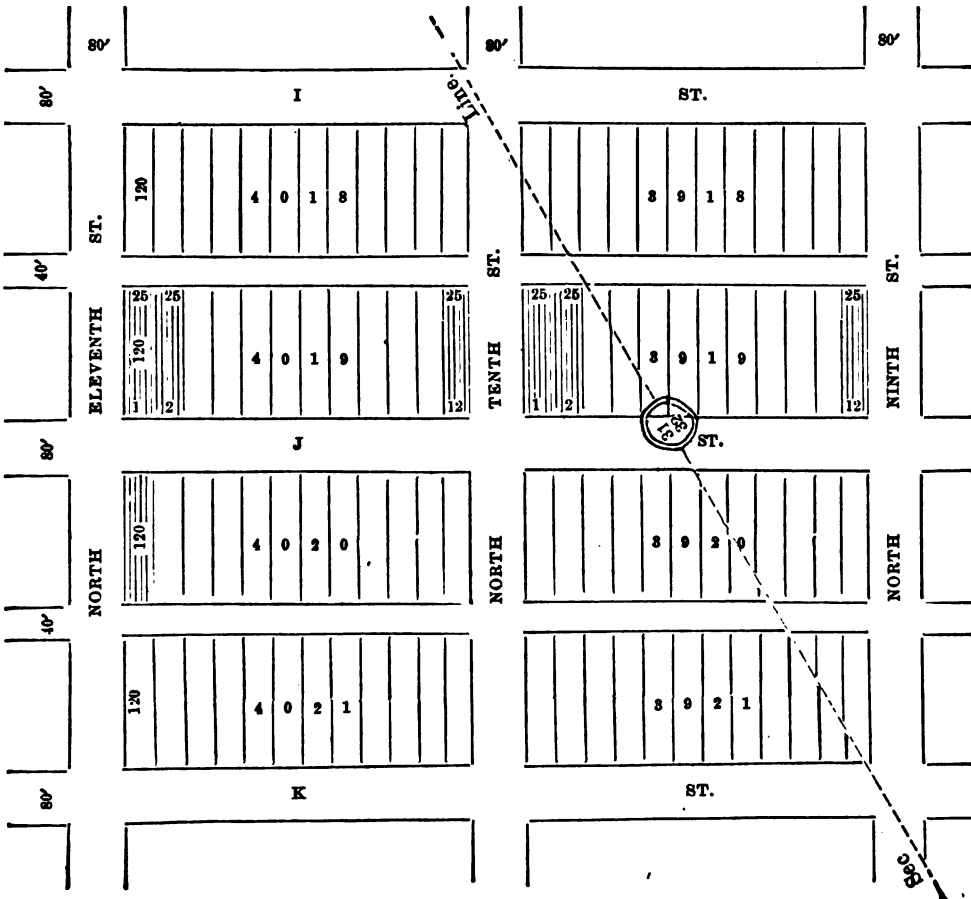
The plat referred to in the opinion is given below.

Crowley & Sullivan and Judson & Sharpstein, for appellant. S. Warburton and J. C. Stallcup, for respondents.

**DUNBAR, J.** This action was brought to foreclose a lien for materials furnished

in the construction of a dwelling house, alleged to be built on lots 1 and 2, in block No. 3,919, in the city of Tacoma. The statement of facts shows that the lien notice was as follows: "— claims a lien upon that certain wooden frame building situated upon the southeast corner of North Tenth and J streets, upon lot No. 12, in block No. 4,016, city of Tacoma," and that no other description is contained in said lien claim. These facts being pleaded in the answer, the plaintiff demurred to the answer, on the ground that it did not state facts sufficient to constitute a defense. Demurrer was overruled, and plaintiff appeals to this court; so that the sole question to consider is the sufficiency of the lien notice.

The only logical theory upon which this action can be sustained is the theory that there is no virtue whatever in the description of a lien notice, for there is nothing in this notice to lead one to the premises sought to be foreclosed, either in the amount of land, the number of the lot or block, or the point at the junction of the streets mentioned; but everything to lead them in another direction. It is not a case



TACOMA.



of insufficiency of description, but the statement in the lien notice flatly contradicts the statement of the complaint. No reconciliation is possible. Had the notice stated that the property was situated on one of the four corners of North Tenth and J streets, that would have been some guidance, though rather indefinite; but it avers that it is situated on the southeast corner, which would lead a person trying to locate the land to block 3,920, if we understand the accompanying plat. If he were to be guided by the plain instruction of the notice, he would be justified in concluding that it was lot 12, in block 4,019, and this idea would be strengthened by the further assertion in the notice that he claims a lien upon said lot; there being, according to the complaint, a lien claimed only on one lot, while, according to the complaint, the building occupies two lots, neither one of which is the lot described. Neither prong of this description would lead a person to lots 1 and 2, in block No. 3,919; but, on the contrary, the fact that the lien was claimed only on one lot would justify any one in coming to a conclusion that the building occupying two lots was not meant. We think no notice so absolutely misleading as this one has been sustained, and if it has, under the decisions of this court in *Warren v. Quade*, 29 Pac. Rep. 827, and *Young v. Howell*, 31 Pac. Rep. 629, they could not be followed.

The judgment is affirmed.

ANDERS, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

(5 Wash. 369)

BARTLETT v. REICHENNECKER et al.,  
(WILLIAM L. GILBERT CLOCK CO. et  
al., Interveners.)

(Supreme Court of Washington. Dec. 3, 1892.)

PREMATURE APPEAL—FROM FINDINGS BEFORE  
JUDGMENT.

An appeal in an action tried by the court, taken immediately after the making and filing of findings of fact and of law, and before the entry of final judgment, will be dismissed as premature, as such findings cannot be considered as equivalent to a judgment under the practice of this state, which gives the parties a right to attack the findings before the entry of final judgment thereon.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action in equity by N. J. Bartlett against W. C. Reichennecker and others and the William L. Gilbert Clock Company and others, interveners. There was a judgment in plaintiff's favor, and Rotschild & Hadenfelder and Ernest Adler, interveners, appeal. Appeal dismissed.

Finch, Snook & Finch, for appellants. Frank A. Steele, for receiver. Hughes, Hastings & Stedman, for respondent A. H. Selwyn. Emmons & Emmons, for respondent Wm. L. Gilbert Clock Co. Fishback, Hardin & McLean, for respondent Bartlett.

HOYT, J. This was a suit in equity. The cause was tried and submitted to the

court, who thereafter made findings of fact and law. Immediately upon the filing of such findings the notice of appeal was given. Respondent moves to dismiss the appeal on the ground that at the time it was taken no final judgment had been rendered in the action. It appears from the record that about three months after the making and filing of the findings of fact and law, and of the giving notice of appeal to this court, a formal judgment and decree was signed by the court, and filed, and entered in the cause. The respondent argues that this state of facts shows that no judgment had been rendered at the time the notice of appeal was given. Appellants claim that the findings of law made by the court were in fact the rendition of judgment; their contention being that when the court had signed and filed such findings he had done all that was necessary; that all that remained thereafter was for the clerk, as a ministerial officer of the court, to make a formal entry of a judgment in accordance with such findings. If it appeared from the record that the court at the time he made and filed the findings of fact and law intended the same as a judgment in the cause, there would be much force in the contention of appellants, as the findings of law cover substantially the requirements of a formal judgment in the action. We are not satisfied, however, that the court intended such findings as a final adjudication of the cause. The practice in all the courts of the state, so far as we know, is to make and file findings of fact and law in cases in which such findings are considered necessary or proper, and submit the same to the parties for examination, and to allow full opportunity for such findings to be attacked before final judgment is rendered thereon. In the light of a practice of this kind it not only does not appear affirmatively that in the making of the findings in this case the judge intended to render final judgment, but, on the contrary, it seems to us to affirmatively appear that the judge had no such intention in the making and filing of such findings. This would be reasonably clear if there had been no action on the part of the court after the filing of such findings, and in the light of the fact that long after such findings were filed the court made and signed a formal judgment or decree, and caused the same to be filed and entered in the cause, the presumption that he did not intend the findings to be treated as a judgment is fully established. We are satisfied that at any time within six months from the date of the signing and filing of the formal judgment in this cause the aggrieved party could have appealed from such judgment. If this be so, then it must follow that before such judgment was signed and filed there had been no such decision of the cause as would sustain an appeal to this court. Under all the circumstances of this case, as disclosed by the record, we are satisfied that at the time the notice of appeal was given final judgment in the cause had not been rendered, within the meaning of our statute as to appeals, and, such being the case,

there was nothing to appeal from, and the attempted appeal must be dismissed.

ANDERS, C. J., and SCOTT, DUNBAR, and STILES, J.J., concur.

(5 Wash. 517)

STATE ex rel. CLINE v. CAMPBELL, Superior Court Judge.

(Supreme Court of Washington. Jan. 13, 1893.)

APPEAL—FAILURE TO FILE TRANSCRIPT—DISCRETION OF COURT.

Where a statute provides that in an appeal from a justice's court the papers and transcript shall be filed in the superior court within 10 days after the judgment rendered, and notice of appeal is given, and a bond filed within the time, and the transcript is not filed till after the 10 days, the supreme court will not interfere with the discretion of the superior court in denying a motion to dismiss made after the transcript was filed, and on the ground that the appeal was not taken in time; the presumption being that good cause was shown for failure to file the transcript.

Petition by the state of Washington, on the relation of G. L. Cline, against Hon. Fremont Campbell, judge of the superior court of Pierce county, Wash., for a writ of prohibition. Petition refused.

J. G. Davis, for relator.

DUNBAR, J. Judgment was rendered for the plaintiff, G. L. Cline, on the 23d day of September, 1892. On the 11th day of October, 1892, the attorney for defendant served a bond and notice of appeal to the superior court of Pierce county, Wash., in behalf of the defendant, upon the attorney for the plaintiff, and C. L. Beach, justice of the peace, before whom said cause was tried. The papers and transcript in the said cause were not filed in the superior court until the 26th day of October, 1892. On the 27th day of October, 1892, the attorney for the plaintiff filed with the clerk of the superior court a motion asking that said cause be dismissed, on the ground that the appeal taken in said cause was not taken within the time prescribed by statute, which motion was overruled by the judge of said superior court.

The statute, it is true, prescribes that the papers and transcript of the case in the justice's court shall be filed by the appellant in the superior court within 10 days after the judgment was rendered; but in this case, the notice of appeal having been given, and a bond filed within the time prescribed by law, and the defendant not moving to dismiss the case on the ground of the absence of the transcript until after the transcript had been filed in the court, and there being no showing to the contrary, this court will presume that good cause was shown to the superior court for failure to file the transcript, or, at least, that the court did not abuse its discretion in refusing to dismiss the appeal, and will therefore refuse to interfere with the discretion of the court in denying the motion to dismiss. The application for an alternative writ of prohibition will be denied.

ANDERS, C. J., and SCOTT, HOYT, and STILES, J.J., concur.

v.32p.no.1—7

(5 Wash. 425)

STATE ex rel. BATTERSBY et al. v. BOARD OF TIDE-LAND APPRAISERS OF WHATCOM COUNTY et al.<sup>1</sup>

(Supreme Court of Washington. Dec. 23, 1892.)

DONATION LANDS—PATENT—DESCRIPTION.

Where a donation claimant, who is entitled to 160 acres of land, procures a survey which covers that amount, and the lines run are such as he has a right to have established, a statement in the patent, by the government officers, that the land so surveyed is a part of a certain section, will not deprive the claimant of that part of the land outside of the exterior boundaries of such section, as the patent must be construed as covering the land contained within the calls thereof, regardless of section lines.

Application for an alternative writ of mandamus by P. S. Battersby and R. W. Battersby against F. N. Barney and others, as constituting the board of tide-land appraisers of Whatcom county. Writ denied.

In 1852, Russell V. Peabody entered upon a tract of land bordering on the waters of Bellingham bay, under the provisions of the act of congress commonly called the "Donation Law." At that time the government had not surveyed any portion of Whatcom county, and did not until October, 1858, when the surveyor general surveyed the townships, and established the section lines where this donation entry had been made, and returned the survey into the general land office. In 1861 a survey was made of the entry of Peabody, and was returned into the general land office, and in 1873 the government issued its patent confirming the entry. This patent was defective, in that the calls in the patent did not close the survey; and in 1883 the patent was reissued, correcting the defect. The land from which the last survey was made borders on the shores of Bellingham bay, at the mouth of what is known as "Whatcom Creek," and embraces some 10 acres of land, which has always been subject to the ebb and flow of the tide. The survey set out in the patent includes this area. In 1889 the relators erected valuable improvements on a portion of this 10 acres, and have since used them for business purposes, paying ground rent to the grantees of the heirs of Peabody. The heirs and grantees of Peabody, he being deceased, made a claim of ownership of this land, and defendants, in making their plat of the tide lands in front of the city, tied their map to the course and distance line called for in the patent, leaving this area of 10 acres unplatted. After the passage and approval of the tide-land act and the establishment of the board of tide-land appraisers, the relators applied to defendants to have the areas covered by their improvements appraised, and they refused.

Bruce & Brown, for appellants. Cole & Romaine, Black & Leaming, and Stratton, Lewis & Gilman, for respondents.

HOYT, J. It is conceded by appellants that, if the calls in the patent of the donation claim are to prevail, this case comes within the case of Scurry v. Jones, (Wash. St.) 30 Pac. Rep. 726, and that, under the

<sup>1</sup> For opinion on rehearing, see 32 Pac. Rep. 775.

rules established by the decision in that case, the decision of the court below must be affirmed. It is contended on their behalf, however, that the calls in this patent cannot prevail; that it must be held that they are controlled by the reference in said patent to the sections of which said donation claim forms a part; that the government survey of such sections, and the plat thereof, must be considered as having been imported into the description contained in the patent; and that, since by said patent it is stated that said donation claim is a part of the sections above referred to, the calls of the patent must be confined within the limits of such sections; and that the lines which would, if run in accordance with the calls of the patent, extend beyond the exterior lines of said sections, must be by such reference stopped at such exterior lines. On the other hand, it is contended by respondents that the calls of the patent are not at all controlled by the reference therein to said sections.

The general rule that reference to a plat or map in a deed of conveyance makes it a part thereof is well settled. It is also well settled that, when it becomes thus incorporated into the deed, all of the lines thereof have the same effect as monuments in controlling the courses and distances therein set out; and, if the question we are now considering comes within this rule, the contention of the appellants must prevail. As we look at the description in this patent, however, it seems to us to be clearly distinguishable from those to which said general rule applies. It is true that it is stated therein that the claim is a part of certain sections; but when we look at the nature of the claim, and of the methods by which the calls of the patent have been determined, it seems to us that such bare reference can have no such force as to make the lines of said sections control the description, when the same conflict with the courses and distances set out in such patent. The lines of a section are determined from a survey thereof made and approved by the proper authority. The lines of these donation claims are also established by a survey approved by the same authority. To hold that the lines thus approved, for the special purpose of establishing the courses and distances to be set out in the patent, should be controlled by those established by like authority for the more general purpose of showing the boundaries of sections, would be contrary to well-settled rules of construction. The donation claimant was entitled to have the exterior boundary lines of his patent run to suit himself, without any reference whatever to section lines; and, when the exterior boundaries of such claim had been so run and approved by the proper authority, the fact that a reference to certain sections is made in the patent cannot control the courses and distances thus established for the express purpose of furnishing a proper description to be set forth in the patent. In the case at bar the donation claimant was entitled to 160 acres of land. He procured a survey which covered that amount. The lines run were such as he had a right to

have established, and it cannot be held that by the statement in the patent, by the officers of the government, that the land so described was a part of any section, he could be deprived of such a part of the land thus described as was outside of the exterior boundaries of such section. In our opinion, the patent must be construed as covering that part contained within the calls thereof outside of the section lines, as well as the part within such sections. Several other questions were raised by the respondents as reasons why the decision of the lower court should be affirmed, but the conclusion to which we have arrived as to this vital one renders it unnecessary for us to decide them. The judgment of the lower court must be affirmed.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ., concur.

(5 Wash. 442)

BOWEN v. HUGHES et al.

(Supreme Court of Washington. Dec. 30, 1892.)

RESULTING TRUST — SETTLEMENT OF DECEDENT'S ESTATE — SETTING ASIDE DEED — UNDUE INFLUENCE.

1. Where an administratrix buys land for herself on her own credit, a trust does not result in favor of the estate by virtue of the subsequent inadvertent application of some of the funds of the estate in part payment of the price, but such a trust can result, if at all, only at the time the title vests.

2. The settlement of an estate will not be disturbed 20 years later, at the instance of a minor heir, claiming fraud and mismanagement, where it appears that the minor had been represented by guardians, who, although without any present recollection, had examined the accounts as they were then filed, and had consented to the settlement.

3. On a question of the undue influence of a mother over a daughter, in procuring the daughter to sell and convey certain land without consideration, it appeared that at the time the daughter agreed to sell she was of full age and living away from the mother, that the mother had no control over her, and that the affection between them was not very strong. The sale was not effected until nearly two years after the agreement to sell. The mother testified that the consideration for the deed was \$800 furnished the daughter while away at school. The consideration expressed in the deed was \$500, which was about the value of the land. Five months after the execution of the deed the daughter married. No demand was made on the mother for several years, and until the land had become greatly enhanced in value. Held not to establish undue influence.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Louisa V. Bowen against Mary L. Hughes, late administratrix of the estate of John Foss, deceased, and Robert Hughes, her husband, to cancel a deed given by plaintiff to defendant, and for an accounting. Judgment for plaintiff. Defendants appeal. Reversed.

Fishbank, Harden & McLean, for appellants.

The administratrix, by inadvertently using certain funds of the estate in payment of land previously bought and conveyed, did not become a trustee holding the land in favor of the estate; but such a

trust can result, if at all, only at the time the title vests. *French v. Shepler*, 83 Ind. 266; *Buck v. Swazey*, 75 Me. 41; *Olcott v. Bynum*, 17 Wall. 44; *White v. Carpenter*, 2 Paige, 238; *Jackson v. Moore*, 6 Cow. 726; *Buck v. Pike*, 11 Me. 25; *Conner v. Lewis*, 16 Me. 274; *Rogers v. Murray*, 8 Paige, 393; *Pinnock v. Clough*, 16 Vt. 506.

Ronald & Piles, for respondent.

The deed from plaintiff to defendant was procured by the persuasions, fraudulent representations, promises, etc., of the defendant. There was no consideration whatever therefor. The burden of proof was upon defendant to show that the transaction was righteous,—untainted with fraud or undue influence. This she absolutely failed to show. *Pom. Eq. Jur.* §§ 951, 955-958, 961, 962, and notes; *Ashton v. Thompson*, (Minn.) 18 N. W. Rep. 918; *Noble's Adm'r v. Moses*, (Ala.) 1 South. Rep. 217; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Dunn v. Dunn*, (N. J. Err. & App.) 7 Atl. Rep. 842; *Davis v. Dean*, (Wis.) 26 N. W. Rep. 737; *Smith v. Smith*, (Wis.) 19 N. W. Rep. 47; *Crawford v. Hoeft*, (Mich.) 24 N. W. Rep. 645; *Sprague v. Hall*, (Iowa), 17 N. W. Rep. 743; *Munson v. Carter*, (Neb.) 27 N. W. Rep. 208; *Carter v. Tice*, (Ill. Sup.) 11 N. E. Rep. 529; *Waller v. Armistead*, 2 Leigh, 11; *Bayliss v. Williams*, 6 Cold. 440; *Turner v. Turner*, 44 Mo. 535; *Greer v. Greers*, 9 Grat. 330; *Suttles v. Hay*, 6 Ired. Eq. 124; *Fuller v. Fuller*, 40 Ala. 301; *Millican v. Millican*, 24 Tex. 426; *Muzzy v. Tompkinson*, 2 Wash. St. 616, 27 Pac. Rep. 456, 28 Pac. Rep. 652.

DUNBAR, J. The motion to strike the statement of facts and dismiss the appeal in this case must be overruled. It would be inequitable, in our opinion, and not in harmony with the spirit of the law, to compel a party desiring to appeal to prepare his statement of facts before he had access to the judgment from which he desired to appeal. The mere oral announcement by the judge of his decision in the case is not, or at least might not be, a sufficient basis upon which to prepare a statement of facts; and appellant would have no right of access to the written judgment until it was filed in the case. The other grounds of the motion, we think, are without substantial merit.

After a careful examination of all the testimony in this case, we have concluded that it must be reversed on the merits, and have, therefore, not found it necessary to pass upon the many technical questions of law raised by the appellant, as to the misjoinder of causes of action, the right of heirship of respondent, errors in rejection of testimony, etc.

This is an action between mother and daughter. The record shows that one John Foss died intestate July 26, 1872, in Snohomish county, Wash., leaving real and personal property in said county subject to administration. He left, as heirs to his estate, his widow, who is the appellant in this action, and a stepdaughter, who is the respondent, and who, by reason of a special act of the legislature, was treated by the probate court as an heir, and whom, as we have above indicated,

we will consider a legal heir, for the purposes of this decision. The mother was appointed administratrix of the estate, and conducted the settlement of the same. In October, 1873, as such administratrix, she filed her final account in the probate court, which was approved, and a distribution of the estate made between her and her daughter, and an order of final settlement made, wherein certain lands were set apart to the daughter, and certain to the mother. The daughter, at the time of such distribution, was a child about nine years old. There seems to be no serious question as to the fairness of the distribution of the real estate; but it is claimed by the daughter that her mother not only mismanaged the estate, but, for the purpose of defrauding her, she dishonestly and fraudulently made false returns to the probate court of her proceedings as administratrix, and that she failed to account to the probate court for all the property of the estate, and that she presented false bills against said estate, and was allowed the same; and she is now called upon to account to the respondent for the property which she received as administratrix of said estate. It is also alleged that certain town lots in the city of Snohomish, which were deeded to the appellant, were purchased with the funds of said estate, and that they should be declared to be held in trust for said estate, and that the appellant should now account to respondent for her share of the same.

On this last proposition, if it were conceded that property of an estate which has not been administered upon could be reached by an heir in this manner, it seems to us that in a transaction of this kind there can be no element of resulting trust. It is true that \$50 of the amount which was paid as the purchase price of the lots were included in the bill which was afterwards presented by the administratrix to the probate court, and allowed in her settlement; but it seems from the evidence that it was simply a mistake and an oversight on the part both of the administratrix and of the court. Even if it were conceded that the estate of a dead person could in any manner authorize any one to invest its funds in land, there is no testimony tending to show that any such authorization was ever made by the court, or by any one interested in the estate, or that there was any understanding whatever between the administratrix and any one else that these lots were to be purchased, or that they were purchased, for the benefit of the estate. Ferguson, the grantor, who was introduced by the respondent, simply testified that Foss, before his death, might or might not have talked with him about buying them. This testimony amounted to absolutely nothing, and would not have amounted to anything if it had established the fact that Foss had talked of buying the lots before he died. The contract for the purchase of these lots was made between Ferguson and Mrs. Foss on December 12, 1872, more than four months after the death of Foss; and the title was conveyed to Mrs. Foss, in her individual name, by warranty

deed from Ferguson, on December 17, 1872. The testimony shows that Ferguson looked to Mrs. Foss, and not to the estate, for his pay. There is nothing in the testimony to show that she did not buy these lots as any one else would buy property,—for her own use. The funds of the estate were not used in the purchase of them, for the lots were purchased on December 17, 1872, and Mrs. Foss was charged with the purchase price, the same as she was with all other items in her account, and the estate was not charged with any portion thereof until the following March; and it certainly cannot be contended that the trust results after the title vests. If it results at all, it results at the time the title vests, and must be declared, because at the time of the vesting of the title the cestui que trust had an equitable interest in the land purchased, and no subsequent misappropriation of the trust funds can create a trust in the lands so purchased. To create this trust it must be shown that the money of the real, and not the nominal, owner formed at the time the consideration for the purchase, and became converted into the land. This is the doctrine announced in *Botsford v. Burr*, 2 Johns. Ch. 405. In this case Chancellor Kent says: "The trust must have been coeval with the deeds, or it cannot exist at all." The case of *Merket v. Smith*, (Kau.) 5 Pac. Rep. 394, cited by respondent, is not applicable to this case. There the funds of the estate were admitted to have been used in the purchase of the property. The only principle upon which resulting trusts are, or can be, declared, is that the estate belongs to the party who advances the money to pay for it. If he advances all the money, all the estate will be held in trust for him; if a portion of the purchase price, the trust will be declared in proportion. But no subsequent appropriation or advance of money to the purchaser, after the purchase is completed, will alter the case. It might be the ground of some new agreement, but it would not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstances of the former advancement. The case of *French v. Sheplor*, 83 Ind. 268, is a case parallel with the one at bar. There it was held that where a guardian purchased land for himself, upon his own credit, and took a conveyance, but afterwards, in violation of his duty, used the money of his ward in payment of the purchase money, no trust in the land resulted or arose in favor of the ward. This is a well-considered case, and the court says: "We have been unable to find an adjudged case which holds that the application of trust funds by the trustee to the payment of purchase money due on land previously sold and conveyed to him upon his own credit creates a trust in the land in favor of the cestui que trust." Here all the testimony there is on the subject is the testimony of Mrs. Foss; and she testifies that she bought the lots for her own use, and on her own credit, and that she did not know until after the commencement of this action that she had been credited in her account as administratrix for any

portion of the purchase price. "The trust results from the original transaction at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever." *Lehman v. Lewis*, 62 Ala. 129. The authorities in this court and elsewhere certainly leave no room for doubt that the "resulting trust springs from the original transaction, and that it is impossible to raise it so as to divest the legal estate by the application of the funds of a third person, whether he is a principal or a cestui que trust, to satisfy the unpaid purchase money." *Coles v. Allen*, 64 Ala. 98. The same principle is announced in *Jackson v. Moore*, 6 Cow. 706; *Buck v. Swazey*, 35 Me. 41; *Olcott v. Bynum*, 17 Wall. 44; and other cases cited by appellant.

So far as the other question raised in this branch of the case is concerned, we do not think that the showing made will justify us in disturbing the settlement adjudged and decreed by the probate court nearly 20 years ago. The records of the probate court show that the minor heir was represented both upon the allowance and settlement of the first account, and the final settlement and partition of the estate, by a guardian ad litem,—a different guardian ad litem being appointed in each instance; and, notwithstanding the fact that they now testify that they have no recollection of the circumstances, they both certified then that they had examined the petitions and accounts filed in the proceedings on behalf of the said minor, and consented to the allowance and distribution prayed for. But, considering the infirmities of memory, we prefer to believe their solemn avowals made at the time, rather than to rely on their memories after the expiration of 19 years, concerning matters which have not during all that time been called to their attention, and of which, at best, after this long lapse of time, they could have but an indistinct recollection. The only theory upon which the contention of the respondent can be sustained, in this particular, is that there was a collusion between the appellant, her attorney, and the court, to defraud the child, and that the final settlement of the administratrix was the result of such collusion. So that, without deciding the question whether or not the decree of the probate court could be annulled and set aside in a proceeding like this, we think the evidence in this case falls to show a state of facts which would justify the court in reaching the conclusion that such a decree should be now disturbed.

It is also claimed in this case that appellant exercised undue influence over respondent in procuring from her a deed to the 100 acres conveyed by the daughter to the mother, that there was no consideration for said deed, and that said deed should therefore be declared null and void. It seems to us, from all the testimony, that there is no question of fiduciary relation in this case, and none of the cases cited containing that element are in point. Even at the time the daughter agreed to

sell the land to her mother, she was past the age of 18 years, which under our law is the age of majority; she having been born October 7, 1864, and the date of her letter to her mother, in which she refers to her agreement to sell, being October 15, 1882. It will be observed, too, that this conclusion to sell was arrived at not when she was living with her mother, or under her control, but when she was living in Seattle, away from her mother. And it is impossible to read the testimony in this case—especially the testimony of the daughter—without coming to the conclusion that she was a young lady of an exceedingly independent cast of mind; that she was self-assertive, inclined to follow her own inclinations, perfectly competent to protect her own interests, and the last person to be controlled against her will, even at the time she agreed to sell. But it must be borne in mind that this sale was not made until nearly 2 years after this, viz. July 30, 1884, when the daughter was nearly 20 years old. This one fact tends to show that the mother was not coercing the daughter, or she would have secured the execution of the deed when she first agreed to sell, and not have waited for nearly two years, during which time her authority and influence would naturally be waning. It may be said that the action of the appellant was not very motherly, and that she was grasping and selfish. The daughter, at least, seems to have entertained this idea, and to have resented it; but that fact was a fact which tended to break down the confidential relations which ordinarily exist between mother and daughter,—relations which would render possible the subjection of the will of the daughter to that of the mother. It appears from the testimony that the mother never resorted to corporal punishment to enforce obedience; and the daughter testifies that she did not, and further, with a manifestation of great self-reliance, testifies that she could not, but intimates that her mother would have liked to have done so. She further testifies that her mother could not have compelled her to teach a school which she did teach. She is frank enough to testify that there was no great amount of affection between them. She went and came when she pleased, and engaged in any business that suited her. It is not claimed that the mother possessed any occult or mesmeric power over her daughter. So that, in the absence of fear or confidence or of affection, it is difficult to see upon what the claim of undue influence is based. The mother testifies that the consideration for the deed was the money furnished to her daughter while she was at Seattle attending school, which amounted to \$800. Some reliance is placed upon the testimony of the probate judge that the settlement of the administration and the partition of the estate were allowed on an oral agreement of the administratrix that she would maintain and educate the minor heir at her own expense. The testimony of the judge, however, flatly contradicts his own records, which show conclusively that the settlement and partition were based upon the report and recom-

mendation of the appraisers appointed to make an appraisement and report upon the distribution of the estate. The report was a long and itemized document, showing the condition of the estate, the account of the administratrix in detail, and exhibiting more than ordinary care in its preparation. The report was in the alternative, and was based solely upon the value of the property, and the recommendation was conditional. They recommended that, in case a certain bill presented by the administratrix was allowed by the court, a certain specific distribution be made, and that in case it was not allowed a certain other and different distribution be made; and distribution and settlement were made in accordance with their recommendation, and without any other conditions attaching. But, even if it be true that the administratrix did agree to maintain and educate the minor heir, it could only be construed to mean such education as could be obtained in the neighborhood where the parties lived, or at least such education as could be obtained in the common schools of the county, and could not be construed, considering the means of these people at the time, and their station in life, to mean that the child was to receive a collegiate education. There is no claim here that the child was not maintained, at the expense of the mother, in a style and manner which comported with her station; and it affirmatively appears that she had the full advantage of the common schools of that county; and while her ambition to receive a higher education was commendable, and her desire to live in the city, and to dress more elegantly and expensively, was perhaps pardonable, yet her mother was under no obligation, under the alleged agreement, to maintain her in this expensive position, and there is no doubt but that at the time the daughter thoroughly understood this, and acted upon it. There is some discrepancy in the testimony of mother and daughter concerning the expenses incurred by the daughter while at Seattle, which the mother paid. But it is very evident, from the testimony of the daughter alone, that the expenses were rather heavy; and as many years have elapsed between the time she lived there, and the time she testified in this action, it is more than probable that many items of expense have been forgotten. Indeed, the faultiness of her memory is manifest; for on her first examination she testified that she only lived in Seattle 7 months, and subsequently that she was probably mistaken, and that she was there 15 months. The mother testified positively that she paid out for her at that time the sum of \$800. The consideration expressed in the deed was \$500; and, without reviewing the testimony in detail, we are satisfied from such testimony, including the assessment of 1884, which was two years after the contract to sell was entered into, that \$500 was about the full valuation of the land. The daughter was married December 16, 1884,—less than five months after the deed was executed; and no demand was made on the mother until June, 1886, after the value of the

land had been greatly enhanced. And it appears from the testimony of the daughter that she was not the most interested party in bringing the action, and in fact knew very little about the facts on which many of the allegations were based; for she frankly testifies, upon cross-examination, that she had never heard of nearly all these alleged frauds until they were called to her attention while on the witnessstand. It seems tolerably plain to us that if any undue influence was brought to bear upon the daughter, to control her actions, it was after, rather than before, her marriage.

It is of little profit to cite authorities in this class of cases, for every case depends largely upon the circumstances surrounding it. There can be very little controversy as to the law governing contests of this kind. The controversy is over the facts. We do not think the testimony in this case shows such a state of facts as would warrant the court in concluding that this deed was procured by fraud, or by the exercise of undue influence, or that there was want of consideration for its execution. Under all the circumstances of the case, we conclude that the respondent has failed to make out her case, in every particular; and the judgment will therefore be reversed, and the cause dismissed, with costs to the appellant in the lower court and in this court.

ANDERS, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

(5 Wash. 462)

**SEATTLE & M. RY. CO. v. CLAUSSEN-SWEENEY BREWING CO.**

(Supreme Court of Washington. Jan. 4, 1893.)

**SALE—WHEN TITLE PASSES.**

Plaintiff railroad company contracted with W. & Co. for the purchase of railroad ties, to be delivered on its right of way; their acceptance being subject to the inspection of plaintiff's inspector, those furnished during one month to be paid for on or about the 25th of the succeeding month; the title to pass on their acceptance by plaintiff. W. & Co. contracted with F. for a portion of the ties, and F. sub-contracted with O. The contract with F. and the subcontract with O. provided for the delivery and acceptance of the ties, and payment therefor, in substantially the same form as the contract between plaintiff and W. & Co. *Held*, that where the ties were delivered by O. on plaintiff's right of way, and accepted by plaintiff's inspector, the title thereto passed to plaintiff, regardless of whether O. had been paid for them.

Appeal from superior court, King county; Richard Osborn, Judge.

Action for conversion by the Seattle & Montana Railway Company against the Clausen-Sweeney Brewing Company. Judgment for defendant. Plaintiff appeals. Reversed.

Burke, Shepard & Woods, for appellant. Stratton, Lewis & Gilman, for respondent.

HOYT, J. This action was brought to recover the value of certain ties alleged to have been the property of the plaintiff,

and to have been converted to its own use by the defendant. The ties alleged to have been so converted, for the purposes of the trial, and consideration here, were divided into two lots, as to one of which, numbering about 1,100, the defendant admitted the taking, but denied the title of the plaintiff; and as to the other, numbering about 700, no question was raised as to the title of the plaintiff, but the taking was denied by the defendant. As to the second parcel, and the questions raised in connection therewith, we shall say nothing, as our conclusions in regard to the questions presented in reference to the other lot will require a retrial of the case; and upon such retrial it is not likely that the same questions will present themselves, as to said lot, as upon the trial already had, and anything that might be now said in regard thereto, for that reason, would be of no avail.

Quite a number of errors have been alleged with reference to the questions presented to the court relating to said first-mentioned lot, some of which we think, as a matter of purely technical law, were clearly well taken; but as it seems to us that the case was submitted to the jury under instructions, the whole scope of which was such as to mislead, to the substantial prejudice of the plaintiff, we shall content ourselves with a general consideration of this substantial error, as the technical errors occurring during the progress of the trial will be substantially covered by such consideration, and the lower court, upon a retrial in accordance with this opinion, will not be likely to fall into the technical errors which appear in this record.

It appears from the record that the plaintiff had made a contract with Woolley & Co. under which they were to furnish to such plaintiff a large number of ties, which were to be delivered on the right of way of the plaintiff, and inspected by it, and those furnished during one month to be paid for on or about the 25th of the succeeding month. Under such contract the intention of the parties seems clear that immediately upon the inspection of the ties, and the acceptance thereof by the plaintiff, the title passed to it, and was not in any sense retained by said Woolley & Co. until payment had been made. In other words, it was clearly a sale of the ties upon credit, by which the title passed, perhaps, immediately upon the delivery upon the right of way of the plaintiff, and before inspection and acceptance by it, and certainly immediately upon such inspection and acceptance. Woolley & Co. let a contract to one Fostrom for the furnishing of a portion of the ties under said contract, and said Fostrom subcontracted for the delivery of such ties with one Osier. The contract between said Woolley & Co. and said Fostrom, and said Fostrom and said Osier, provided for the delivery of the ties, and for the payment therefor in substantially the same form as did the one between Woolley & Co. and the plaintiff; and from the uncontradicted testimony as to the course of dealing, as between the railroad company and its contractors and those having contracts un-



der said principal contractors, it clearly appears that the parties to the several contracts contemplated only one delivery; that it was the intention of all that, when Osler delivered the ties upon the right of way of the plaintiff, they were there for the purpose of being inspected, and, if found in accordance with the contract, accepted, by it; and that such inspection and acceptance were to be operative, not only as between the plaintiff and its principal contractor, but also as between the sub-contractors and their respective principals. This sufficiently appears from an examination of the terms of the contract of the plaintiff with Woolley & Co., and that of the contract between Osler and Fostrom. The last-named contract did not provide that the inspection and acceptance should be personal by Fostrom, but, instead thereof, that such inspection and acceptance should be by the regular tie inspector of the plaintiff; and the terms of payment named in said contract were the same as those of the contract between the plaintiff and Woolley & Co. But if there was any doubt in regard to this matter, from an inspection of the terms of the contract, this doubt was fully resolved in favor of the contention of the plaintiff by the undisputed testimony as to the course of dealing as between such plaintiff and its contractors and sub-contractors, hereinbefore referred to.

Such being the legal effect of all the contracts, the court should have instructed the jury that if, in pursuance of his contract with Fostrom, Osler had made a delivery of the ties upon the right of way of the plaintiff, as required by said contract, and the same had been inspected and accepted by the plaintiff as a delivery by Woolley & Co. under their contract, the title passed to the plaintiff, regardless of the question as to whether or not Osler himself had any knowledge as to when the ties were thus inspected and accepted, or of the question as to whether or not he had or ever did receive his pay therefor. As we view the instruction of the court, it not only did not thus instruct the jury, as it was requested to do by the plaintiff, but, on the contrary, instructed them, substantially, that the title would not pass from Osler unless he was directly a party to the inspection and acceptance of the ties by the plaintiff. This goes to the substance of the whole controversy as to the title to this lot of ties; and, as the testimony was practically undisputed, it would perhaps be our duty to direct the entry of judgment in favor of the plaintiff for this lot of ties, without a retrial, were it not for the fact that the question of value does not seem to have been admitted, nor exactly established, by the undisputed proofs, and of the further and more controlling fact, that such a disposition of the case would leave it undetermined as to the other lot of ties. The result would be that, without the consent of the parties, a single case would practically be made into two, as to one of which the entry of a final judgment would be directed, and as to the other an affirmance or a retrial. In view of these complications, justice will be best subserved by a retrial of

the whole case in accordance with the law herein laid down. The judgment will therefore be reversed, and a new trial ordered.

ANDERS, C. J., and STILES, DUNBAR, and SCOTT, JJ., concur.

(5 Wash. 466)

**WOO DAN v. SEATTLE ELECTRIC RAILWAY & POWER CO.<sup>1</sup>**

(Supreme Court of Washington. Jan. 6, 1893.)

**STREET RAILROADS—NEGLIGENCE—INJURY TO PERSON BOARDING MOVING CAR—SIGNAL TO STOP.**

1. In an action for injuries alleged to have been caused while attempting to board a moving street car, the speed of which had been reduced in response to plaintiff's signal, and then, before plaintiff could get aboard, suddenly increased, it is not proper for defendant, the gist of the action not being an injury caused by fault of plaintiff, to interrogate witnesses as to whether the place was a safe one to board a moving car, or how they would have done under the circumstances had they wanted to board the car, although such questions are not materially prejudicial.

2. An instruction that, if plaintiff attempted to get upon the front platform while the car was running at the ordinary speed, which was seven or eight miles an hour, he was guilty of negligence, was not prejudicial, as plaintiff's theory was that the car was not running at ordinary speed, but at a slower speed, at which the attempt would not necessarily have been negligence.

3. A street railroad is not liable for injury to one who attempts to board a moving car without signaling it to stop.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by Woo Dan against the Seattle Electric Railway & Power Company for personal injuries. Judgment for defendant. Plaintiff appeals. Affirmed.

Finch, Snook & Finch, for appellant. Julius F. Hale and Wiley, Scott & Boswick, for respondent.

STILES, J. The second paragraph of the complaint in this action was as follows: "That said plaintiff, on or about the 6th day of February, 1891, sought, solicited, and asked for passage on one of the cars of the said company on its said road, from Fremont to Seattle; that said plaintiff sought, solicited, and asked for passage of said company on said car by motioning and signaling to the 'motor man' operating said car; that at the time said plaintiff signaled to said motor man, as aforesaid, said car was in rapid motion, at some distance from said plaintiff, and approaching said plaintiff; that said motor man saw said plaintiff standing near said track signaling said motor man to stop said car; and that said motor man, in obedience to said signal, diminished the speed of said car to a rate of speed near approaching a stop; and that, while said car was moving at the rate of speed last aforesaid, said plaintiff, with due care and caution, undertook to board the front platform of said car; and that while said plaintiff was in the act of boarding said car, as aforesaid, and before said plaintiff had fully landed on the platform of said car, said motor man sudden-

<sup>1</sup>Rehearing denied.



ly, and without warning or notice to said plaintiff, and negligently and carelessly, and willfully and maliciously, set said car into fast and rapid motion, throwing and causing said plaintiff to fall beneath said car, with his leg under the front wheel thereof, and that when said plaintiff fell under said car, with his leg under the wheel of said car, and across the rail of said track, as aforesaid, the said wheel of said car caught, ran over, and mangled the leg of said plaintiff, so that, by reason of said injury, said plaintiff, of necessity, had to have the said leg amputated, severed, and cut off from said plaintiff's body." At the trial the only evidence to sustain these allegations was, in the first place, the statement of the plaintiff and several other persons, some of whom were in the car, and others who were in the neighborhood, that plaintiff stood alongside of the railway track in a cut made through a bank of earth which was several feet high, until the car approached near enough for him to attempt to jump on. The bank was high enough to hide the plaintiff until the car got within a few feet of him, and rose within 18 or 20 inches of the side of the car. The cut was some 10 or 15 feet in width. The usual stopping places of cars passing upon that track were to the right and left of the cut, which does not appear to have been at any street crossing. The car approached the plaintiff upon a sharp curve, around which it ran with somewhat less than its usual speed, and after it had rounded the curve the speed was increased, for the purpose of attaining the usual speed of about seven miles an hour. The plaintiff alone testified to the fact that he raised his hand as a signal that he desired the car to stop; that the motor man saw his signal; that the car, at the time it reached him, was going slowly; and that, at about the time he attempted to get on, its speed was suddenly increased, by the motor man applying the full force of the electric current. He says that he caught hold of the front rail of the car, and planted his feet upon the step. Whether he got his feet on or not, the fact is that he was in some way thrown off the car, and struck by the front end of the body of the car, which threw him against the bank of earth, whence he fell to the ground, and under the car wheels.

The first ground of error alleged is that the court permitted the respondent to elicit from several witnesses answers to questions like these: "(1) State to the jury whether this place where the Chinaman attempted to board this car was a safe place, in your opinion,—a safe place to board a car in motion. (2) What would you say as to the manner in which a person should act if they wanted to board a car at that place, to get on the front platform? (3) You may state to the jury whether, at the time this Chinaman jumped to get aboard the car at that place, it was a safe and careful thing for him to do." Abstractly, all such questions must be regarded as immaterial and irrelevant, and therefore not proper to be asked or answered. The gist of this action was not an alleged injury caused by

the fault of the plaintiff while attempting to board the moving car, but that, while he was attempting to do so, the motor man, with knowledge of his attempt, suddenly forced the car to a high rate of speed, and thereby caused the plaintiff's fall. It was not necessary to ask such questions either, because both court and jury, at this time in legal experience, will take notice that to attempt to board a moving street car, especially by its front platform, is dangerous under any circumstances; and if an intending passenger, in attempting to get upon a moving car, is injured simply by his slipping down, he has no one to blame but himself. But such questions, in such a case, could not be materially prejudicial.

The next objection is to the tenth instruction,—that "if the jury believe from the evidence that the plaintiff attempted to board the front platform of the car while the same was running at its ordinary rate of speed, then the plaintiff was guilty of contributory negligence, and, if you so find, your verdict will be for the defendant." The argument which appellant makes in support of his objection to this instruction is defective, for the reason that it admits that the contention of the appellant was that the car was not at the time of his accident running at its ordinary rate of speed, but at a slower rate, at which it would not necessarily have been negligence for the appellant to attempt to get upon it. It is not always negligence per se for a person in good physical condition, and unincumbered, to attempt to get upon a moving street car. *Eppendorf v. Railroad Co.*, 69 N. Y. 195; *Briggs v. Railway Co.*, 148 Mass. 72, 19 N. E. Rep. 19; *Corlin v. Railway Co.*, (Mass.) 27 N. E. Rep. 1000; *Morison v. Railroad Co.*, (Sup.) 8 N. Y. Supp. 436. Usually the question of negligence in getting upon a moving car is for the jury, rather than for the court; but the case of the plaintiff was not injured by the court's telling the jury in this instance that if plaintiff attempted to mount the car when it was going at its ordinary rate of speed, which was clearly established to be seven or eight miles an hour, he was guilty of contributory negligence, because the whole theory of appellant was that the car had slowed down, in response to his signal, and that, when he was about to jump on, the rate of speed was suddenly increased to its usual rate. If the rate was not reduced, and the car was merely proceeding at its usual speed, no negligence was proved, and appellant's injuries must have come in attempting to get upon a car moving so rapidly. As we said before, common knowledge teaches that to get upon any moving car is dangerous, and to mount a slowly moving car is not, per se, a negligent act; but under all the circumstances, as shown by the appellant himself in this case, the court was fully justified in telling the jury that it would have been negligence for appellant to attempt to get upon a car when running at a speed of seven or eight miles an hour.

The twelfth instruction was not open to objection. The portion complained of informed the jury that it was the duty of a person seeking to take passage on a street

car to make such signal as would attract the attention of the person in charge, and that if, without signaling, he attempted to board the car while in motion, and was injured, he could not recover. This is obviously true, since, under such a state of facts, there could be no negligence on the part of the person in charge.

Several requests to charge, made by the appellant, are all open to the objection that they assume facts concerning which there was no testimony in the case, and are apparently directed to an attempt to get the court to say to the jury that certain assumed facts would constitute negligence on the part of the motor man. Such is not the province of the court in charging the jury, at least unless the facts upon which the charge is based are in evidence, and are undisputed. We find no error, and therefore affirm the judgment.

ANDERS, C. J., and DUNBAR and HOYT, JJ., concur. SCOTT, J., concurs in the result.

(5 Wash. 482)

# CITY OF SEATTLE v. DORAN.<sup>1</sup>

## SAME v. ANDERSON.<sup>1</sup>

(Supreme Court of Washington. Jan. 6, 1893.)

FORECLOSURE OF TAX LIEN—NOTICE OF PUBLICATION—PROOF OF CITY ORDINANCE—VALIDITY.

1. In a suit by a city to foreclose a tax lien, the publication of the notice required by City Ordinance No. 737, § 5, providing "that within three days after filing the roll the clerk shall give notice by publication of such filing," may be shown by any competent proof, where the clerk is not required to preserve the proof in any particular way. *Wilson v. City of Seattle*, 27 Pac. Rep. 474, 2 Wash. St. 548, modified.

2. The city clerk was accustomed to copy the ordinances into the ordinance book, where, from time to time, the mayor resigned them. The ordinance directing the improvement in question had been duly copied into the ordinance book, but had not been resigned, and plaintiff, to prove the ordinance, offered the ordinance book, and testimony that the original ordinance had been duly approved and signed by F., the acting mayor, and subsequently destroyed by fire. Defendant objected to the proof, on the ground that, since the official record—the ordinance book—showed that the ordinance had not been signed, parol proof that it had been signed was inadmissible. *Held*, that the testimony is admissible, since it is not a contradiction of the record, but is offered to supply a defect therein.

3. The charter of S. provided that, if the mayor was absent or unable to act, his duties should be performed by the acting mayor. In the absence of the mayor, F. was selected to act as such. It was not clear that the mayor was absent at the very time when the ordinance was passed and signed. *Held*, that the proof is sufficient prima facie to show F.'s authority to approve the ordinance as acting mayor.

4. The ordinance was passed at an adjourned meeting of the city council. It did not affirmatively appear that all the members were present. The record showed that the ordinance was passed, and that several members voted for it, and none against it. *Held*, sufficient prima facie to show that the ordinance was duly passed, since the record did not show that any members were present except those who voted, and since, where the record shows that an ordi-

nance is passed, the presumption is in favor of its regularity, so far as the vote is concerned.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by the city of Seattle against Francis Doran. Same against Elizabeth Anderson. The actions were brought to foreclose liens for costs of improvements against property of defendants, and were tried together. From a judgment for defendants, the city appeals. Reversed.

W. S. Relfe and Wm. H. Moore, for appellant. W. R. Andrews and John G. Barnes, for respondents.

SCOTT, J. In April, 1890, the city of Seattle commenced two suits to foreclose liens claimed by it against the defendants, for the cost of the improvement of Fifth street, assessed against certain property owned by said defendants, respectively; one suit being to enforce the lien against lots 4 and 5, in block 35, of Beren's addition to the city, belonging to Elizabeth Anderson; and the other to foreclose such lien against lot 7, of block 34, of said addition, the property of Francis Doran. By consent the cases were tried together. Judgment was rendered for the defendants, and the city appealed.

The principal error complained of by the appellant is that the court refused to permit testimony to prove the publication of the notice regarding the assessment roll, required by section 5 of Ordinance No. 737, which is as follows: "Sec. 5. That, within three days after filing the roll, the clerk shall give notice, by publication, of such filing; that the same is open to inspection; and that any person feeling aggrieved thereby may apply to the council, at its first regular meeting, the date to be therein stated; notice to be published ten days in each successive issue of newspaper." It seems that the court refused to permit this proof in accordance with the opinion heretofore rendered by this court in *Wilson v. City of Seattle*, 2 Wash. St. 548, 27 Pac. Rep. 474, wherein it is stated that the council could know the fact of the publication in no other way than by the certificate or affidavit of the publisher; and, until that document was before it, it had no jurisdiction to proceed. The language used in *Wilson v. City of Seattle* in this particular is somewhat unfortunate. The matter itself was not directly in issue in said case, and no particular attention had been directed thereto. There is nothing in the charter, or in any of the ordinances of said city to which our attention has been called, which requires the proof of the publication of such notice to be preserved by the city clerk in any particular way, or at all, for that matter, though doubtless the city records should show in some way that such notice was published, and a regular way would be by an affidavit of the publisher, and such affidavit, thus appearing, would be held to be prima facie proof of the publication; but, in the absence of any such requirement, competent proof tending to establish the publication of the notice would be permissible. The court below was justified

<sup>1</sup>For concurring opinion, see 32 Pac. Rep. 1002.

under the decision mentioned, in holding as it did, but we are satisfied that that decision went too far. It is the fact of the publication which gave the city council jurisdiction to proceed, and not the proof of it, under the circumstances. 1 Dill. Mun. Corp. (4th Ed.) § 300.

The appellant sought to prove Ordinance No. 955, directing the improvement, by introducing the ordinance book into which the same had been copied. By this copy it did not appear that said ordinance had ever been approved or signed by the mayor. There was proof to show that the original ordinance had been destroyed by fire, and that it had been approved and signed by Jacob Furth, acting mayor. The respondent objected to this proof, on the ground that parol testimony could not be introduced to show that the ordinance had in fact been signed, as the official record thereof failed to show it; and he further objects upon the ground that it did not sufficiently appear that said Jacob Furth was the acting mayor, or had authority to sign said ordinance.

Upon the first proposition we are satisfied that parol proof was admissible to show the fact that the ordinance had been signed. This testimony was not a contradiction of the record, but was offered to supply a defect or omission. The proof showed that it was the clerk's custom, in copying the ordinances into the ordinance book, not to write the mayor's name therein, but to leave the place blank, and that the mayor would thereafter, from time to time, resign said ordinances in said book. In this instance it had not been so signed. See *Knight v. Railway Co.*, 70 Mo. 231.

As to the further point, in relation to the authority possessed by Furth, it appears that, some weeks prior to the time Ordinance No. 955 was passed, the mayor stated to the council that he was to be absent from the city for some weeks, whereupon the council elected Councilman Furth to act during his absence. It is contended by the respondent that there was nothing to show the mayor was not in the city at the time this ordinance was approved, and for that reason the proof was insufficient to show any authority in Furth to act. The charter provided that during the temporary absence of the mayor of the city, or if he was from any reason unable to act, the council should elect one of their own members acting mayor, and thereupon the acting mayor should transact all the duties of said office during said temporary absence or disability. Respondent urges in this connection that there should have been proof of the mayor's disability or inability to act at said time by reason of his absence, or otherwise. It appears that Furth had served as acting mayor from time to time since his election, down to and including the time of the passage and approval of this ordinance. The proof is not entirely clear as to whether the regular mayor was absent from the city during all this time, nor is there any proof to show that he was incompetent, or unable to act for any other reason; but we think that, under the circumstances, there

was sufficient proof *prima facie* to show authority in Furth to approve the ordinance as acting mayor.

A further point is made by the respondents that the judgment should be affirmed, whatever view we may entertain of the preceding matters, on the ground that there is no proof that a majority of the property owners residing along the line of said improvements had petitioned therefor, or that said improvements were authorized at a regular meeting of the city council, all the members present voting in the affirmative. The record of the meeting at the time this ordinance was passed states that the same was passed, and that several councilmen, naming them, voted in the affirmative, and that none voted against it. It does not affirmatively appear that all the members of the council were present, nor is it entirely clear that the proof which was offered established the fact that it was a regular meeting, but we think the proof tended to show that it was an adjourned meeting from a regular meeting; and the records showing the vote in favor of the ordinance, and not showing any against it, or that any other members were present at the time, we think it was *prima facie* sufficient to establish the fact that the ordinance was duly passed. *Chosen Freeholders v. State*, 24 N. J. Law, 718. There are some presumptions in favor of such proceedings. Where, as in this matter, the record states that the ordinance was passed, it will be presumed to have been regularly passed, in so far as the vote thereon is concerned. Generally, however, in proceedings of this kind, to establish and enforce liens against property, there is no presumption in favor of their validity, and it is incumbent upon the city to show each and every necessary step to establish its claim. *Pittsburg v. Walton*, 69 Pa. St. 365. The judgment is reversed, and the cause remanded for further proceedings.

ANDERS, C. J., and HOYT and DUNBAR, JJ., concur.

(5 Wash. 488)

In re ROSNER.

(Supreme Court of Washington. Jan. 6, 1893.)

PRESUMPTIONS ON APPEAL.

Where, on the trial of a cause, exception to a charge is taken, immediately after it is given, on the ground that it is insufficient and misleading, by reason of certain words used therein, and such exception is allowed, the presumption is conclusive that the words excepted to were used.

Appeal from superior court, Whatcom county; J. R. Winn, Judge.

James H. Rosner was convicted of assault with a deadly weapon, and petitions for a settlement of the statement of facts in accordance with an exception taken by petitioner to a charge of the trial court. Petition granted.

Black & Leaming, for petitioner. Albert S. Cole, for respondent.

STILES, J. The petition in this matter shows that, at the trial of the petitioner

on a charge of committing an assault with a deadly weapon, the court, in defining a deadly weapon, used this language: "A deadly weapon is, one likely to produce death or great bodily injury, and the question whether or not a weapon is a deadly one is a question of fact, for the jurors to determine. You have to take into consideration all of the circumstances in the case; and if you find that the defendant made an assault, and did this with the intent to commit an injury to the person of the complaining witness, where no considerable provocation appears, and that this was done with a deadly weapon, or such a weapon that, in the nature and manner in which it was used, is likely to produce death or injury upon the complaining witness, then it is left with you to say whether it was a deadly weapon, from the facts and circumstances in the case." It also shows that, immediately upon the retiring of the jury to deliberate upon their verdict, the attorney for petitioner arose, and asked the presiding judge to grant petitioner an exception to that part of the charge in which the court defined and referred to a deadly weapon in language, in effect, that it was such a weapon as was likely to produce "death or injury" to the complaining witness, for the reason that, and on the ground that, the same is not, and was not, a true definition, and that the exception was then and there allowed by the court. And it further shows that thereafter a statement of facts was prepared and filed, and notice given for the settlement thereof, preliminary to the taking of an appeal from the judgment entered against the petitioner, which statement of facts consisted of the transcribed notes of one Van Orman, who acted as stenographer for the court in the trial of the cause. And it is further shown that upon the application of the petitioner to the judge who tried the cause, to settle the statement, the judge of his own motion, by interlineation, inserted in the notes of the stenographer, constituting the statement of facts, and in that part of the definition of a deadly weapon where the court referred to a deadly weapon as one which was likely to produce "death or injury" to the complaining witness, between the words "or" and "injury," the words "great bodily." The answer of the judge to the petition, and the order to show cause why the statement should not be settled here, shows that the words inserted were in the charge as given, and that the stenographer's report is erroneous; but it admits that the attorney of the petitioner "excepted to the instruction and charge given in said cause, in the manner and form set out in said paragraph 7;" that is, the exception with regard to the definition of a deadly weapon. Affidavits have been filed in aid of the petition, and also to sustain the contention of the respondent, that the words "great bodily" were actually used in the charge to the jury, but we shall not attempt to pass upon the force or effect of these affidavits. The fact which is admitted,—that the counsel for the respondent, almost immediately after the charge was given,

called the attention of the court to the insufficiency of the definition, and took, and was allowed, an exception, on the ground of the insufficiency, ought, we think, to preclude any further question as to whether the words were used or not. It seems to us that it would not accord with any proper system of judicial procedure that counsel in a cause should, in so serious a matter as the charge to the jury, be allowed to take an exception in the specific manner in which it was taken in this instance, without objection by the court, and the truth or falsity of the matter excepted to be afterwards subject to controversy by affidavit. The order in this matter will be that in the particular mentioned the statement be settled as proposed by the petitioner.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, J.J., concur.

(5 Wash. 493)

#### ANDERSON v. LAND et al.

(Supreme Court of Washington. Jan. 9, 1893.)

#### BILL OF SALE—WHEN TITLE PASSES—DISSOLUTION OF ATTACHMENT—LIEN.

1. Where plaintiff, at the dissolution of an attachment, receives from the attached debtor a bill of sale of the attached property, a good title vests in plaintiff, though the attaching officer had not made a delivery of the property to the attached debtor before the execution of the bill of sale.

2. Where, on the dissolution of an attachment, the attaching officer does not make a formal delivery of the property to the attached debtor, a second attachment will not revive, by virtue of such nondelivery, the lien created by the first attachment.

Appeal from superior court, Island county; Henry McBride, Judge.

Action by G. J. Anderson against L. T. Land and Thomas Nunan, sheriff, to recover certain personal property seized under attachment. From a judgment for plaintiff, defendants appeal. Affirmed.

Garrett & Corliss, for appellants. W. S. Reece, for respondent.

DUNBAR, J. This is an action brought under the provisions of title 8, c. 4, of the Code of Procedure; the plaintiff and respondent claiming the ownership, and right to the possession, of certain saw logs attached by the sheriff of Island county under a writ issued in the case of L. T. Land, Plaintiff, v. Judy & Swanson, Defendants. The levy of the writ against Judy & Swanson was made on November 14, 1890. The partnership existing between Judy & Swanson had been dissolved prior to that time; Swanson assuming the liabilities, and taking the assets. After the dissolution of the partnership, and writ of attachment issued, Swanson executed and delivered to the respondent, Anderson, his note for \$3,000, and a chattel mortgage on the logs in question to secure the same. On the 16th day of December the attachment was dissolved, and on the 18th Swanson gave Anderson a bill of sale of the

logs, and Anderson took possession of the same at the time. On the 18th day of December a second writ of attachment was sued out and delivered to the sheriff, who, without making any actual levy or seizure, indorsed on the writ the ordinary levy. He did not make any actual levy until some days after. Upon the trial of the case the court instructed the jury to return a verdict for the plaintiff.

There can be but two questions in this case: (1) Whether there was any fraud in obtaining the bill of sale by Anderson. (2) Was there any lien on the logs, by virtue of an attachment, at the time the bill of sale was given? One is a question of fact; the other, a question of law, the facts being conceded.

We have carefully examined the testimony, and agree with the trial court that there was no evidence tending to show fraud in obtaining the bill of sale, or tending to dispute the bona fides of the transaction, and consequently nothing under that head to submit to the jury.

We are also of the opinion that the court took the correct view of the legal proposition. Even conceding that the lien under the second attachment had not been lost when the sheriff went out of office,—which would be a doubtful concession, considering the testimony of the new sheriff that he did not make an actual levy until the 4th day of February,—the dissolution of the attachment on the 16th day of December ended the lien, and the owner of the property had a right to make any disposition of it he saw fit, no matter whether the property had actually been turned over to him by the officer or not. He could sell the property during the time the writ was in effect, in such case, and the purchaser's title would only be subject to the right of the attaching creditor under the writ; and when the attachment was dissolved there would be an end to any such right, and the purchaser's title would be complete. So far as the right of the officer is concerned, his title is dependent for its continuance upon the continuing of the necessity of holding the property to answer the purpose of the writ. *Freem. Ex'ns*, § 268; *Wade, Attachm.* § 294. Upon the dissolution of the writ the necessity ceases, and all his title to hold the property ceases. If upon the dissolution of the attachment the sheriff had refused to deliver the property to the defendant, the defendant could have maintained an action against him for its possession; and on the other hand, if, after the dissolution of the attachment, the defendant had taken possession of the property without its having been formally turned over to him, the sheriff would have had no power to enforce its redelivery to him. It follows conclusively that his right of possession ceased with the dissolution of the writ; and, if he was afterwards clothed with authority to seize property of the defendant, he must act on that authority, independently of any effect or power of the old writ. It is conceded that he did not make an actual levy in this case until after the sale to the respondent.

We have examined the other points raised by appellants, and we think there

is no substantial error in the trial by the court, and judgment is therefore affirmed.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

(5 Wash. 496)

STETSON & POST MILL CO. v. McDONALD et al.

(Supreme Court of Washington. Jan. 10, 1893.)

MECHANIC'S LIEN — LIABILITY OF CONTRACTORS' SURETIES — NOTICE OF LIEN — WAIVER OF JURY TRIAL.

1. The lien of a material man for materials furnished certain building contractors by him cannot be enforced against persons who entered into the original building contract merely as sureties that such contractors would turn over the building to the owner when complete, free from liens; the material also being charged to the contractors, and furnished solely on their credit.

2. Lien notices must be recorded or filed for record; and where a notice was filed which was invalid, because there was no notarial seal attached to the affidavit thereto, no subsequent proof could be made as to any material fact to render such notice valid, and make it relate back to the time it was filed.

3. Where parties enter into a trial on the merits of the case, without any objection, or demand to have the case tried by a jury, they cannot, on appeal, raise such objection.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by the Stetson & Post Mill Company against J. F. McDonald and others to foreclose a lien for materials furnished. There was a judgment for all the defendants except McDonald, and plaintiff appeals. Reversed, except as to defendant McDonald.

Battle & Shipley, for appellant. Turner & McCutcheon, for respondents John H. and Leah G. Rengstorff. Stratton, Lewis & Gilman, for respondents E. F. Sweeney and Joel Docking.

SCOTT, J. This case was brought by the appellant to foreclose a lien for lumber furnished to be used in the construction of a building erected on certain real estate in the city of Seattle, in which the respondent Rengstorff had a leasehold interest. McDonald & Docking were partners, engaged in the business of constructing buildings, and entered into the contract in question with Rengstorff for the construction of this building. Piper & Sweeney had no actual part in the construction of the building, but were sureties for the contractors, although, instead of signing a bond for that purpose, they joined in the original contract. The appellant furnished the material in question to McDonald & Docking. In the action to foreclose, McDonald & Docking and Piper & Sweeney, together with Rengstorff, the owner, were made parties defendant. The appellant claims to be entitled to a judgment against Piper & Sweeney in consequence of their having joined in the original contract, which provided that the building should be turned over to Rengstorff free from liens, and that by

establishing the lien these parties also would be liable to it. This position is untenable. The fact that Piper & Sweeney joined in the contract with McDonald & Docking for the construction of the building would not render them liable to the plaintiff, for it appears by the proof that the object in having them made parties to the contract with Rengstorff was to afford Rengstorff additional security to that which he would have had had the contract been solely with McDonald & Docking. It also appears that the material in question was charged to McDonald & Docking, and was furnished solely on their credit. It was not known to the appellant at the time it furnished the materials that Piper & Sweeney were parties to the building contract. In no view of the case could the plaintiff have judgment against Piper & Sweeney.

Subsequent to the signing of the contract, Docking severed his connection with McDonald in the construction of the building, and McDonald alone continued the construction thereof. It does not appear that any new agreement was entered into or understanding had between said contractors and Rengstorff, or between McDonald & Docking and the plaintiff. The court rendered judgment in favor of the plaintiff against McDonald, (who made default,) but held the lien notice defective, and dismissed the action as to the other defendants. Appellant alleges that the court erred in rejecting the lien notice. The objection to this notice was that the seal of the notary was not attached to the jurat, and this we have held, in the case of *Gates v. Brown*, 1 Wash. St. 470, 25 Pac. Rep. 914, to be necessary. At the trial of this cause the appellant offered to prove that the notice had in fact been sworn to, and he argues that this proof should have been received, and given the effect of curing the omission of the notary to affix his seal. This position is untenable. These notices are required to be recorded, or filed for record; and the notice being invalid when filed, no subsequent proof could be made as to any material fact omitted to render the notice valid, and make it relate back to the time it was filed for record.

The lien notice was rightly rejected, but we think the court erred in its final disposition of the case. The defendants entered upon a trial as to the merits of the case, and evidence was introduced relating to the contract between the plaintiff and the contractors, McDonald & Docking, under which the material in question was furnished, without any objection or any demand to have the cause tried by a jury; and, plaintiff having in no wise released Docking, he was still bound under the contract under which the material was furnished, and the judgment should have been rendered, in favor of the plaintiff, against the contractors, McDonald & Docking, for the amount found to be due for said materials. See *Hildebrandt v. Savage*, 30 Pac. Rep. 643, 4 Wash. St. —. The judgment of the court below is reversed, except as to McDonald, and the cause is remanded, with instructions to also render a judgment in favor of the

plaintiff, against Docking, for the amount found to be due.

ANDERS, C. J., and HOYT, J., concur.

(4 Wash. 524)

### HILDEBRANDT v. SAVAGE.

(Supreme Court of Washington. Dec. 21, 1892.)

MECHANIC'S LIEN—PERSONAL JUDGMENT—WHEN LIEN IS INVALID—JURISDICTION.

Where, in an action to foreclose a mechanic's lien, the court determines that the lien is invalid, it has no authority to render a personal judgment against defendant for the amount of the lien; and the question of jurisdiction may be raised on appeal, though defendant did not object to the court proceeding in equity, or demand a jury. Per Stiles and Dunbar, JJ., dissenting.

For report of majority opinion, see 30 Pac. Rep. 643.

STILES, J., (dissenting.) I am entirely satisfied with the decision arrived at in the majority opinion to the effect that in a mechanic's lien case, the lien failing, there can be no personal judgment against the owner; but I cannot agree with that part of the decision which finds that jurisdiction is conferred by the defendant's not demanding a jury trial. The stipulation referred to, in my judgment, was nothing more than an extraordinarily full stipulation to qualify Mr. Millett as a special judge to try the case, and conferred no jurisdiction on him to do anything more than the judge of the court could have done without any stipulation. It seems to me, as this case has been decided, that the statute is a mere trap into which defendants in such cases are almost certain to fall. The case being tried as an equity action, the party has no right to a jury trial; but the holding is that, unless he demands a jury trial,—a thing which he cannot have,—he will be estopped from saying that the judgment rendered by the court without jurisdiction is not binding upon him. In this case the whole attention of the parties was directed to the establishment of the lien, on one side, and its defeat, on the other. The appellant had no opportunity to object to the court's entering a personal judgment against him, because no such thing was discussed or expected by either party. I think it would be far more fair to hold that lien claimants should try the cases which they bring under the statute, and, if defeated in that action, they should not have the reward of being allowed a judgment which the law does not contemplate, and that the defendant, although substantially the victor in the cause, should be compelled to pay the costs of disproving an insufficient lien claim.

DUNBAR, J., concurs.

(4 Wash. 630)

### CHEZUM v. KREIGHBAUM.

(Supreme Court of Washington. Dec. 21, 1892.)

CONTRACT FOR SALE OF LAND—OPTION.

A contract provided that C. should have the exclusive sale of K.'s land for 60 days, at

a sum and on terms named, "and said C. must get his commission above that." *Held*, that C. had an option to purchase the land within the time and on the terms specified. Per Dunbar, J., dissenting.

For report of majority opinion, see 30 Pac. Rep. 1098.

DUNBAR, J. I dissent. I do not think that any of the cases cited by respondent are in point. Here are two persons legally competent to contract, and the contract is one they had a right to make. If the respondent had seen fit to do so, he might have contracted that he would pay \$10,000, or any sum, to sell his land for the sum of \$6,000, and the law would enforce the payment of the price agreed to be paid if appellant had sold the land. The law will leave the parties to make their own contracts, and, after they are made, it will enforce them. This is not so much a question of agency as a question of employment. Nor is it true that, as between the contracting parties, the sale is made for the benefit of the landowner. The sale, if made, is made for the mutual benefit of both. This is not a written contract for the sale of land where the agent gets a commission on the amount of money obtained. The owner here has seen fit to make a contract with special provisions in his own interest. He said, in substance, to the agent, "If you will sell this land within 60 days, you can have for your services all you can get for it over six thousand dollars, be that much or little;" and he should be compelled to do what he agreed to do. This employment was taken on the doctrine of chances. No matter how much labor or money might have been expended by the appellant in an effort to sell the land, if he had failed to make the sale he could have recovered nothing. Respondent had protected himself by his contract, and he ought not to complain if the chances turned to the benefit of the appellant.

(5 Wash. 142)

**MAXON v. SCHOOL DIST. NO. 34, OF SPOKANE COUNTY.**

(Supreme Court of Washington. Dec. 22, 1892.)

For majority opinion, see 31 Pac. Rep. 462.

HOYT, J., (dissenting.) I am unable to agree with the majority of the court in the affirmance of this case. In my opinion, the district could not be held liable until there had been an adjudication of the amount of the indebtedness as between the plaintiff and the contractor. Such indebtedness could have been established in this action had such contractor been made a party thereto; but, he not having been made such party, it, of course, follows that there could be no adjudication as to the amount of the indebtedness as against him. The object of the statute under which the action was brought was to furnish protection in case of work done upon public buildings, similar to that afforded by our lien law when the work was done upon private buildings. There is nothing

in the act which tends to show an intent upon the part of the legislature to give any more extensive rights to the claimant than are given to him under the lien law; and from the nature of the property against which claims of this kind are to be enforced, and of the corporations which are the owners thereof, I not only do not see any reason for extending the remedy, but, on the contrary, I see many reasons why the same should be restricted, and kept within more narrow bounds than are those which are to be enforced under the lien law. Under that law, they are to be enforced against private parties, and as against property of which they are the sole owners. Such parties are presumed to have knowledge of contracts made by them, and the work done thereunder, to a much greater extent than do the representatives of public corporations. The latter usually content themselves with seeing to the execution of the contract, and pay comparatively little attention to the progress of the work thereunder. It must follow that such public corporation has much less complete knowledge of the actions of its contractor than does a private party of one with whom he had contracted. The entire object of the legislation as to this class of claims will be accomplished when the enforcement thereof is placed upon the same basis as the enforcement of the claim against a building owned by a private party under the lien law. That it has always been held necessary, in proceedings to foreclose a lien, to have an adjudication as to the indebtedness as against the contractor, is practically conceded by the respondents, and is fully established by the authorities. See *Kerns v. Flynn*, (Mich.) 17 N. W. Rep. 62; *Vreeland v. Ellsworth*, (Iowa,) 32 N. W. Rep. 374; *Emmet v. Rotary Mill Co.*, 2 Minn. 286, (Ill. 248.) Such being the rule as to the enforcement of claims under the lien law, I think that at least as strict a rule should obtain in the enforcement of claims under the statute in question. Such rule is not only a reasonable and proper one, and one which can inflict no hardship upon the claimant, but is also one which is absolutely necessary for the protection of the corporation. As we have seen, such corporations usually know very little as to the progress of the work, or to what extent the same has been done by any claimant who may seek relief under such statute. It follows that such claimant could meet with no successful resistance as against the enforcement of his claim, however fraudulent or excessive the same might be. Besides, this statute is not intended for the benefit of the contractor, and he should therefore be liable to the corporation for any and all amounts which it may have to pay under the provisions thereof. But, if the proceedings sanctioned by the majority of the court are sustained, the corporation might be compelled to pay a much larger amount than it could recover as against the contractor. The contractor, not having been a party to the proceeding, of course would not be bound thereby; and, when the corporation came to assert its rights as against such contractor, the judgment rendered in the proceeding against it



would not only not be conclusive as to the amount for which he was liable, but would not even be entitled to be introduced in evidence against such contractor. The proper, regular course, and the only one sanctioned by such statute, would be either to require first an adjudication of the amount due to the claimant as between him and the contractor, or else to make the contractor a party to the action against the corporation, so that he would be bound by the adjudication had therein. It follows that, in my opinion, the judgment of the lower court should be reversed.

(5 Wash. 499)

## STATE v. HUMASON.

(Supreme Court of Washington. Jan. 12, 1893.)

CRIMINAL LAW—RECORD ON APPEAL—TRIAL—  
DEMURRER TO INFORMATION—CATTLE STEALING  
—EVIDENCE—OWNERSHIP—USE OF AFFIDAVITS.

1. Questions raised on appeal, which are based on affidavits contained in the transcript, cannot be considered, unless made a part of the record by a statement or bill of exceptions.

2. Under Code Proc. § 1363, providing that no person shall be put upon trial on an indictment or information for a felony until the expiration of five days from the day of his arrest, a person may be tried within five days after information is filed against him, where he was actually arrested more than five days before such trial, since the "arrest" mentioned in the statute is that of being taken into custody before the magistrate, and not the formal rearrest after the information is filed.

3. Where an information is demurred to, and a motion to quash is made, on the ground that it was not signed by any authorized officer, and the demurrer and motion are overruled, without any finding as to such facts, the appellate court will presume that the trial court found the facts to be contrary to the allegation of the demurrer and motion, and will uphold the ruling.

4. On a trial of defendant for stealing certain cattle belonging to M., defendant attempted to show that M. had made a conditional sale of all his cattle to G., and that the property in the cattle at the time of the alleged theft was in G. *Held*, that it was competent for M. to give conversations had between himself and G. when defendant was not present, where such conversations merely showed that the conditional sales had been orally rescinded before the alleged theft, and that the property in the cattle was still in M.

5. It appeared that before a certain day the hides and carcasses of the animals alleged to have been stolen by defendant had been sold by him, and removed from his slaughterhouse. The sheriff who arrested defendant testified that, having gone to defendant's slaughterhouse on that day, he found carcasses and hides and heads of four cattle; that the left ear had been cut from each head; that he called defendant's attention to such fact; that, on returning again, defendant had placed all the ears in a sack, which, on being noticed, he attempted to hide. *Held*, that such evidence was improper, as entirely independent of any matter at issue, and because it was not shown that they were stolen cattle.

6. In the absence of a statute permitting a party in a criminal case to use depositions of absent witnesses, affidavits by persons residing in another state to show defendant's good character were properly excluded.

7. Petitions to the county commissioners, asking that special counsel be employed to prosecute defendant, and that his bond be raised, etc., are properly rejected as having no

bearing on the question of defendant's guilt or innocence.

8. Where it is admitted by the state that defendant did not actively participate in the theft; that some other person took the property, and delivered it to him; that the only grounds for accusing him are the fact of his taking possession of the stolen property at a distance from the place where it was taken, and the circumstances surrounding the receipt and disposition of it,—an instruction that the possession of recently stolen property, if unexplained, might be taken as conclusive evidence of defendant's complicity in the theft, is erroneous, since the fact of possession alone must cut a much less figure, where it is not claimed that the accused himself took the property. Hoyt and Scott, JJ., dissenting.

Appeal from superior court, Spokane county; R. B. Blake, Judge.

E. F. Humason was convicted of grand larceny, and appeals. Reversed.

T. C. Griffiths and Turner & Forster, for appellant. S. G. Allen, Pros. Atty., (Turner, Graves & McKinstry, special counsel,) for the State.

STILES, J. None of the questions raised by the appellant which are based upon affidavits contained in the transcript can be passed upon by this court, since they are not made a part of the record by a statement or bill of exceptions. *Windt v. Banniza*, 2 Wash. St. 147, 26 Pac. Rep. 189.

Appellant was required to go to trial on the 26th day of February, 1891, upon an information filed against him on the 23d day of the same month, for the crime of stealing certain neat cattle, under Code 1881, § 833. He complains because of his trial having been fixed within five days from the date of his arrest, contrary to the provisions of Code Proc. § 1363. Appellant was actually arrested some time before February 23d, and the record clearly shows that he had been held for trial by a magistrate before the information was filed. We think the fair construction of section 1363 ought to be that the arrest therein mentioned is that of being taken into custody upon the charge brought against him before the magistrate, and not the formal rearrest made afterwards, when the information is filed.

A point was made that the information was defective because it was not signed by any officer authorized by law to sign it. This point was raised by a demurrer and motion to quash, wherein it was alleged "that S. G. Allen, who signs himself as prosecuting attorney to said information, is not the prosecuting attorney of said Spokane county, or of any other county in the state of Washington, or of the state of Washington, and is acting therein without any authority of law whatever." There is no finding by the court upon this subject. The ruling of the court was that the motion and demurrer be overruled. We are bound to presume, we think, that the court found the fact to be contrary to the allegations contained in the demurrer and motion, and therefore to uphold the ruling. Superior courts, of course, take judicial notice of the officers of the counties in which they sit, and particularly of their own officers; and this court will presume, in all such cases, that the



lower court has acted correctly in such matters. *Graham v. Anderson*, 42 Ill. 514; *Dyer v. Flint*, 21 Ill. 80; *Thompson v. Haskell*, Id. 215; *Buell v. State*, 72 Ind. 523.

The information is also attacked on the ground that it was unconstitutional, but this matter has been so often adjudicated that we do not consider it necessary or proper that we should enter upon any further review of the matter. *Hurtado v. People*, 110 U. S. 538, 4 Sup. Ct. Rep. 111, 292.

A great many errors alleged to have been committed in connection with the taking of testimony in the case are assigned, a few of which are worthy of review, because of the disposition which we shall have to make of the case. One Weldon A. Morris was on or about the 5th day of January, 1891, the owner of the cattle alleged to have been stolen, which had been running on the range some miles from Spokane. These cattle were suddenly missing from the herd, and they were within a day or two traced to the slaughterhouse of the appellant, in the suburbs of Spokane, where it is not denied they were slaughtered as beef cattle. There was no contention upon the part of the state that the appellant actively participated in the theft of the cattle; but it was strenuously insisted, and with success, before the jury, that he was a participant in the plan to steal them, and that when he received them into his yard, at Spokane, and killed them, it was with knowledge that they had been stolen.

The first question which arises in connection with the evidence, which we deem it necessary to notice, was brought about by the court's action in permitting Morris to detail the conversations had between himself and members of the firm of Gay & Stevens, not in the presence of the appellant. There was no error in this matter, however. The defense endeavored to show, upon the cross-examination of Morris, that he had made a conditional sale of his entire band of cattle to Gay & Stevens, and that the property in the cattle had thereby passed to the latter. The conversations testified to merely went to the point of showing that the conditional sale had been orally rescinded before the alleged theft, and that, therefore, the full property in the cattle was still in Morris.

The first material error which we find in the case is that committed in permitting the sheriff of the county, and other witnesses, to testify concerning certain 8 head of cattle, which were not a part of the 14 head alleged to have been stolen of Morris. The evidence in the case demonstrated that the 14 head of cattle in controversy were killed, and their carcasses and hides fully disposed of by sale, in the usual course of the business of the firm of King & Humason, of which the appellant was a member, before the 9th day of January. On that day, however, the sheriff took possession of the appellant's slaughterhouse, and found there the carcasses of four head of cattle, and some hides, heads, horns, and ears. The sheriff returned from the slaughterhouse, and, as it would seem, without having put him under arrest, took him in his buggy, and drove back to

the slaughterhouse with him. At the slaughterhouse the sheriff called his attention to the carcasses in the shed, and to the hides, and the fact that the left ear had been cut off from each head. The appellant disclaimed any ownership of these cattle, and remarked that the absence of the left ears looked bad. The sheriff further testified that the ears had been gathered up in the morning by him or his men, and that they had been put in a sack with a pair of stag horns. This sack was laid on a platform with a lot of empty sacks. Other testimony was given to show that upon noticing this sack, with the ears in it, appellant attempted to get it out of the way, by putting it in a different place, and piling the empty sacks on top of it. All the testimony upon this subject was drawn out under the strenuous objection of the appellant, and under the statement by the court: "Of course, I cannot see the relevancy of it now, but it seems to me it is entirely harmless matter. If it is irrelevant, it will be stricken out." Now, the whole purpose of this testimony was apparent from the beginning, viz. to endeavor to get before the jury an impression that these four head of cattle, and four others, which were alive and in appellant's yard, were also stolen cattle, and that the appellant, knowing them to be such, had caused the ears, which contained certain marks of ownership, to be cut off and put in a sack, where they would not be likely to be observed, and that, when he found they had been noticed, he endeavored to get them out of the way. The entire transaction was wholly independent of any matter at issue in the case on trial, and there was no legal excuse for injecting it into the case. It was not a case where cattle alleged to have been stolen are found in the possession of the accused, in a herd with other cattle, which are also claimed to have been stolen. These eight head of cattle did not appear at the yards of the appellant until after the cattle in question had been slaughtered, and completely disposed of. Moreover, it was not shown that they were stolen cattle. The court, at a subsequent stage of the case, refused to strike out this objectionable testimony, although twice applied to to do so. He promised to instruct the jury to the effect that, so far as those eight head of cattle were concerned, they should not take them into consideration in determining defendant's guilt, but no such charge was given. It is impossible to resist the conclusion that the jury probably went to their room to determine, as between the state and the appellant, in a case where the only evidence was circumstantial, with an impression that the appellant had been caught in the act of endeavoring to hide the marks of ownership of cattle recently slaughtered on his premises,—an impression which it was legally improper for them to have, in the case before them.

The appellant offered in evidence a large number of depositions taken in Oregon, tending to show his good character while a resident of that state. These the court rejected, correctly. We have no statute in this state permitting either party in a

criminal case to make use of an ordinary deposition of an absent witness; and, as at common law the right to use depositions in criminal cases was not recognized, the action of the court in the matter was proper.

It seems that upon the arrest of appellant numerous petitions were circulated in Spokane county, addressed to the county commissioners, and asking them to employ special counsel to assist in the prosecution of appellant, to secure the raising of his bond, etc. These petitions—under what theory is not made apparent—were offered in evidence by the appellant. They certainly could have no bearing upon the question whether the appellant was guilty or innocent, and were properly rejected.

Considering the use of his books made by the appellant, we think no error was committed by the court in allowing the jury to have the entire books for their inspection.

Error is assigned upon the following charge to the jury: "(5) The possession of stolen property, recently after the larceny thereof, is evidence tending to show such possession to be a guilty one; and if such possession is unexplained, either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it may be taken by the jury as conclusive evidence of the possessor's complicity in the larceny of the property. The weight, however, to be attached to such evidence, is for the jury alone to determine. To justify a conviction upon such evidence alone, it must appear that the possession was personal and exclusive, it must have occurred recently after the commission of the crime, and it must be unexplained. In determining the weight to be attached to such evidence, the jury should consider all the circumstances attending such possession,—the proximity of the place where the property was found to the place of the larceny; the lapse of time since the property was taken; whether the property was concealed; whether the party admitted or denied the possession; the demeanor and character for honesty of the accused; whether other persons had access to the place where the property was found; whether the accused, on different occasions, gave conflicting accounts of the manner of his acquiring possession of the property, or whether such statements were harmonious and consistent. All these circumstances, so far as they have been proved, are proper to be taken into account by the jury, together with all the other evidence in the case, in determining how far the possession of the property by the accused, if it had been proved, tends to show his guilt." In our judgment this was not a case for a charge to the jury that possession of recently stolen property, if unexplained, might be taken as conclusive evidence of the prisoner's guilt. Upon the main proposition there has been much controversy, and many modifications of the old rule, which undoubtedly prevailed, have been suggested and laid down both by courts and text writers. *State v. Hodge*, 50 N. H. 510; *Stover v. People*, 56 N. Y. 315; *Commonwealth v.*

*Bell*, 102 Mass. 163; *Stokes v. State*, 58 Miss. 677; *Smith v. State*, 53 Ind. 340; *Hannah v. State*, 1 Tex. App. 578; *State v. Jordan*, 69 Iowa, 506, 29 N. W. Rep. 430; *Ingalls v. State*, 48 Wis. 647, 4 N. W. Rep. 735; 3 Greenl. Ev. § 81; Whart. Crim. Ev. §§ 758-760; 2 Bish. Crim. Proc. §§ 739-747; Sack. Instruct. Juries, p. 746, § 15. But it is not necessary to pass upon this question of possession now. In this case the property was alleged and proven to have been stolen on Monday night. It was a question in the case whether it came into the hands of the appellant between 4 and 6 o'clock on Tuesday morning, or between 4 and 6 o'clock on Wednesday morning. It was not contended by the state that appellant actually stole the cattle, or that he was outside of the city of Spokane, or within 16 miles of the place whence the cattle were taken, at the time when they were stolen. On the other hand, he did not deny that he had received the cattle at his yard, and caused them to be slaughtered and disposed of within a few hours after their receipt. Thus, there was no question about establishing possession; no question about appellant's not having been the actual thief, nor that his possession was personal and exclusive, or recently after the commission of the crime, nor of the access of persons to the place where the property was. The first question for the jury to determine was, was the property stolen? and that was scarcely denied. There was no question of identity, no doubt of possession, and practically the only question that the jury had to determine was, did the fact of possession together with all the other facts and circumstances adduced by the state, furnish proof sufficient to convince the jury, beyond a reasonable doubt, that the appellant was an accessory before the fact to the stealing of the cattle? Where it is admitted by the state that the accused did not himself participate actively in the theft; that some other person took the property, and delivered it to him; that the only grounds for accusing him are the facts of his taking possession of stolen property at a distance from the place whence it was taken, and the circumstances surrounding the receipt and disposition of them,—the fact of possession alone must necessarily cut a much less figure than where the accused is claimed to have been himself the person who took the property; and in such a case, if in no other, the rule laid down in Texas, California, and Wisconsin, that bare possession of recently stolen property alone is not sufficient to justify a conviction, ought to prevail. If a jurymen were a perfect being, the charge given might almost be said to have been without prejudice, since there was no such thing in the case as possession, standing alone; and no faithful juror could have blinded his eyes to the fact that there were many other circumstances for his consideration, both for and against the appellant. But, in the presence of so much testimony, the task of weighing it, and determining the truth from it, necessarily became a matter of great labor; and it would not be unheard of if the ordinary juror should have taken the court at its word, dropped

consideration of conflicting facts and testimony, and rested a verdict of guilty upon the confessed possession, unsatisfactorily explained. This would have been to cast the burden upon the accused, which the court, in its fifth charge, told the jury must not bedone. The jury should simply have been told that they were the sole judges of the facts, and of the weight to be given to each particular fact; that the possession of this property by the defendant, (if it was necessary to refer to it at all,) if it had been proven to them beyond a reasonable doubt that it was stolen property, was one of the facts which they were authorized to consider, with all the other facts and circumstances in the case, in determining the guilt or innocence of the defendant; and that if, from all these facts, they were satisfied, beyond a reasonable doubt, that the defendant had participated in planning, aiding, advising, or abetting the actual thief in taking the cattle, their verdict should be that of guilty; otherwise, they ought to find for the defendant. The judgment is reversed, and the cause remanded for a new trial. Seventy-three pages of appellant's brief, which contain a reprint of affidavits not in the record, will not be allowed for in taxing costs of the case.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT, J., (dissenting.) In my opinion the instruction which is held to be erroneous by the majority of the court stated the law of the case. Such instruction, taken as a whole, simply told the jury that the possession of property recently stolen was a circumstance which they should take into consideration with all the other circumstances in the case, and upon such consideration determine whether or not the defendant was guilty; that if, in their judgment, the single circumstance of such possession of stolen property was sufficient to convince them, beyond a reasonable doubt, of the guilt of the accused, it alone would warrant a verdict of guilty. This is my construction of the portion of the charge to which exception is taken, and, so construed, I think it properly stated the law. I cannot agree with the further contention of the majority that the circumstance of the possession of the stolen property was rendered immaterial by the course of the trial, or by the concessions of the state. In my opinion the judgment should be affirmed.

SCOTT, J., concurs.

(4 Wyo. 126)

STATE ex rel. FOOTE v. BOARD OF LIVE-STOCK COM'RS OF WYOMING et al.

(Supreme Court of Wyoming. Feb. 9, 1893.)

ESTRAYS—SALE—REMEDIES OF OWNER—MANDAMUS.

1. Laws 1890-91, c. 33, § 29, relating to the live-stock commission, provides that the secretary of the commission shall pay the proceeds from the sale of estrays to a claimant thereof, on proof of ownership, which "shall be by the affidavit of the owner, with at least one credible corroborating witness." *Held*, that the secretary may, in his discretion, require proof in

corroboration of a claimant's affidavit, in addition to that required by the statute.

2. Mandamus will not lie to compel the secretary to pay the proceeds from a sale of estrays to a claimant, unless the secretary abuses his discretion, and refuses to consider proofs presented to him.

Application by Robert Foote for a writ of mandamus to compel the state board of live-stock commissioners and Hiram B. Ijams, its secretary, to pay over the proceeds from the sale of certain estrays. Relator demurs to the answer. Demurrer overruled.

The other facts fully appear in the following statement by CLARK, J.:

This is a proceeding originally commenced in this court, in which the relator prays for a writ of mandamus, requiring the defendants to pay over to him the proceeds of certain cattle sold as estrays by one C. L. Talbott, a stock inspector stationed at Omaha, Neb. The petition of the relator averred, in substance, that he is a resident and citizen of the county of Johnson, in the state of Wyoming, and engaged in the business of dealing in, raising, and selling live stock; that on or about the 7th day of October, A. D. 1891, he was the owner of, and in the possession of, three certain head of cattle, branded with his brand, and on said day he shipped said cattle, in his own name, to market at Omaha, in the state of Nebraska; that upon the arrival of said cattle at Omaha, Neb., one C. L. Talbott, who was then and there an inspector appointed by the board of live-stock commissioners of Wyoming, in pursuance of law, seized said three head of cattle as estrays, sold them, and remitted the proceeds to the secretary of said board. It is also averred that the ownership of the brand borne by said cattle, and of said cattle, were well known to the defendants and to the said stock inspector at the time of seizure. It is also averred that thereafter the relator made proof of his ownership of said brand, and his ownership of the cattle, to the defendants, as required by law, said proof consisting of relator's affidavit, and the affidavit of a credible corroborating witness, and of other evidence; that after the making of said proof relator demanded of the defendants that they pay over to him the proceeds of the sale made by said inspector as aforesaid, but that the defendants have neglected, failed, and refused, and do still neglect, fail, and refuse, to pay said proceeds over to relator; and that by said refusal said relator was deprived of the possession, use, and profit of the money which is justly his. The relator further alleges that he has no plain or adequate remedy at law, whereby he can have redress in the premises, and will be entirely without remedy unless it be afforded by the interposition of this court; and he prays that a writ of mandamus issue against the defendants, the board of live-stock commissioners of Wyoming, requiring it to make an order directing its secretary, Hiram B. Ijams, to pay to relator the proceeds of the sale of said cattle, and requiring the said Hiram B. Ijams, as such secretary, to pay to relator said proceeds. To this petition the defendants filed their

joint answer, in which it is admitted that at the time mentioned in the petition the relator shipped the cattle mentioned from this state to market at Omaha, Neb., and that upon their arrival at Omaha the said stock inspector seized them as estrays, sold the same, and remitted the proceeds, amounting to the sum of \$77.83, to the secretary of the board of live-stock commissioners. It is denied in the answer that relator was ever at any time the owner of the three head of cattle mentioned in the petition, or of any of them. It is also denied that the relator has at any time made satisfactory proof to the said board, or to the said secretary, of his ownership of said three head of cattle, or of any of them. The defendants aver that on or about the 25th day of October, A. D. 1891, the relator submitted to the said secretary his affidavit to the effect that he was the owner of said steers, having bought the same from one L. A. Webb for value, taking a bill of sale therefor from said Webb at the time of sale, and that he has never sold them, or parted with the ownership of the same. This affidavit, it is averred in the answer, was accompanied by the affidavit of said Webb to the effect that in November, 1890, he sold and delivered to relator seven steers, for value, the same being branded with what is called the "Hat Brand," and that at the request of relator he branded the steers with relator's brand at the time of the sale, and that on the 15th day of July, A. D. 1892, the relator also submitted to said secretary his affidavit to the effect that he was the owner of the stock bearing the brand borne by the said three head of cattle; that he was the owner thereof at the time of the shipment of the cattle, and that the three head of cattle were taken from him at Omaha, Neb., and the proceeds were remitted to the said secretary, and by him held as a portion of the estray fund; that these proceeds belonged to him, and he demanded payment. This affidavit is corroborated by one W. B. Adams, who is certified to by the officer before whom the affidavits were made to be a credible person, and worthy of credit. The defendants further allege that said proof and said affidavits so made by the relator were not satisfactory proof to the said secretary, nor to said board, of the ownership of said cattle by said relator, "and therefore the said board of live-stock commissioners and the said secretary did decide that the said Robert Foote was not the owner of said cattle, so far as established by proofs submitted to them." The defendants also allege that, from other papers and documents in possession of the said secretary, it appeared to him and to the board that, at the time the relator purchased said cattle, his vendor, Webb, was not the lawful owner of the same, and that the cattle did not properly belong to said relator. To this answer the relator filed a general demurrer, and it is upon the demurrer to the answer that the cause now comes before the court.

The transactions set forth in the petition and answer were had under the statute creating the board of live-stock commissioners, and defining its duties, (chapter 33,

p. 150, Laws 1890-91, approved January 8, 1891.) The sections of that act which are applicable to this case are as follows: "Sec. 25. All inspectors shall keep a record of all estrays which they may find in any shipment of cattle or horses in transit from this state, and shall take a receipt for the same from the shipper, or in default of such receipt shall take such estray from such shipment, giving the shipper a receipt for the same on behalf of the live-stock commission. Said inspector shall make a report every thirty days of all such estrays not heretofore reported to the secretary of the live-stock commission, giving a description of the same, stating any brands or other marks by which the same may be identified. Said secretary shall keep a record of all such estrays reported to him as aforesaid, which shall at all times be open to the public for inspection. Sec. 26. It shall be the duty of all persons shipping estrays, at once upon the sale thereof, to remit to the secretary of the live-stock commission the proceeds received for each and every estray, the ownership of which shall be unknown to the inspector, to whom a receipt for the same was given. If any inspector shall at any time sell an estray shipped from this state, he shall immediately remit the proceeds thereof to the secretary of the live-stock commission. Sec. 27. All moneys received by the secretary of the live-stock commission from the sale of estrays shall be kept by such secretary in his hands separate from any other fund, and shall be known as the 'Estray Fund,' and shall be so held by said secretary until so paid over to the owners of such estrays, or paid over to the state treasurer as hereinafter provided. Sec. 28. The secretary of the live-stock commission shall semiannually, and during the last week of June and December of each year, send two lists of all unclaimed estrays, for which he has received payment, to the county clerk of each county, who shall post one copy in a conspicuous place in the courthouse, and place one copy on file in his office, as herein provided, since his last publication as herein provided. Sec. 29. The secretary of the live-stock commission, upon satisfactory proof of the ownership of any estray sold as above provided, and for which he has received the money, shall pay such owner the amount received from the sale of such estray or estrays: provided, that such ownership shall be proven within one year after the publication of the notice of sale of said estray or estrays, as above provided. Proof of the ownership shall be by affidavit of the owner, with at least one credible corroborating witness."

John M. Davidson and Robert W. Breckons, for plaintiff. Charles N. Potter, Atty. Gen., for defendants.

CLARK, J., (after stating the facts.) Upon argument counsel for relator called our attention especially to section 29, quoted in the statement of the case appended hereto, and contended that inasmuch as the statute provides that "proof of ownership shall be by affidavit of the owner, with at least one credible corrobor-

rating witness," when such affidavit, so corroborated, is submitted, it only remains for the secretary to pay out the proceeds from the sale of estrays to the person so claiming and submitting such proof, and that the secretary has no power or authority to look to any other papers or documents in his possession which may affect the question before him, but that the question of the ownership of the estrays, and of the claimant's right to the proceeds thereof, must be determined solely by the proof submitted by the claimant; and he also contended that in a proceeding of this kind this court would examine the proofs submitted to the secretary, and if, in our opinion, it should appear from such proofs that the secretary erred in his decision, we would correct the error, and issue the writ as prayed for. We cannot assent to this doctrine. The section 29, before quoted, unquestionably confers upon the secretary power and authority to hear and determine the question of the ownership of any estrays sold under the provisions of the act, and for which he has received the money. The exercise of this power is clearly the exercise of judicial functions, and, in the exercise of judicial functions, it is plain that the secretary is endowed with judicial discretion. The provision of the statute that proof of ownership shall be by affidavit of the owner, with at least one credible corroborating witness, cannot reasonably be construed in such a way that it will take away any part of the discretion with which the law has clothed the secretary, and require him to pay out the funds claimed upon proofs which do not satisfy his mind and judgment, and that simply because the proofs are in the form as required by the statute. This would indeed be sacrificing substance to form, and transforming a provision intended to furnish owners of estrays a simple and inexpensive method of reaching the proceeds of their property into a possible means of perpetrating the gravest of frauds. The language of the section certainly does not afford ground for any such construction. It contemplates that the proof shall be satisfactory to the secretary, and, in providing that the affidavit of the owner shall be corroborated by at least one credible witness, clearly implies, not that such proof shall be the maximum, but the minimum, of the quantity of proof to be submitted, and that the secretary may require further and additional proof in corroboration of claimant's affidavit. Such being the case, how can it be claimed that in a proceeding of this nature we can review the case made before the secretary, and if, in our judgment, it should appear that the secretary erred in the conclusion which he reached, issue the writ, thus transforming a proceeding in mandamus into an appellate proceeding to vacate, modify, or reverse the decision of an official clothed with limited judicial power? Our statute (section 3073, Rev. St.) thus defines "mandamus:" "Mandamus is a writ issued in the name of a territory to an inferior tribunal, corporation, board, or person, commanding the performance of an act which the law specially enjoins

as a duty resulting from an office, trust, or station." And section 3074 expressly provides that "although it may require an inferior tribunal to exercise its judgment, or to proceed to the discharge of any of its functions, it cannot control judicial discretion." This statutory provision is no new doctrine. It simply emphasizes the rule which almost universally existed at common law. We do not deem it necessary to cite authorities in support of the rule. They are so numerous that the rule may be considered elementary. In *Hoole v. Kinkead*, 16 Nev. 217, the court held that "a subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment; and where it is vested with power to determine a question of fact the duty is judicial, and, however erroneous its decision may be, it cannot be compelled by mandamus to alter its determination." We think the above quotation entirely applicable to the case before us. It is true that in cases where it appears that the tribunal required to determine a question of fact did determine the question, but in such a way that it was apparent from an examination of the cause that it flagrantly abused its discretion, and refused to exercise its judgment upon the proofs presented to it, mandamus will lie, and will correct such abuse of discretion; but no such abuse appears in this case, and hence this proposition need not be further considered. For the foregoing reasons we are of the opinion that the answer does set forth a defense to the application for a writ of mandamus, and that the demurrer should be overruled.

GROESBECK, C. J., and CONAWAY, J., concur.

(1 Okl. 210)

MARION et al., Board of School Trustees, v. TERRITORY ex rel. WILSON.

(Supreme Court of Oklahoma. Jan. 27, 1893.)

PUBLIC SCHOOLS — SEPARATE SCHOOLS FOR COLORED PUPILS — ELECTION TO ESTABLISH — STATUTES REGULATING — MANDATORY PROVISIONS — MANDAMUS TO SCHOOL OFFICERS — PETITION.

1. In an action by the territory, on the relation of a resident of a ward of a city, against the members of the school board and city superintendent of schools, to compel defendants to admit relator's children to the ward school as pupils, the petition showed that while a regular term of said school was being held, relator applied to have his children, who were eligible and qualified, admitted to the school; that the application was refused by the teacher and by defendants, for the reason that his children were colored, and said school was established by the school board exclusively for white pupils. A writ of mandate, containing all the substantive averments of the petition, was duly issued. *Held*, that the petition stated a good cause of action, and a demurrer thereto and to the writ was properly overruled.

2. St. c. 79, art. 13, § 1, relating to public schools, provides that separate schools for white and colored children may be established in the territory as follows, "and in no other way." Section 4 provides that "not more than twenty days, nor less than ten days, prior to" an election to determine the question of establishing separate schools for white and colored pupils, "the county commissioners of each county shall

appoint in each election precinct in their respective counties two judges and one clerk, whose duty it shall be to hold said election." Section 8 provides that "any failure to comply with any and all the provisions of this act shall render such act of establishing separate schools void," etc. *Held*, that the provision relative to the time of appointment of judges and clerks was directory only, and the fact that they were appointed 26 days prior to the election was not such failure to comply with the statute as would render the election void. Green, C. J., dissenting.

3. Where a specific chapter of the statutes provides for a system of common schools, and is complete within itself, an election held in compliance with its provisions to determine the question as to whether separate schools shall be established for colored pupils is not invalid because not conducted as required by the statute governing general elections known as the "Australian System."

Appeal from district court, Logan county; E. B. Green, Judge.

Action by the territory of Oklahoma, on the relation of John Wilson, against Francis E. Marion and others, members of the public school board of the city of Guthrie, and Edward L. Hallack, city superintendent of schools of the city of Guthrie, to compel the defendants to admit the relator's children as pupils to a certain ward school of said city. From a judgment for plaintiff, defendants appeal. Reversed.

H. S. Cunningham, for appellants.  
Brown & Soward, for appellees.

BURFORD, J. The relator, John Wilson, brought his action in the district court of Logan county, praying for a writ of mandate against the defendants, compelling them to admit his two children—Eva, aged 10 years, and Janetta, aged 9 years—as pupils in the Fourth ward school of said city. The petition shows that he and his wife are residents of said ward, and have been for the two years last past; that his daughters are eligible and qualified to be admitted as pupils in said school; that a regular term of said public school was being held and taught at said school; and that he had taken his two daughters to said school, and applied to have them admitted and enrolled as pupils, which application had been refused by the teacher of said school, and refused and denied by the defendants, for the reason that his children were colored, and that said school was established by the school board exclusively for white pupils. An alternative writ of mandate was issued, commanding the defendants to appear and show cause why said children should not be admitted as pupils in said school. The defendants appeared, and demurred to said alternative writ, for the reason that said writ did not state facts sufficient to constitute a cause of action against the defendants. This demurrer was overruled, and exception saved. There was no error in this ruling, the complaint states a good cause of action, and the writ contains all the substantive averments of the complaint. The defendants then filed their answer. The first paragraph is a general denial. They next admit that they are the official school board and superintendent of the public schools of the city of Guthrie,

and that they have refused the relator's children the privilege of attending the Fourth ward school of said city; but they further allege that, pursuant to the provisions of article 13 of chapter 79 of the Statutes of Oklahoma, an election was duly held on the first Tuesday of April, A. D. 1891, and at said election there was duly submitted to the qualified school electors of said county, and by them voted, for or against, the proposition of the maintenance of separate schools for white and colored children in said county; that returns of said election were duly made as required by law, and the board of county commissioners of said county duly canvassed the said returns, and published the result in the Guthrie Daily News and Oklahoma State Capitol, newspapers published in said county; that at said election the majority of the votes cast were in favor of the establishment of separate schools for white and colored children in said county; that the board of county commissioners, pursuant to the provisions of said statute, levied and caused to be extended upon the tax rolls of said county a tax of 5 mills upon the dollar upon all the taxable property in said county, in addition to all other taxes provided for by law, and that same is sufficient to maintain separate schools in said county during the current school year; that they have done all things necessary for the maintenance of separate schools for the education of white and colored children, by providing suitable buildings, and furnishing them with suitable furniture and appliances, and have employed competent, capable, and qualified teachers for said schools; that the whole number of schools maintained and teachers employed in said city number 16, 13 of which are assigned for the use of, and are attended exclusively by, white pupils, and 3 of which are assigned to the use of, and attended exclusively by, colored pupils, and that all of said schools are graded according to the attainments and proficiency of said pupils; that all of said schools are located within the corporate limits of said city, and are centrally and conveniently located, and all pupils, white and colored, have convenient access thereto; that the schools maintained by said board for the education of the colored children are equal in every way to those maintained for education of white children, and that all are supplied with equal facilities for acquiring an education; that the relator has been sending his children to one of said schools provided for colored children, and that they were not denied the privilege of the public schools of said city, but were only denied the right to attend as pupils at a school maintained exclusively for white pupils. The relator replied to this answer by a general denial. The cause was submitted to the court for trial by agreement of parties, and, after hearing the evidence, at the request of both parties, the court made a special finding of facts and stated his conclusions of law therein in writing. The finding of facts and conclusions of law present to this court the errors complained of.

The court found the facts to be as fol-

lows: "That the relator, John Wilson, is a colored man, residing within the Fourth ward of the city of Guthrie; that his children are colored children, and reside with him; that they were by Edward L. Halleck, superintendent of the public schools of the city of Guthrie, under the direction of the board of education of such city, denied admission into the schools of said ward for the reason that they were colored children; that, pursuant to the provision of article 13 of chapter 79 of the Statutes of Oklahoma, an election was duly held on the first Tuesday of April, 1891, at which election there was duly submitted to the qualified school electors of the county of Logan the proposition of the maintenance of separate schools for white and colored children in said county; that said electors, at such election, voted upon such questions; that returns of such election were duly made and canvassed within the time and in the manner prescribed by law, and the result of said election was duly published, as required by law; that said result showed a large majority in favor of separate schools for the education of white and colored children; that the defendant school board proceeded to hire teachers and suitable buildings, and to furnish the necessary equipments and furniture, for the maintenance of separate schools for the education of white and colored children in said city, and, at the date when the said Wilson was refused admission into the schools of the Fourth ward, he was informed that his children would be admitted in the school of the proper grade maintained in the Third ward of said city for the education of colored children; that he sent his children to said school, and that at the date of this hearing they were attending the same, and enjoying the privileges thereof; that said schools maintained for the education of colored children, as aforesaid, are equal in every respect to those maintained for the education of white children,—equal in the character and qualification of teachers, equal in the buildings, furniture, and appliances, equal in the grades maintained and branches taught,—the colored pupils having exactly the same facilities for acquiring an education as enjoyed by the white children of said city; that a tax has been levied by the county commissioners of said Logan county sufficient to provide for the maintenance of said schools; that the said elections was held under the provisions of sections 1 to 5, inclusive, of article 13, chapter 79, of the Statutes of Oklahoma, and no effort was made to comply with the provision of chapter 33 of the Statutes of Oklahoma; that the county commissioners, in giving the notice provided for in section 4 of said article 13, gave twenty-six days' notice, instead of twenty days' notice, as required by the terms of said section."

Thereupon the court stated the following conclusions of law: "First. The legislative assembly of the territory of Oklahoma had the power, and it was a rightful subject of legislation, not inconsistent with the constitution and laws of the United States, to provide a school system of public schools for said territory under

which separate schools for the education of white and colored children might be established and maintained. Second. The provisions of article 13 of chapter 79, under which separate schools for the education of white and colored children may be established, are mandatory, and must be strictly complied with in the holding of the election therein provided for, in order that such separate schools may be legally established and maintained. Third. The county commissioners of Logan county had no power or authority, under section 4 of said article 13, to appoint the judges and clerks of said election twenty-six days prior to the election, and their failure to appoint within the time prescribed by that section rendered the election void, and no separate schools for the education of white and colored children could be established and maintained by virtue of said election. E. B. Green, Judge."

The defendants each excepted to the findings of facts and the several conclusions of law. Judgment was rendered for the relator, and a peremptory writ of mandate directed to issue against the defendants. From this judgment and order the defendants appeal to this court.

There are four assignments of error, viz.: First. The complaint of the appellees does not state facts sufficient to constitute a cause of action. Second. The court erred in overruling the demurrer of appellants to the alternative writ. Third. The court erred in making its second conclusion of law upon the special findings of fact. Fourth. The court erred in making its third conclusion of law stated upon the special findings of fact.

As already indicated herein, we think the complaint sufficient, and that the court below committed no error in overruling the demurrer to the alternative writ. The third and fourth conclusions of law present the question of the effect of the election held under article 13, c. 79, St. Okl., and will be considered together. The first section of said act provides: "Separate schools for the education of white and colored children may be established in the territory as follows, and in no other way." It is insisted that this section makes all the provisions of said act mandatory, and that a strict compliance with each and every step is required in order to render an election held thereunder valid. Statutes must be construed according to the legislative intent, in so far as the same can be determined, and according to their purpose. The purpose of this article was to provide the mode for establishing separate schools by a general election, at which all qualified school electors might express their choice on such question, and to declare that separate schools shall not be established in any other way than by submitting said question to the will of the people at a general election, to be held at the time fixed in the statute. It was not intended that the words "and in no other way" should be limited in their application to each and every particular step provided for executing said law, but it is general in its effect, and is an inhibition against establishing separate schools by school trustees, school boards, civil



townships, or municipal corporations, and requiring the question of separate or mixed schools to in every instance be submitted to a vote of the school electors of each county, and making that result final. Section 4 of said article 13 provides as follows: "Not more than twenty days nor less than ten days prior to said election, the county commissioners of each county shall appoint in each election precinct in their respective counties two judges and one clerk, whose duty it shall be to hold said election." The findings of fact herein show that the county commissioners of Logan county appointed these judges and clerks 26 days prior to the election, and in all other particulars the election was held, the returns canvassed, the result declared and published, strictly according to the terms of the statutes. Does this irregularity of the county commissioners invalidate the election? Section 8 of said act reads thus: "Any failure to comply with any and all the provisions of this act shall render such act of establishing separate schools void, and immediately all of the children of school age in such county shall be admitted to the school or schools of their respective district."

It is contended with much force that this section renders all the provisions of this act mandatory, whether they are of such a character as to affect the results of an election or not, and the learned judge who tried the case below adopted this view of the law and so held. We are aware that there is some highly respectable authority in support of this construction, but, as before stated, we must look to the legislative purpose and intent. It was the purpose of the legislature to submit the question of mixed or separate schools in the territory to the school electors of each county, and this was the controlling purpose. All the details of carrying on the election are subservient to this one purpose, and this act must be construed with this purpose in view. McCrary, in his valuable work on Elections, (section 7,) says: "Irregularities which do not tend to affect results are not to defeat the will of the majority. The will of the majority is to be respected even when irregularly expressed. Those provisions which affect the time and place of the elections and the legal qualifications of the electors are generally of the substance of the election, while those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the elections, are directory." And again, in section 187, this author lays down this fundamental rule: "Provisions which affect the merits of the election are mandatory; those which do not are directory." In *Platt v. People*, 29 Ill. 72, and approved in *State v. Nicholson*, 102 N. C. 465, 9 S. E. Rep. 545, the court says: "The rules prescribed by law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, and to ascertain with certainty the result. Such rules are directory merely, not jurisdictional or imperative. If an irregularity of which complaint is made be shown to have deprived

no voter of his right, nor admitted a disqualified person to vote, if it cast no uncertainty upon the result, and had not been occasioned by the urgency of a party seeking to derive a benefit from it, it may well be overlooked in a case of this kind, when the only question is which vote was the greatest. The forms which must be observed in order to render the election valid are those which affect the merits."

It will not be contended that the irregularity in the appointment of judges in any manner, or to any degree, prevented a free and fair exercise of the elective franchise in this case. It deprived no voter of any right; it did not permit any illegal voter to vote; it cast no uncertainty upon the result; it was not occasioned by the urgency of any person seeking to derive a benefit from it; and, in the language of the learned Illinois court, it may well be overlooked. In *People v. Cook*, 8 N. Y. 67, it is held that mere irregularities in the selection of election officers, which do not affect the merits of the case, are not to be regarded as affecting the validity of an election. To the same effect are *Whipley v. McKune*, 12 Cal. 352; *Colt v. Eves*, 12 Conn. 243; *Dale v. Irwin*, 78 Ill. 170; *Bacon v. Malzacher*, 102 Ill. 663; *Paine, Elect.* § 309; *Keller v. Chapman*, 34 Cal. 635. The rule seems to be well established that those requirements of a statute which are mandatory must be strictly observed; those which are directory need not. Those matters are mandatory which affect the results or merits of the election; all others directory. Then, what are the mandatory requirements under the statute in question? It is mandatory to appoint judges, for an election cannot be held without judges. But the time in which they are to be appointed is directory; the time of their selection is not of the substance of the election. In the absence of fraud, it can in no way affect the results. The time and place of holding the election are mandatory, for, being fixed by statute, the electors must know the law, and can safely rely upon the time and place fixed, and no one has authority to change it. The returns must be canvassed and declared. The statute fixes the time in which it shall be done. Failure to observe this time would not invalidate the election, because the time of making the returns is not of the substance, and does not affect the results or merits. In the case at bar the judges were appointed, there was no failure to act, but the board appointed the judges and clerks six days too soon. This was an irregularity only. It was not a failure to comply with the statute, but was an act required to be done, and was done, but in an irregular manner. Such acts are not void, and an immaterial error of this kind cannot be held to vitiate the entire election, and set aside the will of the voters, freely and fairly expressed, and honestly determined and declared. The purpose of the legislature as set forth in section 8 was not to change the ordinary rules of construction, but to recognize and adopt them as they existed; to declare that all things required, which went to affect the merits or results of the election, if omitted to be done should ren-



der the election void, but as to those acts which were not theretofore mandatory, but only directory, said section does not change the rule. An examination of and reference to the laws generally adopted by our first legislature supports and sustains this conclusion.

We are further supported in our view of the interpretation of this act by the provisions of section 9, which provides that "any person aggrieved by any actions on the part of a district or township school board or board of county commissioners in failing to comply with the provisions of this act may have his remedy by writ of mandamus against such district or township school board or board of county commissioners in any court having jurisdiction." Why the necessity for this provision? It gives the party no new remedy. He had the right to this remedy before it was provided for by this section. It is another legislative recognition of the laws of the land, and is cited in support of the interpretation we have put upon section 4. If the board of county commissioners had failed to appoint the judges and clerks not more than 20 nor less than 10 days before the election, any school elector might have had his writ of mandamus to compel them to act. This writ could not issue until they had refused or failed within the time to act, and, if for a failure only, why this remedy, if the act when done should be void? It seems clear that if the board should fail within the statutory time to make the required appointments, that writ of mandamus might issue to compel them to appoint after the time had expired, and prior to the day of election, and the irregularity of the appointments when made would not affect the validity of the election. The power to control local affairs is by our forms of government largely vested in the people, and legislatures and courts are slow to adopt any rule which tends to diminish or destroy this power when exercised properly. It has always been the policy of the courts in this country to give effect and validity to elections by the people, when there has been a reasonably fair attempt to comply with the requirements of law, and no fraud has been practiced or advantage acquired. Mere technical irregularities and omissions in the performance of ministerial duties by election officers should not be permitted to defeat the popular will in any case when there has been an attempt to conform to the requirements of the statute, and no injury has resulted to any one. The act of the board of county commissioners in this case in appointing the election judges prematurely did not affect the merits or validity of said election.

It is contended by counsel for the relator that said election was illegal because not held under the provisions of the general election law known as the "Australian System." Chapter 33, St. Okl. Chapter 79 is a law complete within itself, and provides for a system of common schools, the board of school officers, the means of raising and expending school revenues, and the terms of office, times and manner of electing school officers.

Article 13 is a part of this chapter, and must be construed with reference to its other provisions. It is a part of the school system adopted, and controls absolutely in school matters. The general election law provides a system of elections for all purposes other than that provided for in the school law. The two are not in conflict, but are independent statutes, each for a particular purpose. The school law may be defective in some particulars, but that question is not for the courts to deal with. The election was held under the school law, and there is no reason why it should not be held legal and valid.

Under the facts as found by the court, the defendants were entitled to judgment in their favor. The judgment of the court is reversed, with directions to restate his conclusions of law numbered second and third, in accordance with this opinion, and render judgment thereon for the defendants. Judgment reversed at costs of the relator, Wilson.

GREEN, C. J., (dissenting.) I do not concur in the reasoning or conclusion of the majority of the court, and shall briefly state the grounds of my dissent. The question involved in this case is not one of public policy, but simply one of law, and the policy or impolicy of a legislative act is not a question for the courts, but a question for the legislature. Whether it is better to maintain a system of separate schools for white and colored children, or to maintain a system of mixed schools, are questions with which the courts have nothing to do, and should be left entirely to the legislative branch of the government. It is well said in the majority opinion that the legislative intent must control in the construction of the act, and so it must; but that intent must be looked for in the act itself, and not in the regions of speculation and conjecture outside the act. Section 4 of the act provides the appointment of the officers of election as follows: "Not more than twenty days nor less than ten days prior to said election the county commissioners of each county shall appoint in each election precinct in their respective counties two judges and one clerk, whose duty it shall be to hold said election: provided, that at first election herein provided for the election precincts be the same as those designated by the governor in his proclamation calling an election for delegates to congress upon November fourth, one thousand eight hundred and ninety." It is conceded that the judges and clerks of the election at which the people voted for the maintenance of separate schools for white and colored children were appointed 26 days prior to the election; but it is held by the majority of the court that the provision of section 4, supra, that "not more than twenty days nor less than ten days prior to said election the county commissioners of each county shall appoint in each election precinct in their respective counties two judges and one clerk, whose duties shall be to hold said election," is merely directory, and not mandatory; and so it would be if the legisla-

ture itself has not made it mandatory. By section 8 of the act it is provided: "(8) Any failure to comply with any and all the provisions of this act shall render such act of establishing separate schools void, and immediately all the children of school age in such county shall be admitted to the school or schools of their respective district." Can language be clearer than this with reference to the legislative intent? And we have seen that the legislative intent must govern in the construction of the act, and so the majority opinion holds, and the legislature has here declared that any failure to comply with any and all the provisions of this act of establishing separate schools renders such action void. If it is possible for a legislature, by the use of words, to declare the provisions of an act mandatory, it has been done in this instance; and the authorities cited in the majority opinion, while good law, have no application in this case. In McCrary on Elections, an authority cited in the opinion of the majority of the court, the author states the rule of law which is in point in the case in the following clear language: "While it is well settled that mere irregularity on the part of election officers, or their omission to observe some merely directory provisions of the law, will not vitiate the poll, there has been some confusion and conflict as to what we are to understand by irregularities, and as to what provisions of statute are to be regarded as directory and what mandatory. A few remarks upon this subject will be proper in this connection. The language of the statute to be construed must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature." McCrary, Elect. § 190. That the legislative will, when clearly expressed, must prevail, is axiomatic in the law; and when the legislature declares, as in this instance, that any failure to comply with any and all the provisions of the act shall render the establishment of separate schools void, and it is conceded that some of the provisions of the act have not been complied with, it does not lie with the courts to say that the will of the legislature shall not be respected, and that separate schools shall be established whether the provisions of the act have been complied with or not.

(50 Kan. 553)

STEWART, County Treasurer, et al. v. KANSAS TOWN CO. et al.

(Supreme Court of Kansas. Jan. 7, 1898.)

CITIES OF SECOND CLASS—CONTRACTS—TAX LEVY.

A city of the second class has authority to contract for water, electric light, and supplies for the fire department for the city, and to pay for the

same out of the general revenue fund; but the levy for these and all the other ordinary expenses of the city to be paid out of the general revenue fund cannot exceed 10 mills on the dollar of the property which is subject to taxation.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the Kansas Town Company, a corporation, and others, against M. W. Stewart, as county treasurer of Wyandotte county, and others, to enjoin the collection of taxes levied on the property of plaintiffs. Judgment for plaintiffs. Defendants bring error. Affirmed.

J. M. Asher, Hutchings, Keplinger & Miller, and Morgan & Riley, for plaintiffs in error. White & Earhart, for defendants in error.

JOHNSTON, J. This was an action by the Kansas Town Company and other owners of real estate situate within the limits of the city of Argentine, to enjoin the collection of taxes levied by the officers of the city of Argentine for the year 1891. The case was tried upon an agreed statement of facts, from which it appears that Argentine is a city of the second class, and that the property of the parties complaining was situate within the limits of the city during the year for which the taxes were levied. At the proper time for the levying of taxes for the year 1891, an ordinance was passed by the city, making the following levies, to wit: 10 mills on the dollar for general revenue purposes; 5 mills on the dollar for general improvement purposes;  $1\frac{1}{2}$  mills on the dollar for interest on bonded indebtedness; 8 mills on the dollar for water; 8 mills on the dollar for electric light; 2 mills on the dollar for supplies for fire department. These levies were all charged against the property within the limits of the city for the year 1891; but none of the charges are complained of by the defendants in error except the levies for water, electric light, and for fire-department supplies. As to these, it is contended that they are illegal, and in excess of the power of the mayor and council of cities of the second class to levy. The right of such a city to contract for water, electric light, and supplies for the fire department, is not disputed; but it is argued that it must be paid out of the general revenue fund, and that, under section 32 of the act authorizing the levy of taxes, cities of the second class are limited to a levy of 10 mills on the dollar for such purposes. Gen. St. 1869, par. 788. It provides that a city of the second class is authorized "to levy and collect taxes for general revenue purposes not to exceed ten mills on the dollar in any one year," etc. The plaintiffs in error contend that the city is authorized to contract for both water and light; that authority to contract for these implies the authority to pay for the same; and that, as no special provision has been made for the payment of these necessities, it is implied that it is to be done in the ordinary way, by the levy and collection of taxes. They further argue that the only statutory limitation is to be found in section 40 of the act governing cities of the second class, which

provides that "at no time shall the levy of all city taxes of the current year for general purposes, exclusive of school taxes, exceed four per cent. of the taxable property of the city, as shown by the assessment books for the preceding year." *Id.* par. 796. It appears that the total of the levies made by the city of Argentine was three cents and four mills, and therefore came within the limitation of section 40. It is conceded, however, that this section grants no power to levy taxes for any purpose; and it must also be conceded that the only express authority to levy taxes for these purposes is found in section 32 of the act, which distinctly limits the total levy for general purposes to 10 mills on the dollar. The power to levy taxes must be expressly granted, and we think that the authority to levy the taxes in question, if it exists at all, must be found in section 32. The limitation in that section is 10 mills on the dollar, while section 40 places a limit of 40 mills upon the aggregate levies for the current year for general purposes, exclusive of school taxes. We think there is no real inconsistency between these two provisions. The first is a limitation upon the levy to meet the current and ordinary expenses of the city. Supplies of water, light, and for the fire department are among the daily necessities of the city, and naturally fall within the class of expenses which are to be paid out of the general revenue fund. The limitation of section 40 not only covers this levy, but all other levies of city taxes for general purposes, exclusive of school taxes. The city is authorized to levy and collect taxes for the payment of bonded indebtedness, and the interest on the same, as well as to pay off and discharge any judgment obtained against the city; and the levies for these purposes, including that for general revenue, must not in the aggregate exceed 40 mills on the dollar. *Weber v. Traubel*, 95 Ill. 427. So construed, there is no inconsistency between these provisions but, if they were held to be inconsistent, the limitation in section 32 would necessarily prevail, as it is the latest legislative expression. Section 32, as it now stands, was enacted in 1881, while the provisions of section 40 were enacted in 1872. In holding the taxes to be excessive, and in allowing an injunction against the same, the learned judge of the district court stated the following, among other, cogent reasons for his judgment: "The furnishing of water, light, and proper facilities for the control and extinguishment of fires is an exercise of authority for the public use, and is necessary for the public welfare and protection of such city and its inhabitants; and, in my opinion, is a proper item of expenditure from the fund provided for general revenue purposes, and comes within the provisions for levying taxes for general revenue purposes." In the absence of any other provision for raising revenue therefor, I think the expenditure to be made for these purposes, and the contracting power of said cities therefor, is limited to the amount of revenue provided by law to be raised for such fund. It therefore follows that, a levy of ten mills on the dollar hav-

ing been made by said city for general revenue purposes, the authority of said city to levy taxes for such purpose was thereby exhausted; and the further levy of eight mills for water, and eight mills for light, and two mills for fire department, was without authority of law, illegal, and void. *City of Leavenworth v. Norton*, 1 Kan. 432; *Burnes v. City of Atchison*, 2 Kan. 454; *Railroad Co. v. Woodcock*, 18 Kan. 20; *Board v. Blake*, 25 Kan. 356.

It is claimed by counsel for the defendants that the limitation upon the authority of said city to levy taxes for these purposes is contained in section 40 of the act relating to cities of the second class, and that the authority of said city to contract for supplying the city with water and light, and to organize and maintain fire companies, and furnish the necessary supplies therefor, necessarily carries with it the authority to levy such taxes as may be required to pay therefor, within the limit fixed by said section 40, notwithstanding the fact that there is no provision of the statute which in terms authorizes the levy of taxes for such purposes. As above stated, in my opinion, under the provisions of the constitution above referred to, there can be no implied power of taxation vested in the officers of said city, and such taxes can only be levied in pursuance of some law, distinctly stating the object of the same; that no provision of law exists under which such taxes can be levied, except the statute authorizing the levy for general revenue purposes; and that such levies necessarily came within the limitation fixed by such statute. In the case of *Manley v. Emlen*, 46 Kan. 655, 27 Pac. Rep. 844, cited by counsel for defendants, the levy complained of was within the limit for general revenue purposes, and for that reason was held to be valid. In the case of *Columbus Waterworks Co. v. City of Columbus*, 46 Kan. 666, 26 Pac. Rep. 1046, the only question decided was as to the validity of the contract between the waterworks company and the city, which the court held to be valid, and ordered that a peremptory writ of mandamus issue, commanding the mayor and council of said city to levy a tax to pay for water furnished thereunder. It does not appear what taxes had been levied by said city, but I think it must be presumed that the limit for general purposes had not previously been exceeded. The limitation prescribed by said section 40 was obviously intended to apply to the levy of taxes provided for in the preceding sections, and which are authorized by law to be levied. We think the court correctly interpreted the statute, and that its judgment must be affirmed. All the justices concurring.

(50 Kan. 560)

STEWART, County Treasurer, et al v. ADAMS et al.<sup>1</sup>

(Supreme Court of Kansas. Jan. 7, 1898.)

CITIES—EXTENSION OF BOUNDARIES—CREATION OF SCHOOL DISTRICTS—CHANGE OF CITY ORGANIZATION.

1. The case of *Stewart v. Kansas Town Co.*, 22 Pac. Rep. 121, 49 Kan. —, (just decided,) followed.

<sup>1</sup>Rehearing denied. See 32 Pac. Rep. 912.

2. A city of the third class cannot enlarge its limits from the territory adjacent thereto by an ordinance of the city council only, when the territory sought to be added is not subdivided into lots or parcels of five acres or less. Paragraph 1018, Gen. St. 1889.

3. A city of the second class cannot enlarge its limits from the territory adjacent thereto by an ordinance of the city council only, when the territory sought to be added is not subdivided into lots and blocks. Paragraph 884, Gen. St. 1889.

4. School districts in this state, outside of cities of the first and second class, are created and changed by the county superintendent, as prescribed by paragraphs 5571, 5572, Gen. St. 1889.

5. The mere proclamation of the governor changing the form of a city of the third class to a city of the second class does not leave the city without a city government; and, of necessity, until the officers of the new city, as a city of the second class, qualify, the old form of government and the old officers will continue. *Campbell v. Braden*, 3 Pac. Rep. 542, 31 Kan. 754; *Ritchie v. City of South Topeka*, 16 Pac. Rep. 332, 38 Kan. 370.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; E. B. Alden, Judge.

Action by David J. Adams and others against M. W. Stewart, as county treasurer of Wyandotte county, and others, to enjoin the collection of taxes levied on the property of plaintiffs. Judgment for plaintiffs. Defendants bring error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

This action was brought in the court below by David J. Adams, Julius King, and F. B. Mitchener against M. W. Stewart, as county treasurer of Wyandotte county, et al., to enjoin the collection of taxes levied upon their property by the city of Argentine. The case was tried upon an agreed statement of facts, and the court rendered judgment in favor of the plaintiffs, perpetually enjoining all the taxes complained of. In 1882 the city of Argentine was created as a city of the third class. The property included in this case was not within its limits when created. No change was made in the city boundaries until 1889, when an ordinance was enacted attempting to extend the limits so as to include this property. All the property so included was not platted into lots and blocks. The trial court made and filed the following conclusions of law:

"(1) That said ordinance No. 115, described and set out in plaintiffs' petition, passed May 14, 1889, is illegal and void for the purpose of extending the limits of the city of Argentine; and said ordinance did not add or annex the property of these plaintiffs, as described in their petition, to said city of Argentine. (2) That the action of the directors of school district No. 40, Wyandotte county, Kan., on July 24, 1889, in attempting to attach the territory of school district No. 41 to school district No. 40 for school purposes, was illegal and void; and said action of said school directors did not attach the property of the plaintiffs described in the petition to said district No. 40 (which was afterwards succeeded by the board of education of the city of Argentine) for school purposes. (3) That the property of these plaintiffs described in the petition has never been legally attached to the city of Argentine

for school purposes. (4) That said ordinance No. 217, described and set out in plaintiffs' petition, passed July 29, 1890, is illegal and void, for the purpose of extending the limits of the city of Argentine; and said ordinance did not add or annex the property of these plaintiffs, as described in the petition, to said city of Argentine. (5) That the levies of taxes by the city of Argentine for the year 1891, of eight mills on the dollar for water, eight mills on the dollar for light, and two mills on the dollar for fire-department supplies, were each and all in excess of the maximum legal amount authorized to be levied by said city under the law for said year for such purposes, and are each and all illegal and void. (6) That the property of plaintiffs described in the petition was not at any time during the year 1891 within the corporate limits of the city of Argentine; and said property is not liable for any of the taxes or special assessments levied or charged up by the city of Argentine against said property, or for the taxes levied by the board of education of the city of Argentine, and charged against the said property for said year 1891. (7) That the plaintiffs are entitled to the relief and injunction prayed for in their petition." The defendants excepted, and bring the case here.

J. M. Asher, Hutchings, Keplinger & Miller, and Morgan & Riley, for plaintiffs in error. White & Earhart, for defendants in error.

HORTON, C. J., (after stating the facts.) The questions in this case are: (1) Was the property of plaintiffs below within the corporate limits of the city of Argentine, and subject to taxation therein for the year 1891? (2) If the property was not within the corporate limits of the city, was such property within any territory which had been legally added or attached to the city for school purposes, so as to make it subject to the taxes levied by the board of education of the city for that year? (3) If the property was within the city limits, and subject to any taxation therein, were the levies of taxes by the city for water, electric light, and fire-department supplies legal?

The last question is answered in the negative by the case of *Stewart v. Kansas Town Co.*, 49 Kan. —, 32 Pac. Rep. 121, (just decided.) It is held in that case that "supplies of water, light, and for the fire department are among the daily necessities of a city, and naturally fall within the class of expenses which are to be paid out of the general revenue fund." Therefore the city of Argentine, a city of the second class, after levying 10 mills on the dollar for general revenue purposes, in 1891, had no authority to levy, in addition, the taxes complained of for water, electric light, and fire department supplies. The city of Argentine claims that the property upon which taxes were levied in 1891 was within the limits of the city, under the provisions of either or both ordinances Nos. 115 and 217. Ordinance No. 115 was passed by the city on May 14, 1889, while Argentine was a city of the third class.

Ordinance No. 217 was passed on July 29, 1890, and published July 31, 1890, after Argentine had become a city of the second class. The attempted extended limits of Argentine included unplatted territory as follows: Within the limits established by ordinance No. 115: A tract of 20 acres, marked "A" upon the map; a tract of about 8 acres, marked "D;" and three tracts of about 5 acres, each marked respectively "F," "H," and "I." Within the limits established by ordinance No. 217, and beyond those established by ordinance No. 115: A tract of about 8 acres, marked "B;" a tract of about 10 acres, marked "C;" and a tract of about 15 acres, marked "J." The charter provision for the extension of the limits of cities of the third class is in paragraph 1018, Gen. St. 1889, and provides "that, whenever the city council of any city of the third class desires to enlarge the limits thereof from the territory adjacent thereto, said council shall, in the name of the city, present a petition to the board of commissioners of the county in which said city is situated, setting forth, by metes and bounds, the territory sought to be so added, and praying that such territory may be added thereto. Upon such petition being presented to said board, with proof that notice as to the time and place said petition shall be so presented has been published for three consecutive weeks in some newspaper published in said city, they shall proceed to hear testimony as to the advisability of making such addition; and upon such hearing, if they shall be satisfied that the adding of such territory to the city will be to its interests, and will cause no manifest injury to the persons owning real estate in the territory sought to be added, they shall make an order declaring said territory a part of the corporate limits thereof, and subject to the laws and ordinances pertaining thereto: provided, that no such proceeding shall be necessary when the territory sought to be added is subdivided into lots or parcels of five acres or less; but in such cases the city council of said city shall have power to add such territory to said city by ordinance." Laws 1872, c. 102, § 3, as amended by Laws 1886, c. 66, § 4. The provisions for extending the limits of cities of the second class are substantially the same as those for extending the limits of cities of the third class, except that the petition for the second class must be presented to the judge of the district court, instead of to the board of county commissioners, as in the third class; and except, also, that in cities of the second class an ordinance of the city council must follow the finding of the judge of the district court. Paragraph 884, Gen. St. 1889; Laws 1885, c. 97, § 1, as amended by Laws 1886, c. 69, § 1.

The trial court, in its opinion, holding that ordinance No. 217 is void, said, among other things: "The boundaries set out in the ordinance include a large territory of land, consisting of different tracts and descriptions not included within the prior limits of the city. A portion of the territory so included in the ordinance, and not included within the prior limits of said city, consists of lands which

had not been platted or subdivided into lots and blocks, while other portions of said territory had, prior to said time, been so platted and subdivided. No proceeding or action of any kind, either by petition to the judge of the district court or otherwise, as prescribed by said paragraph 884, was had in relation to adding the territory or any part thereof to the city, except the passage and publication of said ordinance. Granting that the ordinance is sufficient by its terms for the addition of territory to the city, that it is void so far as it affects land included within its boundaries not platted or subdivided into lots and blocks is obvious. No authority was vested in the mayor and council of said city to extend the limits of the city to include unplatted territory, without first performing the requirements of said paragraph 884 in relation thereto. Then, is said ordinance valid as to the platted territory included within the boundaries therein set out, and which was not included within the prior limits of said city? One portion of an act or ordinance may be void, for want of authority in the body enacting it, and other portions of such act or ordinance may be valid and effectual for the purposes intended; but, in order to constitute such portion valid and effectual, it must be capable of being separated from the invalid portion; and, when the invalid portion is stricken out, that which remains must be complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected. The purpose of this ordinance, if it can be construed to intend the addition of any territory to the limits of said city, was to accomplish a single object only, viz. the addition of all the territory included within its boundaries not included within the prior limits of said city. This is attempted to be done in one section, and under one description. A portion of this territory was unplatted, and beyond the authority of the mayor and council to add to the city by such ordinance. The platted and unplatted portions are inseparably connected with each other in said ordinance, and it cannot be presumed that the mayor and council would have added one without the other. Therefore the whole must be held void." As to ordinance No. 115, the trial judge, in his opinion, stated that that ordinance is also void, for the same reasons that ordinance No. 217 is void. We think the reasons given by the trial judge are sufficient to show that the city council, in passing both ordinances Nos. 115 and 217, acted without jurisdiction, as all the territory sought to be added was not subdivided into lots and blocks, as prescribed by the statutes; and that it cannot be said, considering the language of the ordinances, that either ordinance is valid as to the tracts or pieces of land subdivided into lots and blocks, but not valid as to the tracts or pieces of land which were not subdivided or platted. In this case the ordinances must all stand or fall together, because all of the parts are inseparably united.

The first question, as well as the third, presented for our determination, must be

answered, for the foregoing reasons, in the negative. The second question presented may also be disposed of upon the opinion delivered by the trial judge. The part we refer to is as follows: "The city of Argentine was, on July 20, 1889, by proclamation of the governor, declared a city of the second class. July 24, 1889, a petition of citizens of school district No. 41, in which the lands of plaintiffs were then situated, was presented to the school board of school district No. 40, which included the city of Argentine, as a city of the third class, asking to be annexed to district No. 40, the prayer of which petition was then granted by the school board of district No. 40, as shown by the records of the district. On July 26, 1889, the following entry was made by the county superintendent in the records of his office: 'Whereas, by proclamation of the governor of the state of Kansas, the city of Argentine was proclaimed a city of the second class, said proclamation bearing date of July 20th, 1889; and, whereas, application was duly made to the school board by the city of Argentine, by a majority of (all but one) the residents of school district No. 4, praying that school district No. 41 be attached to the city of Argentine for school purposes, and the application was duly received and accepted by the school board of the city of Argentine on the 24th day of July: School district No. 41 was, and is hereby, attached to the city of Argentine for school purposes, and ceases to exist as an independent and separate district. Dated July 26th, 1889. Edw. F. Taylor, Co. Supt.' No other action or proceeding was had in the matter of changing the school district, or attaching the territory to the city of Argentine for school purposes. Since the 24th day of July, 1889, the board of directors of school district No. 40, and the board of education of the city of Argentine, after its election and organization, has assumed control and jurisdiction for school purposes of the territory formerly known as 'District No. 41,' and levied taxes for school purposes upon the property therein. The city of Argentine, as a city of the third class, was a part of district No. 40. School districts in this state, outside of cities of the first and second class, are created and changed by the county superintendent. Paragraph 5571, Gen. St. 1889, of the act relating to schools, provides: 'It shall be the duty of the county superintendent of public instruction to divide the county into a convenient number of school districts, and to change such districts when the interests of the inhabitants thereof require it, but only after twenty days' notice thereof, by written notices posted in at least five public places in the district to be changed.' Laws 1881, c. 152, § 12. There was no power vested in the board of directors of school district No. 40 to change the boundary of the district. This could be done only by the county superintendent, and by him only after public notice thereof as required by paragraph 5571, (Laws 1881, c. 152, § 12.) No such notice thereof having been given, and no action taken therein by the county superintendent, except to record the ac-

tion of the school board, said territory could not have been added to school district No. 40 by such proceedings under the provisions of paragraph 5571. Again, when the city of Argentine became a city of the second class, it became subject to different laws, both as a municipality and as a school district. The limits of the school district then became coextensive with the limits of the city, and territory outside the city limits could then be attached to such city for school purposes only in the manner prescribed by paragraph 5725, Gen. St. 1889, (Laws 1876, c. 122, art. 11, § 4,) of the act relating to schools. I think the city of Argentine became a city of the second class at the time of the publication of the governor's proclamation, declaring it to be subject to the provisions of law governing cities of the second class, on July 20, 1889, (paragraph 756, Gen. St. 1889; Laws 1872, c. 100, art. 1, § 1, as amended by Laws 1889, c. 99, § 1;) and that, from and after that date, the school board of school district No. 40 could exercise no authority, or perform any act therein other than what was necessary for the preservation of the school property, and the maintenance of the schools, until the election and organization of the board of education for the city as a city of the second class, as provided by law," (Ritchie v. City of South Topeka, 38 Kan. 371, 16 Pac. Rep. 332; Moser v. Shamleifer, 39 Kan. 685, 18 Pac. Rep. 956.)

One question only remains: Were the plaintiffs below estopped by acquiescence? They are and have always been nonresidents. They neither petitioned nor voted. One tax only has been levied since the attempted extension of the limits of the city of Argentine and the attempted union of school district No. 41 with school district No. 40, prior to the levies of 1891, which are complained of. It was said in *Armstrong v. City of Topeka*, 36 Kan. 432, 13 Pac. Rep. 843, by this court, that "we do not believe that the payment of a tax, whether legally or illegally assessed, would be a ratification by plaintiff, or would in any manner estop him from denying that the land was a part of the city of Topeka. The plaintiff gains nothing thereby; the city loses nothing; on the contrary, the city obtains the advantage of the tax, and in this we fail to see any element of ratification, or anything that would estop the plaintiff in this matter." See, also, *Railroad Co. v. Maquillin*, 12 Kan. 304; *Jay v. Board of Education*, 46 Kan. 527, 26 Pac. Rep. 1025; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. Rep. 800. We think there was no acquiescence, especially no long acquiescence, which can be insisted upon to prevent plaintiffs below from being relieved of the taxes levied in 1891. In the case of *Ritchie v. Mulvano*, 39 Kan. 241, 17 Pac. Rep. 830, the real estate was sold at tax sale, and, under section 142 of the tax laws, the purchaser was permitted to recover the state, county, and school-district taxes, but not the city taxes; but in this case there has been no tax sale, tax certificate, or tax deed issued for the levies of 1891. The judgment of the district court will be affirmed; all the justices concurring.

**STEWART, County Treasurer, et al. v. SCHOONMAKER et al.<sup>1</sup>**

(Supreme Court of Kansas. Jan. 7, 1893.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by M. Schoonmaker and others against M. W. Stewart, as county treasurer of Wyandotte county, and others, to enjoin the collection of taxes levied on the land of plaintiffs. Judgment for plaintiffs. Defendants bring error. Affirmed.

J. M. Asher, Hutchings, Keplinger & Miller, and Morgan & Riley, for plaintiffs in error. White & Earhart, for defendants in error.

**PER CURIAM.** Upon the authority of the cases of *Stewart v. Kansas Town Co.*, 32 Pac. Rep. 121, and *Stewart v. Adams*, Id. 122, the judgment of the district court will be affirmed.

**STEWART, County Treasurer, et al. v. BURT et al.<sup>1</sup>**

(Supreme Court of Kansas. Jan. 7, 1893.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by O. D. Burt and others against M. W. Stewart, as county treasurer of Wyandotte county, and others, to enjoin the collection of taxes levied on the property of plaintiffs. Judgment for plaintiffs. Defendants bring error. Affirmed.

J. M. Asher, Hutchings, Keplinger & Miller, and Morgan & Riley, for plaintiffs in error. White & Earhart, for defendants in error.

**PER CURIAM.** The judgment of the court below in this case of M. W. Stewart, as county treasurer of Wyandotte county, and others, against O. D. Burt and others, will be affirmed, upon the authority of the following cases: *Stewart v. Kansas Town Co.*, 32 Pac. Rep. 121; *Stewart v. Adams*, Id. 122; and *Stewart v. Schoonmaker*, supra.

(50 Kan. 574)

**HOYT v. BUNKER et al.<sup>2</sup>**

(Supreme Court of Kansas. Jan. 7, 1893.)

**CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT—PREVIOUS EXHAUSTION OF CORPORATE PROPERTY—PRIORITIES AMONG CREDITORS.**

1. Judgment creditors of a corporation, seeking the enforcement of their rights against stockholders thereof under paragraph 1192, Gen. St. 1889, must strictly comply with the provisions of said statute.

2. Such creditors cannot resort to the fund in the hands of the stockholders of said corporation to satisfy their judgments against it until they have exhausted the corporate property.

3. The court has no power to entertain motions for orders allowing executions against stockholders of a corporation under paragraph 1192, Gen. St. 1889, until the record of the case in which the motion is made shows that the corporate property has been exhausted.

4. Where several parties having judgments against a corporation seek to enforce their claims against the stockholders thereof, under paragraph 1192, Gen. St. 1889, and it appears that one of said parties strictly pursued the provisions of said statute, and exhausted the corporate property, before filing his motion and giving notice of his application for an order allowing execution to issue against such stockholders, and such other parties filed their motions, and gave notice of their application for orders allowing executions in their behalf to issue against the stockholders of said cor-

poration, without having proceeded against the corporate property, the party that first procured an order pursuant to the provisions of said paragraph has a right to the fund in the hands of such stockholders prior to that of the other parties; and injunction will lie in behalf of such party to enjoin the other parties from proceeding against the stockholders until the rights and priorities of all the parties are ascertained by the court.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Reno county; L. Houk, Judge pro tem.

Action by W. M. Hoyt against L. A. Bunker and others to enjoin defendants from obtaining executions against the stockholders of the Hutchinson Union Stock-Yards Company, and restraining the stockholders from paying the executions till plaintiffs and defendants' rights and priorities are finally determined. A demurrer to the petition was sustained, and plaintiff brings error. Reversed.

Leslie & Crawford, for plaintiff in error. F. F. Prigg and Whiteside & Gleason, for defendants in error.

**STRANG, C.** This was a proceeding by injunction to restrain L. A. Bunker, the Valley State Bank, the National Bank of Commerce, and W. F. Mulkey, as assignee, and the First National Bank from obtaining executions and proceeding against A. J. Lusk, J. F. Greenlee, E. S. Handy, W. E. Hutchinson, and L. C. Welton, stockholders in the Hutchinson Union Stock-Yards Company, and to restrain the said stockholders from paying to said defendants the several sums claimed by them against said stock-yards company, until the rights and priorities of the plaintiff and the defendants seeking said executions be finally determined. The petition was demurred to. The court sustained the demurrer, and the case is brought here by the plaintiff below.

The petition in the court below alleges that on the 4th day of October, 1890, in the district court of Reno county, the plaintiff obtained a judgment against the defendant the Hutchinson Union Stock-Yards Company for the sum of \$9,790, which was by the court declared a first lien upon the property of said defendant therein described, and it was ordered that after the expiration of six months said property be sold, and the proceeds, after payment of costs, be applied to payment of said judgment; that after the six months' stay had expired the property was sold for \$5,000, and the proceeds applied on said judgment, leaving a balance of said judgment unpaid; that after the confirmation of said sale the plaintiff procured an execution to issue for the remainder of said judgment, which was levied upon other property of said stock-yards company, which was sold, and the proceeds applied upon said judgment, leaving a balance still due of \$4,812; that plaintiff then caused another execution to issue on said judgment, which was returned, "No property found." And the plaintiff alleges in his petition that there was no property whereon to levy this last execution; that on the 14th day of August, 1891, and after the return of said execution "No property

<sup>1</sup>Rehearing denied. See 32 Pac. Rep. 913, mem.

<sup>2</sup>Rehearing pending.



found," the plaintiff filed his motion to charge the stockholders of said stock-yards company with the payment of the balance of said judgment, and served notice thereof upon certain of said stockholders, and that on the 15th day of September, 1891, said motion was heard by the court, as to the stockholders made defendants in this case, and that the court ordered execution to issue against them; that the defendants, except the defendant the Hutchinson Union Stock-Yards Company, obtained judgments against said stock-yards company amounting, on the average, to about \$2,000 each; that executions on some of them were levied upon the property of the stock-yards company, and the property was appraised at \$5,000, but such executions were returned showing the property not sold for want of bidders; that afterwards executions were issued on all of said judgments, each of which was returned, "No property found, whereon to levy this execution, sufficient to make the amount of the within judgment;" that after said executions were so returned the defendants L. A. Bunker, as the People's State Bank, the Valley State Bank, and W. F. Mulkey, as the National Bank of Commerce, filed motions, and caused notices thereof to be served upon a large number of the stockholders of the said stock-yards company, to appear and show cause why orders should not be allowed for executions to issue against them, as such stockholders, in favor of said defendants, for the amount of their judgments; that the said L. A. Bunker and the Valley State Bank have obtained orders against certain of the said stockholders, against whom this plaintiff is also proceeding, requiring them to pay over the amount of their liability on the judgments of said L. A. Bunker and the Valley State Bank; and that the defendants the First National Bank and the National Bank of Commerce are also proceeding against said stockholders.

With these allegations in the petition, did the court err in sustaining the demurrer thereto? We think so. We believe the petition shows the existence of a state of facts, in connection with the litigation between the parties seeking to enforce their claims against the Hutchinson Union Stock-Yards Company, that authorizes the court to enjoin the defendants from proceeding to enforce their claims against the stockholders of said corporation, and the stockholders themselves from paying over on the judgments of the other defendants herein, until the rights and priorities of the plaintiff and defendants are settled by the court. All the parties to the suit are seeking the enforcement of claims against the stockholders of their common judgment debtor, the Hutchinson Union Stock-Yards Company, and they are all moving under paragraph 1192, Gen. St. 1889. But it seems that the plaintiff proceeded strictly according to the provisions of that paragraph of our statutes, while it is alleged by him that the defendants seeking the enforcement of their claims did not, and that by reason of the fact that the plaintiff followed the directions of the statute, and such defendants

did not, the plaintiff has acquired the first lien upon the funds in the hands of the stockholders of the corporation, though the defendants, moving in the same direction, filed their motions first in point of time. Since all the creditors of the defendant the Hutchinson Union Stock-Yards Company are pursuing their claim under the statute, we think they should proceed according to the provisions of such statute. A proper construction of paragraph 1192 requires the judgment creditor of a corporation to pursue the property of said corporation as long as any property thereof can be found upon which an execution can be levied before resorting to the proceeding therein provided against the stockholders. In other words, the property of the corporation must be exhausted before the creditor may resort to the fund in the hands of the stockholders thereof. In this case the plaintiff, Hoyt, pursued the statute strictly. He sold, on an order of sale, the property of the corporation on which he had a lien, and applied the proceeds on his judgment. He then caused a general execution to issue, and had it levied upon other property belonging to the corporation, which was sold, and the proceeds applied upon his judgment; and, there being a balance still unpaid thereon, he procured still another execution to issue thereon, which was returned, "No property found." He then proceeded under the statute to enforce his remedy against the stockholders, but found the other defendants herein, who were also judgment creditors of the corporation, already moving against such stockholders, and that, too, without having first pursued the property of the corporation.

The record shows that some of the defendants obtained executions against the corporation, and levied upon property of the corporation which was appraised at \$5,000, but that such executions were returned, "Property not sold, for want of bidders." Want of bidders was not a sufficient excuse for an abandonment of the property levied on. It could have been advertised over and offered again, and then, if it was ascertained that the appraisal was too high, the court should have been asked to set aside the appraisal, and order the property reappraised, when it could again have been offered for sale. Nothing of this kind was done. Nor was there any attempt to levy upon the other property of the corporation, subsequently levied upon and sold by the plaintiff; but all the defendant judgment creditors of the corporation, without any further pursuit of the corporate property, had executions issued and returned, "No property found, whereon to levy this execution, sufficient to make the amount of the within judgment." This proceeding not only did not exhaust the property of the corporation, but the return was so indefinite that it does not appear how much might have been made on each of the executions of the said defendants so returned. So far as the returns show, the bulk of each of such executions might have been made out of the corporate property. The plaintiff seems to have been the first creditor to proceed against



the stockholders after the corporate property was exhausted, and the only one who pursued such property in good faith. We therefore think his right to the fund in the hands of the stockholders, pursued by him, should take precedence to the right of the defendants, pursuing the same stockholders. "Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets." Cook, Stock & S. § 219. "The liability of the stockholders, being secondary, cannot be enforced until the assets of the bank, which is the primary debtor, are exhausted." Appeal of Means, 85 Pa. St. 75; Wright v. McCormack, 17 Ohio, 86. "After judgment is obtained against the corporation, if the execution issued thereon against its property be returned nulla bona, then executions may issue against any of the stockholders to an extent equal in amount to stock owned by him or her, in accordance with the terms of section 32, art. 4, c. 23, Comp. Laws 1879." Valley Bank & Sav. Inst. v. Ladies' Congregational Sewing Soc., 28 Kan. 423. "The judgment creditor of an insolvent corporation who first moves, in conformity to the provisions of section 32, c. 23, Gen. St. 1889, to charge a stockholder on his liability under the statute, acquires a priority of right to recover against such stockholders, with which a creditor subsequently moving cannot rightly interfere." Wells v. Robb, 48 Kan. 201, 23 Pac. Rep. 148.

It is asserted by counsel for the defendants who have already obtained orders for executions against the stockholders of the corporation that if it be true that they had no right to proceed against such stockholders until they had first exhausted the corporate property, yet, having done so, and obtained their orders, the plaintiff herein cannot raise the question of their right to do so; that if the stockholders are satisfied the plaintiff must be, and cannot attack their judgments in such collateral manner. We do not think the orders of the court authorizing the issuance of execution against the stockholders of the corporation are such judgments as to render the plaintiff in the case subject, in its full extent, to the rule relating to collateral attacks on judgments. Under the summary process authorized by the statute, the order of the court for execution to issue against stockholders does not possess all the qualities of an ordinary judgment, and is not so conclusive in all respects as such a judgment, and not so conclusive as a judgment obtained against a stockholder under the last clause of the same paragraph. This court, in Hentig v. James, 22 Kan. 326, on this subject, uses the following language: "The concluding provision of said section 32 [being the same as paragraph 1192] plainly prescribes that if the creditor wishes to make the stockholder a judgment debtor, with all that term implies, he may proceed by action, and charge the stockholder with the amount of his judgment against the cor-

poration. \* \* \* We conclude that the proceeding to obtain an execution on a motion is a special proceeding, limited in its character, and does not convey with it all the powers of a judgment. It assimilates to proceedings of garnishment, but allows the execution, instead of an action to recover the amount to be paid."

But, if such an order partook of all the characteristics of an ordinary judgment, still Hoyt might be said to be in a position to attack and set it aside in this proceeding. "The rule that a judgment of a court of competent jurisdiction is conclusive until reversed, or in some manner set aside and annulled, and that it cannot be attacked collaterally by evidence tending to show that it was irregular or improperly obtained, only applies to parties and privies to the judgment, who may take proceedings for its reversal, and in no sense extends to strangers." Atkinson v. Allen, 12 Vt. 619; Steel Works v. Bresnahan, (Mich.) 33 N. W. Rep. 834; Caswell v. Caswell, 28 Me. 233, 237; Succession of Quin, 30 La. Ann. 947. In the case of Sidsensparker v. Sidsensparker, 52 Me. 481, it is stated "that a stranger whose rights are affected may impeach a judgment collaterally on three grounds: (1) That the court rendering it had no jurisdiction of the cause; (2) that the judgment was obtained by fraud or collusion; and (3) that the judgment was irregularly or unlawfully rendered, to his prejudice." See, also, Lyles v. Bolles, 8 S. C. 258, and Bolase v. Dickson, 31 La. Ann. 741. It must certainly be conceded that Hoyt has an interest in the funds in the hands of the stockholders that will be prejudiced if the defendants seeking the same fund are held to be prior in right to him.

Again, it is questionable whether, under the summary process of said paragraph, the court has any power to act until an execution issued against the corporation has been returned in accordance therewith. The statute reads: "If any execution shall have been issued against the property or effects of a corporation, \* \* \* and there cannot be found any property whereon to levy such execution," then, upon motion in open court, in which the judgment against the corporation is pending, and notice to the stockholders to be charged, execution may issue against such stockholders. The record of the judgment against the corporation should show an execution so returned as to show that the corporate property has been exhausted, before the court may entertain the proceeding to order execution against the stockholders. With records in each case showing that the corporate property had not been exhausted, had the court power to entertain motions for orders allowing executions to issue against the stockholders in favor of said defendants? If not,—and it seems to us that it had not,—then, under Pierce v. Carleton, 12 Ill. 358, orders so allowed are "unauthorized and void," and the plaintiff can attack them collaterally. In that case the court held that where the previous proceedings were "unauthorized and void" a garnishee might inquire into the previous proceedings on the attachment. See, also, Insurance Co. v.

Cohen, 9 Mo. 421, and Schoppenbast v. Bollman, 21 Ind. 285. We think the trial court erred in sustaining the demurrer to the petition in this case, and recommend that the case be reversed, and remanded for further proceedings.

**PER CURIAM.** It is so ordered; all the justices concurring.

(50 Kan. 129)

**ROSENTHAL v. STATE BOARD OF CANVASSERS et al.**

(Supreme Court of Kansas. Jan. 7, 1893.)

**MANDAMUS TO CANVASSING BOARD—CONTENTS OF WRIT—POWER OF BOARD AFTER ADJOURNMENT—REASSEMBLY.**

1. The courts have jurisdiction, in mandamus, to control a canvassing board, whether it be township, city, county, or state, if it neglects or refuses to perform any act which the law especially enjoins upon it as a duty.

2. The writ of mandamus, whether alternative or peremptory, must not only show the obligation of the defendant to perform the act, but must also show his omission to perform it. *State v. Carney*. 8 Kan. 88.

3. Mandamus will not lie to compel an officer or a board of canvassers to do an act which, without its command, it would not have been lawful for the officer or board to do. *State v. Board of Com'rs of Kearny County*, 22 Pac. Rep. 735, 42 Kan. 739.

4. Where the county clerk of a county signs, authenticates, and transmits to the secretary of state, within the time prescribed by the statute, an abstract of the votes of a representative district of his county, cast for a member of the house of representatives, although such abstract states incorrectly the votes cast for the candidates for such office, yet if the board of state canvassers, without any notice or knowledge of the error or mistake in such abstract, proceeds, in good faith, according to the statute, to examine and declare the whole number of votes given in the representative district at the election, and from the face of such abstract determines that the person therein stated to have the greatest number of votes is duly elected as representative, and no other abstract is presented, or called to the attention of the board, from that county or district, during its session, such board discharges its whole duty in the premises; and after it has finally adjourned its power is at an end, and it cannot reassemble or make a recount. When its duty is once fully performed, it is performed once and forever, and cannot be repeated.

5. After the board of state canvassers has canvassed all the returns from all the counties of the state, and declared the result, and ordered certificates, as prescribed by the statute, and then, having completed its labors, adjourns without day, it is functus officio,—officially dead; and the courts have no power to compel the board to reassemble, or recount any returns.

(Syllabus by the Court.)

Original proceeding in mandamus, by Joseph Rosenthal against the state board of canvassers of the state of Kansas and others, to compel defendants to determine that Joseph Rosenthal has received the highest number of votes cast in the 121st representative district for member of the house of representatives, and to issue a certificate therefor. Writ refused.

W. C. Webb, G. C. Clemens, and Frank Doster, for plaintiff. J. N. Ives, Atty. Gen., T. F. Garver, F. R. Peters, F. B. Dawes, and C. I. Long, for defendants.

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**HORTON, C. J.** This was an action of mandamus to compel the board of state canvassers to convene, and determine that Joseph Rosenthal has received the greatest number of votes cast in the 121st representative district for member of the house of representatives, and, after having declared him duly elected to that office, to issue to him a certificate therefor. The facts in the case are as follows: Joseph Rosenthal, at the general election held on the 8th of November, 1892, being eligible thereto, was a candidate for the office of member of the house of representatives for the 121st district, being Haskell county, for the term commencing on the second Tuesday of January, 1893. A. W. Stubbs was also a candidate for the position at that election. Upon the face of the returns filed with W. H. Hussey, county clerk of Haskell county, after the election, as prescribed by the statute, Joseph Rosenthal received 156 votes, and A. W. Stubbs 123, only. Subsequently the board of county canvassers of Haskell county duly canvassed the returns, in accordance with the face thereof, and such determination was reduced to writing, signed by the commissioners, and attested by the clerk, showing that Joseph Rosenthal had received the highest number of votes for the office of representative. Afterwards the county clerk made out and forwarded to the secretary of state an abstract of the votes for representative of Haskell county, but by accident or design—probably by gross negligence—transposed, in the abstract of votes, the figures, so as to show that A. W. Stubbs received 156 votes, and Joseph Rosenthal 123, only. This abstract, certified to by Hussey, as county clerk, on the 12th day of November, 1892, was sealed up by him in an envelope, indorsed and addressed as required by law, and then transmitted to the secretary of state, who received and filed it in his office on the 16th day of November, 1892. The state board of canvassers met for the purpose of canvassing the result of the election of November 8, 1892, as prescribed by the statute, on the 28th of November, 1892, and continued in session from day to day until December 1, 1892, when, having completed the canvass of all the returns on file with the secretary of state, of the November election of 1892, adjourned without day. The certified abstract of the votes given in Haskell county for representative was examined by the board, and thereon a statement was made by them, showing that A. W. Stubbs had received the greatest number of votes for representative, and was duly elected to that office. A certificate of such determination was ordered by the board, and was subsequently signed and issued. On the 19th day of December, 1892, about three weeks after the board of state canvassers had discharged their duties, and adjourned without day, an envelope addressed to him was received by the secretary of state, without any indorsement to indicate that the same was an official communication, which contained what purported to be a correct abstract of the votes of Haskell county for representative, showing that Joseph Rosenthal received 156 votes, and

A. W. Stubbs 123, only, and attached to the new or corrected returns was an affidavit of the county clerk, stating that his former abstract was incorrect and erroneous, and also further stating that the new or supplemental returns were the correct abstract of the votes in Haskell county for representative, cast at the election on the 8th of November, 1892. At the time that the state board canvassed the abstract of the county clerk of the 12th of November, 1892, the members thereof had no notice from Joseph Rosenthal, or any one else, that the returns were incorrect, or in any way defective. It seems to be conceded in this case that in canvassing such returns they acted in good faith. No misconduct is charged. After the supplemental returns were received by the secretary of state, on the 19th day of December, 1892, no request was made, before the commencement of this action, by Joseph Rosenthal or any one else, that the board should reconvene or examine the additional returns and affidavit of the county clerk.

It was urged upon the hearing of this case, upon the part of the defendants, that this court had no jurisdiction to inquire into the matters presented, because the constitution of the state ordained that "each house shall judge of the election, returns, and qualifications of its own members." This court is not, in a proceeding of this kind, a contest court, and, of course, cannot go behind the returns, and hear and determine whether Rosenthal or Stubbs received legal or illegal votes, or whether any frauds were committed at the election to the prejudice of either candidate. But this court has jurisdiction, in mandamus, to control, in certain cases, a canvassing board, whether that board be a township, a city, a county, or a state canvassing board. In case the board refuses to issue a certificate of election to the person receiving the highest number of votes, upon a duly-authenticated abstract on file in the office of the secretary of state, and the relief by mandamus is withheld, the party aggrieved can have no remedy whatever to obtain his certificate. The person who has, upon the certified abstract, the greatest number of votes, is entitled to a certificate; and this cannot be awarded by the legislature, or either branch thereof. A certificate of election has some value. It is prima facie evidence of the election of the person holding it to the office claimed. *State v. Carney*, 3 Kan. 88. Where a canvassing board wrongfully neglects and refuses to canvass returns which are regular in form, as a general rule, the courts may, by mandamus, compel the board to canvass and declare the result upon the face of their returns; and if a canvass has been wrongfully or improperly made, and the board has adjourned sine die, this court may compel it to reassemble, and make a correct canvass of all the returns before it at the time of the first canvass. *Lewis v. Commissioners*, 16 Kan. 102.

If a person, upon the face of the returns, is entitled to the certificate of his election, except in special instances, where wrong or injustice will be done, the courts have

power to reach the officers composing the delinquent board by writ of mandamus, and compel them to action, and, if necessary, may compel them to reconvene and recanvass. Therefore, if there was nothing in this case but the question of jurisdiction of this court, the plaintiff would be entitled to the relief claimed by him. But it appears in this case, from the records of the board of state canvassers, that the board on December 1, 1892, long before what purported to be the corrected returns from Haskell county were filed with the secretary of state, had completed its labors, declared the result against the plaintiff, and finally adjourned. A writ of mandamus "may be issued to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station." Section 688 of the Code. "A want of a 'plain and adequate' remedy, in the ordinary course of the law, is an essential prerequisite to the issuance of the writ, in every case; but an equally essential prerequisite is an omission on the part of the defendant to perform the act required of him. The writ, whether alternative or peremptory, must not only show the obligation of the defendant to perform the act, but must also show his omission to perform it." *State v. Carney*, 3 Kan. 90. "If the board may be compelled to reassemble and canvass the returns of the election, it would seem that it might voluntarily do so. Mandamus is employed to enforce the performance of a duty; and, since it is a duty, it certainly may be performed by the officers without the command or compulsion of the court. It is held that mandamus will not lie to compel an officer to do an act which, without its command, it would not have been lawful for him to do." *State v. Board of Com'rs of Kearny County*, 42 Kan. 739, 22 Pac. Rep. 735. If the board of state canvassers had discharged all of its duties, which the law especially enjoined upon it, before its final adjournment, on the 1st day of December, 1892, then no writ of mandamus can issue, because there would be the performance of no duty to enforce. "A canvassing board, having once counted the votes, and declared the result according to law, has no power or authority to make a recount. When this duty is once fully performed it is performed once and forever, and cannot be repeated. To suppose that it could be renewed, that the canvass of one day could be repeated the next, and counter certificates be issued to different contestants as new light or influence was brought to bear upon the mind of the clerk, would render the whole proceeding a farce." *McCrory, Elect.* (3d Ed.) § 232; *Bowen v. Hixon*, 45 Mo. 340; *Clark v. Buchanan*, 2 Minn. 346, (Gil. 298; ) *State v. Donnewirth*, 21 Ohio St. 216; *State v. Stewart*, 26 Ohio St. 216.

If a canvassing board, having concluded its labors, and finally adjourned, has no power or authority to reconvene and recount, the courts, under the provisions of the statute, cannot, by mandamus, compel the board to reassemble, or give them any power so to do. It is, however, contended, upon the part of Rosenthal, that

as the statute requires the county clerk of Haskell county to make out an abstract of the votes for representative, and, after having been signed and certified to by him, to deliver the same, by mail, to the secretary of state, and as the first returns were not true, because they incorrectly stated the votes of each of the candidates, no valid abstract was received from Haskell county prior to December 19, 1892, and therefore, as no true abstract or returns were received, this court may compel the board of state canvassers to reassemble, and complete its work, by canvassing the later, or supplemental, returns. If no abstract from Haskell county had been received by the secretary of state before the final adjournment of the board, on December 1, 1892, and if the state board had had no abstract or returns before them, from Haskell county, to act upon, it is possible that under the decision of *Lewis v. Commissioners*, 16 Kan. 102, mandamus would lie, upon the ground that only a partial canvass had been made. But that is not this case. An abstract of the votes for a member of the house of representatives, signed and certified by the county clerk, properly indorsed and directed to the secretary of state, was received by him, and placed before the state board of canvassers during their proceedings in November. That abstract was incorrect, but it came from the proper officer. It was signed and certified by the proper officer. It was duly authenticated. It was not challenged or objected to. The members of the state board of canvassers had no notice or knowledge, at the time they were considering it, that it was incorrect or defective. Upon the face of the returns, they appeared to be in full compliance with the provisions of the statute. There was nothing in the returns, or in the manner in which they were transmitted or received, to cause suspicion, or to demand any other action thereon than usual and customary in such cases. The state board accepted the returns as truthful, passed upon them as such, and declared the result therefrom. It is well settled that the duties of canvassing officers are purely ministerial, and extend only to the counting up of the votes, and awarding the certificate to the person having the highest number. They have no judicial power. *State v. Marston*, 6 Kan. 524; *McCrary, Elect.* (3d Ed.) § 228. As was said by Hoar, J., in *Luce v. Mayhew*, 13 Gray, 83: "They are not made a judicial tribunal, nor authorized to decide upon the validity or the fact of the election in any other mode than by an examination of the 'returns' made to them according to law. They are not required or authorized to hear witnesses or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns, and another is the real truth of the case, they can only act upon the former. If they have not done their duty, the remedy of the person actually elected to the office is not to be sought in a mandamus. This court has no power to direct public officers to do any more than their duty, or anything different from their duty."

Considering all the facts and circum-

stances of this case presented upon the trial, as no fraud, wrong, or other official misconduct is imputed to the members of the state board of canvassers, or either of them, in receiving and counting the returns complained of, we must hold that they did not improperly reject any returns, or refuse to canvass any proper returns. When the board adjourned, on the last day of December, 1892, the members thereof had fully discharged all of their duties; and it is too late now to say that they can voluntarily, or by compulsion, meet again, as canvassers, to examine and pass upon the returns of the election of November, 1892. As a body, the board of state canvassers is *functus officio*,—officially dead. It has no power of resurrection, so as to consider the returns of the election of November, 1892, and this court cannot animate its dead body with the breath of life. Not only has its power in the premises ended, but its successors have no authority to reassemble, or act again upon the election returns.

If it be said that this leaves Rosenthal without any remedy, and that the law, in some way, ought to furnish him a remedy for the wrong committed against him, we answer that if this be true it is the fault of the legislature, not the fault of the state board of canvassers, nor the courts. But it is not wholly true. While Rosenthal may not obtain from the state board his certificate, yet he has a remedy before the house of representatives, even if not a complete one. The jurisdiction of each house to decide upon the election returns and qualifications of its own members is clearly given by the constitution and the statutes. That body, with the general consent of its members, can admit him to his seat at once, or, if it so determines, it can delay his admission until full investigation is had of his claims. It may, it is true, act arbitrarily, and refuse him rights, but this is hardly probable. This proceeding, if successful, would have only given a certificate. The proceeding in this court is not a contest between Rosenthal and Stubbs, nor can we try the title to the office. The house of representatives has the exclusive power to decide who have been elected members to its body. Rosenthal has already commenced his contest before that tribunal. The house has full and ample jurisdiction over the office,—the substance he is seeking,—even if it cannot give him a certificate, the paper title. If he has been elected representative, as it seems to be conceded, it should be the wish and desire of every honest and patriotic citizen of the state that the will of the people of his county, as expressed by their ballots, should be carried out, and that, as speedily as possible, he be permitted to occupy his place as representative. No party desiring the support of the good people of the state can, for partisan or political purposes, refuse him his seat merely because the clerk of Haskell county has made a mistake in his abstract or returns. The clerk has attempted to make some reparation by filing with the secretary of state corrected returns, with his affidavit supporting the same. Most certainly, if we saw any way in which this court, in this

proceeding, could properly, and in accordance with legal principles, grant Rosenthal a certificate, we would gladly do so. Under the limitations of the constitution and the provisions of the statutes, we are powerless. The board of state canvassers, having finally adjourned, on December 1, 1892, are powerless, and their successors are equally so. The house of representatives can rectify the serious mistake of the county clerk, which has deprived Rosenthal of his certificate. No other tribunal or body can now do so. That the house will act promptly and justly in the premises, we have the fullest confidence. The peremptory writ of mandamus prayed for will be refused. All the justices concurring.

(50 Kan. 132)

**SHELLABARGER v. WILLIAMSON et al.,**  
Commissioners.

(Supreme Court of Kansas. Jan. 7, 1893.)

**MANDAMUS TO ELECTION OFFICERS—WHEN GRANTED—APPORTIONMENT ACT—REPRESENTATIVE DISTRICT—INTENTION OF LEGISLATURE.**

Under the apportionment act of 1886, Jackson county constituted only one representative district, numbered 43. Under the apportionment act of 1891, it was divided into two representative districts, numbered 38 and 39. The thirty-eighth representative district included the city of Holton within its territorial boundaries, but the city of Holton was not mentioned in the act. At the election in 1892, votes were cast for representative in the thirty-eighth representative district, including Holton, as follows: For Nick Kline, 956 votes; for Ed. Shellabarger, 766 votes; for Moses Sarbach, 81 votes; and the canvassing board of Jackson county, in canvassing the votes cast in the thirty-eighth representative district, counted the votes cast in the city of Holton as belonging to such district. The votes cast outside of the city of Holton for candidates for representative were as follows: For Shellabarger, 629 votes; for Kline, 554 votes; for Sarbach, 14 votes. *Held*, that it was, in all probability, the intention of the legislature that Holton should constitute a part of the thirty-eighth representative district, and that the intention of the legislature should govern, although they may not have used the most appropriate language to express their intention; that the legislature could not create a representative district including a city within its territorial boundaries without providing in any manner for the city, and thereby disfranchise the voters of such city; that to disfranchise the voters of the city of Holton would be a great injustice and wrong, and mandamus will not lie where its only effect is to aid in accomplishing an injustice or wrong; nor will it lie to accomplish a useless or fruitless thing. In no event can it be considered that Shellabarger was elected a representative from any district in Jackson county, and a party having no interest in the result of an action cannot maintain the action.

(Syllabus by the Court.)

Original proceeding in mandamus, by Ed. Shellabarger against Williamson and others, the board of county commissioners of Jackson county, and another, to compel defendants to recanvass the votes cast for representative of the thirty-eighth representative district in the general election in 1892. Writ refused.

W. C. Webb, G. C. Clemens, and Frank Doster, for plaintiff. T. F. Garver, F. R. Peters, C. I. Long, and F. B. Dawes, for defendants.

**VALENTINE, J.** This is an application, brought originally in this court by Ed. Shellabarger, for a writ of mandamus to compel the board of county commissioners of Jackson county, as a board of county canvassers, and the county clerk, to reconvene, and recanvass the votes cast at the general election held in November, 1892, for the office of representative of the thirty-eighth representative district. It appears that the board, in its previous canvass, declared that for that office Nick Kline received 956 votes, Shellabarger received 766 votes, and Moses Sarbach received 81 votes, and showing that Kline was duly elected. The canvassing board, in its canvass, included the votes cast in the city of Holton, while Shellabarger claims that such votes should not be counted, and that by counting the others only, and not them, the number of votes cast for Shellabarger would be 629; for Kline, 554; and for Sarbach, 14; total, 1,197. The writ of mandamus must be refused. Under the apportionment act of 1886, Jackson county constituted only one representative district, numbered 43. Under the apportionment act of 1891, which is now in force, that county is divided into two representative districts, numbered 38 and 39. The thirty-eighth district is composed of six townships, in the north-east part of the county, and contains about one third of the territory of the county. The thirty-ninth district is composed of the remaining townships of the county. The city of Holton is not mentioned by name in the act. It is situated, however, wholly within the territorial boundaries of the thirty-eighth district; and, so far as the map presented to the court during the hearing of the application shows, it is also situated wholly within the territorial boundaries of Franklin township, which is one of the townships of the thirty-eighth representative district. Unquestionably the legislature intended to include Holton within the thirty-eighth representative district; for, if it is not within that district, then the voters of the city of Holton must be, and are, disfranchised, so far as representative is concerned, and it cannot be supposed that the legislature ever intended any such illegal and outrageous thing. Besides, if the city of Holton is not included within the thirty-eighth representative district, then such district will have an exceedingly small voting population,—only 1,197 votes,—while the surrounding representative districts in that county, and the counties of Pottawatomie, Marshall, Nemaha, Brown, Atchison, Jefferson, Shawnee, and Wabaunsee,—12 representative districts,—have an average voting population of over 3,400. Even with Holton in the thirty-eighth representative district, the district would have a comparatively small voting population,—only 1,806. Probably, under the general rules for the construction of statutes, it should be held that Holton is within such district; for it is a general rule of construction that the intention of the legislature shall govern, whenever that intention can be fairly ascertained, although the most appropriate language might not be used in expressing

that intention. If it were held that the city of Holton is within the thirty-eighth representative district, that would end this case; for in that case the board of canvassers did precisely what was their duty to do, and Kline, and not Shellabarger, was elected representative of that district. But if it should be held that the city of Holton is not within the thirty-eighth representative district, and that its voters should be disfranchised, then it must be held that the canvassing board did not do its duty. We shall cite some of the authorities upon the construction of statutes. Where it reasonably appears what was the intent of the legislature, the statute will be construed so as to effect that intent, although contrary to the letter of the statute. In *re Vanderberg*, 28 Kan. 243, 258; *Sedgw. St. Const.* (2d Ed.) 254, 255, note; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 152; *Brown v. Somerville*, 8 Md. 444, 456; *City of Wichita v. Burleigh*, 38 Kan. 34, 42, 12 Pac. Rep. 332; *People v. Insurance Co.*, 15 Johns. 358; *Pond v. Maddox*, 38 Cal. 572; *Amberg v. Rogers*, 9 Mich. 340; *State v. Boyd*, 2 Gill & J. 365, 374; *New England Car Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81; *U. S. v. Freeman*, 3 How. 556, 565; *Murray's Lessee v. Baker*, 3 Wheat. 541; *Oates v. Bank*, 100 U. S. 239; *U. S. v. Kirby*, 7 Wall. 483, 486, 487. "Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter, on the principle that what is within the intention of the makers of a statute is within the statute, though not within the letter, and that what is within the letter of a statute, but not within the intention of the makers, is not within the statute; it being an acknowledged rule, in the construction of statutes, that the intention of the makers ought to be regarded." *State v. Boyd*, 2 Gill & J. 374. "Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances, and, when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute." *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 152, approved in *New England Car Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81. "Laws to carry on the government are to receive a liberal construction to effectuate the objects designed; and if the legislative purpose can be arrived at, in the absence of express language, that meaning is to be observed and obeyed." *Hardesty v. Taft*, 23 Md. 513. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded." *People v. Utica Ins. Co.*, 15 Johns. 358. "The meaning of the legislature may be extended beyond

the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." *U. S. v. Freeman*, 3 How. 565. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter." *U. S. v. Kirby*, 7 Wall. 482, 486, 487.

If it should be held that the city of Holton is not within the thirty-eighth representative district, then it must be held that the apportionment—so far, at least, as the city of Holton, and perhaps the district or county, is concerned—is absolutely void. *State v. Van Duyn*, (Neb.) 39 N. W. Rep. 612; *Cooley, Const. Lim.* (6th Ed.) 775; *Attorney General v. Board of Supervisors*, 11 Mich. 63; *People v. Maynard*, 15 Mich. 463, 469, 471. The legislature had no authority to disfranchise the voters of the city of Holton; and if they attempted to do so, or left it out inadvertently, their act or omission would be void. If such an act or omission would render the district void, then Shellabarger, the applicant, would have no interest in any recanvass of the votes; for no person could be considered as having been elected a representative of a district which had no existence. Any recanvass of the votes, in such a case, would be absolutely fruitless, and Shellabarger could obtain no rights under such a recanvass; and a writ of mandamus will never be allowed where it can accomplish nothing, or where, under it, the applicant can obtain no benefit. But if only the act or omission of leaving Holton out of the district would be void, and if the district, with Holton in it, is valid, then the board of canvassers did their exact duty, and Kline is elected. No one has any right to claim an election under the apportionment law of 1886; for that law was absolutely repealed, by an express provision of the statute, when the apportionment law of 1891 took effect. But even if it was not repealed, and if it were still in force, and if Jackson county is still the old forty-third representative district, still Shellabarger could not claim to be elected under that apportionment; for he did not receive a majority, or even a plurality, of all the votes cast in Jackson county for representative. Each of two others received a higher number of votes than he did, to wit, the aforesaid Kline, in the thirty-eighth district, and J. F. Pomeroy, in the thirty-ninth district. Kline received the highest number of votes for representative of any person in Jackson county.

But, aside and independent of all the foregoing, Shellabarger has no right to a writ of mandamus. The allowance of a writ of mandamus is largely within the discretion of the court, and it is never allowed or issued where it will work injustice and wrong. Courts never lend their aid, by mandamus, to perpetrate an in-

justice or a wrong, and it would certainly be a great injustice, a great wrong,—indeed, a great outrage,—to disfranchise the voters of the city of Holton, and to allow such a small voting district, as the district without Holton would be, surrounded by populous districts, to elect a representative. This injustice, however, is, in effect, just what is asked for in the present case. It therefore follows, in any view we may take of the case, that Shellabarger is not elected; and, whether the city of Holton is in or out of the thirty-eighth representative district, Shellabarger can have no possible interest in a canvass. If the city of Holton is in the district, either because the legislature intended that it should be in, or because the legislature, in creating the district, and in surrounding Holton, and including it within the boundaries of the district, and without otherwise providing for Holton, could not legally leave Holton out of the district, still Kline, and not Shellabarger, was elected. If, by leaving the city of Holton out of all districts, the thirty-eighth district is void, then still Shellabarger could not be considered as elected, and would have no interest in the result of this action. If the old apportionment of 1886 is still in force, and governs, then Kline is elected, and not Shellabarger; and a party having no interest in the result of an action cannot maintain the action. The writ of mandamus will be refused. All the justices concurring.

(50 Kan. 149)

**RICE v. BOARD OF CANVASSERS OF COFFEY COUNTY et al.**

(Supreme Court of Kansas. Jan. 7, 1893.)

**MANDAMUS TO ELECTION OFFICERS—RECANVASSING VOTES—DELAY IN APPLICATION—DISCRETION OF COURT.**

Where a candidate for representative in the state legislature brings an action of mandamus to compel the board of canvassers of a county to reconvene and recanvass the returns from a certain township, and to make a corrected abstract, crediting him with 96 votes,—one more than was given to him by the first canvass,—and it appears by the certificate in the poll books, made by the judges and clerks of election, that he received 96 votes in that township, but it also appears from the enumeration of votes on the tally sheets, which were included in the poll books, that he only received 95 votes, which is corroborated by the duplicate poll book retained in the township, and it appears by these and other evidence that he did not actually receive but 95 votes in that township, and where it further appears that no complaint was made by him of the canvass until more than three weeks after the state board of canvassers had finally adjourned, and that the writ, if issued, would be fruitless and unavailing, the court, in its discretion, will refuse the same.

(Syllabus by the Court.)

Original proceeding in mandamus, by O. M. Rice against the board of canvassers of Coffey county and others, to compel defendants to recanvass the returns for member of the legislature, and send a corrected abstract of the votes cast for representative in Coffey county. Writ refused.

W. C. Webb, G. C. Clemens, and Frankster, for plaintiff. T. F. Garver, F. R.

Peters, C. I. Long, and F. B. Dawes, for defendants.

**JOHNSTON, J.** This is a proceeding in mandamus, brought originally in this court by O. M. Rice against the board of canvassers and the county clerk of Coffey county. He asks for a writ compelling them to reconvene, and recanvass the returns of the township of Avon, Coffey county, for member of the legislature; to correct an alleged error in the first canvass; and to certify and send to the secretary of state a corrected abstract of the votes cast for representative in Coffey county. The case was tried on an application for a peremptory writ, after notice had been given to the defendants.

It appears that O. M. Rice and T. C. Ballinger were candidates for representative from Coffey county at the late election, and that when the county canvassing board met, and canvassed the result of that election, they found and declared that each had received 1,826 votes, and a certified abstract of that result was sent to the secretary of state. Since that time the state board of canvassers canvassed the returns from that county, and found that there was a tie, and, having settled it as the statute prescribed, awarded the certificate to Ballinger. The plaintiff alleges that the canvassing board of the county refused to canvass all the votes returned for him in Avon township; that, by the certified returns from that township, he received 96 votes, and Ballinger received 68 votes; but that the board determined and declared that Rice only received 95 votes. He avers that if all had been counted it would have appeared that he had a total of 1,827 votes,—one more than Ballinger,—and that, as a true and correct abstract of the votes had not been sent to the secretary of state, the state board of canvassers could not declare him to be elected, nor award him the certificate to which he was entitled. The poll books of Avon township were presented to the court, and from them it appears that the footings and statements made in the certificate of the judges and clerks of election show that Rice received 96 votes in that township; but it also appears by the enumeration or tallies entered on the tally sheet of the poll books, as the ballots were counted by the judges, that he only received 95 votes. When the canvassers met they decided that they would consider the enumeration of the votes upon the tally sheet, in determining who was elected to the various offices, and this was in accordance with a practice which had long prevailed in that county. What is called the "tally sheet" is bound in, and as a part of, the poll book. On the left-hand side of the sheet is printed the names of the officers voted for. To the right of the list of candidates, the sheet is ruled in squares large enough to contain five marks or tallies. The clerks entered a mark or tally opposite the name of each candidate for each vote read and counted for him by the judges. On the same sheet is a certificate made by the judges and clerks, in which the total number of votes understood to be received by each candi-



date was written, and all included in a cover, marked "Poll Book." A meager description of the poll books and forms provided for tallying the ballots as they are taken from the ballot box and read is sufficient. Substantially the same form of poll books and tally sheets have been in use for many years, if not from the organization of the state, and almost every elector is familiar with them. To the right of the name of Rice, votes were entered in 20 columns or spaces. In each of 18 of them there were 5 tally marks entered, by making 4 straight marks, and then by drawing a diagonal one across them. In one space, not far from the middle of the line of spaces, there were only 4 marks, with no line across them, and in the twentieth space there was but 1 mark. It appears that the judges and clerks assumed that there were 5 tallies in each space, except in the twentieth, and so, without otherwise counting them, they decided that 19 spaces contained 95 votes; and these, added to the one in the twentieth space, made up the 96 votes, and they made their footing and certificate accordingly. As a matter of fact, only 95 tallies were entered on the tally sheet, and it was from the tally sheet alone that the judges and clerks determined the total number of votes that were cast, and in the manner described. One of the poll books, including this tally sheet, on which they made their certificate and return, was sent by them to the county clerk's office, and the duplicate was retained by the township trustee. We have examined both of them, and find that they correspond exactly in the record of Rice's vote. With this return before them, the county board determined that Rice received but 95 votes, and made their canvass accordingly. From the poll books, and the evidence submitted to us, it appears reasonably certain that only 95 votes were cast for Rice in Avon township. No objection against the count was made by him at the time, nor when the canvass was made by the state board, weeks afterwards; nor was there any protest from him until the commencement of this proceeding, long after the final adjournment of the state board of canvassers.

It is urged that the tally marks constitute no part of the return, and cannot be used in determining the number of votes. Of course the board must make its determination from the legal returns made by the judges and clerks, and cannot exercise the functions of a contest court. It is argued, however, in behalf of the defendants, that the statute contemplates there shall be just such an enumeration or tallying of the votes, as the count proceeds, as was made in this instance. Gen. St. 1839, pars. 2679, 2680, 2684, 2687. It is also contended that such tally sheets have been made and returned as a part of the poll books from the earliest history of the state; and it is further said that the tally sheets have been recognized in several decisions of the supreme court, and this method of making the poll books and tallying the votes has been in universal use for so many years, and been recognized by all the departments of the state government, as to constitute a practical con-

struction of the statute,—a construction which has generally been accepted and acted on by the people of the state. There is some diversity of judicial opinion in regard to whether the tally or enumeration of the votes entered in the poll book may be considered as a part of the return. In Missouri, which has a statute similar to our own, it is held that they cannot be used to verify or correct the figures or footings contained in the certificate. *State v. Trigg*, 72 Mo. 365. *State v. State Canvassers*, 36 Wis. 498, is cited as sustaining the same view. The preponderance of decisions under statutes somewhat similar to ours, however, appears to uphold the view that the tally or enumeration of the votes in the poll books may be considered in verifying the returns, and that if a disparity exists between the footings and the tallies the latter should control. *Dalton v. State*, 43 Ohio St. 652, 3 N. E. Rep. 685; *State v. Hill*, 20 Neb. 119, 29 N. W. Rep. 258; *People v. Ruyle*, 91 Ill. 525; *Simon v. Durham*, 10 Or. 52; *State v. Cavers*, 22 Iowa. 343; *Trueheart v. Addicks*, 2 Tex. 221. The writer of this opinion is inclined to think that the entries or tallies made by the clerks in the poll books as the count proceeds constitute a part of the return which may be considered by the county canvassing board in determining the result. The court, however, will not decide that question at this time, but will rest its decision upon other grounds.

The plaintiff seeks relief through an action of mandamus, which, as has been generally decided, lies, to a great extent, in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be granted when its enforcement would work an injustice or accomplish a wrong. *State v. Marston*, 6 Kan. 524; *Peters v. Board of State Canvassers*, 17 Kan. 365; *State v. Stevens*, 23 Kan. 456; *People v. Board of Canvassers*, 129 N. Y. 360, 29 N. E. Rep. 345; High, Extr. Rem. § 40; 14 Amer. & Eng. Enc. Law, § 97. Has the plaintiff shown a clear legal right to be credited with 96 votes from Avon township? Would any contesting tribunal, from the evidence submitted, give him more than 95 votes? The enumeration entered in the poll books, and the one on which the judges and clerks relied to make out their certificate, and which they set up as a part of their return, plainly shows that he only received 95 votes. This return was verified and corroborated by the duplicate return retained in the township. An abstract or return by the county canvassing board showing that Rice had received 96 votes in that township, and 1,827 in the county,—a plurality of one over his opponent,—would apparently be an untruth; and to compel the canvassers to declare such a result, and assist him in obtaining a certificate or office to which he was not elected, would be a wrong and an injustice. Further, it appears that a vote was cast for "Barringer," and that it was not counted for Ballinger. The similarity of the sound and form of the two names would indicate that it was intended for Ballinger. *Clark v. Commissioners of Montgomery Co.*,

33 Kan. 202, 6 Pac. Rep. 811; Behrensmeyer v. Kreitz, (Ill. Sup.) 26 N. E. Rep. 704; State v. Foster, 38 Ohio St. 599; Newton v. Newell, (Minn.) 6 N. W. Rep. 346; Cooley, Const. Lim. 769. If that had been done, Ballinger would have had a plurality of one vote, and would have been entitled to the certificate.

There is another sufficient reason why the writ should not go. It is a fundamental rule of law that it will never be granted where, if issued, it would prove fruitless and unavailing. *Shellabarger v. Williamson*, 50 Kan. —, 32 Pac. Rep. 132; *High*, Extr. Rem. § 14; *People v. State Board of Canvassers*, 129 N. Y. 370, 29 N. E. Rep. 345; 14 Amer. & Eng. Enc. Law, 104. Another canvass and abstract would be obviously useless. Rice alleges that, by the refusal of the board, he has been deprived of his right to receive from the secretary of state a certificate showing that he was elected representative from Coffey county, and this alleged right he now seeks to enforce. A certificate, if he is entitled to it, would serve no useful purpose at this time. He made no complaint, and took no steps to correct the alleged error, until more than three weeks after the state board of canvassers had finally adjourned. That board, when in session, canvassed the returns from Coffey county, which were executed by the proper officers, in regular form, and were genuine, and have been duly transmitted to the secretary of state. It has just been decided in *Rosenthal v. Board of Canvassers*, 50 Kan. —, 32 Pac. Rep. 129, that after the board of canvassers has canvassed all the returns, declared the result, completed its labors, as the statute prescribes, and adjourns without day, it is *functus officio*, and cannot voluntarily, or by compulsion, reassemble, or make any other or different canvass than has been made. No certificate can now be obtained by him, and, if he has been wronged by the action of the county canvassing board, it can only be corrected by the house of representatives.

It was suggested in argument that he was entitled to have a recanvass made in order to furnish evidence of the true result for use in the contesting tribunal. It is wholly unnecessary, however, to invoke the mandate of this court for that purpose. The legislature itself is vested with full power to obtain all the testimony which could be compelled by this court, and it is fundamental that mandamus will not be employed where there is another adequate and suitable remedy. Our conclusion is that the plaintiff has failed to establish his right to the writ, and it must therefore be refused. All the justices concurring.

(50 Kan. 144)

**WILDS v. STATE BOARD OF CANVASSERS.**

(Supreme Court of Kansas. Jan. 7, 1893.)

**ELECTIONS FOR REPRESENTATIVES—ERRORS IN BALLOTS.**

In canvassing the votes cast for representative in a county constituting a single representative district, it appeared that some of the ballots

were cast by voters of that county on which the district was designated by an erroneous number. Held, that the erroneous designation should be treated as surplusage, and that all of the votes should be counted.

(Syllabus by the Court.)

Original proceeding in mandamus by J. W. Wilds against the state board of canvassers to compel defendants to recount the returns from Republic county, and declare him elected representative, instead of J. M. Foster. Writ refused.

W. C. Webb, G. C. Clemens, and Frank Doster, for plaintiff. T. F. Jarver, F. R. Peters, C. I. Long, and F. B. Dawes, for defendant.

**JOHNSTON, J.** This is an application by J. W. Wilds for a writ of mandamus to compel the state board of canvassers to recanvass the abstract or returns from Republic county, and upon that return to declare that he has been elected representative, instead of J. M. Foster, to whom a certificate of election has been granted. In his application he states, in substance, that he was a candidate at the last election for representative of the sixty-first district; that J. M. Foster and L. M. Morris were also candidates for the same place; that at that election he received 2,064 votes, Foster received 1,682 votes, and Morris received 99 votes, and that the county canvassing board substantially found and declared that result; that the county clerk then transmitted an abstract of the votes to the secretary of state, which, upon its face, shows that Wilds received the greatest number of votes for representative in that district, but that the state board of canvassers, in violation of its duty, had found and declared that Foster was elected, and that a certificate had been issued to him. The abstract was referred to in the information, and was presented to the court at the hearing, and upon these two papers the right of the plaintiff to an alternative writ, or to any aid through a proceeding in mandamus, is presented to this court. Having this abstract before us, we have all that was before the state canvassing board, and everything upon which Wilds bases his right for relief, and hence we may now dispose of the case upon its merits.

It is conceded that the duties of the canvassing board are mainly ministerial, and that they are confined to an examination of the returns made to them. They are required to give a reasonable construction to the return, and exercise intelligence and judgment in determining what it shows. All parts of it should be taken and considered together in determining the real result of the election. So considered, then, what is a fair and just construction of its terms? It reads as follows:

"Certified abstract of votes cast for members of the senate and house of representatives, in the county of Republic, state of Kansas, at the general election held on the 8th day of November, A. D. 1892. "State of Kansas, county of Republic—ss.: I, R. H. Galloway, county clerk of the county of Republic, state of Kansas, do hereby certify that the following is a

true and correct abstract of votes cast in said county, at the general election held on the 8th day of November, A. D. 1892, for members of the senate and house of representatives, to wit:

For Senator, ..... District:		
Name.	P. O. Address.	Received.
B. R. Hoggins,	Belleville,	2,145 votes.
George D. Bowling,	"	2,054 votes.
Geo. M. Simpson,	Concordia,	183 votes.
For Representative, 61st District:		
Name.	P. O. Address.	Received.
J. M. Foster,	Courtland,	1,682 votes in 61 Dist. 472 " in 73 "
J. W. Wilds,	Munden, Kas.,	2,154 2,064 votes in 61 Dist. 8 " in 73 "
L. M. Morris,	Unknown,	2,067 99 votes.

"Part of the tickets were printed giving the number of the representative district as the 73d, instead of the 61st; hence the vote for the two districts.

"In witness whereof, I have hereunto subscribed my name, and affixed the seal of the county of Republic, at Belleville, this 14th day of November, A. D. 1892. R. H. Galloway, County Clerk. [Seal.]

"State of Kansas, county of Republic—ss.: I, R. H. Galloway, county clerk of the county of Republic, state of Kansas, do hereby certify that the above is a true and correct copy of the original abstract now on file in my office. In testimony whereof, I have hereunto subscribed my hand, and affixed the seal of the county of Republic, at Belleville, this 14th day of November, A. D. 1892. R. H. Galloway, County Clerk. [Seal.]

"Filed for record Nov. 18, 1892. Wm. Higgins, Sec. of State."

It will appear from the abstract that there were 2,154 votes cast for Foster for representative in the county of Republic, but it is contended by Wilds that, because the abstract shows that 472 of them were cast for him as representative of the seventy-third district, they should not be counted. As will be seen, the abstract contains a statement explaining how the error occurred. It is said that the explanatory statement has no place in the abstract, and should not be considered; but we think it may properly be regarded as a part of the abstract, and should be considered in determining the result of the election. It appears to be a part of the abstract made by the county canvassing board, which is now on file in the records of Republic county. Like the balance of the statement in the abstract, it precedes the certificate of the clerk, who certifies that all of it constitutes a true and correct copy of the original abstract on file in his office. A fair interpretation of the abstract clearly shows that all of the votes mentioned therein were cast in Republic county, and by electors of that county. The county constitutes a single representative district, and the district includes all of the county. Every elector in that county was entitled to vote for a representative, and, as but one representative could be voted for in the county, can there be any question that all of the votes mentioned were cast for the representative of Republic county, and of the sixty-first representative district? The officer to be

chosen is designated in the constitution as "representative," and not as the representative of a numbered district, and the addition of words which wrongly describe the office should not destroy the ballot, nor defeat the manifest will of the electors. The ballot indicates the will of the voter, and when, in the light of all the surrounding circumstances, the purpose of the voter can be ascertained with reasonable certainty, effect should be given to it. So it has been held that a slight error in writing the name of a candidate upon a ticket, or an immaterial misdescription of an office thereon, will not annul the vote. The words "in 73 Dist.," under the authorities, should be treated as surplusage, and the undoubted will of the voter carried out. *Clark v. County of Montgomery*, 33 Kan. 202, 6 Pac. Rep. 311; *State v. Howe*, (Neb.) 44 N. W. Rep. 874; *Inglis v. Shepherd*, 67 Cal. 469, 8 Pac. Rep. 5; *McKinnon v. People*, 110 Ill. 305; *Newton v. Newell*, (Minn.) 6 N. W. Rep. 346; *Behrens-meyer v. Kreitz*, (Ill. Sup.) 26 N. E. Rep. 704; 5 Cong. Elect. Cas. 190. We are to take notice of the general laws of the state upon the question, and by doing so it is easy to account for the erroneous description of the district. The present apportionment law constitutes Republic county the sixty-first representative district, and the preceding apportionment law made a portion of the same county the seventy-third representative district; and, as the abstract shows, some of the voters carelessly used the old number in designating the office upon their ballots. But, as it would have been sufficient and legal to have designated the office "representative," without any number, the addition of the words indicating a wrong number, and one in which the electors of Republic county could not have voted, will not affect the validity of the votes. When all the votes are counted, Foster has a plurality of 87 votes, and is entitled to the office. We reach the conclusion, without any hesitation, that the state board of canvassers acted correctly in awarding the certificate to Foster, and, further, that the application of Wilds should be denied. That will be the judgment of the court. All the justices concurring.

(7 N. M. 58)

CHAVEZ et al. v. CHAVEZ DE SANCHEZ.  
(Supreme Court of New Mexico. Jan. 25, 1893.)

SPANISH LAND GRANTS—ESTABLISHMENT IN COURT OF PRIVATE LAND CLAIMS—HOMESTEAD PATENTS—PRIORITIES—RECOVERY FOR IMPROVEMENTS.

1. By Act Cong. 1854 for the settlement of land claims in New Mexico and other territories, a surveyor general was appointed, with power to ascertain the number and validity of all Spanish or Mexican grants, and report thereon to congress, with a view to the confirmation of bona fide grants. By Act March 3, 1891, congress established a court of private land claims, and section 8 of the act provides that, if a title claimed shall be perfect, its confirmation shall be for only so much as the perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States; and

section 14 provides that, if any of the land decreed to a claimant under this act shall have been granted by the United States to another person, the title from the United States shall be valid notwithstanding the decree. *Held*, that a patent from the United States gives a title superior to a grant from the Spanish government made in 1750, where such grant has not been confirmed by congress, or by any tribunal authorized by congress so to do, though the holder under such grant has a complete title from the original grantee.

2. In ejectment by the patentee against such claimant under the Spanish grant, it was proper to reject evidence offered by the claimants to the effect that in 1887 they presented their claims to the land to the surveyor general, it appearing that, though plaintiff's homestead patent was issued after that date, yet the homestead entry was made in 1882, and formal proof thereon made in 1883, and that, therefore, since the patent related back to the entry, the land was segregated prior to the time defendants presented their claim.

3. Plaintiff, holding under the patent, had a superior right of possession vested in her thereby, and the patent, being valid on its face, was not subject to collateral attack, and defendants could not show that when plaintiff entered on the patented lands embraced in her homestead she knew that such lands were claimed by defendants under the Spanish grant.

4. The trial court had no power to recognize the title claimed from the Spanish grant, for the determination of such claims was expressly reserved by congress to itself, and later to the court of private claims; and, the land in question being a part of the territory ceded by treaty to the United States, of which the court took notice, the patent was conclusive evidence of the proper conveyance of the land, and that the United States was the rightful owner at the time the patent issued.

5. It cannot be claimed that the lands embraced in the homestead patent were reserved from sale by Act Cong. 1854, § 8, which required the surveyor general to report all grants for confirmation, and then provided that the report should be laid before congress for action thereon, and until the final action of congress all lands covered by such claims should be reserved from sale or other disposal by the government; for this reservation was not intended to take effect until the coming in of the report of the surveyor general when the location and extent of the land could be known, and the report on the land in question did not come in until 1887, five years after the homestead entry was made.

6. The land in question must be regarded as a part of the public domain at the time of the homestead entry, and therefore the claimants under the Spanish grant cannot recover for the value of any improvements made by them on the land, and have a lien on the land for the same under Comp. Laws, § 2581, they being wrongfully in possession, and for the further reason that such a lien would interfere with the disposition of the public lands, which cannot be done by any state or territorial legislation.

Error to district court, Valencia county; W. D. Lee, Judge.

Action of ejectment by Barbara Chavez de Sanchez against Vicente Chavez and others. From a judgment for plaintiff, defendants bring error. Affirmed.

The other facts fully appear in the following statement by McFIE, J.:

This was an action of ejectment, brought in the district court for Valencia county by defendant in error, who was plaintiff in the court below, to recover from the plaintiffs in error the possession of a portion of the land described in a

homestead patent from the United States dated April 3, 1889, and embracing 157.36 acres. Defendants below admitted the fact of their being in possession of a portion of the land embraced in the patent, and attempted to defend against the patent by showing that the land was a part of a perfect grant made to one Nicolas de Chavez in the year 1739, and long prior to the cession of said land by the republic of Mexico to the United States in 1848 by the treaty of Guadalupe Hidalgo. It was also admitted on the trial below that the defendants were heirs or purchasers from heirs of said grantee, and that the land described in the patent was within the exterior boundaries of what was claimed to be the Nicolas de Chavez grant. Trial was had at the September, 1891, term, before the court and a jury, and to maintain the issues for the plaintiff the patent was introduced in evidence, and the defendants admitted that the homestead entry upon which the patent is founded was made by plaintiff December 27, 1882, and that final proof was made thereon August 15, 1883, and the ouster charged, and possession of defendants as to part of the lands embraced in the patent was also admitted. The defendants having pleaded not guilty, and with the plea filed notice that upon the trial they would prove the improvements made by them upon the land in controversy, and also the value of the same, offered in evidence a petition of Nicolas de Chavez to the governor and captain general of New Mexico for a grant of land; the grant by said governor to said Nicolas de Chavez; the document showing the act of judicial possession for the land granted; a subsequent order of said governor as to boundaries; and a decision or certificate of Bernardo Antonio Bustamante Tagle, lieutenant governor, as to a disputed boundary, together with translation of the same; and offered to prove the genuineness of the said petition, grant, act of possession, order and decision, by the evidence of William M. Tipton, official translator of the office of the surveyor general; and the plaintiff admitted that Mr. Tipton, if sworn and put on the stand, would be competent and fully qualified to testify as an expert concerning such papers, and that he would testify that he had made a careful and critical examination of the handwriting and signatures in said documents, of the paper on which they were written, and of their appearance and condition generally, and comparison thereof with many other similar papers admitted and known to be genuine, and that from such examination and comparison he is satisfied that these documents are genuine, and were actually made and signed as they purport to have been, and especially that the official signatures appearing in said documents are genuine signatures of the officers named; and plaintiff further admitted that she could offer no evidence in rebuttal of said evidence by Tipton, but plaintiff objected to the admission of said documents, or either of them, in evidence, or of any evidence relative to them, as being irrelevant, incompetent, and immaterial, which objection was sustained by the court, and said doc-

uments and the evidence relative thereto were excluded by the court; to which rulings of the court exceptions were properly saved by the defendants. Defendants also offered to prove, by the records of the office of the surveyor general, produced in court, that in April, 1887, a petition was filed in the office of the surveyor general of the territory of New Mexico for an approval of said grant, and that in November of the same year the surveyor general reported upon said grant, and forwarded his report to the department of the interior at Washington, D. C., to be laid before congress, in pursuance of an act of congress of 1854, which was objected to by the plaintiff. The objection was sustained by the court, and the evidence offered was excluded, and the defendant duly excepted. The defendants further offered to prove by Francisco Chavez y Armijo, that at the time of the alleged settlement and occupation by the plaintiff and her deceased husband they knew that the land was claimed under this grant; and, further, that the plaintiff entered into possession of the premises in dispute as one of the heirs of Nicolas de Chavez, and knew at the time of making her homestead entry that the land in question was claimed under said grant. This evidence tendered by the defendants was excluded by the court upon objection of plaintiff's counsel, to which ruling of the court defendants saved an exception. The defendants further offered to prove the value of the land in controversy, and also the value of the improvements made thereon by the defendants, and by those from whom they claimed title; but, upon objection by plaintiff's counsel, this evidence was also excluded, and the defendants duly excepted to the ruling of the court. Thereupon, the defendants having closed their case, and no evidence in rebuttal being offered, the jury, by direction of the court, returned a verdict in favor of the plaintiff. The defendants moved for a new trial, but the court overruled the motion, and entered judgment for the plaintiff upon the verdict of the jury. The case is in this court upon writ of error, in which the plaintiffs in error assign nine grounds of error, and seek a reversal of the judgment of the court below upon them.

Frank W. Clancy, for plaintiffs in error.  
Neill B. Field, for defendant in error.

McFIE, J., (after stating the facts.) The first assignment of error goes to the merits of this case. The decision of the court upon this assignment practically disposes of all other assignments of error with the exception of the fifth, which is based upon the refusal of the court to permit evidence to be introduced showing the value of the land in controversy and the value of the improvements. Counsel on both sides have with commendable fairness endeavored to present to this court for its determination this question: Can a plaintiff in ejectment, relying upon a patent from the government of the United States, be defeated by the defendants showing that the lands described therein

are part of a private land claim deriving its validity from another sovereignty, but never acted upon by the political department of the government of the United States, nor by any tribunal created for that purpose by the political department of our government? The superior right of possession is involved in the decision of this question, and must be awarded to the defendant in error in the event of an affirmance of the validity of the patent title, or to the plaintiffs in error in case the patent shall be held void as against the grant title.

The first assignment of error is as follows: "The court erred in refusing to admit in evidence the documents offered by the plaintiffs in error, which show the making of a grant of land to Nicolas de Chavez, it being admitted that they were heirs or purchasers from heirs of Nicolas de Chavez, and that the land in question was within the boundaries of such grant." If it was conceded by the plaintiffs in error that the grant to Nicolas de Chavez was an inchoate or imperfect grant, this case would be very readily disposed of, as the courts have uniformly held that questions concerning the title of grants of lands by a foreign government prior to cession to the United States, having at the time of cession imperfect or inchoate titles, requiring some act of the new sovereign to vest in the grantee a perfect title, are reserved by congress to be determined by the political department of the government, or by such tribunal as may be, by act of congress, designated and authorized to determine them. In the case of *Dent v. Emmegeer*, 14 Wall. 308, the supreme court of the United States says: "But inchoate rights, such as those of *Cerre*, were of imperfect obligation, and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a validity and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by congress they became American titles, and took their validity wholly from the act of confirmation, and not from any French or Spanish element which entered into their previous existence." The case of *Grant v. Jaramillo*, (decided by this court in an opinion January 6, 1892,) 28 Pac. Rep. 508, was a case wherein the plaintiff in ejectment claimed under a patent from the United States for land in New Mexico. The defendant claimed under a grant from the king of Spain, while New Mexico was a province of Spain, but he offered no title papers in evidence, asking the court to presume the grant from uninterrupted occupation since 1825. He also sought to sustain the grant under the prescriptive laws of Mexico in force at the time of cession to the United States by the treaty of Guadalupe Hidalgo. In the court below, upon the second trial of the cause, the court directed a verdict in favor of the grantee under the patent, and in affirming the judgment of the court below in that case this court, after a careful review of the authorities, said: "It is evident that if the plaintiff in error has any rights to the land in question growing out of the

Spanish and Mexican claims set up by him, they are of an inchoate character, and, according to the decisions of the supreme court before referred to, are such as are reserved by congress to be determined by the political department of the government, or by such tribunal as may be, by an act of congress, authorized to try and determine them; and it is equally clear that this court has not been clothed with such authority." But in the case now under consideration plaintiffs in error insist that the grant to Nicolas de Chavez, under whom they claim, was a perfect grant, and the title to the land embraced within the grant became and was a perfect title under the laws, usages, and customs of Spain and Mexico prior to the year 1750, and long prior to the cession of the lands now embraced within the territory of New Mexico by the republic of Mexico to the United States under the treaty of Guadalupe Hidalgo; that under the eighth article of that treaty such title must be regarded as a perfect title by the courts of the United States, and a paramount title to a patent of the United States government embracing lands within the exterior boundaries of such grant subsequent to the grant title, and prior to the determination of the grant title by the political department of the government, or by a tribunal authorized by act of congress to determine them.

Counsel for defendant in error challenges the correctness of the position of the plaintiffs in error, and insists that the patent title is valid, and conclusive in the case; that the court below was without jurisdiction to hear or determine the grant title set up as a defense in the case; that the court properly excluded from the evidence the title papers offered in support of the grant, and directed a verdict for the defendant in error. From this statement of the issue it seems clear that, if the contention of the plaintiffs in error is sustained, it was error for the court to exclude the documents offered constituting the grant title. It is unnecessary for us to consider or set out in this opinion the documents offered and rejected with a view of determining whether or not they constituted a perfect title under the laws, usages, and customs of Spain and Mexico prior to the cession of these lands to the United States, for the reason that the genuineness of the documents was not questioned; nor was the claim of the plaintiffs in error that these documents, and the testimony relating to them, showed a perfect title under the laws of Spain and Mexico prior to the cession, denied by the defendant in error. The objection of the defendant in error to the proof relating to the grant title, in effect, was this: That, although the proof offered, if the same had been received, would have established the fact that the title of said grant was perfect under the laws, usages, and customs of Spain and Mexico prior to the treaty of cession of 1848, the evidence was still irrelevant, and incompetent, as it did not tend to establish a legal defense; the court having no jurisdiction to determine the value of such titles, prior to the determination of them by the political department of the govern-

ment, or some tribunal established by act of congress to hear and determine them.

Proceeding, then, to examine the law in relation to grants having perfect or inchoate titles prior to the cession to the United States, we find that this subject has been before the courts of this country ever since Louisiana and the Floridas were ceded to the United States by France and Spain. Many questions have been raised as to the status of the alleged grants upon land ceded to the United States, the value of their titles, and the forum in which the rights claimed under them should be adjudicated. In the determination of these private land claims in Louisiana and Florida under the act of congress of 1824 only inchoate titles and equitable titles were to be considered by the tribunal established by that act. In cases where the claimant asserted a perfect title from the former government, he was remitted to the courts, there to assert his rights upon the documents under which he claimed. In *Fremont v. U. S.*, 17 How. 553, 554, the supreme court of the United States, distinguishing between the act of congress of March 3, 1851, for the settlement of private land claims in California, and the act of 1824, for the settlement of such claims in Louisiana and Florida, says: "In this respect it differs from the act of 1824, under which the claims in Louisiana and Florida were decided. The jurisdiction of the court in these cases was confined to inchoate and equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claims to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law upon the documents under which he claimed." "And when a party, holding such complete title, is encroached upon, he should find protection in the judicial tribunals, as he can get nothing by a resort to confirmations or releases or patents by the political power which acquired the sovereignty over the territory, but not the property itself, 'belonging to its inhabitants.' Chief Justice Marshall says in *U. S. v. Percheman*, 7 Pet. 87: 'The king cedes that only which belonged to him. Lands he had previously granted were not his to cede.' And the complete title to them before obtained is strengthened by no confirmation from the United States, who have acquired no interest in them." *Doe v. Eslava*, 9 How. 428. Now, the title set up by the petitioner is a complete legal title, and if he can establish the facts stated in his petition his title is protected by the treaty itself, and does not need an act of congress to perfect or complete it. *U. S. v. Roselius*, 15 How. 38. Numerous other authorities to the same effect might be cited referring to private land claims in Louisiana and Florida, wherein courts took jurisdiction, and a perfect title was claimed; but it is useless to multiply them. The reason for the law announced in these cases is doubtless found in the fact that the courts held that the treaty of cession acted directly upon the subject, and that the treaty itself was to be regarded as the law, and not as a contract.

U. S. v. Percheman, 7 Pet. 86, 87. A perfect title, prior to that treaty, was confirmed and established by the language of the treaty itself; and the action of the political department, or the tribunal organized to determine titles to these claims, and make inchoate or equitable titles of foreign inception American titles, were not clothed with authority to investigate titles declared perfect and protected by the treaty itself. This was the system adopted by the United States government as to these claims in Florida and Louisiana; but it is clear that the United States adopted a different system in the settlement of private land claims in the territory that is now the state of California, which was ceded to the United States by Mexico in 1848. By the act of March 3, 1851, congress provided a commission, with judicial powers, to examine and determine the validity of these private land claims, with a right to appeal to the courts, which, while called an appeal, was really a trial de novo in the court, where new evidence might be heard; and there can be no doubt whatever that all private land claims, whether held by perfect or inchoate and equitable titles from either Spain or Mexico, were alike required to be presented to that commission for settlement.

In *Fremont v. U. S.*, 17 How. 542, 543, Chief Justice Taney, delivering the opinion of the court, said: "It will be seen from the quotation we have made that the eighth section embraces not only inchoate or equitable titles, but legal titles also, and requires them all to undergo examination, and be passed upon by the court. The object of this provision appears to be to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country in a manner and form that will prevent future controversy." In *U. S. v. Fossatt*, 21 How. 445-447, it is said: "The matter submitted by congress to the inquiry and determination of the board of commissioners by the act of March 3, 1851, and to the courts of the United States on appeal, by that and the act of August 31, 1852, are the claims of each and every person in California by virtue of any right or title derived from the Spanish or Mexican government, and it will be at once understood that these comprehend all private claims to land in California." In *U. S. v. Castillero*, 2 Black, 17, 158, it was said: "Power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government, as a matter of original jurisdiction, is, by the act of March 3, 1851, exclusively conferred upon the commissioners appointed under the first section of that act." But the case of *Botiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525, is both elaborate and conclusive. In that case Dominga Dominguez claimed a private land claim in Los Angeles county, Cal., known as the "Rancho las Virgenes." Believing that she had a perfect title to the land from Mexico, and that she was not compelled to present the same to the commission,

she failed or refused to present her claim to the board for settlement during the two years allowed for presenting same under the act of March 3, 1851. Botiller and others then settled on portions of the land embraced in her claim as pre-emption and homestead settlers. Dominguez brought suit in ejectment to recover possession of the lands they had settled upon, and she was successful in the state court. Appeal was taken to the supreme court of California, and the decision was affirmed by that court. 13 Pac. Rep. 685. The case was taken to the supreme court of the United States by appeal, where it was reversed and remanded, the court holding that, as the claim had not been presented to the commission for settlement, as required by act of March 3, 1851, it was invalid, and the land was subject to entry as public domain. Among other things, the court said: "The more important question, however, is, does the statute, in its provisions for the establishment and ascertainment of private land claims in that country which was derived from Mexico, apply to such as were perfected according to the processes at the time the treaty was entered into? Or is it limited to those imperfect and inchoate claims where the initiation of the proceedings necessary to secure a legal right and title to the property had been commenced, but had not been completed? \* \* \* It is not possible, therefore, from the language of this statute, to infer that there was in the minds of the framers any distinction as to the jurisdiction they were conferring upon this board between claims derived from the Spanish or Mexican government, which were perfect under the laws of those governments, and those which were inchoate, imperfect, or inchoate. Undoubtedly, under the powers which these commissioners had to examine into the existing claims, there would be a difference, in the principles of decision which they would apply as to their validity, between a perfected title under the Mexican government and one which was merely inchoate, and which the board might reject as unworthy of confirmation for many reasons. \* \* \* Nor is there any reason in the policy upon which the statute is founded and the purposes it was intended to subserve. \* \* \* The order of the commissioners or the decree of the court established as between the United States and the private citizen the validity of such claims, and enabled the government of the United States, out of all its vast domain, to say, 'This is my property;' and also enabled the claimant under the Mexican government, who had a just claim, whether legal or equitable, to say, 'This is mine.' This was the purpose of the statute, and it was equally important to the object which the United States had in the passage of it that claims under perfect grants from the Mexican government should be established, as that imperfect should be established or rejected. \* \* \* We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held a proprietary interest from those which be-



longed, either equitably, or by a strict legal title, to private persons. Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts or exercises powers over property may be called before the proper tribunals to sustain them. \* \* \* Upon the mere question of authority these decisions, of the supreme court of the United States and of the supreme court of California, would be decisive against the judgment of the latter court in this case. But we are quite satisfied that upon principle, as we have attempted to show, there can be no doubt of the proposition that no title to land in California, dependent upon Spanish or Mexican grant, can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the district or supreme court of the United States." Here we have not only the decision of the court of last resort, but the reasoning by which the conclusion was reached, that it was just as essential to the validity of a private land claim, to which a perfect title under the laws of Mexico was asserted, that it should be presented and passed upon by the tribunal organized by the political department of the government for that purpose, as it was to a claim relying upon an inchoate or equitable title; and not only that, but it is declared that such a law is just, reasonable, and constitutional, and not a violation of the obligations of the treaty of Guadalupe Hidalgo. Congress seems to have determined that all titles to lands in the United States should rest upon American titles, and that it was no violation of the treaty to require them to be made such. In Louisiana and Florida, claims based upon inchoate and equitable titles were to be made American titles under the act of 1824. Legal titles were left to stand or fall on the merits of their foreign titles. But our government was evidently convinced that all lands claimed by virtue of foreign titles should be passed upon by an American tribunal, and, if the title was valid, or such as this government was required to protect under the provisions of the treaty of Guadalupe Hidalgo, and the laws of nations, the decree of the American tribunal should give to them an American title, and upon this theory the titles to private land claims in California were adjudicated, and the lands embraced in all such claims as were not presented for settlement to that tribunal were declared to be a part of the public domain, and the public land laws were extended over them. Congress was doubtless led to this conclusion also from considerations of public policy, for until some action of this nature was taken it would be impossible for the government to know what was or was not its own land, and subject to its land laws; but by such adjudication a record would be made of all

valid claims; the public surveys would definitely fix their location; and in that way the government would have positive information as to what lands were subject to its disposal, and also that which belonged to private parties.

Passing, then, to the system adopted for the settlement of private land claims in New Mexico, which had become a part of the United States by the same treaty, it cannot be well supposed that congress was less anxious to know, and have segregated from the public domain, lands held under foreign titles, which the government under the treaty was bound to respect, and have them settled and placed upon the land records and surveys of the country, and also become American titles, whose validity would be derived, after settlement, from the American sovereignty, and not from the foreign elements of title. In 1854 congress passed the first law which had for its object the settlement of private land claims in this territory. By this act of July 22, 1854, congress created the office of surveyor general, and conferred upon that officer power to ascertain the number, extent, and validity of all Spanish or Mexican grants of lands lying in this and other territories, made prior to cession, and to report thereon, "which report shall be laid before congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of 1848 between the United States and Mexico." By this act congress asserted its right to do that which it authorized a board of commissioners and the courts to do in California, namely, examine and determine the validity of all land grants in New Mexico and other territories, making no exception of perfect titles. The very fact that it became necessary for congress to require the surveyor general to report even the number of these claims, demonstrated the necessity of providing some tribunal having authority to ascertain the number, extent, and location of such claims, determine the validity of their titles, and place them upon the public records. Congress determined to do this, and simply required the surveyor general to furnish information, together with his opinion as to their validity, which would enable congress to act intelligently in determining the validity of these claims. Upon such reports many of these grant titles were settled by the confirmatory act of congress, and thereby obtained American titles. Congress finally ceased to act upon these reports, and on March 3, 1891, passed an act establishing a court of private land claims, and clothed it with authority to examine and settle claims of this nature. This court is given ample jurisdiction to settle all claims of this nature now unsettled, but it is provided that the holder of a perfect title "shall have the right (but shall not be bound) to apply to said court in the manner provided in this act for other cases for a confirmation of such title." There is also a provision that, if the claimant asserting a perfect title does not present his claim to the court, the United States may bring such claimant into court to try his title.

Whether this provision was intended to exempt claimants relying upon a perfect title from presenting their claims for settlement, and as an indirect recognition of these claims, we are not called upon to decide. So long as these claims are not adjudicated, the settlement of them belongs to the political department of the government, and not to the courts not specifically authorized to take cognizance of them. Congress has power to establish tribunals for the settlement of these titles, and doubtless has the power to confer such jurisdiction upon the territorial courts or those of the United States, but it has not by this act conferred such jurisdiction upon the courts, except in the single instance where suit is brought by the United States against grant owners claiming a perfect title, and who refuse to avail themselves of the protection of the court established for the purpose of settling and confirming their titles, and by appeal. By the act of congress of June 21, 1860, Juan B. Vigil et al. were authorized to bring suit in the supreme court of this territory for lands which he, and those claiming under him, claimed, with the right of appeal to the supreme court of the United States. This shows that as early as 1860 congress regarded it as necessary that authority should be expressly granted before suit could be brought in the courts. In the case of *Tameling v. Emigration Co.*, 93 U. S. 644, the court says: "We have repeatedly held that individual rights of property in the territory acquired from Mexico by the United States were not affected by the change of sovereignty and jurisdiction. They were entitled to protection whether the party had the full and absolute ownership of land or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed was within the appropriate province of the political department of the government. \* \* \* But congress legislated otherwise for the adjustment of land claims in New Mexico. By the eighth section of the act of 1854, (10 St. p. 308,) the duty of ascertaining their origin, nature, character, and extent was expressly enjoined upon the surveyor general of that territory. He was empowered for that purpose to issue notices, summon witnesses, administer oaths, and perform all necessary acts in the premises. He was directed to make a full report, with his decision as to the validity or invalidity of each claim, under the laws, usages, and customs of the country before its cession to the United States. That report, according to a form to be prescribed by the secretary of the interior, was to be laid before congress for such action as might be determined just and proper. It will thus be seen that the modes for the determination of land claims of Spanish or Mexican origin were radically different. Where they embraced lands in California, a procedure essentially judicial in its character was provided, with the right of ultimate appeal by either the claimant or the United States to this court. No jurisdic-

tion over such claims in New Mexico was conferred upon the courts, but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim reserved to congress is, of course, conclusive, and therefore not subject to review in this or any other forum." In *Pinkerton v. Ledoux*, 129 U. S. 346, 9 Sup. Ct. Rep. 399, which was a case in which the Nolan grant of this territory was involved, the court says: "The surveyor general's report is no evidence of title or right of possession. His duties were prescribed by the act of July 22, 1854, before referred to, and consisted merely in making inquiries, and reporting to congress for its action. If congress confirmed a title reported favorably by him it became a valid title; if not, not. So with regard to the boundaries of a grant. Until his report was confirmed by congress it had no effect to establish such boundaries, or anything else subservient to the title. \* \* \* There is a question which may be entitled to much consideration,—whether the Nolan title has any validity at all without confirmation by congress. The act of July 22, 1854, before referred to, seems to imply that this was necessary." In the case of *Chaves v. Whitney*, 16 Pac. Rep. 608, which was decided by this court at the January term in 1888, and which case involved the title to land grants in New Mexico, the court said: "Following the decision of the supreme court of the United States in the *Tameling Case*, in the very language used there, 'no jurisdiction over such claims in New Mexico was conferred upon the courts, but the surveyor general decides them in the first instance.' What the court meant by the use of this language we cannot say. It is susceptible of two constructions. It may be that the court intended to declare that, as the law now stands, the whole power and jurisdiction over the subject of Spanish and Mexican land grants is committed into the hands of the surveyor general for investigation, with the reservation of the ultimate power to adopt or reject what he does by congress, and that, until after the confirmation or rejection of such grants through this mode of procedure, the courts have no jurisdiction whatever to hear and determine any question arising under such grants in this territory; or that congress, by the course of legislation adopted, has reserved to the political department the sole power of defining the rights of grant owners under the treaty, and to that end has withdrawn by implication all jurisdiction from the courts to interpret the treaty or define the legal rights of persons thereunder in the broad sense of general jurisdiction, involving necessarily the power and duty of the courts to construe the treaty, and define and enforce the rights of claimants as they might appear; but that, subject to the ultimate power reserved to congress, the courts would be permitted to exercise a limited jurisdiction to the extent of protecting the possession from intrusion by wrongdoers or persons having no superior title. We think the latter the more reasonable view to take, and especially so when it is provided by our local statutes that, in

order to maintain ejectment, a strictly legal title need not be proven." Counsel for plaintiffs in error argue that the language used by the supreme court of the United States in the *Tameling Case*, that "no jurisdiction over such claims in New Mexico was conferred upon the courts," was mere dicta of the court, and not necessary to the decision of the case, but that, if applicable to that case, it is not of general application, and that this court, in adopting the language of the *Tameling Case* as of general application, announced an erroneous doctrine. We cannot so regard these cases, but, on the contrary, regard the decisions of the courts in these cases as the deliberate judgment of the court after mature consideration of the subject, and we regard the conclusions as correct, and affirm them in this case.

It is true that, as to grants to which a perfect title is asserted, the law of 1891 does not make the presentation of such claims to the court of private land claims compulsory, but there is no evidence obtainable from the provisions of the act creating that court that such Spanish or Mexican titles, prior to adjudication by that court, will be held valid as against the United States or a grantee under a patent from the United States; but, on the contrary, we think it clear that they will not be so held. Section 8, among other things, provided that "if in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adverse to the holder of any such claim or title." Section 14 provides "that if in any case it shall appear that the lands, or any part thereof, decreed to any claimant under the provisions of this act, shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree." Here, then, we find a specific provision of law, enacted by the political department of the government, that, where the government has sold or granted land embraced within a grant, it shall be held valid as against even a perfect Spanish or Mexican title, when the same is presented for confirmation by the court established for that purpose. That being the case, and the operation of the land laws not suspended, the reservation clause of the act of 1854 being specifically repealed, it is a provision of little value that a grantee having a perfect title "shall have the right (but shall not be bound)" to present the same for confirmation. When congress passed the act of 1851, providing for the settlement of private land claims in California, regardless of whether the title was perfect or inchoate, all grant owners were notified that the United States reserved the right to examine and determine the value of all foreign titles before such titles would be protected against alienation by

the government; and as early as 1854 congress passed a law which, in effect, notified grant owners that the political department of the government had opened the doors for the settlement of grant titles in New Mexico. The surveyor general was directed to report them to congress for confirmation. Many grant owners availed themselves of the benefits of the act, and as early as 1858 and 1860 confirmation of private land claims in New Mexico began. The penalty for a failure to present for settlement such claims, in California, within two years, was a forfeiture of the land to the United States, and Dominga Dominguez suffered the penalty by reason of a failure to present her claims to the court established for the protection of her rights under the treaty. In New Mexico there is no forfeiture declared for a failure to present a claim to the court of private land claims where a perfect title is relied on, but by the above provisions of the act of March 3, 1891, which established that court, grant claimants are advised that, so long as they decline the protection of the tribunal established for the settlement and protection of their treaty rights, and prefer to rely upon a foreign title, all titles accruing to settlers under the operation of the land laws of the United States will be held valid as against any title relied upon by them. Therefore there is a penalty to which a claimant subjects himself who refuses to submit his title for confirmation to the court of private land claims created by act of March 3, 1891. The title of the defendant in error under the patent is by that act expressly confirmed, and declared superior to the grant title set up in this case, and the penalty for delay has been incurred by the grant owners. As counsel for defendant in error suggests, congress never intended that any claim under Spain or Mexico to grants of land should be of higher dignity or effect without a decree of confirmation than with such decree. It is clear that if this claim had been presented to the court for confirmation, the title of defendant in error under the patent would have been held valid as against the grant; therefore it is idle to say that the grant title may become superior to that of the patent by the grant owners declining the jurisdiction of the court of private land claims. To the contention that such a statute is in violation of the obligations of the treaty of Guadalupe Hidalgo it may be said that this court cannot consider that question. In the case of *Bottiller v. Dominguez*, 130 U. S. 238, 9 Sup. Ct. Rep. 525, the supreme court of the United States decided that very question, saying: "With regard to the first of these propositions it may be said that, so far as the act of congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to

enforce upon another the obligations of a treaty."

It follows from our conclusion as above announced that, inasmuch as the plaintiffs in error relied in the court below on their Spanish title papers, executed prior to the year 1750, and, in effect, conceded that the Nicolas de Chavez grant, under which they claimed, was not confirmed by congress, or by any tribunal authorized by congress to examine into and determine the validity of such titles in New Mexico, the papers offered in evidence tending to establish such Spanish title were properly rejected by the court. The court, upon objection, properly rejected the evidence offered by plaintiffs in error relative to the presentation of such claims to the surveyor general of New Mexico in the year 1837, for the reason that, while the homestead patent was issued after that date, the homestead entry was made on the 27th day of December, 1882, and final proof was made thereon August 15, 1883. The patent was founded upon the entry and related back to the entry; the land, therefore, was segregated prior to the time the plaintiffs in error claim to have presented said claim to the surveyor general. Moreover, such presentation would not be of any value prior to confirmation.

Defendant in error relies upon a patent from the United States, which is the highest source of title in this country. After speaking of the value of a patent from the United States as a source of title in an action of ejectment in the federal courts, the supreme court of the United States, in the case of *Gibson v. Chouteau*, 13 Wall. 92, says: "So, also, of an action of ejectment in the state courts, when the question presented is whether the plaintiff or defendant has the superior legal title from the United States, the patent must prevail, for, as said in *Bagnell v. Broderick*, 13 Pet. 450, congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declare the patent the superior and conclusive evidence of legal title. Until its issuance, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment." "It is this unassailable character [of the patent] which gives to it its chief—indeed, its only—value as a means of quieting the possessor in the enjoyment of the land it embraces. If intruders upon them could compel him in every suit for possession to establish the validity of the action of the land department, and the correctness of its ruling upon matters submitted to it, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title where to rests upon the same facts, because another jury came to a different conclusion." *Smelting Co. v. Kemp*, 104 U. S. 641. "Until set aside or enjoined it must, of course, stand against a collateral attack with the efficacy attending judg-

ments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possesses such an equitable right to the premises as would give him the title if the patent was out of the way. If he occupy, with respect to the land, no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. \* \* \* In any event, whether the officers of the government have been misled by the testimony produced before them or not, the conclusions reached by them are not to be submitted for the consideration of every jury before which the patent may be offered in evidence in the trial of an action." *Steel v. Smelting, etc. Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Grant v. Jaramillo*, 5 N. M. —, 28 Pac. Rep. 508. The defendant in error, holding under the patent, had a superior right of possession, which the patent vested in her, and the patent, being valid upon its face, was not subject to a collateral attack such as was attempted by the plaintiffs in error in the court below in their tender of proof that the defendant in error, when she entered upon the possession of the patented lands embraced in her homestead, knew that said lands were claimed as a part of the Nicolas de Chavez grant. Consequently the court committed no error in excluding such evidence.

Plaintiffs in error assign as another ground of error that the court refused to allow them to prove that the lands embraced in the Nicolas de Chavez grant never belonged to the United States, and upon this they contend that they were denied the right to show that the patent issued to defendant in error was void. We have practically disposed of this assignment, as the testimony which the plaintiffs in error contend would have shown that the United States never owned the land patented, and which the court excluded, is the same testimony offered by them to prove a perfect Spanish title. This assignment of error presupposes the plaintiffs in error to have had a perfect title to the land embraced in the grant that the court below was compelled to declare valid in this case; and, being prior in time to the patent, the land did not belong to the United States when the patent issued, and that it was therefore a void conveyance. We have endeavored to show that the court below was powerless to take cognizance of the grant title, or declare it of any value whatever; and, the land being a part of the territory ceded to the United States, of which the court took notice, the patent was conclusive evidence in the court below of the proper conveyance of the land, and that the United States was the rightful owner at the time the patent issued.

The cases cited by counsel for plaintiffs in error in his brief to show that a patent is void when issued for lands that have been previously sold, reserved, or otherwise disposed of, or never belonged to the

United States, while sound as applied to the facts of the cases in which the decisions were rendered, are not in point in this case. Patents were held void because the land had been previously sold, reserved, or otherwise disposed of by the United States itself, or some state or territory thereof, and not by a foreign government. For instance, in the case of *Morton v. Nebraska*, 21 Wall. 660, a patent was granted for agricultural lands, which proved to be saline lands. The court declared the patent void, for the reason that saline lands had always been reserved from sale as agricultural lands. In the case of *Polk v. Wendell*, 9 Cranch, 87, there was a conflict between two grants of land by the state of North Carolina, and the prior grant was sustained and the junior declared void. And so in other cases. But the principle governing these cases is this: that the prior act of the sovereign in disposing of lands in the United States must govern; but this principle cannot be applied to this case.

Counsel for plaintiffs in error, Mr. Clancy, suggests, but declines to argue, that the lands embraced in the homestead patent were reserved from sale by section 8 of the act of 1854, which created the office of surveyor general of New Mexico, and required him to report all grants for confirmation, and then provided: "Which report shall be laid before congress for such action thereon as may be deemed just and proper with a view to confirm bona fide grants, and give full effect to the treaty of 1848 between the United States and Mexico; and, until the final action of congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provision of this act." By act of congress of May 24, 1858, the New Mexico land district was created, and the general land laws were extended to the lands of this territory, and, if this reservation took effect upon the taking effect of the law of 1854, the land would not be subject to entry in 1882, when the homestead entry was made. But we agree with the opinion of counsel for plaintiffs in error that the reservation took effect upon the coming in of the report of the surveyor general to congress, when its location and extent could be known and respected until final confirmation by congress, or under its authority; otherwise the greatest confusion would prevail, and the land laws would be practically inoperative. We are strengthened in this view by the construction given this clause by the commissioner of the general land office in his instructions to the surveyor general, dated October 10, 1884, and urging prompt examination and report upon a certain grant, in which he says: "Though the claim, if found valid, cannot be definitely located till after confirmation, as a part of the inquiry you will endeavor to ascertain approximately, or as nearly as possible, the location and boundaries or limits of the same, and advise this office thereof, to the end that the land covered by the claim may be withheld or withdrawn from settlement or disposal pending final action

thereon." Furthermore, the homestead entry upon which the patent was issued under which the defendant in error claims, and which shows that the public land laws were operative, was allowed in 1882, or long after the passage of the act containing provisions for the reservation. If, therefore, the reservation took effect upon the report of the surveyor general, it has no application in this case, inasmuch as the surveyor general did not report upon the Nicolas de Chavez grant until December, 1887, or five years after the homestead entry was made, final proof made thereon, and final certificate issued. By the act of March 3, 1891, congress repealed section 8 of the act of July 22, 1854, which provided for the reservation of the land, and this of itself eliminates the question of the reservation of the land from this case.

There remains, then, for our consideration the fifth assignment of error, which is that the court erred in excluding tendered proof of the value of the land in controversy, and the improvements made thereon by the plaintiffs in error. It is urged that under section 2581, Comp. Laws N. M., plaintiffs in error have a right to recover the value of improvements made by them upon the land, and have a lien upon the land for the same. We think not. So far as this case is concerned, the land embraced in the homestead patent must be regarded as being part of the public domain at the time the homestead entry was made. There could be no rightful possession in plaintiffs in error, and the law was not intended to be available in behalf of a party wrongfully in possession; nor does this statute apply to this case for the further reason that such a lien would interfere with the disposition of the public lands of the United States. "The power of congress in the disposal of the public domain cannot be interfered with or its exercise embarrassed by any state (or territorial) legislature, nor can such legislation deprive the grantees of the possession and enjoyment of the property granted." *Gibson v. Chouteau*, 13 Wall. 92; *King v. Thomas*, (Mont.) 12 Pac. Rep. 865. The patent was introduced to sustain the issues for the plaintiff below, and, all of the testimony offered by the defendants having been excluded, the court properly instructed the jury to find for the plaintiff. We find no error in the record, and therefore affirm the judgment of the court below; and it is so ordered.

O'BRIEN, C. J., and SEEDS, J., concur; FREEMAN, J., being absent.

(7 N. M. 17)

DE MANDERFIELD v. FIELD et al.

(Supreme Court of New Mexico. Jan. 3, 1893.)

PARTNERSHIP ACCOUNTING—RIGHTS OF ASSIGNEE OF DECEASED PARTNER—FINDINGS BY REFEREE.

1. An assignee of a deceased partner cannot maintain an action for an accounting against surviving partners, and representatives of other deceased partners, without making the administrator of the assignor a party.

2. An assignment by a partner of his in-

terest in the firm dissolves the partnership between him and the other partners, and does not make his assignee a copartner; such assignee being entitled only to the assignor's interest in the surplus after the payment of all partnership debts, and the settlement of all accounts between partners.

3. Where, in an action by such assignee for an accounting, the assignment was attacked on the ground that the assignor was non compos at the time, and the referee refused to make any finding on that point, deciding the case on other issues involved, his refusal was equivalent to a finding of that issue in favor of the assignee, and was not error that such assignee could complain of.

4. In an action for an accounting by the assignee of a deceased partner against surviving partners, and representatives of other deceased partners, where the evidence furnishes no basis by which a correct balance could be struck between the dead and surviving partners, and the claim of the complainant is attempted to be made out by vague imputations of fraud, the complaint was properly dismissed; the rule being that where actual fraud is not made out, and death has closed the lips of those whose character is involved, and lapse of time has obscured the details, the rules of diligence will be rigidly enforced against those who have not been diligent in enforcing their rights. *Hammond v. Hopkins*, 12 Sup. Ct. Rep. 418, 143 U. S. 274, followed.

Appeal from district court, Santa Fe county; Edward P. Seeds, Judge.

Action by Josefa S. de Manderfield against Nell B. Field, administrator, etc., and another. Judgment for defendants. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by LEE, J.:

On the 6th day of December, 1887, William S. Woodside died intestate in the county of Bernalillo, and the defendant Field was appointed his administrator, and took possession of his assets. On the 5th day of December, 1888, the complainant filed her bill of complaint in the district court of Santa Fe county against the defendant Field and Thomas B. Catron, in which she alleged that on the 13th day of January, 1885, Woodside, William H. Manderfield and Catron entered into a copartnership for the purpose of carrying on a trading post at Ft. Wingate, N. M.; that the said parties were equal partners in the said business; that on the 1st day of August, 1888, the said W. H. Manderfield sold, transferred, and conveyed to the complainant all his right, title, and interest in and to said firm, its assets, accounts, properties, and moneys. The bill contains many specific allegations of wrongdoing on the part of Woodside and Catron with reference to the partnership property; alleges that William H. Manderfield died on the 3d day of December, 1888; and prays that an account may be taken, and that the defendants be compelled to set forth a full, true, and just account of all moneys and property of the said firm now in their hands, and of all the profits, sales, and expenditures thereof, together with all sums drawn by them, or either of them, from the said firm, and of all the transactions, of any sort or kind, which may be pertinent to the issues and questions herein, and that the defendants may be decreed and compelled to pay to the complainant all

sums found to be due to her upon such accounting. The bill also contains a prayer for general relief. Three exhibits are referred to in the bill, only two of which were filed with it. The third, being the assignment upon which the complainant bases her right of action, was not filed with the bill, nor was any reason assigned for the failure on the part of the complainant to file it, or a copy of it, as required by our statute. The defendant Field pleaded to the bill that at the time of the pretended assignment W. H. Manderfield was non compos mentis, and incapable of making the assignment, and that, therefore, no right passed to the complainant by virtue of it. He also answered, denying the material allegations in the bill. The defendant Catron filed an answer in which he denied all the material allegations of the complainant's bill, and charged that W. H. Manderfield had drawn out of the business of the partnership moneys greatly in excess of his just share and proportion. Replications having been filed, the case was on the 20th day of November, 1889, referred, by the following order: "It is hereby ordered by the court that John P. Victory be, and he is hereby, appointed special master to take the testimony in this cause, and to report the same, with his opinion thereon, to the court." This order of reference appears to have been treated by the master and the counsel engaged in the case as broad enough to authorize the taking of testimony upon all the issues made by the pleadings, and under it evidence was offered by the complainant by which she attempted to establish her right to an accounting against the defendants, and also to show what, on such accounting, was due her, as the assignee of William H. Manderfield. The master excluded the assignment offered in evidence upon the ground that it was the foundation of the complainant's action, and was inadmissible, because not filed with the bill of complaint. Certain pages of a book claimed by the complainant to be the ledger of Woodside were offered and admitted by the master, over the objection of the defendant Field. Evidence was offered on both sides as to the mental condition of Manderfield at the time of the alleged assignment. The master also admitted, over the objection of defendant Field, three letters written by Field to Gildersleeve shortly after his appointment as administrator. Certain drafts, notes, and mortgages were also admitted, over the objection of the defendant, but in his brief Mr. Gildersleeve says that the complainant claims nothing on account of those instruments. The master reported that there was no proper evidence in the case tending to establish a privity between the complainant and the defendants, or either of them, and that the proof failed to substantiate the allegations of the bill. He declined to find on the issue of Manderfield's sanity, stating that he deemed such finding unnecessary, and reported as a conclusion of law that the complainant was not entitled to any relief. Objections were filed by the complainant, which, by consent, were to

stand as exceptions to the master's report; and those exceptions, upon argument, were overruled by the court, and a decree was entered dismissing the complainant's bill. From that decree she appeals to this court.

C. H. Gildersleeve and J. H. Knaebel, for appellant. Neill B. Field, for appellees.

LEE, J., (after stating the facts.) The real questions which must determine this case arise in the peculiar and anomalous character of the proceedings. An assignee of a deceased partner files her complaint against a surviving partner, and an administrator of a deceased partner, without making the administrator of the estate of her assignor a party thereto, calling upon the surviving partner and administrator of the deceased partner to account to her for all moneys and property of said firm now in their hands, and all the profits, sales, and expenditures thereof, together with all sums drawn by them, or either of them, from said firm, and all the transactions, of any sort or kind, which may be pertinent to the issues and questions herein, and that the said defendants may be decreed and compelled to pay unto the petitioner all sums so found due her upon such accounting. The assignment of W. H. Manderfield (the deceased partner) to the complainant was offered in evidence by the complainant, which was objected to by the defendants for the reason that a copy thereof had not been filed with the complaint, as required by statute. The objection was sustained below, which action, it is urged here, was error, and should reverse the case. Suppose, for the purpose of investigating other points in the case, we assume that the said assignment had been admitted in evidence, and we were considering the case from that standpoint. The assignment of W. H. Manderfield to the complainant had the effect to dissolve the partnership which had existed between him and Thomas B. Catron and William S. Woodside, but it did not make his assignee a copartner with, or tenant in common in the property with, the other two partners. She did not, by the assignment, become the owner of a third interest in the partnership property. The effects or property of a partnership belong to the firm, and not to the individual partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts, and after settlement of the accounts between the partners. Thus in *Taylor v. Fields*, 4 Ves. 396, it is said: "A party coming into the right of a partner (in any mode; either by purchase from such partner or his personal representatives, or under an execution or commission of bankruptcy) comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts." The utmost extent of the transfer by the assignment of W. H. Manderfield to the complainant was an inter-

est in the surplus, if any, which might remain after all debts of the firm should be paid, and after his liabilities to his copartners, as such, had been discharged. The effect of the assignment was to dissolve the partnership, and to clothe the complainant with a power to compel an accounting and settlement of the business of the partnership, to ascertain what, if anything, her interest might be, on its full adjustment. Suppose, for the investigation of the case, it is conceded that W. H. Manderfield had an assignable interest in the partnership property, which passed by the assignment to the complainant, and which she has a right, in a court of equity, to enforce. It becomes a leading and controlling question, lying at the very foundation of the case, whether there are any obligations of debt outstanding against the firm, and whether W. H. Manderfield has fully discharged his obligations to his copartners; and this could not be adjudged without the said W. H. Manderfield or his administrator was a party to the suit, as it is a universal rule in equity that, upon a bill for an accounting, the party against whom a balance is found will be decreed to pay it. Suppose the balance should be found against W. H. Manderfield. It could not be decreed against his estate, for the reason that his administrator is not a party. It could not be decreed against the complainant, for the reason that, as an assignee, she is not liable for the partnership obligations. And yet, whether she has an interest in the partnership, or acquired anything under the assignment, can be determined only by a final and conclusive settlement of the partnership accounts between all the partners, or their representatives. Yet in this case W. H. Manderfield, one of the partners, or his administrator, is not made a party. Manifestly, this is an incurable defect. No decree can be made for an accounting until all the partners, or their representatives, are made parties. "The court cannot enter a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and the objection may be taken at any time upon the hearing, or in the appellate court." *Cotron v. Millaudon*, 19 How. 113.

It may, however, be urged that the court should not have dismissed the bill, but have allowed the proper parties to have been brought in by a supplemental bill. It is doubtless the general rule that a bill in chancery will not be dismissed for the want of proper parties, but it is not universal. It must depend, to a great extent, upon the circumstances of the case. If the evidence had shown that there had been a full accounting of the assets of the partnership, and that all the firm debts had been satisfied, and that W. H. Manderfield's obligations to his copartners had been adjusted, and there was a balance due the complainant, the court would have allowed the administrator of the assignor to have been made a party, so that a decree could have been made in favor of the complainant for the amount thus found to be due her. But there was no motion to amend, to make the administrator a party. She chose to stand up-



on the bill as it had been presented. The bill appears to have been filed, and the evidence introduced in support of it, upon the theory that the complainant, by virtue of the assignment to her by W. H. Manderfield, had a right of action against the copartners of her assignor for sums that he may have advanced for the use of the firm, or for credits that might appear upon the books in his favor. Even in that view of the case, the master finds that the evidence does not support the allegations of the bill. But the theory is erroneous; and if he had found, from the evidence introduced, that there was a balance in her favor, it would still be far short of being sufficient to support a decree in her favor, even if the proper parties had been joined in the bill, as it would not show that such a balance was the result of a final settlement of the entire partnership business, nor does it appear that such a balance could be ascertained. Under these circumstances, there was no reason for an amendment bringing in other parties. Therefore, for the reason given, the bill, as a bill for an accounting, was fatally defective, for the want of an indispensable party,—the administrator of W. H. Manderfield. *Bank v. Railroad*, 11 Wall. 625; *Campbell v. Zabriskie*, 8 N. J. Eq. 738; *Colron v. Millaudon*, 19 How. 113.

As to the question in regard to Exhibit C (the assignment) being excluded by the master from the evidence, it becomes immaterial, as in our consideration of the case we have assumed the assignment to be in evidence.

In regard to the exception that the master failed to make a finding on the issue of the sanity of the assignor, W. H. Manderfield, at the time of making the assignment to the complainant, such failure would not be error that she could complain of, as it is equivalent to finding that issue in her favor. Nor are we prepared to say that the findings of the master and the conclusions of the chancellor upon the merits of the case as presented by the evidence should not be sustained, if all other questions were out of the way. The evidence furnishes no basis by which a correct balance could be struck between the dead and surviving partners, or by which an equitable adjustment of the partnership business could be made. The claim of the complainant is attempted to be made out by vague and uncertain imputations of fraud on the part of the other partners; and in such cases it has been said that "where actual fraud is not made out, but the imputation rests upon conjecture; where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions, and obscured their details,—the welfare of society demands the rigid enforcement of the rules of diligence. The hourglass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused." *Hammond v. Hopkins*, 143 U. S. 274, 12 Sup. Ct. Rep. 418.

We think the court below was right in dismissing the bill, but that it should have been without prejudice; and therefore the

judgment of the court below is affirmed, but without prejudice to the complainant.

FREEMAN and McFIE, JJ., concur.

(7 N. M. 26)

LYNCH et al. v. GRAYSON et al.

(Supreme Court of New Mexico. Jan. 3, 1893.)

FINDINGS BY COURT—REVIEW ON APPEAL.

Act Jan. 5, 1889, § 4, providing that in cases where a jury has been waived, and the cause tried by the court, the supreme court "shall review said cause in the same manner, and to the same extent, as if it had been tried by a jury" does not intend that the supreme court shall decide on the weight of the evidence given, but on the sufficiency of the facts found to support the conclusions of law.

On rehearing. Judgment affirmed. For prior report, see 25 Pac. Rep. 992.

Catron, Thornton & Clancy and Elliott, Pickett & Elliott, for appellants. Ryerson & Wade and S. B. Newcomb, for appellees.

FREEMAN, J. This is an action of trespass on the case, brought by the appellees against the appellants in the district court of the county of Dona Ana, wherein, by consent of parties, a jury was waived, and the cause heard and determined by the court. A general verdict and judgment were rendered in favor of the appellees, from which judgment an appeal was had to this court, which was heard and determined at the January term, 1891, resulting in the affirmance of the judgment below. The case is reported at page 992, 25 Pac. Rep., wherein the facts are very fully set out in the opinion of this court, as rendered by Justice Lee. In that opinion this court also endeavored to dispose of all exceptions taken to the rulings of the court below in the admission and rejection of testimony. An application for rehearing was filed and allowed, and the cause has been reargued at the present term of court.

It is now insisted, with much zeal and ability, by the attorneys for the appellants—First, that, under the legislation of this territory, it is the duty of this court to examine all the evidence in the case, precisely as if we were sitting as a jury in the court below; and, second, that having gone into the evidence, and examined all the facts, as well as all the questions of law, we will find that the judgment of the court below is not supported by the evidence which was properly received, and that we will become satisfied that the weight of evidence is with the appellants, and that, therefore, it will become our duty to reverse the judgment of the court below. In order that there may be no mistake as to the character of the issues which it is insisted we are called upon to determine, we will give the statement in the precise language of the counsel for the appellants: "This statute [section 4, Act Jan. 5, 1889] requires the supreme court to examine the record, and to determine the facts thereon. It makes no exception in favor of rulings of the court, but puts the whole record be-

fore the supreme court. We insist that it requires the supreme court to retry this case the same as the court below tried it, or the same as a jury would have tried it, without reference to any finding of facts made by the court below, and that it is the duty of this court to weigh the evidence, and decide according to preponderance of evidence, and in that way ascertain the facts, after having passed upon all objections and exceptions taken, included in the bill of exceptions in the record, and expunge such evidence as was properly objected to. It is the duty of this court to ascertain from the evidence properly before it the various facts essential to make out a case,—whether the cattle of defendants came from Texas; whether there is any infected district in the state of Texas; whether or not said cattle came from such infected district; whether they were infected with any disease germ; whether they communicated the germ from which plaintiffs' cattle contracted the disease; whether they carried the disease, and in any manner communicated it; whether the disease from which plaintiffs' cattle died is the same disease described in the declaration; whether defendants had any knowledge that their cattle came from any infected district, or any knowledge whether cattle were diseased, or carried the germs of disease, or were liable to communicate any disease to plaintiffs' cattle, and whether that disease was the disease mentioned or described in the declaration; whether or not plaintiffs had as much knowledge of the disease as defendants; whether plaintiffs communicated their knowledge to defendants, or sufficient knowledge to put the defendants upon such inquiry as would have ascertained that their cattle came from an infected district, or were infected, or carried the germs of infection of the disease mentioned and described; whether or not plaintiffs did have the same amount of knowledge which would have put them upon the same inquiries; whether or not they made any effort to guard against it; whether or not they were not negligent, in caring for their own cattle, in permitting them to run upon defendants' range, and whether or not it was not as probable that plaintiffs' cattle, if they contracted the disease from defendants' cattle, contracted it on defendants' range, from plaintiffs' negligently permitting their cattle to range with defendants' cattle, and neglected, failed, and refused to make any effort to keep them apart, after defendants' cattle had been driven to their own range; whether or not plaintiffs' cattle died from a contagion known, or commonly known, as 'Texas Cattle Fever;' and whether they did not die from a non-contagious disease, called 'Texas Fever.' We insist that if it should be found by this court that there is no evidence showing that defendants' cattle came from an infected district, or that defendants knew that they came from such infected district, plaintiffs' case fails. We further insist that if it appears from the evidence, either entirely, or by preponderance of the evidence, that defendants were ignorant that their cattle came from an infected

district, and were also ignorant that their cattle carried any disease, or germs of disease, and that they were also ignorant that they were liable to communicate or spread any such disease, at the time they brought them into the territory of New Mexico, such fact, found in their favor, must defeat plaintiffs' case. We further insist that if plaintiffs had knowledge, or good reason to believe, that defendants' cattle came from an infected district, or were diseased, or carried the germ of a disease, and were liable to communicate the disease, that it was their duty to take every precaution against such disease, and that if, without making any effort to prevent it, they allowed their cattle to mix with, range and graze with, and on the same pastures with, defendants' cattle, they were guilty of contributory negligence, and cannot recover, although defendants may have had the same knowledge as plaintiffs. We insist that plaintiffs having alleged that defendants' cattle communicated to their cattle a 'contagious disease,' called 'Texas Cattle Fever,' that if the evidence shows that plaintiffs' cattle died from a disease called 'Texas Fever,' and that such disease was not contagious, or that if they died from alkali or murrain, or any other disease except the disease known as 'Texas Cattle Fever,' and which was contagious, the plaintiffs cannot recover. We furthermore insist that, if plaintiffs have alleged that the disease with which their cattle died was communicated to said cattle on the lands and premises of plaintiffs, that there is no proof showing that a single head of cattle of plaintiffs, which died, contracted the disease on the lands of plaintiffs, but that the proof shows at least as strongly that, if they did contract the disease from defendants' cattle, they contracted it on defendants' range and premises, or some other place besides the lands and premises of plaintiffs, and that when they contracted it, if they did contract it from defendants' cattle, plaintiffs were guilty of negligence,—at least, of sufficient negligence to make them contributory to the loss. We claim that under section 2190 the court must look into all of these facts, and make these findings from a preponderance of the evidence."

The position that this extraordinary jurisdiction is conferred by section 2190, Comp. Laws, is not seriously contended for by appellants, who do insist, however, that it was conferred by the fourth section of the act of our legislature approved January 5, 1889, which is as follows: "In all cases now pending in the supreme court, or which may hereafter be pending in the supreme court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common-law side of the court, or in which a jury may have been waived, and the cause tried by the court or judge thereof, it shall be the duty of the supreme court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in a bill of exceptions, and pass upon all of them, and upon the errors, if any shall be found therein, in the

rulings and decisions of the court below, grant a new trial, or render such other judgment as may be right and just and in accordance with law; and said supreme court shall not decline to pass upon any question of law or fact which may appear in any record, either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or by the judge thereof without a jury, but shall review said cause in the same manner, and to the same extent, as if it had been tried by a jury." Bearing constantly in mind the closing paragraph of this enactment, that the court "shall review said cause in the same manner, and to the same extent, as if it had been tried by a jury," it becomes now our duty to ascertain what, if any, innovation upon the practice as known to the common law has been created by this enactment. In order to do this, we shall have to have recourse to the construction given by the supreme court of the United States to similar acts of congress. The seventh amendment to the constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The seventeenth section of our enabling act provides that "the constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States." The proviso to the first section of the act of congress approved April 7, 1874, declares that "no party \* \* \* shall be deprived of the right of trial by jury in cases cognizable at common law." It is admitted that at the common law there are but two modes by which the finding of a jury upon a question of fact may be reviewed, to wit, by the granting of a new trial by the trial court, or the award of a *venire facias de novo* by the appellate court for some error of law. Nor is it seriously controverted that under a statute providing that parties may, by consent, waive a jury, and submit the matters in dispute, both as to the facts as well as the law, to the determination of the court, the finding of fact by the court has the same force and effect as the verdict of a jury, unless the statute regulating such submission provides for a different result. On the former hearing we considered the facts established as sufficient to form the basis for the conclusion reached by the judge. Before proceeding to determine whether, under our statute, the general finding of fact by a judge sitting, as in this case, without the intervention of a jury, is, as to the weight of evidence, subject to review in this court, it will become necessary, as already observed, to direct our attention to the construction given by the supreme court of the United States to statutes similar, in many vital respects, to our own.

The second section of the act of April 20, 1871, carried into the Revised Statutes at section 700, which was an amendment to section 4 of the act of March 3, 1865, (Rev. St. § 649,) which was itself an amendment to the twelfth section of the judiciary act

of 1789, taken in connection with the several acts of which it is amendatory, constitutes a complete Code for the determination, without the intervention of a jury, of matters of fact arising in a common-law proceeding. That section is as follows: "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." The concluding paragraph of section 649 is as follows: "The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." The concluding paragraph of our own act, as we have already seen, is that the finding of fact by the court below may be reviewed to the same extent as a finding of fact by a jury. So that it will appear, as already observed, that the national and territorial legislation are so nearly alike as to render the decisions of the supreme court of the United States instructive, if not binding upon us. In this territory a seeming attempt has been made to confer on this court the jurisdiction to revise the finding of a jury upon a question of fact. Section 2190 of the Compiled Laws provides that "the supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained, alone, shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law." And yet the supreme court of this territory in the case of *Badeau v. Baca*, 2 N. M. 196, adopted as the law of this territory the following language, taken from *Hilliard on New Trials*: "That a verdict will not be set aside unless clearly, palpably, decidedly, and strongly against the evidence, or so much against the weight of the evidence as, on the first blush of it, to shock the sense, or unless there has been a flagrant abuse of discretion," etc. Page 449. So, also, in construing the twenty-second section of the act of 1789, commonly known as the "Judiciary Act," which provided "that there shall be no reversal in the supreme court or in the circuit court, upon a writ of error, for any error of fact," the supreme court of the United States held that no exception could be taken where there was no jury, or where the question of law was decided in the final judgment of the court. *U. S. v. King*, 7 How. 832; *Craig v. State*, 4 Pet. 410. The purpose, therefore, of section 4, Act March 3, 1865, was to confer upon the supreme court jurisdiction to pass upon such rulings of the court below as were excepted to at the time, and also to review the judgment of the court upon the question as to whether facts specifically found by the court were sufficient to support its judgment. The evident purpose of the legislation to which we have re-

ferred was to get rid of that infallibility which from time immemorial had attached, in all common-law jurisdictions, to the verdict of a jury upon questions of fact. It had been demonstrated by experience that 12 men taken from the body of the vicinage, though "good and lawful" they may be, are in no wise safer arbiters of complicated facts, enveloped, it may be, in the mysteries of arts and sciences, than a lawyer trained in the art of weighing testimony, and experienced in the manner of the application of the rules of evidence. Hence it is that in many, if not in all, the states, the jurisdiction of the courts of equity has been from time to time enlarged, and made to comprehend, at least concurrently, many of the oldest and best-established matters of common-law jurisdiction. The act of congress already referred to, as embodied in section 649, Rev. St., accomplished only in part the reformation intended to be ingrafted upon the common-law practice; for having provided that the findings of the court, whether general or special, should have the force and effect of the verdict of a jury, it provided no means whereby such a judgment might be reviewed. Hence it was held that the judgment of the court trying a cause, by stipulation waiving a jury, was in the nature of an award by a referee, and could not be reviewed. In order to meet this objection, and provide a means by which the findings of the trial judge might be reviewed, congress passed the act already referred to, as found at section 700, Rev. St. It is to be observed, however, that in none of the legislation to which reference has been made is there the slightest indication of any purpose upon the part of congress to change or modify the common-law rule that the ascertainment of the facts in the trial of a common-law cause is a matter of *nisi prius* jurisdiction. It is not a change of forum, but the substitution of the opinion of the judge for that of the jury, and is to that extent only a partial abrogation of so much of the ancient maxim as declares, "ad questiones facti non respondent iudices." But right here we encounter what we believe to be the fatal error in the position assumed by the counsel for the appellants. It is not the purpose of congress, nor our legislature, to invest the appellate court with jurisdiction to pass upon the weight of the testimony introduced in the court below, but upon the sufficiency of the facts found by the court to sustain the conclusions of law. In cases of this character the judgment of the court below as to the credibility of witnesses and the weight of testimony has the same effect as is given to the verdict of a jury. The only revisory jurisdiction conferred upon the appellate court was to determine whether the facts found by the trial judge were sufficient to warrant the conclusions of law. So that by this amendatory legislation the forum for the determination of the weight of evidence was not changed. In the case of *Guild v. Frontin*, 18 How. 135, it was said: "Parties may, by consent, waive the trial of issues of fact by a jury, and submit the trial of both fact and law to the court.

It will not be a mistrial. But, if they wish the judgment of the court to be reviewed on a writ of error, a special verdict or agreed statement of facts must be put on the record." And in *Suydam v. Williamson*, 20 How. 427, it is said: "It is of the very essence of a special verdict that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found; and every special verdict, to enable the appellate court to act upon it, must find the facts, and not merely state the evidence of facts. So that where it states the evidence, merely, without stating the conclusions of the jury, a court of error cannot act upon matters so found." In the case of *Kelsey v. Forsyth*, 21 How. 85, Chief Justice Taney, delivering the opinion of the court, said: "It will be seen from this statement that a common-law action of ejectment was submitted to the court upon the evidence without the intervention of a jury, leaving it to the court to decide the facts, as well as the law, upon the evidence and admissions before it. The case, therefore, is the same in principle with that of *Guild v. Frontin*, 18 How. 135; and the doctrine in that case was reaffirmed in the case of *Suydam v. Williamson*, 20 How. 428, and the grounds upon which it rests fully set forth." In the case of *Campbell v. Boyreau*, 21 How. 223, the chief justice said: "The finding of issues of fact by the court upon the evidence is altogether unknown to the common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of a jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge, upon the evidence, he does not exercise judicial power in deciding, but acts, rather, in the character of an arbitrator; and this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law as if those facts had been conclusively determined by a jury, or settled by admission of the parties." This case is not cited as authority applicable to the case at bar, because, as we have already seen, it was the purpose of the act of March 3, 1865, to confer this jurisdiction. In the case of *Prentice v. Zane's Adm'r*, 8 How. 485, in a lengthy review of the decisions affecting this question, after going on to show that it was impossible for that court to determine whether inferences or conclusions of fact were correctly drawn, the court say that such a determination is the proper province of the jury, or of the judge himself, if the trial by jury is waived. In the case of *Graham v. Bayne*, 18 How. 63, it was said: "The counsel in this case have agreed that 'if it should be necessary, to a hearing of this cause in the supreme court, to treat the evidence in the nature of a special verdict,' this agreement may be as good, as between themselves, and point out the source from which the facts for a case stated or special verdict may be drawn; but it cannot compel this court to search through the evidence to find out the facts. The record exhibits the testi-

mony and evidence laid before the judge. It is evidence of facts, but not facts themselves, as agreed or found. \* \* \* No mere agreement of counsel can substitute evidence of facts in place of facts, or require the opinion of this court on an imperfect statement of them. A writ of error cannot by these methods be converted into a chancery appeal, nor a court of error into appellate arbitrators." In the case of *Burr v. Railway Co.*, 1 Wall. 99, Justice Miller, after referring to the fact that, according to Sir William Blackstone, error did not lie to a statement of facts, under the English practice, an agreed statement of facts not being in the nature of a special verdict, proceeds as follows: "Under the practice of our courts, such agreements are signed by counsel, and spread upon the record at large, as a part thereof; and thus they become, technically, a part of the record, into which the appellate court look, with the other parts of it, to ascertain if there be error. \* \* \* The statement of facts on which this court will inquire if there is, or is not, error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient, in itself, without inferences or comparisons, or balancing of testimony or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and to deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon. The paper before us is the evidence of facts, and not the facts themselves, as agreed or found." *Graham v. Bayne*, 18 How. 62. It is to be noted that the concluding part of section 649 of the Revised Statutes, and the concluding part of our own statute, each places a limitation upon the exercise of the authority intended to be conferred. In the federal statute it says that such finding shall have the same effect as the verdict of a jury, while in the territorial statute it is declared, substantially, that such finding shall be reviewed in the same manner, and to the same extent, as if the cause had been tried by jury. It is further to be observed that under the federal statute, if such finding were general, it could not be disturbed at all; and in cases where the finding is special the review may extend, not to the weight of the testimony, but to the sufficiency of the facts found to support the judgment.

It may not be amiss, just at this point, to institute an analytical comparison of the two statutes. The federal statute provides that issues of fact made by consent of parties be tried without the intervention of a jury. Our statute provides substantially the same thing. The federal statute provides that the rulings of the court in the progress of the trial of a

cause, if excepted to at the time, may be reviewed by the supreme court. Our statute provides for a general review of all the "rulings and decisions of the court which may be apparent upon the record, or which may be incorporated in a bill of exceptions," and provides that the supreme court "shall not decline to pass upon any question of law or fact which may appear in any record, either upon the face of the record, or in the bill of exceptions, because the cause was tried by the court, or by the judge thereof, without a jury." It is difficult to discover any substantial difference in these two enactments, unless it is to be found in the requirement of our statute, that the court pass upon the entire record, while in the federal statute it was necessary, in order to invoke the revisory power of the supreme court, that exception be taken at the time, and duly presented by a bill of exceptions. This difference, however, is one of mode rather than of jurisdiction, and it is the question of jurisdiction that we are now discussing. The two statutes, national and territorial, having provided a means by which questions of fact may be determined by the court below without the intervention of a jury, it is interesting to note the effect which is to be given to such findings. Was it intended by our statute that this court should sit as a jury to determine the weight of evidence submitted in the court below? We think the concluding part of the statute itself furnishes a complete negative to this proposition. "The court shall review said cause in the same manner, and to the same extent, as if it had been tried by a jury." Under the federal statute, even where the finding is special, the supreme court cannot pass upon the weight of the testimony given in the court below, but only on the sufficiency of the facts found. This doctrine has been laid down in many of the leading cases. *Norris v. Jackson*, 9 Wall. 125; *Coddington v. Richardson*, 10 Wall. 516; *Miller v. Insurance Co.*, 12 Wall. 297; *Insurance Co. v. Folsom*, 18 Wall. 248. In *Norris v. Jackson*, supra, it was said: "The next thing to be observed is that, whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it includes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law." So, also, it has been held in all of these cases that it was the lower court, and not the reviewing court, that congress intended to vest with the power to determine the weight of the evidence; that the parties, in their agreement, did not consent to submit the questions of facts to the supreme court, but to the lower court. In the case of *Martinton v. Fairbanks*, 112 U. S. 674, 5 Sup. Ct. Rep. 321, it was said: "The provision of the statute that the finding of the court shall have the same effect as the verdict of a jury cuts off the right to review in this case." But it is insisted by the counsel for the appellants that the ap-

application of this doctrine in the federal courts is governed by the authority of the seventh amendment to the constitution, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law. It is conceded for the purpose of this argument that the seventh amendment has no special application to the courts of this territory, although it was formerly held by the supreme court of the United States that a territorial court had no power to determine questions of facts in a common-law action without the intervention of a jury. *Webster v. Reid*, 11 How. 460. It has been settled, however, in the more recent cases of *Clinton v. Englebrecht*, 13 Wall. 441, and *Horubuckle v. Toombs*, 18 Wall. 654, that the seventh amendment, so far as it related to courts, was intended as a limitation, only, upon the power of the courts of the United States, and that it did not extend to territorial courts; that as to the latter they were, like the state courts, invested with general jurisdiction. Conceding, therefore, that our courts are not restricted in their jurisdiction by the provisions of said amendment, and that we must look alone to the several acts of congress, and of our territorial legislature, as defining the extent of our jurisdiction, it is nevertheless believed that the construction given by the supreme court of the United States to the acts of congress which we have been considering is authority for the construction that we have placed upon our own legislation, because it is to be observed that in all of the cases which have passed under our review the point determined was the intent of the act of congress. If congress had attempted to confer upon federal courts the authority to determine facts arising out of common-law actions without the intervention of a jury, without the consent of the parties, such an act would, of course, have involved the authority of congress under the seventh amendment. But congress, acting within the scope of its authority, having conferred on common-law courts the jurisdiction to determine, by consent of the parties, issues of fact without the intervention of a jury, and having declared that such determination shall have the same force and effect as the verdict of a jury, and our own legislature, acting within the scope of its authority, having conferred on common-law courts the power to determine questions of fact, by the consent of parties, without the intervention of a jury, and having given to such determination the same force and effect as that given to like findings in the federal courts, the construction given by the supreme court of the United States to these acts of congress becomes to us a source of the very highest authority in the construction of our own statute. The first section of the act of congress approved April 7, 1874, which authorizes the several territories of the United States to mingle in the same court a common-law and chancery jurisdiction, contains a positive inhibition against any impairment of the right of trial by jury in common-law cases. This provision of the national

statute is not, of course, quoted for the purpose of casting any doubt over the validity of the act of the legislature providing for dispensing with a jury by consent of parties. It is referred to, however, for the purpose of noting the jealousy with which congress has preserved the right of trial by jury in the territories. Any act of the legislature, therefore, that provides for the trial of common-law cases otherwise than by jury, must receive a strict construction. When, therefore, we are advised, as we have been by the concluding part of the act of the legislature, that the findings of fact reached by a court below, sitting instead of a jury, ought to receive the same consideration in this court as similar questions determined by a jury, we have no difficulty in determining the extent of our authority in the premises.

It is insisted, however, with great earnestness, on the part of the appellants, that the construction which we have given to the law places the rights of a litigant at the mercy of a judge who, through prejudice, ignorance, or corruption, may have chosen to ignore the facts. The manifest reply is that the law of the land offered to the appellants a jury of "good and lawful" men, which they declined, choosing, rather, to submit the facts as well as the law of the case to the decision of a judge, who, so far as the record discloses, was not governed by other than sound judicial considerations.

In our former consideration of this case, we examined the entire record. We became satisfied that the material questions of fact were seriously controverted; that there was competent evidence in the record, sufficient, if believed by the presiding judge to be true, to support the judgment rendered by him. We declined then, as we decline now, to pass upon the question of the credibility of the witnesses, or the weight of the testimony, but have considered these questions "in the same manner, and to the same extent, as if the cause had been tried by a jury." The former judgment of this court is therefore reaffirmed.

LEE and SEEDS, JJ., concur.

McFIE, J., took no part in the consideration or decision of this cause.

(7 N. M. 43)

#### TERRITORY v. TRUJILLO.

(Supreme Court of New Mexico. Jan. 4, 1893.)

HOMICIDE—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. Where, in a trial for murder, there is evidence which, if true, sustains a verdict of guilty, such verdict will not be disturbed, even though there was a substantial conflict in the testimony.

2. Where a single witness swore positively at the trial that she saw defendant kill deceased, and she stated at another time that her husband had done the killing, which statement she accounted for by defendant's threat that, if she did not say her husband did the killing, he (defendant) would kill her, such conflicting statement went to her credibility only; and her testimony, if believed, fully sustained a verdict of guilty.

3. The admission of evidence not objected

to on the trial cannot be made available as error on appeal.

4. Defendant, in his own behalf, testified that when he gave himself up it was the first time he heard that he was charged with the murder, which occurred about four months before, in V., where he had been a number of times since. Four witnesses testified, in rebuttal, that it was a matter of common notoriety during the four months, in V., that defendant was charged with the killing. The court, on its own motion, instructed the jury, with reference to such rebuttal testimony, that it "only goes to the question of the probability of the defendant having heard that he was charged with the crime, if he was often in V. after the killing; and you must not consider it as evidence tending to prove that defendant killed deceased." *Held*, that the instruction was not in violation of Comp. Laws, § 2055, providing that the court "shall not comment upon the weight of the evidence."

5. On the question of an alibi, the court instructed the jury: "If you believe that the evidence clearly sustains this defense, or raises in your minds a reasonable doubt of defendant's guilt, you must acquit." *Held*, that the instruction gave defendant the benefit of all his legal rights; the rule being that the burden of proof is on defendant to establish an alibi.

6. Where the court, in its instructions, fairly represents the issues to the jury, a failure to instruct on other theories of the case is not error, where defendant does not request such additional instructions.

Error to district court, Taos county; Edward P. Seeds, Judge.

Jesus Maria Trujillo was convicted of murder, and brings error. Affirmed.

J. H. Crist and B. M. Read, for plaintiff in error. Edward L. Bartlett, Sol. Gen., for the Territory.

McFIE, J. The defendant, Jesus Maria Trujillo, who is also plaintiff in error here, was convicted of murder in the first degree, and sentenced to the penitentiary for life, at the May term, 1892, of the district court of the first judicial district, sitting in Taos county. Defendant moved for a new trial in the court below, and, the same being overruled by the court, he has brought the case to this court by writ of error, seeking a review and reversal of the judgment and sentence of the court below.

The 1st, 2d, and 7th assignments are, substantially, that the verdict of the jury was not sustained by the evidence, that the verdict was against the weight of the evidence, and that the court erred in overruling the motion for a new trial, based upon these grounds. These assignments of error will be considered together, as they are practically one. Upon the trial of this cause in the court below the jury were the judges of the weight of the evidence, and also of the credibility of the witnesses, and in the exercise of their powers they agreed upon a verdict of guilt. The law is well settled in this territory that where there is a substantial conflict of evidence, even in a criminal proceeding, it is the province of the jury, and not of the court, to determine the facts established by the evidence. In the case of *Territory v. Webb*, 2 N. M. 147, this court said: "It cannot be said that the verdict was contrary to the evidence, because there was positive evidence, which, if true, fully justified the verdict." "It is such a well-

established rule as scarcely to require repetition that when there is competent evidence the jury are the judges of its credibility, and the weight to be attached to it." *Territory v. Maxwell*, 2 N. M. 250. In a very recent case, decided by this court at its last term, the court again refused to disturb the verdict of a jury based upon conflicting testimony. "In regard to the contention that the verdict is not sustained by the weight of the evidence, it has been held in a very great number of cases that an appellate tribunal will not weigh the evidence in a case where there is a direct conflict, but will accept and act upon that which the court and jury trying the case deemed most trustworthy. The cases in which a judgment has been reversed upon the ground that the verdict is not sustained by the evidence are rare. Many appellate courts refuse to consider such a case at all; the theory being that the court and jury, who saw the witnesses and heard them testify, were in a better position to determine the weight that should be given to their evidence than are the judges of the appellate court." *Hicks v. Territory*, (N. M.) 30 Pac. Rep. 872. That there was a substantial conflict in the testimony in this case is undoubted, but it is equally true that there was evidence for the prosecution which, if true, sustained the verdict of guilty. The witness Susana Sieneros swore positively at the trial below that she was present at the time of the killing, and saw the defendant kill the deceased, and describes the manner in which it was done. If the testimony of this witness is true, it cannot be doubted that it fully sustains the verdict of the jury. But counsel contend that the testimony of this witness is not worthy of belief, because she stated at other times that her husband had killed the deceased. The record shows that, while she did state to her uncle that her husband killed the deceased, she says she did so because the defendant had told her, at the corner of her uncle's house, that, if she did not say that her husband killed the deceased, he (defendant) would kill her. It may well be doubted whether the witness intended to swear before the coroner's jury that her husband killed the deceased, or whether she simply intended to admit that she had so stated to her uncle; but, however that may be, such testimony went to her credibility only, and this was a matter as fully within the province of the jury to determine as was the weight of the evidence. The defendant had the benefit of a motion for a new trial. "This was addressed to the sound discretion of the court below. The chief justice of this court, who presided as judge in that court, heard all of the testimony as it was uttered by the witnesses. He, as well as the jury, had the opportunity to notice the manner, and to some extent the character, of each witness on the stand. \* \* \* All this is an utter blank to the other members of this court, and renders them much less competent to weigh this conflicting evidence, should they attempt to do so." *Territory v. Webb*, 2 N. M. 147. The above language was used in the consideration of an assignment of error that the verdict of the jury



was against the weight of the evidence, but is equally applicable to this case.

The third and fourth assignments of error will also be considered together. The third assigns the admission of illegal evidence as error; and the fourth, instruction No. 8, evidently based upon the evidence referred to in the third assignment of error.

From the record it appears that the killing occurred in a small town called Vallecito, on or about the 28th day of December, 1889. On the trial in the court below the defendant, in his own behalf, testified, among other things, that he gave himself up to the officer about the 2d or 3d of March, 1890. He was then asked: "Question. Was that the first time you had heard that they had charged you with this thing? [referring to the killing of Martinez.] Answer. Yes, sir. Q. And you had never heard that they had charged you with it, before that time? A. No. Q. That was about four months after the time the man was killed, wasn't it? A. I don't know how long. Q. How long are you gone from Rio Arriba, that time you went up there? A. I was all the time in the county, with the exception of a few days I spent in Conejos. Q. Didn't go into the town of Vallecito very often, did you? A. Yes, sir. During that time I went sometimes. Q. Didn't you go as often as you did at times before? A. The same as I go now, or used to go before." Four witnesses were examined in rebuttal, and allowed to testify that it was a matter of common notoriety in the town of Vallecito, between the time of the killing and the surrender of the defendant, that the defendant was charged with the killing of the deceased; and this is the evidence alleged to have been erroneously admitted. There was an objection made to one question upon this subject, in the examination of the first witness, Ramona Martinez; but the question was afterwards repeated and answered without objection, and similar testimony was given by the other witnesses without objection. It was not the province or duty of the court to exclude evidence not objected to; and hence the admission of this evidence cannot be made available in this court as error. An assignment of error for the admission of improper evidence should be based upon the action of the court where objection was made and exception saved in the court below.

The fourth assignment of error is based upon instruction No. 8, given by the court upon its own motion, which is as follows: "In the testimony in rebuttal there was evidence to the effect that the general talk in Vallecito, as to the killing of the deceased, connected the name of the defendant with said killing. You are instructed that said testimony only goes to the question of the probability of the defendant having heard that he was charged with the crime, if he was often in Vallecito after the killing; and you must not consider it as evidence tending to prove that the defendant killed the deceased." Counsel for the prisoner contend that this instruction is in violation of section 2055, Comp. Laws, which provides:

"Before the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked, and the charge of the court, shall be in writing. The court shall instruct the jury as to the law of the case, but shall not comment upon the weight of the evidence," in that it is a comment by the court upon the weight of the evidence. That section 2055 applies to criminal cases, we do not feel called upon to decide; for, whether it does or not, the instruction is not subject to the objection made. The court does not attempt to place a value upon this evidence, but refers to the evidence in order that it might limit the application of it to the credibility of the defendant as a witness, and prevent its consideration by the jury upon the question of the guilt of the defendant. The evidence having been admitted without objection, the court was evidently impressed with the opinion that such instruction was necessary to fully protect the rights of the defendant, and therefore out of abundant caution, and of its own motion, gave the explanatory instruction. The instruction made it clear to the jury that such evidence was applicable only to the credibility of the defendant as a witness for himself, and that it was not to be considered upon the question of the guilt of the defendant. It was therefore given in the interest of the defendant, and for his protection; and he cannot be heard to object to that which was in his own interest, and which could not and did not work injury to him. The court had an undoubted right to confine the application of the evidence referred to in the instruction to that branch of the case which it tended to establish, and upon which it was offered and admitted; and in doing so, by the language used, the court did not comment upon the weight of the evidence, within the meaning of section 2055, Comp. Laws.

The fifth assignment of error, and the last we deem it necessary to consider, is that "the court erred in failing to instruct the jury more fully on the law with reference to an alibi." The language of this assignment is an admission that the court did instruct the jury specially as to the alibi claimed, and, turning to the record, we find that the court gave the following instruction upon that subject: "No. 8. The defendant has introduced evidence of an alibi. That is evidence to the effect that he was not present at the time and place where the killing occurred. This is a legitimate method of defense; and if you believe that the evidence clearly sustains this defense, or raises in your minds a reasonable doubt as to the guilt of the defendant, you must acquit him." Counsel for the prisoner refer us to the American and English Encyclopedia of Law, (pages 454-456, and cases there cited,) and we find that the citations are mainly from the supreme court of the state of Iowa. It is insisted that the court erred in failing to "instruct the jury that a bare preponderance of the evidence, when tending to prove an alibi, is sufficient, and that to establish an alibi it is

not necessary that the jury should be fully satisfied of its truth, and that the accused is not bound to prove an alibi beyond a reasonable doubt." *State v. Hardin*, 46 Iowa, 623; *State v. Reed*, 62 Iowa, 40, 17 N. W. Rep. 150; *State v. Hamilton*, 57 Iowa, 598, 11 N. W. Rep. 5; *Turner v. Com.*, 88 Pa. St. 54. That an alibi is a matter of defense is too well settled to require discussion or the citation of authorities, but the amount of proof required to establish this defense is not uniform. That it is not necessary for the accused to establish this defense beyond a reasonable doubt is supported by a long line of authorities. In the earlier decisions of the supreme court of Iowa and some other states, it was held that a preponderance of the evidence was sufficient to maintain this defense. We are, however, of the opinion that the weight of authority is now settled that, where an alibi is relied upon as a defense in a criminal prosecution, the burden of the proof rests upon the defendant to establish it, to the satisfaction of the jury. *State v. Jennings*, 81 Mo. 185; *Garrity v. People*, 107 Ill. 162; *Creed v. People*, 81 Ill. 585; *State v. Hemrick*, 62 Iowa, 414, 17 N. W. Rep. 594; *State v. Reed*, 62 Iowa, 40, 17 N. W. Rep. 150; *State v. Krewsen*, 57 Iowa, 588, 11 N. W. Rep. 7; *State v. Hamilton*, 57 Iowa, 598, 11 N. W. Rep. 5; *State v. Vincent*, 24 Iowa, 570; *State v. Ostrand*, 18 Iowa, 435; *State v. Waterman*, 1 Nev. 453; *French v. State*, 12 Ind. 670; *Ware v. State*, 67 Ga. 349; *Com. v. Webster*, 5 Cush. 324; *State v. Davidson*, 30 Vt. 377; *Fife v. Com.*, 29 Pa. St. 429. The court gave an instruction upon the defense of an alibi in this case which is clearly within the law as now settled. The court uses the words, "that if the evidence clearly sustain this defense," but this is substantially the same as an instruction that the issue must be proven to the satisfaction of the jury. In order that the jury shall be satisfied, the evidence should be clear, and there is no substantial difference in the language. But the court goes further, and gives the defendant the benefit of a reasonable doubt, in this connection, by instructing the jury that, if the evidence upon this subject raised in their minds a reasonable doubt as to the guilt of the defendant, they must acquit him. These instructions placed the issue fairly before the jury, and gave the defendant the benefit of all his legal rights. Such being the case, it is not ground of error that the court did not "more fully" instruct the jury, especially where the record, as in this case, does not show a request for further instructions. If the accused deemed further instructions necessary, it was his privilege to request them and thereby give the court an opportunity to comply with his request. The court has repeatedly held that if the defendant fails or refuses to avail himself of the privilege of requesting additional instructions, and the court, in its instructions, fairly represents the issues to the jury, it is not error that the court did not more fully instruct the jury upon all possible theories of the case. *Territory v. O'Donnell*, 4 N. M. 36, 12 Pac. Rep. 743; *U. S. v. De*

*Amador*, (N. M.) 27 Pac. Rep. 488; *Express Co. v. Kountze*, 8 Wall. 342. There being no reversible error in this record, the judgment of the court below is affirmed, and it is so ordered.

FREEMAN and LEE, JJ., concur.

(7 N. M. 54)

TERRY et al. v. MARTIN.

(Supreme Court of New Mexico. Jan. 4, 1893.)

RECEIVERS—CONTINUING BUSINESS—ATTORNEYS' FEES.

1. In the absence of express authority from the court, a receiver placed in charge of a drug store, pending litigation in reference thereto, has no right to continue the business of the store, hire his son to clerk therein, and open a physician's office in connection therewith; and a claim presented by him for his son's services as clerk, rent, etc., is properly refused.

2. Though a receiver may, under certain circumstances, employ counsel to advise him with regard to the property in his charge, the necessity must be clearly apparent, or a claim for attorneys' fees will be disallowed.

Appeal from district court, Socorro county; A. A. Freeman, Judge.

J. S. Martin presented a claim for services performed by him as receiver of certain property, for attorneys' fees, etc., pending litigation between John W. Terry and others against Perkins and Southgate. The claim was disallowed, and he appeals. Affirmed.

T. B. Catron, J. S. Sniffen, and W. E. Kelley, for appellant. James G. Fitch, for appellees.

SEEDS, J. From the record in this case it appears that, some time in 1886, certain parties, by the names of Perkins and Southgate, were engaged in the drug business in Socorro, in this territory. They became indebted to one Terry, and possibly others, and it became necessary to place their property in the hands of a receiver, pending the litigation in reference thereto. In November, 1886, the court appointed one Dr. J. S. Martin the receiver of the property. He took possession of the goods, and made an inventory of the same, according to which the drugs and fixtures were worth about \$2,500. It appears that the receiver opened the store, and began selling goods from the store, and that he occasionally made purchases to keep the stock intact. We have been unable to find any specific authority for such proceedings upon his part, and, if he possessed it at all, it must have resulted by implication from his position, or from his original appointment, which is not set out in the record. It also appears that he used the store as his office, and that he hired his son, who was not a druggist, to be a clerk in the store, at a salary of \$45 per month. In the early part of 1887, and before the receiver had opened the store, the several parties to the litigation entered into an agreement to have the property sold, and the court made an order to that effect. The order contemplated a sale in bulk, and an effort was made to comply with the order, but the receiver refused the bid, for reasons growing out of the objections of Terry, as he insists, but

which Terry denies. Afterwards the receiver opened up a retail drug store, as before recited, and ran the same for four months, when the parties to the litigation again got together, and agreed to have the drugs stored in another building, as the expenses were eating up the stock. The court made an order accordingly. The record shows quite conclusively that during the time in which the receiver was running the drugstore and his physician's office at the same place, and while his son was acting as clerk, the sales only averaged about \$92 per month, while the expenses were nearly that amount, not counting the receiver's allowance, or his attorneys' fees, if they should be allowed. It was a pure question of addition and subtraction as to how long this could be kept up before all the assets would disappear, and the creditors be confronted with a bill for thus dispensing with the trust property. In 1889 the receiver made an *ex parte* application to have the property sold, as the rent and deterioration were consuming it. The order was made, but, before the sale was made, the complainant Terry found out that the order had been made, and, by proper objections, prevented it. Afterwards, in 1890, the receiver made his report, showing certain sales of the drugs, the expenditures, the money on hand, the outstanding debts, and asked an allowance for his services, and \$150 for the services of his attorney. Exceptions were filed to the report, and the whole matter referred to a master to take testimony. Upon the filing of the master's report, the chancellor refused to allow a number of items claimed; as \$180 for the son's services, \$18 for going to Albuquerque to consult the court, \$150 for lawyers' services, and various sums for rent, invoicing, etc.

After carefully considering the actions of all parties, as shown by the record, it is forcibly presented to us that this is a case in which the assets were deliberately squandered. It would seem as though the receiver thought they were placed in his hands for his pecuniary benefit. We are forced to believe that the parties to the litigation were acting all the time as if they must agree to some action to prevent the receiver from completely wasting the estate which was placed in his hands. The receiver is an officer of the court, and the property is in the custody of the court while under his control. His duty was to conserve such property, and, unless directly so authorized, or unless the character of the business was such as to imperatively require it, he had no authority to open a business, in which he could place his son, and run a physician's office in connection therewith. Beach, Rec. §§ 1, 249, 257. We fail to find any authority which justified him in running the store.

The receiver is, under certain circumstances, justified in retaining counsel to advise him, (Id. § 261;) but, if he does so, he must be prepared to show the necessity. In this case he has not done so. It is a cardinal rule, in regard to matters of receivership, that the receiver is at all times subject to the control of the court. He is but a hand of the court, and all of his

actions must pass under the watchful eye of the chancellor, and we think it a safe rule to presume that the action of the chancellor in passing upon the accounts of the receiver was correct, in the absence of a clear showing that it was either erroneous or illegal. In this case we think it is clear that his action was perfectly correct. The judgment of the lower court will be affirmed.

McFIE and LEE, JJ., concur.

(23 Or. 455)

PETRAIN et al. v. KIERNAN et al.

(Supreme Court of Oregon. Jan. 30, 1893.)

TRUSTS—PURCHASER FROM HOLDER OF LEGAL TITLE—NOTICE OF TRUST—POSSESSION BY CESTUI QUE TRUST—EVIDENCE.

1. Where a cestui que trust is in possession of real estate, the legal title to which is in another, a purchaser from the latter takes it charged with notice of the trust.

2. In a suit to enjoin an action at law for the recovery of a certain lot, and to establish a trust in favor of plaintiff, there was evidence that with money left by plaintiff's deceased mother in a bank, in the name of plaintiff's sister, their father purchased, in the latter's name, a certain lot; that this lot was exchanged by the father for four lots, to one of which he retained title; that he afterwards conveyed such lot to a contractor to pay for a dwelling on one of the other three, (the lot in dispute;) that plaintiff had occupied the lot ever since the house was erected, several years prior to bringing this suit; that it was the understanding of the father and plaintiff from the statements of the sister that plaintiff was to have the property in dispute as her share in the division of the money left by their mother; and that defendants obtained title since the occupancy by plaintiff by mesne conveyances from the sister. *Held*, that a decree for plaintiff was proper.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by Charles A. Petrain and Annie Petrain against John Kiernan and others, by way of cross bill, to enjoin defendants from prosecuting an action at law for the recovery of a certain lot, and to establish a trust. From a judgment and decree entered on the report of a referee in favor of plaintiffs, defendants appeal. Affirmed.

F. R. Strong, for appellants. A. F. Sears, Jr., for respondents.

LORD, C. J. This is a suit or cross bill to enjoin an action at law for the recovery of certain real property begun by defendants against the plaintiffs, and that the defendants be declared trustees of such real property, for the benefit of the plaintiff Annie Petrain, and that she be also declared the actual owner of the same, and entitled to the possession thereof. The facts out of which the controversy arises, as exhibited by the pleadings, briefly are these: On April 8, 1891, John A. O'Brien and Emily H. O'Brien sold and conveyed to Daniel Kern, by deed of warranty, for the consideration named therein, lot No. 6 in block No. 252 in the city of Portland, subject to a certain mortgage for \$1,400; that on the 18th day of April, 1891, Daniel A. Kern and Emma Kern sold and conveyed the same property, for the same consideration, to Mary Kiernan, for her

natural life, and the remainder in fee simple to Mary A. Kiernan, Frank Kiernan, Ellen Kiernan, and Louise Kiernan, subject to the same mortgage, both of which deeds were duly recorded; that at the time of making these conveyances the plaintiffs, who were husband and wife, occupied the premises, and, upon their refusal to vacate them, the defendants, Mary Kiernan et al., brought an action at law to recover the same, whereupon the plaintiffs, Charles A. Petrain and Annie Petrain, filed their cross bill against them, in which, *inter alia*, it was alleged that the plaintiffs were in the actual bona fide and exclusive possession of such real property; that it was purchased with money belonging to the plaintiff Annie Petrain, but that her father, William Showers, who superintended the transfer of said property at the time of the purchase, had the conveyance thereof made to Emma O'Brien, one of his daughters, and sister of the plaintiff Annie Petrain, although it was always understood between them that Annie Petrain was the owner of the same, and that Emma O'Brien held the title in trust for her; that, soon after such purchase, the plaintiffs erected a dwelling house upon the lot, paying for the same with their own money, and entered into the occupation of the premises, and ever since have remained in the actual, exclusive and notorious occupation of said house and lot, exercising therein every right of ownership; and that the defendants were notified and had full knowledge of the ownership, possession, and adverse claim of the plaintiffs, etc. The defendants denied that plaintiffs own any right, title, or estate in the property, and all other material allegations of the complaint; and set up that, desiring to purchase a home for themselves, they requested John Kiernan, who is the son of Mary Kiernan, to select and purchase a lot for them to be occupied as a home; that they had no knowledge or notice whatever of whom said real estate was purchased, or of any interest or claim therein or thereto by the plaintiffs; that the defendant John Kiernan purchased the said property, and received a deed therefor from Daniel Kern, who subsequently conveyed it, as already stated, to Mary Kiernan et al., and that they furnished the money or consideration for which said real property was purchased, and are the exclusive owners thereof; that it was purchased in open market; and that the record of deeds for the county showed the legal title of said property to be at the time of its purchase in Emily O'Brien, who deeded it to Daniel Kern, as before stated, etc. A reply was filed to the new matter, and the cause, being at issue, was referred to a referee, who, after hearing the testimony, reported his findings of fact and conclusions of law to the court, which were adverse to the defendants. The court, after argument, confirmed the report, except as to the accounting, and decreed that the plaintiff Annie Petrain is the owner of the property, and that the defendants hold the legal title in trust for her, etc.

It is admitted that the plaintiffs were in the actual possession of the property at

the time of the purchase, and several years preceding, and that it was of that character which places the purchaser upon inquiry. The effect of possession is to excite inquiry with reference to the title, and operates as effectually to notify a purchaser as any other circumstance the knowledge of which may be brought home to him. Mr. Pomeroy says: "If a purchaser or incumbrancer, dealing concerning property of which the record title appears to be complete and perfect, has information of extraneous facts, or matters in pais, sufficient to put him on inquiry respecting some unrecorded conveyance, mortgage, or incumbrance, or respecting some outstanding interest, claim, or right which is not the subject of record, and he omits to make proper inquiry, he will be charged with constructive notice of all the facts which he might have learned by means of a due and reasonable inquiry." And again: "Whenever a party, dealing as purchaser or incumbrancer with respect to a parcel of land, is informed or knows, or is in a condition which prevents him from denying that he knows, that the premises are in possession of a third person, other than the one with whom he is dealing as owner, he is thereby put upon an inquiry, and is charged with constructive notice of all the facts concerning the occupant's right, title, and interest which he might have ascertained by means of due inquiry." 2 Pom. Eq. Jur. §§ 613, 615. As it is conceded that the plaintiff Mrs. Petrain was in the actual possession of the property at the time of the sale, and that, by reason thereof, the defendants were put on inquiry, they must therefore stand charged with constructive notice of whatever right, title, or interest Mrs. Petrain had in the property which might have been ascertained by means of due and reasonable inquiry.

The question, then, for our determination is, what right, title, or interest had Mrs. Petrain in the property in controversy at the time of the sale of it. This question is entirely one of fact, and is to be ascertained wholly from the evidence. The defendants claim there is no evidence sufficiently clear and decisive to show that Mrs. Petrain had any right or interest in the property other than bare occupancy, and, if this is so, it is immaterial whether they prosecuted the inquiry which her possession made incumbent upon them. It is important, however, that the evidence should sustain their contention; for, if its examination should satisfactorily disclose that Mrs. Petrain had some equitable right or interest in the premises, they must suffer the consequences of their omission to make due inquiry, and stand charged with notice of her title. The evidence shows that Mrs. Petrain and Mrs. O'Brien are sisters, and the daughters of Mrs. Showers, now deceased, and that William Showers, an important witness, was her husband; that Mrs. Showers died without a will, but that, prior to her death, she was paralyzed, and unable to attend to her affairs; that there was the sum of \$3,000, which came from her, deposited in one of the banks of the city in the name of her daughter, now Mrs. O'Brien,

at the time of her death. Mrs. Petrain testifies that this money was deposited in the bank in her sister's name for convenience, owing to the inability of her mother to attend to any business; but Mrs. O'Brien testifies that it was a gift from her mother, and was deposited in the bank by her, and as her property. However this may be, there are many circumstances which lend countenance to Mrs. Petrain's version of the matter. With \$2,500 of this money William Showers bought a piece of property upon which there was some talk of building a house for Mrs. Petrain. In respect to this matter, William Showers testifies that "Mrs. O'Brien made the remark, and had at different times, that she wanted Mrs. Petrain to have as much as she did, and she wanted to divide with her, and that I told her that this was a small piece of ground to divide. 'Neither of you will have anything when you get it divided up.' She said it was very small. I said, 'I have a half block in the lower end of the town, Couch's addition, that I would give her for this lot, which was worth \$1,000 more than this, but that 'I would turn it over to you as you want it for that purpose.' She was rather anxious to do it; so we made the transfer, and at the same time—perhaps not at the same time, but after that—they got to talking about building the house, and they asked me how they would get at it. I told them they could leave one lot in my name, and I would"—Here, being interrupted as to what "the understanding was between all the parties"—Mrs. Petrain, Mrs. O'Brien, and yourself—"that the property was to be owned," he answered: "My understanding all the time was that the lot which was deeded to me was to go on Mrs. Petrain's; that, when she wanted to build her house there, to give her that lot; that is, turn that property over to her." He then proceeds, in substance, to testify that the understanding was that "one of these ladies should have two lots and the other two lots;" that "they agreed among themselves that they were to leave one lot in my name for to build a house upon the other lot;" that he traded that lot which he held to Alfreds, to build a house upon the other lot; and that it was built for Mrs. Petrain, who has occupied it ever since. Upon cross-examination, he said that Mrs. O'Brien "suggested the idea that she wanted to divide with Annie," (Mrs. Petrain,) and, when asked if "she simply said she wanted to make Annie a gift," he answered: "No; not a gift; that word wasn't used. She said she wanted to divide with Annie; that the money had been left in her name, and she wanted to divide with Annie." It is evident, in view of all the circumstances, that Mr. Showers understood from Mrs. O'Brien that she did not claim that the whole of the money belonged to her; that it was only deposited in the bank in her name; but that she recognized that her sister, Mrs. Petrain, was entitled to her share of it, and that the object of the exchange of property was to make an equal division between them. To aid Mrs. O'Brien in carrying out this purpose, he was willing to give them

property more valuable than he received. He would hardly have done this unless he understood the arrangement and the object to be accomplished by it; and, in pursuance of this arrangement, his evidence shows that the exchange of property was made; that one lot was left in his name, to be used in building a house on the other lot for Mrs. Petrain; that he deeded the lot to the contractor for building a house on the other lot; and that Mrs. Petrain immediately went into the possession of it, and has so remained in possession of it ever since, covering a period of several years. Evidently the division which Mrs. O'Brien desired to make was fully accomplished when the house was built on the lot, and Mrs. Petrain went into possession of it with her family. The reasons given why none of the property was put in the name of Mrs. Petrain was that her husband was not doing much at that time, and they were somewhat involved in debt. It was also intimated at the argument that the mortgage was given for improvements, the bulk of which was to cover street and sewer assessments. Mr. Showers's evidence is supported by Mrs. Petrain, and Mr. Petrain, and in many particulars by Mrs. O'Brien, though she claims that the property in question belonged to her. It is conceded by her counsel that she often expressed the desire to divide with her sister, or give her the property in question, but their contention is that she changed her mind, and concluded not to give it to her sister. Mrs. Petrain testifies that Mr. Kiernan, one of the defendants, was informed of her ownership of the property, and he stated that he had not purchased the same, but that Mr. Kern had purchased it; and she also says that Kern knew he had no right to buy it, as she had had a conversation with him several weeks prior to his purchase, giving him notice of such ownership. Mr. Petrain testifies that prior to the sale he met Mr. Kiernan, and informed him that the property belonged to Mrs. Petrain. Mr. Kern contradicts them, and states that he had purchased the property prior to this conversation. There was an allegation of fraud, but we have not deemed it necessary to refer to it, or lay any great stress on the fact that the property was sold for a sum considerably less than its value. In view of the evidence and all the surrounding circumstances, we are unable to see there was any error, and must affirm the decree.

(23 Or. 446)

## HILL v. STATE.

(Supreme Court of Oregon. Jan. 30, 1893.)

WRIT OF REVIEW TO JUSTICE'S COURT—CRIMINAL ACTION—AMOUNT OF FINE.

1. Hill's Code, § 2161, provides that an appeal cannot be taken in a criminal action in a justice's court where the fine is less than \$20. Section 585, as amended by Act 1889, provides that the writ of review shall be concurrent with the right of appeal, and "shall be allowed in all cases" where the inferior court, in the exercise of judicial functions, appears to have exercised them erroneously, or to have exercised its jurisdiction to the injury of some substantial right of plaintiff, and not otherwise. *Held*, that

the right to a writ of review was not limited to cases in which the concurrent right of appeal existed.

2. Where defendant in a criminal action is fined less than \$20 by a justice of the peace on an information which charges no offense, defendant is entitled to a writ of review, since there is an erroneous exercise of jurisdiction.

Appeal from circuit court, Polk county; Reuben P. Boise, Judge.

Homer Hill was tried and convicted in a justice's court on a complaint for trespass, and sued out of the circuit court a writ of review. From a judgment of the circuit court dismissing the writ for want of jurisdiction, defendant appeals. Reversed.

A. M. Hurley, for appellant. Geo. E. Chamberlain, Atty. Gen., for the State.

LORD, C. J. The defendant was tried and fined in a justice's court, upon a complaint for trespass, conceded to be fatally defective. A writ of review was sued out of the circuit court, which, upon motion, was dismissed for want of jurisdiction. The error alleged in this ruling is the ground of the appeal. The ruling was based on the assumption that there is no right to the writ to review the judgment of a justice's court in a criminal action when the fine is less than \$20, for the reason that the right to the writ is concurrent with the right of appeal. A correct determination of the question presented depends upon the construction to be given to section 585 of Hill's Code, as amended by the act of 1889. Prior to the amendment, the writ was allowed in all cases where there was no appeal, and where the inferior tribunal exercised its judicial functions erroneously, or exceeded its jurisdiction. But by the amendments, section 585 reads as follows: "The writ shall be concurrent with the right of appeal, and shall be allowed in all cases where the inferior court, officer, or tribunal, in the exercise of judicial functions, appear to have exercised their functions erroneously, or to have exercised it or his jurisdiction to the injury of some substantial right of the plaintiff, and not otherwise." It is manifest, as the section now stands, that where there is a right of appeal there is a right to a writ of review, as the latter is made concurrent with the former, so that in all cases, where the inferior tribunal exceeds its jurisdiction, or exercises its powers erroneously, and a right of appeal exists, there is the concurrent right of review. As an appeal could not be taken in a criminal action in a justice's court where the fine is less than \$20, (section 2161, Hill's Code,) the trial court held that, as the fine was less than \$20, the right to the writ was not authorized, and could not be granted; or in other words, as the right of review and the right of appeal were concurrent remedies, and there being no right of appeal in the case, because the fine was less than \$20, there could be no right of review. This result would undoubtedly be correct if the section as amended only made the right of review concurrent with the right of appeal; but it not only provides that the writ shall be concurrent with the right of appeal, but that it "shall be allowed in all cases" where the inferior

tribunal acts without jurisdiction, or exercises its powers erroneously, to the injury of the plaintiff. In the case at bar it is conceded that the court acted without jurisdiction, to the injury of the defendant, as no offense was charged against the defendant in the complaint; and consequently, while there was no right of appeal, there was an erroneous exercise of jurisdiction, which entitled the plaintiff to the writ, within the terms of the section. It results from these views that the trial court erred in dismissing the writ for want of jurisdiction, and that the judgment must be reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

(23 Or. 411)

#### STATE v. BAKER et al.

(Supreme Court of Oregon. Jan. 30, 1893.)

#### CRIMINAL LAW — EVIDENCE OF OTHER CRIMES — READING AFFIDAVIT FOR CONTINUANCE.

1. On a trial for stealing a mare, the prosecution introduced evidence that the mare described in the indictment was stolen from one N., at night; that on the same night another mare and other property was stolen from neighbors of N.; that defendants were afterwards seen traveling towards eastern Oregon with the mares in their possession; that on a direct route from there to Salem other property had been stolen; and that, when defendants were arrested at Salem, soon after, they had the mare described in the indictment, and the other stolen property, in their possession. *Held*, that it was admissible, since it was impracticable to trace defendants' connection with N.'s mare from the time it was stolen until their arrest without disclosing the commission of the other crimes.

2. On such trial defendants' affidavit for a continuance should not be read and commented on by the district attorney in his closing argument to the jury, or they be permitted to take it to their room while deliberating on their verdict, unless the affidavit is first admitted in evidence.

Appeal from circuit court, Linn county; Reuben P. Boise, Judge.

Charles Baker and F. S. Phelps were convicted of larceny, and appeal. Reversed.

J. K. Weatherford and W. S. McFadden, for appellants. Geo. E. Chamberlain, Atty. Gen., for the State.

BEAN, J. The defendants were indicted, tried, and convicted of the crime of larceny in stealing one mare, the property of S. N. Needham. On the trial the prosecution gave evidence tending to show that the animal described in the indictment was stolen from Needham's pasture, about four miles southeast of Albany, in Linn county, on the night of the 12th of October, 1891; and on the same night another animal was stolen from one Anderson, and a saddle and bridle from Albers, both neighbors of Needham. On the 15th of the same month the defendants were seen at the toll gate on the toll road leading from Lebanon to eastern Oregon, traveling east, with these two animals in their possession, but, having no money with which to pay toll, were compelled to and did return towards the Willamette valley, and two days later the animals were turned into a pasture near or adjacent to the toll road, where they remained until

the night of the 30th, when they were taken therefrom, without the knowledge of the owner of the pasture, and without the pasturage having been paid. On the same night the animals were taken from the pasture, and on a direct route from there to Salem, there was stolen from one Royce, at Lebanon, a spring back, a set of harness, and a buggy robe; and from one Baltimore, about 12 miles east of Albany, a pair of single lines, a buggy cushion, and two blankets. The defendants were arrested at Salem on the evening of the following day, having in their possession, as the evidence tended to show, the mare described in the indictment; also the Anderson mare, and the property stolen from Albers, Baltimore and Royce. The defendants objected and excepted to the admission of any evidence tending to show that any of the property claimed to have been found in defendants' possession at the time of their arrest, except that described in the indictment, was stolen property, on the ground that such evidence tended to prove other and different crimes from the one alleged in the indictment. The general rule is unquestioned that evidence of a distinct crime unconnected with that laid in the indictment cannot be given in evidence against the prisoner. Such evidence tends to mislead the jury, creates a prejudice against the prisoner, and requires him to answer a charge for the defense of which he is not supposed to have made preparation. And while, as Lord Campbell says, "It would be evidence to prove that the prisoner is a very bad man, and likely to commit such an offense," (*Reg. v. Oddy*, 5 Cox Crim. Cas. 210,) under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer. And yet, while this is the general rule, the exceptions to it are so numerous that it has been said "It is difficult to determine which is the most extensive,—the doctrine or the acknowledgment exceptions." *Trogdon v. Com.*, 31 Grat. 870. In cases where the prosecution relies on circumstantial evidence for a conviction, and the evidence offered forms logically one link in the chain of circumstances, tending to show that he who committed the one crime must have committed the other, or is so intermingled and connected with the crime charged as to form one entire transaction, it is admissible, although it may tend to prove distinct felonies. The purpose of such proof, however, should be explained in the charge of the court. *Whart. Crim. Ev.* § 31; *Brown v. Com.*, 76 Pa. St. 319; *Mason v. State*, 42 Ala. 532; *Long v. State*, 11 Tex. App. 381; *Jones v. State*, 14 Tex. App. 85; *House v. State*, 16 Tex. App. 25; *Heath v. Com.*, 1 Rob. (Va.) 735. "It frequently happens," says *Brockenbrough, J.*, "that, as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of these circumstances involves the proof of

other acts, either criminal or apparently innocent. In such cases it is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence that they cannot be departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent." *Walker v. Com.*, 1 Leigh, 574. Now, in the case at bar, the evidence tending to show that the property found in defendants' possession at the time of their arrest was stolen property was so intermingled and connected with the evidence tending to show that defendants committed the crime charged as to form one entire transaction, and to identify the actor by a connection which logically tends to show that he who committed the one must have committed the other. Without such evidence, the chain of circumstances against the defendants would not have been complete, and the state could not have made out its case in its entirety. To exclude the evidence relating to the larcenies for which the prisoners were not on trial, would have broken the chain formed of links more or less perfect connecting them with the one which constituted the subject-matter of the trial, for it was impracticable for the prosecution to trace the animal of Needham and defendants' connection therewith from the time it was stolen until their arrest without disclosing the commission of the other crimes, and hence we are of the opinion that no error was committed in admitting such testimony.

This cause was continued from the March to the June term of the court below on an affidavit made by the defendant Baker, in order to procure the attendance of five certain witnesses in behalf of the defendants. In this affidavit he represented that he could have these witnesses duly served, and their attendance in the trial at the succeeding term, and could prove by one of them that the mare in question was stolen on the 8th day of October; and by two others that neither of the defendants were in Linn county at that time, but both were in Portland from the 3d to the 15th of October, and therefore could not have stolen the mare described in the indictment. Neither of the witnesses referred to in the affidavit were called or testified at the trial, and the district attorney, in his closing argument to the jury, was permitted by the court, against the objection and exception of the defendants, to read the affidavit for a continuance, and comment thereon, and the jury were allowed and permitted to take this affidavit to their room while deliberating on their verdict, without the same having been offered or admitted in evidence, to which defendants also excepted. It seems to us this was clearly error. The affidavit was no part of the



evidence in the case, and should not have been referred to or used as such, or permitted to go to the jury, without first having been regularly admitted, if competent, as evidence, and defendants given an opportunity to make any explanation they may have desired as to the absence of these witnesses, or of any other statement in the affidavit. Hill's Code, §§ 204, 1356; McLeod v. Railway Co., 71 Iowa, 138, 32 N. W. Rep. 246; Alger v. Thompson, 1 Allen, 453; State v. Lantz, 23 Kan. 728. But counsel for the state insists that the record does not disclose that the comments of the district attorney or the consideration of the affidavit by the jury produced any improper influence on the jury, or prejudiced the defendants in any way. A copy of the affidavit is in the record, from which it is apparent that an inference may have been, and perhaps was, drawn unfavorable to the defendants, because of their failure or neglect to secure the attendance and testimony of the witnesses named therein, and hence we cannot say the error was a harmless one. The cause must therefore be reversed, and a new trial ordered.

(13 Mont. 70)

#### HOSKINS v. WHITE et al.

(Supreme Court of Montana. Jan. 30, 1893.)

ACTION FOR WRONGFUL ATTACHMENT—PARTIES—AMENDMENT OF PLEADINGS—INFANCY OF PLAINTIFF—EMANCIPATION.

1. In an action for wrongful attachment, the principals in the attachment bond are proper parties, though the bond was signed only by the sureties.

2. Code Civil Proc. § 9, provides that, "when an infant is a party, he shall appear by guardian, who may be appointed by the court in which the action is prosecuted," etc. Section 116 provides for amending pleadings by inserting the name of a party. *Held* that, where the complaint shows plaintiff to be a minor, it is not subject to demurrer because of plaintiff's want of capacity to sue, but a guardian should be appointed, and his name inserted.

3. The emancipation of a minor by his parents does not render him capable of suing without a guardian.

Appeal from district court, Park county; Frank Henry, Judge.

Action by Clarence F. Hoskins against F. A. White and others. Defendants had judgment, and plaintiff appeals. Reversed.

E. P. Cadwell, for appellant. Word, Smith & Word, for respondents.

HARWOOD, J. Plaintiff brought this action to recover damages for the alleged wrongful attachment of his goods in a former suit prosecuted against him by respondents F. A. White and J. L. Platt, Jr. To obtain the attachment in the former suit, White and Platt procured and filed the undertaking required by statute, executed by D. O'Shea and William O'Connor, as sureties, but such undertaking was not signed by the attaching creditors, White and Platt. In that suit it appears Hoskins prevailed, and the attachment on his goods was dissolved. Now he prosecutes this action against White and Platt, and their sureties, O'Shea and

O'Connor, all joined as defendants herein, to recover damage for said wrongful attachment.

The first question presented on this appeal is whether the district court erred in sustaining the demurrer interposed by defendants White and Platt, on the ground that they were improperly joined with O'Shea and O'Connor as defendants in this action. The tendency of the Montana decisions appears to be to the effect that the sureties in such an undertaking, and the principal on whose behalf it was executed, may be proceeded against in the same action for the damage sustained. McIntosh v. Hurst, 6 Mont. 287, 12 Pac. Rep. 647; Pierse v. Miles, 5 Mont. 549, 6 Pac. Rep. 347. See, also, Jennings v. Jonier, 1 Cold. 645. It ought to be so held on principle. The subject of the action is the damage committed by the wrongful attachment. The principal and sureties are all liable for one and the same thing, to the amount for which the undertaking provides. If A, in writing, guarantees that B, will pay his own grocery bill, would it be contended that A. and B. could not be sued together in the same action for that debt? Although B. did not sign the guaranty to pay his own debt, both are liable for the bill, —one as primary debtor, and the other as surety or guarantor. Here, in the action at bar, White and Platt and O'Shea and O'Connor are all liable for one and the same damage, committed by the wrongful attachment, —White and Platt primarily, and O'Shea and O'Connor as sureties. The latter have guaranteed, as evidenced by the written undertaking, that White and Platt will pay such damages. In Pinney v. Hershfield, 1 Mont. 367, (an action to recover damages for wrongful attachment,) it was held that "a demand on the principal debtor, and a failure on his part to do that which he is bound to do, are requisite to found any claim against the guarantor. 2 Pars. Cont. 29." In the case at bar the condition of the undertaking is that the undersigned sureties, "in consideration of the premises and of the issuing of said attachment, do jointly and severally undertake, in the sum of \$1,270, and promise, to the effect that if the defendant recover judgment in said action, or if the attachment be dismissed, the plaintiff will pay all costs that may be awarded to the said defendant, and all damages he may sustain by reason of the attachment." Section 16 of the Code of Civil Procedure provides that "any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff." Is not the principal who caused the attachment, and whom the sureties guaranteed would pay the damage, a party in interest, adverse to the plaintiff? He is bound to reimburse the sureties for whatever they are compelled to pay on his behalf in the premises. The statute provides that where "one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendants are sureties of such principal debtor or debtors, the court may order the judgment so to state; and, upon the issuance of an execution upon such judgment, it shall di-

rect the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements, of the principal debtor or debtors, or, if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety." Comp. St. div. 5, § 1293.

Respondents' counsel contend that there can be no implied parties to the obligation sued on. True enough, but the obligation sued on should not be confounded with the evidence by which defendants became parties to that obligation. The obligation, resting upon all these defendants alike, is to compensate for the damage resulting from said wrongful attachment. That damage is the cause of action. The obligation to answer therefor rests upon several parties. White and Platt are primarily bound therefor, because of the obligation imposed by law to answer for a damage directly caused by their unlawful act in suing out the attachment. They are the principal parties, charged therewith by operation of law, because they are the direct authors of the damaging act. But the law, to make sure provision that the damage wrought by the misuse of its process will be compensated, requires that others shall take upon themselves the same obligation, namely, to answer for the damage caused by the wrongful procurement and use of the attachment writ. O'Shea and O'Connor, by their written engagement, took upon themselves the same obligation, and upon this evidence the law lays upon them a judgment for said damage, of course not exceeding the amount of their undertaking; and, if judgment was sought against the sureties for any greater amount than their undertaking, it would be limited thereto. It is eminently proper that all parties bound for this damage should be proceeded against in the same action (*Jennings v. Jouler*, supra,) if they can be found and served with summons, because plaintiff has a right to judgment against them without prosecuting two actions, although plaintiff, at his option, may proceed against all or part of those liable to answer for the same obligation, (section 20, Code Civil Proc., and section 1296, div. 5, Comp. St.); and to deny plaintiff's right to have such judgment as he may recover entered against White and Platt, as well as O'Shea and O'Connor, in this action, by sustaining the demurrer on behalf of White and Platt, on the alleged ground of misjoinder, was error.

The second proposition to be considered arose in this wise: After demurrer on behalf of White and Platt was sustained, the action was proceeded with against said sureties, O'Shea and O'Connor. It appears that upon the trial the evidence disclosed the fact that the plaintiff was a minor, then of the age of 19 years. Thereupon evidence was also introduced to show "that plaintiff was emancipated, and given his time, by his father and mother, in the month of March, 1889, and was released by them from any responsibility to them as their son, by reason of his being under the age of twenty-one

years;" that during all times stated in the complaint, "and at the present time, plaintiff was acting and doing business as a man of the age of twenty-one years; that neither of his parents have or claim any right, title, or interest in his property or his earnings, as his parents, since, or at any time since, the month of March, 1889." At the close of the introduction of evidence on behalf of plaintiff, he asked leave of court to amend his complaint "to conform to the evidence introduced;" and, having obtained such leave, filed his complaint as amended, setting forth the facts above stated in relation to his minority and alleged emancipation by his parents. Defendants O'Shea and O'Connor thereupon interposed a demurrer to said last amended complaint, on the ground "that it appears upon the face of said amended complaint that plaintiff has no legal capacity to sue or maintain this action." This demurrer was sustained by the court, and that order is assigned as error.

Where an amendment is properly allowed to cover some variance, and make the allegations conform to the proof, as contemplated in sections 112 and 113 of the Code of Civil Procedure, we do not think it would be subject to demurrer. The amendment as to the minority and the emancipation of plaintiff, however, had no reference to matter originally introduced in the case by any allegations, so there was no variance "between the allegations in the pleadings and the proofs" to be cured by such an amendment. But the feature disclosed by the proof on which the amendment was introduced related to plaintiff's capacity to prosecute his action alone. The only question in relation to that point is whether the court ruled correctly in entertaining and sustaining a demurrer on the disclosure by the proof that plaintiff was a minor, in court with an action, without a guardian, and the insertion of that fact in the complaint by amendment. Where no suit has been granted on such disclosure, it has been held error on appeal, and that it is only ground for abatement. *Drago v. Moso*, 10 Amer. Dec. 592; *Moke v. Fellman*, 67 Amer. Dec. 656; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 552; 1 Chit. Pl. 464. It is also directly held that an amendment is allowable by the insertion of the name of the guardian or prochein ami. *Young v. Young* and *Blood v. Harrington*, supra. The terms of our statute seem to contemplate that a minor may come into court with his action; and, it appearing that he is a minor, the court will, on suggestion of that fact, clothe him with capacity to prosecute his action by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian, (sections 9, 10, 116, Code Civil Proc.) and from the authorities supra this would appear to be the proper practice in such a case as this. The language of sections 9 and 10 of our Code of Civil Procedure is as follows: "When an infant is a party he shall appear by guardian, who may be appointed by the court in which the ac-

tion was prosecuted, or by a judge thereof, or a probate judge." Section 9. "The guardian shall be appointed as follows: First. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or, if under that age, upon the application of a relative or friend of the infant. Second. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon application of any other party to the action, or of a relative or friend to the infant." Section 10. Section 116 of the Code of Civil Procedure provides for amendment by inserting the name of a party. *Young v. Young and Blood v. Harrington*, supra. While the question of emancipation would be a relevant inquiry if the controversy related to the right of plaintiff to property or earnings, as between himself and parents or others, we do not think emancipation by the parent would clothe the minor with capacity to sue, especially in view of our statute in that regard. In *Person v. Chase*, 37 Vt. 647, the court (per Kellogg, J.) said: "The emancipation of the infant by his father did not enlarge or affect his capacity to make a contract, and its only effect was to release him from his father's control, and to give him a right, as against his father, to his earnings. *Taunton v. Plymouth*, 15 Mass. 203; *Vent v. Osgood*, 19 Pick. 572." The judgment must be reversed, and the cause remanded, with direction to overrule demurrers, and allow plaintiff to proceed according to the views herein set forth; and it will be so ordered. Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

(4 Ariz. 1)

PORTER v. HUGHES, Auditor.

(Supreme Court of Arizona. Jan. 26, 1893.)

VETO POWER—APPROPRIATION BILL—DISAPPROVAL OF SINGLE ITEM.

Act Cong. July 19, 1876, (Organic Act of the Territory of Arizona,) conferring on the governor the veto power, provides (1) that, if he approve a bill, he shall sign it; (2) if he do not approve it, he shall return it, together with his objection, to the house in which it originated; and (3) that he may retain a bill until it becomes a law by the expiration of 10 days while the legislature is in session. *Held*, that where the governor signed the appropriation bill of 1887, (Rev. St. 1887, Appendix,) and added after his signature that the same is approved except as to subdivision 17 of section 1, and returned the bill to the house in which it originated, which sustained the veto, the bill as a whole was approved, since the governor had no power to veto a single item of an appropriation bill.

Petition by W. W. Porter for a peremptory writ of mandamus to be directed to Thomas Hughes, auditor of the territory, to compel him to issue to plaintiff a warrant on the treasurer of the territory for the sum of \$1,200 in payment of his salary as district judge. Writ granted.

W. W. Porter and W. H. Barnes, for plaintiff. William Herring, Atty. Gen., for defendant.

SLOAN, J. The plaintiff, W. W. Porter, applies to this court for a peremptory writ of mandamus to be directed to the defendant, Thomas Hughes, auditor of the territory, requiring him, as said auditor, to issue a warrant on the treasurer of the territory, in favor of the plaintiff, for the sum of \$1,200. This sum plaintiff claims to be due him for salary as one of the district judges of the territory for the years 1887 and 1888, under an act of the legislative assembly entitled "An act making appropriations for the current and contingent expenses of the civil government of the territory of Arizona for the two years ending on the 31st day of December, 1888, and for other purposes." This act is published in the appendix to the Revised Statutes of 1887. Among other items of appropriation enumerated in said act is one numbered 17 therein, which reads as follows: "For territorial salaries of the district judges, as provided by law, to be expended under the direction of the territorial auditor, to be paid in quarterly installments, \$7,200.00; one half to be expended in each of the years 1887 and 1888." Following the act as published in the appendix to the Revised Statutes, appears the following note: "Approved March 10, 1887, (except as to item No. 17, which was vetoed by the governor, and veto sustained by the body in which the act originated.)" The case was heard upon an agreed statement of facts signed by the plaintiff and by Clark Churchill, attorney general, for the defendant. The facts, as agreed to, are as follows: First, that the petitioner was one of the associate judges of the supreme court for the years 1887 and 1888, and district judge; second, that the petitioner received from the territory during that time \$50 per month, and no more; third, that the governor signed the appropriation bill passed in the year 1887, as it appears in the appendix to the Revised Statutes; fourth, that in signing it he added that the same was approved, except as to subdivision 17 of section 1, which applies to appropriation for salaries of judges of the district court; fifth, that the auditor has refused a warrant for the amount claimed in the petition, or any other amount.

Under the pleadings and the facts as agreed to, there is but one question in this action for our decision. Did item 17 of said appropriation bill become a law at the time the governor affixed his signature to the bill, notwithstanding his attempt to except such item from his approval of the bill as a whole? What is commonly known as the "veto power" was conferred upon the governor of the territory by the act of congress of July 19, 1876. By the terms of this act the governor, in exercising the power, is limited to one of the following courses of action: First, if he approve a bill, he shall sign it; second, if he shall not approve it, he shall return it, together with his objection, to the house in which it originated; third, he may retain a bill presented to him for his approval until it becomes a law by the

expiration of 10 days after said presentation, provided the assembly shall not have adjourned sine die during the 10 days, in which case it shall not become a law. By the organic act referred to, whatever the governor may do in the premises has reference to a bill in its entirety, and not to any of its parts. A bill is approved as a whole, or disapproved as a whole. The signature of the governor affixed to a bill is the evidence of his approval. In the case of the act in question, it being admitted that the governor affixed his signature to the same, this action of the governor, being in full compliance with the organic act, must be taken, therefore, as an approval of the whole bill as passed by the assembly, and as presented to him for his official action. It becomes immaterial what the governor may have done thereafter in the way of adding his objections to any part of said bill, for he had already exercised the full measure of his power in respect thereto. We hold, therefore, said item numbered 17 in said appropriation bill, making appropriations for the salaries of the judges of the district courts, to be valid, and that the plaintiff is entitled to the relief prayed for in his complaint. The writ will issue.

SLOAN, KIBBEY, and WELLS, JJ., concur.

(4 Ariz. 4)

#### CHARTZ v. TERRITORY.

(Supreme Court of Arizona. Jan. 28, 1893.)

MURDER—SPECIAL GRAND JURY—TRIAL JUROR—CHALLENGE—QUALIFICATIONS—EXPRESSION OF OPINION—DISCOVERY AFTER TRIAL—NEW TRIAL—HARMLESS ERROR.

1. Rev. St. par. 2184, relating to the drawing of jurors, provides that the judge "may, in his discretion," order drawn a grand jury from the regular list. Paragraph 2196 provides that where jurors are not drawn and summoned in the manner hereinbefore prescribed to attend any district court, or a sufficient number fail to appear, such court "may, in its discretion," order a sufficient number to be drawn forthwith, and summoned to attend said court. *Held*, that a grand jury, summoned on an open venire from the body of the county, after the discharge of the regular grand jury drawn from the regular list, was legal, and an indictment returned by such jury was valid.

2. Where, in a criminal case, it does not appear that defendant exhausted his peremptory challenges, and was compelled to exercise one challenge on an objectionable juror, as to whom a challenge had been erroneously overruled, the error is harmless.

3. In a murder case, a juror on his voir dire stated that he had formed a qualified opinion of defendant's guilt or innocence, but it was not such as would control him in arriving at a verdict, and that he had no prejudice against defendant. After the trial it was shown that prior to the trial the juror had said to the affiant that "there are so many married men whose wives are loose characters, and single men will get around them and get the best of them, and their husbands will make gun-play," and he didn't believe in it; and that, from what he had heard and read about the case, he was satisfied that defendant was guilty. It appeared that defendant did not learn these facts until after the trial. *Held*, that the juror was disqualified, and the showing sufficient to entitle defendant to a new trial.

4. Under Pen. Code, § 1759, providing that

a new trial may be granted "where any good cause exists other than those in this section enumerated," a new trial may be granted on the ground of the disqualification of a trial juror, though such ground is not specified in the section as one of the causes for granting such new trial.

Appeal from district court, Yavapai county; Edmund W. Wells, Judge.

John Chartz was convicted of murder, and appeals. Reversed.

Herdon & Hawkins, James H. Wright, and W. M. Lang, for appellant. Robert Brown, Dist. Atty., and Baldwin & Johnson, for the Territory.

SLOAN, J. The defendant was indicted, tried, and convicted in the district court of Yavapai for the crime of murder. His motion for a new trial having been overruled, defendant appeals to this court. Numerous errors are assigned, the more important of which we will consider.

A challenge was interposed by the defendant to the panel of grand jurors which found the indictment upon which the defendant was tried, upon the ground that the jurors were not drawn from the regular jury list on file with the clerk, but were summoned by an order of the court, on application of the district attorney, from the body of the county. The record discloses that at the opening of the court a grand jury was in attendance, which, by the order of the judge duly made and entered, had been drawn and summoned as provided by paragraphs 2184 and 2185, inclusive, of the Revised Statutes. Said grand jury, after serving as such, was discharged by order of the court. Subsequently, and during the term, another grand jury was summoned on an open venire, impaneled, and charged by the court. The indictment on which the defendant was tried and convicted was found by this special grand jury. The contention of the defendant is that the latter grand jury was illegal, for the reason that the court had no power to order a grand jury otherwise than is provided in said paragraph 2184 of the Revised Statutes. We are unable to interpret the statutes as limiting the power of the court in calling a grand jury to the one mode provided in said paragraph. At common law, a court possesses the power of directing the summoning of a grand jury upon an open venire whenever, in the discretion of the court, it be found necessary. The statutes ought not, therefore, unless the legislative intention appears otherwise, to be so construed as to deprive the court of this power. *Mackey v. People*, 2 Colo. 13; *Levy v. Wilson*, 69 Cal. 105, 10 Pac. Rep. 272; *Wilson v. State*, 32 Tex. 112; *White v. People*, 81 Ill. 333; *State v. Marsh*, 13 Kan. 596. Paragraph 2184 provides that the judge "may, in his discretion, order drawn a grand jury from the regular list." Again, paragraph 2196 provides that "where jurors are not drawn and summoned in the manner hereinbefore prescribed to attend any district court, or a sufficient number fail to appear, such court may, in its discretion, order a sufficient number to be drawn forthwith and

summoned to attend said court; or it may, by an order entered on its minutes, direct the sheriff of the county forthwith to summon as many good and lawful men of his county to serve as grand or trial jurors as the case may require." We think it plain from the foregoing provision of the statute that it is left to the discretion of the court either to order a grand jury to be drawn from the regular grand jury list or to be summoned upon an open venire from the body of the county, as was done by the court in this case.

As to the challenge interposed by the defendant to the juror Bowder, we think, from the answers of the witness, given upon his examination on voir dire, that the challenge was well taken, and that he should have been excluded from the jury. The record, however, discloses that the juror was excused at some time before the jury was sworn, but whether by the defendant or the territory does not appear. Before we could find this ruling of the court to have been reversible error the record should disclose that the defendant exhausted his peremptory challenges upon the panel, and that he was compelled to exercise one of them upon the objectionable jurors, otherwise it must be presumed that the defendant was not injured by the ruling of the court.

One of the grounds upon which the defendant relied in his motion for a new trial was the disqualification of one of the jurors, which did not appear until after the trial. In support of his motion defendant produced and read the affidavit of one Charles Bennett to the following effect: That some time prior to the trial of the defendant he, Bennett, had a conversation with the juror Martin Crouse in relation to the charge against the defendant, to wit, the killing of George Johnson, in Prescott, in October, 1890. That in said conversation the said Crouse used the following language in substance, to wit: "That there are so many married men whose wives are loose characters, and single men will get around them, and get the best of them, and their husbands will make gun-play," and that he did not believe in it; and from what he had heard and read about the case he was satisfied that John Chartz was guilty of having done said killing. The defendant also made affidavit that the facts stated by Bennett were unknown to him, and were not communicated to him by said Bennett, or by any one, prior to the trial, nor until after said affidavit was made by said Bennett. No other affidavit was filed, or other proof taken, as to the proof of the fact alleged by Bennett. The records disclose that the juror Crouse was examined upon voir dire, and gave the following answers to the questions put to him: "Question. Do you know defendant? Answer. Yes, sir. Q. Did you know George Johnson? A. Yes, sir. Q. Have you heard the facts, or what purports to be the facts, of this case? A. No, sir. Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant? A. I have formed an opinion. Q. From what you have heard? A. Yes, sir. Q. What kind of an opinion is that?

Is it qualified or unqualified? A. Qualified. Q. Is it a fixed opinion? A. No, sir. Q. Is it such an opinion as would influence or control you in making up a verdict in this case? A. No, sir. Q. Could you render your verdict in accordance with the law and the evidence without any regard to that opinion you have formed? A. Yes, sir. Q. You live on Cherry creek? A. Turkey creek. Q. You were not in town at the time that this occurrence took place? A. No, sir. Q. Were you at any of the trials? A. No, sir. Q. Have you any bias or prejudice against this defendant? A. No, sir. Q. Do you know of any reason that would bias or prejudice you or disqualify you in any way for this trial of this cause? A. No, sir." If the facts as stated by Bennett be true, (and it is to be observed that they were not denied,) then Crouse was wholly unfit to serve as a juror in this case; and, had this appeared upon his examination, the court no doubt would have excluded him from the jury. As seen by his answer, nothing in his examination appeared which indicated the true state of the juror's mind, and which was calculated to lead either the court or the defendant to believe that he was other than an impartial juror. There can be no question but that the law favors the granting a new trial when it clearly appears that one of the jurors was disqualified by reason of bias or prejudice, and the fact of his disqualification was not known until after the trial. Indeed, the authorities are unanimous that it is the duty of the court to grant a new trial in such a case, especially when the juror may have been examined as to his qualification, and failed to disclose the fact which disqualified him. *People v. Plummer*, 9 Cal. 310; *State v. Burnside*, 37 Mo. 347; *Busick v. State*, 19 Ohio, 198. Our statutes, while not especially mentioning the disqualification of a trial juror as a ground for a new trial, is broad enough to include a case of this character. Section 1759, Pen. Code, after enumerating the various causes for which a new trial may be granted, provides, in addition, for a case "where any good cause exists other than those in this section enumerated." We are strongly of the opinion that the existence of the state of mind on the part of the juror Crouse entertained prior to the trial towards the defendant, and his unqualified expression of his belief in the defendant's guilt, as disclosed by the affidavit of Bennett, is good cause, within the meaning of the statute. Quoting the language of the court in *People v. Plummer*, cited above: "One of the dearest rights guaranteed by our free constitution is that of trial by jury,—the right which every citizen has to demand that all offenses charged against him shall be submitted to a tribunal composed of honest and unprejudiced men, who will do equal and exact justice between the government and the accused, and, in order to do this, scan impartially every fact disclosed by the evidence." This guaranty, being regarded as of inestimable value, would be entirely worthless if persons are to be admitted in the jury box who are influenced by passion, ill

will, or prejudice, or who, by reason of having formed an opinion as to the merits of the case, will be incapable of judging with impartiality. We hold, therefore, the showing sufficient to have entitled the defendant upon this ground alone to a new trial.

We deem it unnecessary to consider such of the assignment of errors as relate to the conduct of the trial, the admission of evidence, and the giving or refusing of instructions, for the reason that, if any error was committed, it will doubtless be corrected by the learned judge who tries the case at the next trial of the cause. Judgment reversed, and the cause remanded for a new trial.

GOODING, C. J., and KIBBEY, J., concur.

(3 Cal. Unrep. 771)

**SAN BERNARDINO NAT. BANK v. ANDRESON et al.** (No. 19,002.)

(Supreme Court of California. Feb. 8, 1893.)

NOTES SIGNED AS OFFICERS OF CORPORATION—PERSONAL LIABILITY—ACTION—PLEADING.

1. Where defendants sign a note with their individual names, adding thereto "president" and "secretary," respectively, in which note they promise to pay plaintiff bank a certain amount, and there is nothing on the face of the note to indicate a principal back of them, they are personally bound, and cannot set up a defense that they executed the note as officers of a corporation, that the loan which the note was given to secure was made to such corporation, and that the intention of both parties was that it should bind the corporation, and not defendants.

2. The fact that a resolution of the corporation, with the corporate seal thereon, authorizing defendants to make the loan and execute the note in the name of, and as the note of, the corporation, was attached to the note, was without effect, as such attachment did not make the resolution a part of the note.

3. By failing to verify their answer, where a copy of the note was set out in the complaint, defendants admitted, not only the genuineness, but also the due execution, of the note.

4. A cross-complaint setting up the facts in regard to the execution of the note, and praying that the corporation be made defendant, and that the note be reformed so as to make it the note of the corporation, could not be sustained; for, if a proceeding for reformation could be maintained by plaintiff, it could not by defendants, whose only interest in reforming the contract was to relieve themselves from liability thereon, and to show it was not their contract, but that of the corporation, which they cannot be allowed to do.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

(Not to be published in California Reports.)

Action by the San Bernardino National Bank against John Andreson and J. A. Crawford to recover on a promissory note. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Rowell and E. E. Rowell, for appellants. Curtis, Oster & Curtis, for respondent.

TEMPLE, C. Defendants appeal from the judgment and from an order denying a new trial. The complaint is in the ordinary form, upon a promissory note,

which is set out, and is as follows: "San Bernardino, Cal., July 16, 1888. \$2,000. On August 16, 1888, at three o'clock P. M. of that day, (no grace,) for value received, in gold coin of the government of the United States, we promise to pay to the order of San Bernardino National Bank, of San Bernardino, two thousand dollars, with interest from date at the rate of one per cent. per month until paid, payable monthly; both principal and interest payable in like gold coin. John Andreson, President. J. A. Crawford, Secretary." The defendants answered, setting up two separate defenses. The first avers that the note was without consideration. The finding to the effect that there was sufficient consideration is fully sustained by the evidence.

The second defense was stricken out on motion of plaintiff, and this ruling is assigned as error. In this defense it is averred that the defendants, at the time of the execution of the note, were, and for a long time prior thereto had been, respectively, the president and secretary of the San Bernardino Fruit Company, a corporation, of which facts plaintiff had full knowledge; that, prior to the making of the note, plaintiff had agreed with the corporation to loan to it \$2,000; that the money was so loaned and delivered to the corporation, and the note in suit was given to secure it, and for no other purpose; that plaintiff and its officers well knew the facts, and that the note was intended as and for the note of the corporation, and not as the individual note of the defendants, and that it was intended to bind the corporation and not the defendants, and was received by plaintiff as the note of the corporation; that the corporation had duly authorized, by resolution, the making of the loan, and these defendants to execute the note in the name of, and as the note of, the corporation, as plaintiff well knew, and that "there was attached to said note, as part thereof, a copy of said resolution, and that plaintiff received said note with such copy of said resolution attached thereto, which said resolution showed that defendants had been authorized by said company to make said note as the corporate note of said company, and not otherwise; and defendants further allege that said note bore the impress of the corporate seal of said company, and was so received by plaintiff, which corporate seal disclosed the corporate name and capacity of said San Bernardino Fruit Company."

The case of *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. Rep. 320, would seem to be on all fours with this. It was as manifest in that case as here that the loan was to the corporation; that the defendant did not intend to bind himself personally, but did intend to bind the corporation; and that all these facts were known to the payee. There, as here, the action was between the original parties to the note. In that case, also, as in this, there was nothing on the face of the note to indicate that there was a principal back of the defendant. The signature was the same as here, and it was held that the defendant was personally bound, and could not show a

contract differing from that which he had executed. The fact that the resolution of the company, with the corporate seal, was attached to the note, did not make that document a part of the note. Besides, by failing to verify their answer, since a copy of the note was set out in the complaint, the defendants admitted, not only the genuineness, but the due execution, of it. Section 447, Code Civil Proc.; *Burnett v. Stearns*, 33 Cal. 473.

There was also a cross-complaint, to which plaintiff demurred. The demurrer was sustained, and defendants did not amend. It set up pretty much the same facts which were stated in the second defense, as above recited; prayed that the San Bernardino Fruit Company be brought in, and made a defendant, and that the note be reformed so as to make it the note of the San Bernardino Fruit Company. This is on the theory that the execution of the note by the defendants as their individual note was a mistake. Conceding that such a proceeding could be maintained by plaintiff, it is plain that it cannot be done by these defendants. This would not be a reformation of an instrument which had been executed by the corporation. It would be to compel the corporation to execute a contract to which it is now not a party, on the ground that the corporation intended to execute it, and plaintiff received the note believing that it had done so. The only interest defendants have in reforming the contract is to be relieved from it themselves; that is, to have it show that it was not executed by them, was not their contract, but was the contract of the corporation. No authority for such a proceeding is cited, and I know of none. This would allow them to do indirectly that which it is held in *Hobson v. Hassett* they cannot do, to wit, to show by parol that they are not liable on the note as parties thereto.

The other alleged errors are disposed of by this conclusion. I advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 254)

MILLS v. LA VERNE LAND CO. et al.  
(No. 19,037.)

(Supreme Court of California. Feb. 1, 1893.)

MECHANIC'S LIEN—ASSIGNMENT OF RIGHT.

Code Civil Proc. § 1183, provides that "all persons, and laborers of every class, performing labor upon, or furnishing materials to be used in the construction" of a building, may have a lien thereon for such services or materials; and section 1187 provides that such persons shall themselves file a claim for record, stating the character of the labor or materials which they themselves furnished for the building. *Held*, that the right to assert such a lien is a personal right, for the laborer's own protection, and cannot be assigned.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by J. S. Mills against the La Verne Land Company and others to enforce an alleged mechanic's lien. From a judgment for defendant, entered on an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. G. Rossiter, for appellant. W. S. Wright, for respondent.

McFARLAND, J. This action was brought to enforce an asserted lien under the mechanics' lien law. The court below sustained a general demurrer to the complaint, and judgment was rendered for defendants. Plaintiff appeals. The averments of the complaint are, in brief, that the La Verne Company, defendant, was indebted to Meek & Benton in the sum of \$700 for labor and materials furnished by them for and in the construction of a building on land of said company; that said Meek & Benton, by a written instrument, assigned the indebtedness to plaintiff, and also assigned, if the thing could be done, all their "right of lien" against said building and land; and that afterwards, and within the statutory time, plaintiff, as assignee, formally filed in the recorder's office a notice of claim of lien against said property for the money due said Meek & Benton for the said labor and materials which they had furnished as aforesaid. And we think that the demurrer was properly sustained. The question presented is not whether a lien for work or materials can be assigned, or would pass under an assignment of the debt secured, but whether a laborer or material man can assign his mere right to assert and create a lien,—by complying with statutory provisions, clothe the assignee with the power to create the lien for himself,—and we are satisfied that he cannot. This question has never been heretofore determined in this state. In *Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. Rep. 890, referred to by appellant, the only question involved was whether in an action brought by the assignee of "a lien," there should be an averment that the assignment was in writing. The case in our Reports which comes the nearest to touching the principle involved is *Godeffroy v. Caldwell*, 2 Cal. 489, where it was held that "one who advances money as a loan, though expressly for the payment of materials and labor devoted to the structure of a building, can have no claim to the benefit of the mechanic's lien law. The decisions on the point in other states are no doubt somewhat conflicting, although the conflict may be explained to some extent by the different provisions of various statutes; some showing more clearly than others that only a personal right was intended to be conferred. But the weight of authority is clearly to the point that the said right cannot be assigned. In *Rollin v. Cross*, 45 N. Y. 771, the court said: "The lien under statutes of this character is, in general, a personal right given to the mechanic, material man, and laborer for his own protection, and the right to create it cannot be assigned or transferred to another. The statute under which the plaintiff claims does not authorize a lien to



be filed by the assignee of a debt for work performed under a building contract." In *Fitzgerald v. Trustees*, Mich. N. P. 243, note, the court holds that "the lien is personal to the contractor or subcontractor, and is assignable." In *Caldwell v. Lawrence*, 10 Wis. 331, it is held that "the lien of the mechanic, lumberman, etc., for work and materials, is a personal right, and cannot be transferred or assigned so as to enable the assignee to prosecute the claim in his own name, and avail himself of the benefit of the lien given against the building." In Iowa, the courts having decided that such right was not assignable, the legislature enacted that "the mechanics' liens are assignable, and shall follow the assignment of the debt. But the court, in *Brown v. Smith*, 55 Iowa, 31, 7 N. W. Rep. 401, held that the statute referred "to the lien perfected by the filing of a claim therefor, and not to the inchoate right to a lien," and, further, as follows: "The mere performance of the requisite labor is not sufficient. His right to a lien cannot be said to exist until he has complied with the statute. When he does so, it will be conceded, for the purposes of this case, that he has a lien which may be assigned, and that an assignment of the account carries with it the lien. The language of the statute is that the lien is assignable, and not the mere right, which follows the performance of labor, and which depends for its existence on the volition of the subcontractor." In the late case of *Dexter, Horton & Co. v. Sparkman*, 2 Wash. 168, 25 Pac. Rep. 1070, the court, speaking of a claim filed by an assignee, said: "This he could not do. The lien given by statute is personal to the laborer. It does not run with the chose in action." There are many other decisions in various states to the same point, but the foregoing citations are sufficient to show the general drift of judicial opinion on the subject. In *Phillips on Mechanics' Liens* decisions on both sides of the question are referred to, and we think that the true rule is expressed in the following paragraph from section 54 of said work: "Where, throughout the whole act, the right of lien, and the right to enforce it, appear to be confined to the contractor, laborer, or persons furnishing materials, and where in no instance is the assignee of such claim recognized in connection with the creation or enforcing of the lien, there can be no construction given to such a statute other than as conferring a mere personal right on the contractor laborer, etc., and not on his assignee." And, under our statutory provisions on the subject, no right of lien is given to an assignee, or to any person other than those mentioned in section 1183 of the Code of Civil Procedure; and the persons there mentioned include only "mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers, of every class, performing labor upon, or furnishing materials to be used in the construction," etc.

Appellant invokes the rule that the assignment of a debt carries with it the lien by which it is secured. But, in the first place, that rule is not of universal applica-

tion. It does not apply, for instance, to vendors' liens, or to the many liens which accrue to various kinds of bailees. And, in the second place, at the time of the assignment of the debt to plaintiff in the case at bar, there was no lien securing it in existence. The assignors had merely a personal right to create a lien by complying with the statute. But the statute nowhere confers such right upon an assignee. It would be impossible for an assignee to comply with the statute; for the Code, § 1187, provides that the contractor or other person mentioned in section 1183 must himself file a claim for record, stating the character of the labor or materials which he himself furnished for the building. And this shows clearly that the legislature was providing a lien only for a contractor, laborer, or material man. It is urged that it would be a construction beneficial to the laborer to hold that he could sell or raise money upon his mere personal, inchoate right to procure a lien; but the legislature may not have thought that it would be advantageous to a laborer (for whose benefit the law was originally passed) to allow him the privilege of frittering away his wages at ruinous discount to money lenders and speculators. At all events, a court can neither make nor amend a statute. The law must be enforced as we find it enacted.

Judgment affirmed.

We concur: De HAVEN, J.; HARRISON, J.

(97 Cal. 253)

GARIBALDI v. GARR. (No. 19,079.)

(Supreme Court of California. Jan. 31, 1893.)

#### DISMISSAL OF APPEAL—EFFECT.

Where a former appeal has been dismissed for failure to file a transcript within the prescribed time, and the order of dismissal did not expressly provide that it was made without prejudice to the right to take another appeal, such dismissal was, under Code Civil Proc. § 955, in effect an affirmance of the judgment.

Department 2. Appeal from superior court, Los Angeles county; W. L. Pierce, Judge.

Action by one Garr against one Garibaldi. From the judgment, defendant appeals. Appeal dismissed.

A. B. Hotchkiss, for appellant. James McLachan, Dist. Atty., for respondent.

DE HAVEN, J. This is an appeal by the plaintiff from a judgment in favor of the defendant. This is the second appeal plaintiff has taken from the same judgment. The former appeal was dismissed by this court on April 12, 1892, for failure to file the transcript within the time prescribed by rule No. 2; and the order of dismissal did not expressly provide that it was made without prejudice to the right of defendant to take another appeal. This being so, the dismissal of the former appeal was in its effect an affirmance of the judgment. Section 955, Code Civil Proc. The order submitting this case for decision upon the merits will be set aside, and

the motion of respondent to dismiss the appeal granted. Appeal dismissed.

We concur: BEATTY, C. J.; McFARLAND, J.

(3 Cal. Unrep. 717)

ROUSSETT v. REAY et al. (No. 14,368.)  
(Supreme Court of California. Feb. 3, 1893.)

On petition for a rehearing. Denied.  
For former report, see 31 Pac. Rep. 900.

PER CURIAM. Ordered: The petition for a rehearing herein is denied, but the judgment of the department is hereby modified so as to read as follows: "The order appealed from is reversed, and the cause remanded for further proceedings."

(97 Cal. 259)

HAYNE v. HERMANN. (No. 19,099.)  
(Supreme Court of California. Feb. 4, 1893.)  
CONSTRUCTIVE TRUSTS — CONVEYANCE PROCURED  
BY UNDUE INFLUENCE—EVIDENCE.

1. Civil Code 1886, § 158, provides that transactions between husband and wife shall be governed by the general rules which control the actions of persons occupying confidential relations with each other. Section 1575 defines undue influence as the use by one in whom a confidence is reposed by another of such confidence to obtain an unfair advantage over him. *Held*, that a conveyance of land from the husband to the wife, with an oral agreement that it was to be held in trust by her, would be presumed to have been obtained by undue influence whenever the trust should be violated. *Brison v. Brison*, 17 Pac. Rep. 689, 75 Cal. 525, and 27 Pac. Rep. 186, 90 Cal. 323, followed.

2. The declarations of the trustee as to the character in which she held the property are admissible in an action against her by the cestui que trust, to corroborate the latter's witnesses.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Martha H. Hayne against Angelica Hermann to enforce a trust in property, and for a conveyance thereof. Judgment for plaintiff. Defendant appeals. Affirmed.

L. S. Seaman and Louis Luckel, for appellant. A. G. Hinckley and Guthrie & Guthrie, for respondent.

HARRISON, J. Action to obtain a judgment that certain property is held by the defendant in trust for the plaintiff, and for a conveyance thereof. E. C. Hermann, the father of the plaintiff, and the husband of the defendant, in his lifetime caused a certain tract of land in Los Angeles county, of which he was the owner, to be conveyed to the defendant, and also certain moneys and other personal property to be paid and delivered to her. The court finds "that said money was paid to defendant, and note and deed delivered to her, upon the express understanding and agreement that she would hold the same in trust for said E. C. Hermann during his life, and for plaintiff and herself in equal proportions after his death, and said defendant accepted said money, note, and deed to hold in trust, as aforesaid, and without hav-

ing paid any consideration therefor." This finding is fully sustained by the evidence. Von der Kühlen, who held the property in trust for Hermann, and who made the conveyance to the defendant, testified: "On the direction of Mr. Hermann, she was to hold it in trust for Mr. Hermann while he lived, and then for plaintiff and defendant equally. That is what was said at the making of the arrangement, that she should keep it in that way, and Mrs. Hermann consented." The plaintiff herself testified: "My father directed the deed to be made to my mother by Mr. Von der Kühlen. It was said by my father and mother at the time as to making the deed that way that it was to be made in my mother's name for my father in trust, and after a while to be divided up in equal proportions. My mother agreed to that. Mother and father said that it was to be held in trust for him, and after his death it was to be divided in equal parts between me and my mother. \* \* \* My father said to me and my mother that she was to take the deed in her name in trust for the family. \* \* \* My father said the property was to be for us both, and said that it was to be conveyed to my mother in trust. I heard him use the word 'trust.' Other testimony to the same effect was given by these witnesses, and the finding of the court in conformity therewith must be sustained.

It is objected, however, on the part of the appellant, that a trust in lands cannot be created by parol, and that, inasmuch as there was no note or memorandum in writing expressing the trust, no trust was created, and that she is entitled to retain the property as her own estate. Constructive trusts, however, or such as arise by operation of law, are expressly excepted from the requirement that a trust can only be created by an instrument in writing, (Civil Code, § 852;) and whenever one person acquires from another the title to real estate by a fraud, actual or constructive, practiced upon that other, a constructive trust is created, which a court of equity will fasten upon the title in his hands. There are certain relations in which such confidence and trust exists between the parties that any dealings between them wherein one obtains an advantage from the other raises the presumption of fraud, and casts upon him the burden of executing the trust which the law imposes upon him. One of these relations is that of husband and wife, and their transactions with each other respecting property are declared by Civil Code, § 158, to be "subject to the general rules which control the action of persons occupying confidential relations with each other, as defined by the title on 'Trusts.'" Fraud also is presumed whenever one party gains an advantage to himself through any undue influence exercised by him over the party from whom the advantage is derived; and section 1575 of the Civil Code declares that undue influence consists "in the use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him."

In *Brison v. Brison*, 90 Cal. 336, 27 Pac. Rep. 186, it is said: "The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue whenever this confidence is subsequently violated or abused." The complaint in the present case alleges, and it is not denied in the answer, "that the said E. C. Hermann reposed great faith and confidence in his wife, the defendant herein, and, believing that she would faithfully execute the trust created in her, directed Von der Kuhlen" to make the conveyance and deliver the property; and the court finds that the deed was made and the property delivered to her upon the aforesaid trusts, "on account of the confidence that said E. C. Hermann reposed in his said wife, the defendant, that she would take and hold the said property in trust for him during his lifetime, and in trust for the plaintiff and defendant thereafter." The facts in this case are not distinguishable in principle from those presented in the cases of *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689; *Id.*, 90 Cal. 323, 27 Pac. Rep. 186; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. Rep. 599; and *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. Rep. 521; and upon the authority of those cases the action of the court below must be sustained.

The claim that the conveyance was made to hinder, delay, and defraud the creditors of Hermann is not sustained by the record. No issue of that character was presented by the pleadings, and there was no proof of any debts against Hermann that it could have defeated. See *Alaniz v. Casenave*, 91 Cal. 47, 27 Pac. Rep. 521.

The court did not err in receiving the testimony of certain witnesses concerning the declarations by the defendant of the character in which she held the property. This testimony was not competent for the purpose of proving the trust, but was admissible in corroboration of the testimony of the plaintiff's witnesses. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(97 Cal. 263)

**GIANT POWDER CO. v. SAN DIEGO FLUME CO.** (No. 19,018.)

(Supreme Court of California. Feb. 7, 1893.)

**MECHANICS' LIENS—MATERIAL MEN.**

Code Civil Proc. § 1183, provides that, where a building contract is void because it is not recorded, the materials furnished shall be deemed to have been furnished at the personal instance of the owner, and the material man shall have a lien for the value thereof. *Held* that, where materials used in the construction of a flume were furnished before the contract for the construction thereof was recorded, the material man is entitled to a lien against the flume for the value thereof.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the Giant Powder Company against the San Diego Flume Company and another to enforce a material man's lien. From a judgment for plaintiff, defendant flume company appeals. Affirmed.

Shaw & Holland, for appellant. J. F. Cowdery and Oscar Trippet, for respondent.

**PER CURIAM.** This appeal is from a judgment rendered in the court below in favor of the plaintiff. The action was brought to obtain judgment against a contractor, by a material man, for materials furnished in the construction of certain works to be used to support the flume of one of the defendants and appellant, and against the flume company, to subject the structure in which the materials were used to the statutory lien of the plaintiff. The case has been twice before, on appeal, in the supreme court. 78 Cal. 193, 20 Pac. Rep. 419; 88 Cal. 20, 25 Pac. Rep. 976. The point made for the reversal of the judgment, on the judgment roll alone, now, is that the judgment is not supported by the findings; the argument appearing to be that it was held on the last appeal, which is the law of the case, that there was no valid contract existing between one John-drew, the contractor, and the flume company, until the contract was filed for record on the 6th of June, 1887, and that as a consequence there was no lien in favor of the material man against the structure, which had been accepted by the flume company from the contractor, for materials furnished before the filing of the contract, although the materials were used in the construction of the accepted work or structure. The opinion filed at that time is not, in our judgment, susceptible of any such construction. The pivotal point in that case was whether or not the structure was completed, by acceptance on the part of the flume company, when abandoned to it by the contractor; and thereby depended the determination of the question as to whether or not the filing of the notice of lien of the plaintiff was premature, under section 1187 of the Code of Civil Procedure, as amended March 15, 1887. That part of the section which makes the acceptance of the structure or improvement conclusive evidence of completion has reference to cases where there is a valid contract between contractor and owner of the structure, improvement, or building; and the language of the opinion, which it is erroneously claimed by appellant declares that the payment of the value of the materials furnished before the contract was filed for record cannot be enforced as a lien, must be read with reference to the precise matter which was being discussed in the opinion,—that is, whether, admitting a valid contract to have existed by virtue of the filing thereof for record on the 6th of June, 1887, the notice of lien was premature, or not. There was no need to determine whether a lien could be enforced for materials furnished, when no valid contract existed; that is, before the contract

was filed for record. And the decision only goes to the extent, on that head, of determining that a lien for those materials furnished, "by virtue of the contract," i. e. the filing of the contract, could be enforced if the notice was properly filed for record. And, after that matter is disposed of, there follow expressions, merely, which lead up to the consideration of the real point in the case which was to be decided; and then the writer of the opinion proceeds to dispose of the mooted question in favor of the proposition that the notice was a proper one, because the date of the acceptance of the structure, under the circumstances of the case, was the date of its completion, and the plaintiff, having filed a notice of lien within 30 days after such completion, did not proceed prematurely.

But, as to the enforcement of the lien for the value of the materials furnished before there was any valid contract between the contractor and the owner, the findings must be construed with reference to the case as it is now presented, uncontrolled by anything said in the former opinion in 88 Cal. 20, 25 Pac. Rep. 976. The findings now show a completion of the structure by its acceptance, and that a notice of lien was filed in due and proper time; and they also show that the materials and the value thereof, claimed by the plaintiff to have been furnished to the contractor, and used in the completion of the structure, were so furnished and used. It was said by the supreme court in *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. Rep. 509, where a contract was void because not filed for record, and where a material man sought to enforce his lien: "The extent of the material man's recovery is not measured by the terms of the contract. On the contrary, the statute provides in express terms that where the contract is not recorded the material man shall have a lien for the value thereof. In case the contract is not recorded the statute, and not the contract, measures the extent of his recovery." The statute alluded to above (section 1183, Code Civil Proc.) provides, where an attempted contract is void for nonfiling for record, that "in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The judgment appealed from is affirmed.

(97 Cal. 266)

McDONALD v. DREW et al. (No. 14,916.)  
(Supreme Court of California. Feb. 8, 1893.)

ADVERSE POSSESSION—PAYMENT OF TAXES.

Defendant owned lot 7, adjacent to plaintiff's lot 4, and for more than five years the division fence existed so as to place a narrow strip of lot 4 on defendant's side. *Held*, where during all the time plaintiff's property was assessed to him as "lot 4," and he paid all taxes on such assessment, and defendant's property was assessed to defendant simply as "lot 7," without mention of the fence, and he paid all taxes on such assessments, that defendant's possession of the strip of lot 4 on his side of the fence was not adverse; Code Civil Proc.

§ 325, providing that adverse possession cannot be established without payment by claimant of all taxes on the land in question during the alleged adverse possession. *Webb v. Clark*, 2 Pac. Rep. 747, 65 Cal. 56; *Ross v. Evans*, 4 Pac. Rep. 443, 65 Cal. 439; *McNoble v. Justiniano*, 11 Pac. Rep. 742, 70 Cal. 395,—followed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Mary A. McDonald against H. L. Drew and others. Judgment for defendant. Plaintiff appeals. Reversed.

Rolle & Freeman and Paris & Fox, for appellant. Goodcell & Leonard, for respondents.

VANCLIEF, C. Action in the nature of ejectment to recover possession of a narrow strip of land, about 18 inches wide and 100 feet in length, being part of lot No. 4, block 20, of the city of San Bernardino, the east side of which strip adjoins the east boundary line of said lot. The defendant pleaded title by prescription through an adverse possession during a period of five years. The court found the facts as follows: "For the purpose of this action the following are stipulated as facts: (1) That at the time of the commencement of this action the plaintiff was, and for twenty years next prior thereto she and her grantors had been, the owners of lot 4, in block 20, of the city of San Bernardino, the land described in the complaint, except in so far as such ownership may have been impaired by adverse possession of the defendants and their grantors as to the strip of land described and claimed in the answer; (2) that during all of said times the plaintiff and her grantors have been in the actual and exclusive possession of said lot four as owners, except in so far as such possession may have been ousted or withheld by the defendants and their grantors as to said strip; (3) that J. W. Satterwhite was such owner and possessor at the time of the construction of the fence mentioned in the answer, and referred to as a division fence, and the plaintiff's title is derived through him; (4) that during all of said times the defendants and their grantors were the owners of the west half of lot 7, in said block 20, lying east of and adjoining said lot four; (5) that, at the time of the construction of the fence mentioned, Byron Waters was the owner of the said west half of lot 7, and in the actual possession thereof, and the defendants' title is derived through him, but this does not admit any possession, or right of possession, as to said strip of land; (6) that during all of said times the said lot 4 has been assessed to the plaintiff and her grantors, described simply as lot 4, in said block 20, without mention of said fence or reference thereto, and the plaintiff and her grantors have paid all taxes upon such assessments; (7) that during all said times the said west one half of lot 7 has been assessed to the defendants and their grantors simply as to the west one half of lot 7 of said block, without mention of said fence or reference thereto, and the defendants and their grantors have paid all

taxes upon such assessments. Rolfe & Freeman and Paris & Fox, for Plaintiff. Goodcell & Leonard, Attorneys for Defendants. And in addition to said stipulation the court finds the following facts from the evidence: (8) That the east line of lot 4, block 20, of the city of San Bernardino, referred to in the findings and the aforesaid stipulation, commences at a point on Court street, in said city, 22 inches west from the southwest corner of the brick building on the north side of said Court street known as the 'Courier Office,' running thence due north about 130 feet to the northeast corner of said lot 4, and the same line constitutes the west line of lot 7 of said block. (9) That ever since the spring of the year 1881, being more than five years before the commencement of this action, the defendants and their grantors and predecessors in interest were in the actual, uninterrupted, open, and exclusive possession of the strip of land along and upon the east side of said lot 4 referred to in the complaint, said strip being about one foot and a half wide at the south end, and extending north 100 feet from the north side of said Court street, and gradually narrowing northward a few inches, to wit, to about one foot in width at the north end of said 100 feet; such possession being under claim as of right, and adverse to plaintiff and her predecessors in interest and all the world, except as such adverse possession may be affected by the nonpayment of taxes by the defendants or their predecessors, on any of said lot 4, as shown by the aforesaid stipulation." Upon the facts found the court adjudged that the defendants were the owners of the land in question. Plaintiff brings this appeal from the judgment upon the judgment roll, and contends that upon the findings of fact the judgment should have been in her favor; and so it appears to me.

The controversy is reduced to the question of law, as to whether the possession of the defendants could have been adverse without payment by them of all taxes which had been levied and assessed upon the land in question during the five-years period of the alleged adverse possession, as required by section 325 of the Code of Civil Procedure. This question has been answered negatively by this court in several cases.—Webb v. Clark, 65 Cal. 56, 2 Pac. Rep. 747; Ross v. Evans, 65 Cal. 439, 4 Pac. Rep. 443; McNoble v. Justiniano, 70 Cal. 395, 11 Pac. Rep. 742; see, also, Allen v. Reed, 51 Cal. 362,—and, as all the arguments urged here by counsel for respondent seem to have been considered and answered in the cases cited, it is unnecessary to reconsider them on this appeal. I think the judgment should be reversed, and the lower court be directed to render judgment on the findings of fact in favor of the plaintiff.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the lower court is directed to render judgment on the findings of fact in favor of plaintiff.

McFARLAND, J., (concurring.) I concur in the judgment because it does not appear in the findings either that the coterminal owners had agreed upon the fence as the line between lots 4 and 7, or that respondents had claimed it as such line. All that appears is that respondents, in addition to the west half of lot 7, also held by adverse possession a part of lot 4 as such; and, as they had paid no taxes on the part of lot 4 in their adverse possession, they could not invoke the statute of limitations. But I do not think that the provision of section 325 of the Code of Civil Procedure, about the payment of taxes, applies to a small strip along a boundary line, when the adverse holder claims that the general description in his title deed carries him to the line to which he had held adversely by actual possession, and he has paid the taxes on the land thus described in his deed.

(97 Cal. 258)

**TIBBETTS et al. v. RIVERSIDE BANKING CO. et al. (No. 19,154.)**

(Supreme Court of California. Feb. 4, 1893.)

**BILL OF EXCEPTIONS — SETTLEMENT — MANDAMUS.**

Code Civil Proc. § 652, provides that, "if a judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same." *Held*, that where a judge refuses to settle a statement of the case and bill of exceptions, prepared by an appellant, and served on the opposite party, or any bill of exceptions according to the facts of the case, the proceedings must be by mandamus to compel the judge to settle the bill or statement.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by L. C. Tibbetts and another against the Riverside Banking Company and another. On a motion for a new trial the judge of the superior court refused to sign the statement of the case and bill of exceptions offered by plaintiffs, or any other bill of exceptions. Plaintiffs petition the supreme court to settle the statement and bill. Petition denied.

L. C. Tibbetts and A. B. Paris, for petitioners. H. C. Hibbard, for respondents.

PER CURIAM. The plaintiffs have filed a petition here purporting to be made under section 652 of the Code of Civil Procedure. Petitioners say that they prepared a statement of the case and bill of exceptions, served it on counsel for defendants, and presented it to the judge of the superior court for settlement; "that said judge refused to sign said bill of exceptions, and still refuses to sign said bill, or any bill, according to the facts of the case." Therefore they pray "that this court may sign and seal said bill of exceptions, as provided for under section 652, Code Civil Proc." <sup>1</sup> Petitioners have mis-

<sup>1</sup>Code Civil Proc. § 652, provides that, "if a judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same."

taken the provisions of said section. That section only provides that where, upon the settlement of a bill of exceptions or statement, the judge refuses to allow an exception, the party may petition this court to prove said exception; but in this case petitioners merely show that they presented quite a lengthy statement on motion for new trial to the judge of the superior court, and that he refused to sign it, or any other bill of exceptions. In such case the judge can be compelled by mandamus to settle the bill or statement; but this court has not the power, nor is it its duty, to take the place of the judge of the lower court, and perform the duty of settling the statement.

The petition is denied.

(3 Colo. App. 122)

**KELLEY et al. v. ANDREW.**

(Court of Appeals of Colorado. Jan. 23, 1893.)

FORCIBLE ENTRY—EVIDENCE—PLEADING—QUESTION OF TITLE.

1. Gen. St. par. 2674, provides that public lands are open to the occupancy of all citizens of the state. Paragraph 2681 provides that any person holding title to land by occupancy may bring forcible entry and detainer for injuries to the possession. Paragraph 2683 provides that the holder must mark out the boundaries of his claim before he will be entitled to maintain such action. *Held*, in forcible entry and detainer to recover possession of public lands, a deed from the original settler, through whom plaintiff claimed, though not admissible as evidence of title in plaintiff, was admissible to show the staking and holding of such land in compliance with the statute, since plaintiff must show such facts, in addition to peaceable occupancy, to entitle him to maintain such action.

2. Even though it were error to permit the introduction of such deeds in evidence, a judgment for plaintiff should not be reversed where there is nothing in the record to show that there was no sufficient proof on which the recovery could have been based, aside from the deeds.

3. A defendant cannot set up title in himself, and thereby defeat plaintiff's right to recover on the basis of peaceable occupancy.

4. Where the complaint alleges that plaintiff was peaceably in possession by virtue of certain deeds, an answer setting up that defendants were peaceably in possession by virtue of conveyances to them does not raise any issue as to title so as to deprive the justice of jurisdiction.

Error to Pueblo county court.

Action of forcible entry and detainer by Joseph Andrew against J. J. Kelley and George Roesch to recover possession of certain land. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Kerr & Dennin, for plaintiffs in error.  
C. J. Hart, for defendant in error.

**BISSELL, J.** As nearly as may be gathered from the very meagre and insufficient record on which error is prosecuted in this case, early in the eighties J. J. Kelley settled on a part of section 31, which was then and at the commencement of the suit a part of the public domain of the United States. The land was adjacent to the city of Pueblo, and on what would have been a continuation of Santa Fe avenue if

that street ran through the section. He built some sort of a structure on a part of his premises, and apparently occupied a strip of land some 16 feet wide alongside of the building. Subsequently, and in 1889, the property passed into the possession of Joseph Andrew, the present defendant in error. For the purposes of rendering the present controversy intelligible, it may be stated that before either of the parties to the present suit acquired any interest in the property, J. J. Kelley, the husband of Eldora, deeded his interest in this settlement to Eldora Kelley, his wife, who subsequently, by a bill of sale, attempted to transfer her interest to Joseph Andrew, the defendant in error. To confirm the transfer, J. J. Kelley likewise deeded his interest to Andrew by deed of quitclaim. It would seem that doubts arose as to the character of this transfer, because subsequently Kelley attempted to convey the identical property to his codefendant in error, George Roesch. These facts are gathered from the pleadings in the case and from the deeds which were introduced in evidence. Some of them are very manifest from the abstract, and others are probably legitimate deductions from its contents. In 1890, Andrew brought forcible entry and detainer against J. J. Kelley and Roesch to recover the possession of the premises. The action was aptly brought, on a sufficient complaint, and the plaintiff must have recovered if it had been supported by competent and sufficient testimony. There was a paragraph in the complaint which stated the plaintiff's entry by virtue of the transfers from the Kelleys to him. The defendants answered, denying the peaceable entry, the possession, and all the other material allegations of the complaint, and concluded with a clause averring their entry by virtue of conveyances from the original occupant. During the progress of the trial the bill of sale from Eldora Kelley to Andrew, and the deed whereby J. J. Kelley's interest became vested, if at all, in Eldora, and therefore in Andrew, were offered in evidence. The defendants objected, but on what grounds the record does not disclose. They were received, and are found in the abstract. When the defense was put in, the deeds by which it was contended that the Eldora Kelley title became vested in Roesch and J. J. Kelley were likewise offered and received. Whatever other evidence may have been introduced on the trial is entirely omitted.

The plaintiffs in error rely solely on the contention that to admit the deed from Kelley to Andrew and the bill of sale from Eldora Kelley to Andrew, was error which will necessitate the reversal of the judgment entered for the plaintiff. This cannot be conceded. Many of the arguments advanced in support of the position are undoubtedly based upon well-established principles of law. A plaintiff in an action of forcible entry and detainer cannot recover upon the constructive possession which would be evidenced by the conveyance of the fee title from its original source, and ordinarily evidence of that title may not be produced, either for the

purposes of establishing the possession or establishing the character of an entry. *Hoag v. Pierce*, 28 Cal. 187; *Kepley v. Luke*, 106 Ill. 395; *Jenkins v. Tynon*, 1 Colo. App. 133, 27 Pac. Rep. 893. Actions of forcible entry and detainer must generally be controlled and tried according to these very well established rules. But the present case furnishes an exception to the doctrine, and the exception, like all others of that description in this particular procedure, is based on the necessity of the case, and the provisions of the statute. Under the law of Colorado the public domain is open to the occupancy and use of its citizens until such time as the government may see fit to part with its title. It is needless to determine what are the steps prerequisite to securing that right of occupancy which may be defended in the courts by all the possessory actions which may be resorted to by the holder of a fee title. It is enough to say that such title may be acquired, and that it may be defended, according to the terms of the act, by various actions, among which is that of forcible entry and detainer. The statute, however, puts a limitation upon the right to maintain these possessory suits by providing as a condition precedent that the boundaries of the claim shall be marked and staked by the holder. Under these circumstances, it is undoubtedly incumbent on the plaintiff in the action to show the segregation of the land of which he claims to be in the peaceable possession, and on which he asserts the defendant entered, and that it was segregated in the fashion pointed out by the statute, to entitle the holder to protect his occupancy. These rights of occupancy which have been acquired under the statute are by it made the subject of transfer and sale. Since these things are true, it must be competent for the plaintiff, who seeks in an action of forcible entry and detainer to recover the possession of a part of the public domain which he occupies, to establish the act of the original settler, and his compliance with the statute. As the occupant is by the statute required neither to cultivate nor to be actually present on the entire holding of the amount of land to which he may be entitled, to wit, 160 acres, it becomes necessary for him to prove the staking by the settler, and the filing of the declaration provided for by the act, to show the fact of his possession. As a necessary consequence, he may produce the transfer from the occupant to him. In this wise, and being offered solely for this purpose, neither the declaration nor the deed are to be taken as evidences of title, or as giving to the plaintiff the right to recover on the strength of his constructive possession, but they are simply evidences of the staking and the holding which the statute says he must prove, in addition to the peaceable occupancy, to entitle him to maintain the action. It has been held in California, in one of the cases cited, that the plaintiff may introduce his muniments of title in a case of this description for the purpose of showing the boundaries of the property which he claims, where, in a sense, there could

be no actual occupancy of the entire tract. The peculiar character of the possession which a person may acquire of the government domain necessitates this exception to the general rule concerning the introduction of evidence of the right to occupy. Aside from these considerations, the case should not be reversed because these paper evidences of title were introduced, without something in the record to show that there was no sufficient proof on which the recovery could have been based aside from the deeds. It is quite possible that the plaintiff may have made ample proof of his possession, and clearly established his right to recover, without the deeds at all. Under such circumstances, unless it was very clear that the defendants were prejudiced by the production of the deeds, the case would not be reversed, and the error would be held immaterial and harmless.

The plaintiffs in error likewise contend that the action should never have been tried by the justice before whom it was brought because the question of title was raised by the pleadings. There are two answers to this contention. It is incompetent for the defendant to set up title in himself, and thereby defeat the plaintiff's right to recover on the basis of his peaceable occupancy. *Altree v. Moore*, 1 Or. 350; *Drake v. Newton*, 23 N. J. Law, 111; *Bliss v. Bange*, 6 Conn. 78. In the next place, there was no issue as to title raised by the pleadings. The plaintiff simply averred that he was peaceably in possession by virtue of certain deeds of conveyance. The defendant inserted an allegation to the effect that he was in peaceable possession, likewise by virtue of sundry conveyances. It cannot be said, however, upon a careful consideration of the complaint and answer, that there was any plea of title which would divest the justice of jurisdiction to hear and decide the action. When the case came to the county court on appeal it did not err in refusing to dismiss the suit because the justice had been deprived of the right to try the case by such a plea. There are no errors apparent in the record, and, so far as can be seen, the case was properly tried, and the right judgment entered, and it will be affirmed.

(3 Colo. App. 49)

#### MARKELL v. MATTHEWS et al.<sup>1</sup>

(Court of Appeals of Colorado. May 9, 1892.)

##### RATIFICATION OF PARTNER'S ACTS — ACCEPTANCE OF BENEFITS — EVIDENCE.

1. Defendant and partner owned a mine, which they worked together till defendant, a nonresident, wired his partner to stop work on his account. The partner continued work on his own account, and incurred debts, including that in suit, in doing development and other work beneficial to the property. Defendant afterwards agreed to pay these debts if his partner would withdraw a certain claim against him and settle their interests in the mine as he proposed, defendant to share in the benefit of the work done by his partner as above. *Held*, that as the debt in suit was incurred in and about work beneficial to the mine, and as de-

<sup>1</sup>Affirmed on rehearing February 15, 1893.



fendant had accepted the benefit thereof, he had so far ratified his partner's act as to be liable therefor.

2. A note executed two months after the settlement between defendant and his partner, and signed only by the latter as "manager" and individually, was not admissible to show defendant's liability for the claim in suit.

3. In such case, where defendant's liability was fully sustained by other evidence, the admission of such evidence would not be ground for reversal.

4. The debt to plaintiffs was for advances on ore, and there was evidence that defendant's partner agreed to pay 2 per cent. per month for such advances. Held that, in the absence of evidence to show that defendant authorized such agreement, he was not bound thereby.

Appeal from district court, Pitkin county; Thomas A. Rucker, Judge.

Action by James F. Matthews and William J. Chamberlain against Clinton Markell to recover money advanced. Judgment for plaintiffs, and defendant appeals. Affirmed.

Chas. I. Thomson and Oscar Reuter, for appellants. F. G. Salmon, Wilson & Stinson, and F. S. Rice, for appellees.

BISSELL, J. There are no legal propositions of much difficulty to be settled and applied in determining the rights of the parties to this controversy. The application of the well-settled principle of adoption or ratification will determine the whole matter. It is only needful to state the controversy to make it apparent that this principle must control the judgment. In 1886 the appellant, Markell, and W. J. H. Miller were joint owners of the "La Salle" claim. They worked it together until early in January, 1887, when Markell, who apparently had been putting up all the expenses of operating the property, telegraphed Miller to stop work on his account. The order proceeded from a misunderstanding between the tenants in common, which need not be stated. The order was disregarded in so far as it concerned the progress of the work, which Miller continued on his own account until early in July. It is unimportant to state the reasons which actuated Miller in this proceeding. The fact alone is the important element in the litigation. During the time that Miller was working the property, he incurred considerable debts, which at the last date remained unsettled. Markell was a nonresident, and when he arrived in Aspen, in July, he entered into negotiations with Miller looking to the adjustment of their controversies. By reason of some antecedent transactions between these parties, Markell had become indebted to Miller to the extent of about \$1,600, and Miller had brought suit to enforce his supposed rights in the property, and to recover what he claimed was due him. This is an important fact to remember when the question of ratification comes to be considered. While Miller was prosecuting his operations on the property, he mined and shipped considerable ore, which he sold to the appellees, J. F. Matthews & Co. According to the quite common usage among people who are working mines which produce, but do not yield enough to pay current expenses, he ob-

tained from Matthews & Co. sundry advances upon ores to be mined and shipped. The advances were made under the agreement that they should be repaid by ore to be subsequently mined, if sufficient for the purpose. The arrangement seems to have been carried out in good faith between Miller and Matthews & Co., but the result was that upon the conclusion of their dealings there was due Matthews & Co. upwards of \$1,800. They brought this suit against Markell to compel him to pay these advances. He defended, set up his order to stop work, and insisted that he could not be held liable for the debts which Miller had contracted during the time its operations were carried on contrary to his directions and expressed wish. It is tolerably clear that he cannot be held liable on the theory of an agency properly exercised by Miller at the time the debt was contracted. If he is to be held at all, it must be on the ground that he accepted and adopted Miller's acts. There is little difficulty to hold him on this principle. When he reached Aspen he entered into negotiations with Miller to adjust their differences. Miller's claim to an interest in the property seems to have been recognized, and Markell agreed that if he would forego his claim against him for some sixteen hundred and odd dollars, and settle upon the basis which he proposed concerning the interests which Miller was to enjoy in the La Salle and Harrisburg properties, he would pay all the debts which Miller had incurred during the time that he was working the property without Markell's consent. The indebtedness to Matthews & Co. was not the sole obligation which Miller had contracted and left undischarged, but there were sundry other claims for supplies of various sorts held against Miller and the mine by the dealers in Aspen. These supplies included groceries and materials which are essential to mining operation. It is not important to state what Miller did on the property whereby the debts accrued. There seems to be no question that it was development work, which tended to the opening up and advancement of the claim as a piece of mining property. There is another very important circumstance to be stated in this connection. This claim was adjacent to what was called in that section the "Durant" property, and it was for the interest of the owners of the claims that a drift should be run along the boundary line between the two properties. This work was done by Miller under an agreement that the Durant Company should pay for it. The work was done at a profit, and netted \$1,000, which was paid into the common treasury of the La Salle mine. Markell received the benefit of the expenditures which Miller made, and of the money earned and paid into the treasury. There is thus an ample consideration for the agreement which Markell made concerning these debts. Unless there be some legal obstruction to a recovery, he should be held liable under his agreement. The recovery can easily be supported. A party may not accept what has been done for him by one who is not his agent and deny the power of the individual to act.

In other words, it is settled by the authorities that it is enough to charge the principal with a responsibility for the things done if he adopts the acts by accepting the benefits of the transaction. In this case work was done on the property to its advantage. Markell got the benefit of the profits from running the line drift between the La Salle and Durant claims. He agreed to accept the benefit of the ore which had been shipped to Matthews & Co. at the time of his agreement with Miller, and he was released from a liability to Miller amounting to upwards of \$1,600. Under all these circumstances, it must be held that Markell so far ratified Miller's acts that he became liable for the debts which he agreed to pay.

During the progress of the trial it was sought to prove the making of the advances, which was the real cause of action, by the production of a note to Matthews & Co., executed in September following the agreement, and running as the individual promise of Miller to Matthews, Webb & Co. It was for a certain sum at 2 per cent. interest, signed by "W. J. H. Miller, Manager," and by "W. J. H. Miller." It was strenuously objected that this note was not competent evidence against Markell, and in no manner tended to establish his liability for the claim sued on. The objection was well taken, and the note should have been excluded. There is no force in the contention that an exception was not sufficiently taken to the introduction of the evidence. The case was tried to the court, without a jury. The objection taken was not a general one, but was specific, and raised the precise questions which are now presented for determination. The court admitted it, subject to the objection, which was to be disposed of on the final hearing. Judgment passed against Markell; and exception was duly taken; and it must be held that this sufficiently saves the question to entitle the party to raise it on the appeal. Whatever error was committed in this regard cannot operate to reverse the judgment. The note was wholly unnecessary to the maintenance of the plaintiff's cause of action. This was sustained otherwise by sufficient competent testimony. It was clearly proven that Miller and Matthews & Co. entered into an agreement concerning the shipment and purchase of the ore. The money sued for was shown to have been advanced by Matthews & Co. Markell adopted the agreement, accepted its benefits, and promised, upon a sufficient consideration, to repay the money. Since there was sufficient competent testimony to support the finding and judgment of the court, and the case was tried without the intervention of a jury, there cannot be a reversal because the court erred in permitting to be brought to its attention incompetent evidence. It will be assumed that this did not influence its conclusion.

The court entered judgment for an erroneous sum. There was some evidence offered which tended to prove that at the time Miller got the advances he agreed to pay 2 per cent. per month interest for the money. Aside from the note, there was no

proof of any agreement that would, in the absence of express authority and ratification as to that part of the contract, bind Markell to pay this interest. There was neither authority nor ratification. In this respect the judgment is erroneous. This error does not require us to send the case back for the entry of a proper judgment. It can be entered here, and the rights of the parties properly protected and conserved. The judgment will therefore be modified and affirmed. It is ordered that the interest included in the judgment in excess of the statutory rate be deducted from the amount of the judgment as entered, and that final judgment be entered in this court for the amount of the claim and statutory interest to the time of the entry, and that the costs of the appeal be divided between the parties.

The judgment is modified and affirmed.

(3 Colo. A. 63)

**COLORADO LOAN & TRUST CO. et al. v. GRAND VALLEY CANAL CO.**

(Court of Appeals of Colorado. Jan. 9, 1893.)

**CANCELLATION OF DEED—FORGERY—ESTOPPEL.**

1. A suit to cancel a deed from plaintiff corporation alleged it to be a forgery, and the evidence showed that the grantee acted in good faith, and had no knowledge of any fraud. Plaintiff's president, whose name appeared to the deed, when examined as a witness for plaintiff, testified nothing in regard to the supposed forgery of his name, and, when examined by defendant, admitted that he had made the contract with the grantee for the sale and conveyance of the land, and signed the deed in blank. *Held*, that there was no evidence of forgery.

2. After the grantee received his deed, he executed a trust deed of the land therein to defendant loan company, to secure the purchase-money notes, which notes and trust deed were delivered to plaintiff, and an application then made to defendant for a loan, which was negotiated through the efforts of both plaintiff's and defendant's officers by a sale of the notes to B., and the proceeds thereof paid to plaintiff. *Held*, that defendant was chargeable with full knowledge of B.'s rights in the land covered by the trust deed, and was estopped to assert the invalidity of such deed in order to give a claim subsequently acquired by it on the same premises precedence.

**Error to district court, Arapahoe county.**

Action by the Grand Valley Canal Company against the Colorado Loan & Trust Company and others. Judgment for plaintiff. Defendants appeal. Reversed.

The other facts fully appear in the following statement by REED, J.:

This was a suit in equity, brought by the defendant in error to enjoin the sale, quiet title, and cancel conveyances of certain land and water rights in Mesa county. The Grand Valley Canal Company was a corporation operating an irrigating canal, selling lands, water rights, etc. It is alleged in the complaint that on the 1st day of December, 1884, defendant in error made and delivered to one Lucius Cost deeds purporting to convey the lands in controversy, together with certain wa-

ter rights; that on the same date Cost conveyed the same property in trust to the Colorado Loan & Trust Company, as trustee, to secure the sum of \$1,000, borrowed or to be borrowed. The trust deed was filed for record on the 3d day of December, 1884. G. P. Bissell & Co., of Hartford, Conn., bought the notes for \$1,000, made by Cost, secured by the deed of trust above mentioned, the money going to the use of the Grand Valley Canal Company. On the 1st of November, 1884, a deed of trust was made by the Grand Valley Canal Company, conveying all its property, including the land in controversy, to Gustavus F. Davis, trustee, to secure bonds to the amount of \$200,000, issued by the company, and put upon the market for sale. Whether or not they were all sold we are not informed, but a part (amount not shown) were purchased by the Travelers' Insurance Company. Default having been made by the Grand Valley Canal Company, the Travelers' Insurance Company, on the 9th day of March, 1888, brought a suit to foreclose. On July 21, 1888, a decree of foreclosure was entered, which was followed by a sale of the property, which was purchased by the Travelers Insurance Company, which afterwards sold and conveyed the property to the Colorado Loan & Trust Company. Bissell & Co. attempted to enforce its lien upon the land in question to satisfy the Cost notes, and this suit was instituted for the purposes abovementioned. The Grand Valley Canal Company was the successor of the Grand River Ditch Company. In regard to the trust deed of Bissell & Co. it is alleged in the complaint "that on the 1st day of December, 1884, pretended conveyances of the property in controversy were executed by the Grand River Ditch Company to one Lucius Cost. Plaintiff is informed and believes that the conveyances were a forgery. That some one, not authorized, signed the name of T. C. Henry, the president of the Grand River Ditch Company, to the deeds, and that the deeds were never acknowledged by Henry, and that the deeds were not the deeds of the Grand River Ditch Company." The answer fully denies the allegation of forgery of the deeds, etc., and alleges "that G. P. Bissell & Co., in good faith, paid out the money on the notes secured by the deeds of trust executed by Lucius Cost to the Colorado Loan & Trust Company. That the notes of said Cost were negotiated and sold to said Bissell & Co. by T. C. Henry, the president of the Grand River Ditch Company, and that T. C. Henry as such president, represented to Bissell & Co. that all the deeds were good and valid, and that Bissell & Co. relied upon such representations." A trial was had upon the issue involved, and a large amount of testimony taken. On the 21st of January, 1891, the cause was submitted. On the 26th of January, 1891, there was a finding for the plaintiff, and a decree finding that Cost had no title, and the trust deeds made by him were invalid and void, and allowing the injunction. To reverse such decree a writ of error was sued out to this court.

John P. Brockway, for plaintiffs in error. Chas. H. Toll and Wm. R. Barbour, for defendant in error.

REED, J., (after stating the facts.) It will be observed that only one issue is made by the pleadings, viz. the validity of the deed from the Grand Valley Canal Company to Cost. The validity of the trust deed made by Cost is dependent upon his title; hence only the validity of his title is involved. By the pleading and the conduct of the entire case it appears to be conceded that the Cost security would, if valid, be prior to and take precedence of that of the other parties; consequently this issue of validity is the only one to be determined. There is another insisted upon in argument, but not presented by the pleading, which will be examined hereafter.

The allegation in the complaint is "that the conveyances were a forgery; that some one, not authorized, signed the name of T. C. Henry, the president of the Grand River Ditch Company, to the deeds, and that the deeds were never acknowledged by Henry, and that the deeds were not the deeds of the Grand River Ditch Company." A novel and very peculiar case is made in evidence. It is not pretended that Cost, or any one in his interest, committed the forgery, or was guilty of any irregularity whatever the entire transaction, or during his life had any knowledge of the present supposed irregularities. It is conceded that the land was regularly purchased by him from the ditch company, and an agreement made by it to convey to him. Taking the case as claimed to have been made by the evidence, and we have the anomalous one of the officers and managers of a corporation forging a deed to its own property to close a legitimate sale and execute a contract, and setting up its own fraud to defeat its conveyance. The fraud attempted to be proved, it will readily be seen, was not the fraud of the grantee upon the company, but the fraud of the company upon its grantee, who acted in good faith; neither participated in nor had knowledge of it.

A brief examination of the evidence of plaintiff in error and of the officers of the Grand Valley Canal Company when called for the defense is necessary. T. C. Henry was president of the Grand Valley Canal Company, the defendant. When called by the plaintiff in error, he testified nothing whatever in regard to the supposed forgery of his name to the deed,—a fact that should not pass without comment. It was the only issue in the case, and, if a forgery of his name, he was certainly the most competent witness to establish the fact; yet in such examination the subject of the forgery was studiously avoided. When called and examined by the defense, he stated that he, as president of the defendant, made the contract with Cost for the sale and conveyance of the land to him. "I don't recollect particularly the time and circumstances under which those particular deeds were executed. I remember well the agreement and transaction that culminated in that transaction. Perhaps,

If I were to see the deeds, I should recall some more of the circumstances connected with it." He had not seen the original deeds of the land since they were executed and delivered. The deeds for water rights from the company to Cost, which were a part of the same transaction, and were shown him, he identified as having been executed by him. He testified: "My present recollection is that—in fact, I know that it was my practice to sign papers when I was an officer, in blank, and leave them in possession of a notary public, to be used as occasion might require;" and in regard to those particular deeds: "My present recollection is that I left deeds, probably signed many months before this time, in the possession of the notary who was in the office,—Mr. Rees,—in his presence. Question. Do you know who prepared the deeds that you made in this matter? Answer. No, sir; without looking at them. Q. Did you do it? A. No, sir; I signed them in blank."

H. J. Aldrich, secretary and treasurer of the company, on behalf of the plaintiff: "Question. Did you have authority to sign Mr. T. C. Henry's name, the president, to deeds in his absence? Answer. I did. Q. And were you accustomed to sign deeds in his absence? A. I did such things on some occasions. It didn't amount to a custom, but I did it sometimes. Q. Now, when you would sign Mr. Henry's name to deeds in his absence, what would be done in reference to having them acknowledged? A. Well, I don't recall any instance when I signed his name; but still I think it was done in some instances. Q. Now, when you signed Mr. Henry's name as president to an instrument, would you hand it to Mr. Rees, and would he certify that it was acknowledged before him as a notary public? A. I don't know whether he did or not, and I don't know as I ever handed any to him." When called by the defendant he testified: "Q. I will ask you to look at the signature to these three instruments, and say whose signature it is, if you know. (Three papers handed to witness.) A. I should say they were the signature of T. C. Henry. Q. How well are you acquainted with T. C. Henry's signature? How many times have you seen it? A. A very great number of times. Q. Have you seen him sign his name a very great number of times? A. Yes, sir; I am as familiar with it as I am with my own. Q. And you say that this signature is the signature of T. C. Henry, do you? A. That would be my judgment. Q. I believe you said that in some cases you were authorized by Mr. Henry to sign his name in his absence? A. I was. Q. Do you remember the transaction of the giving of the deeds to Lucius Cost by the Grand River Ditch Company, which has been mentioned here? A. Yes, sir. Q. Do you remember about the negotiation of the notes and deed of trust given by Lucius Cost to Messrs. Bissell & Co., the defendants here? A. I do. Q. Did you take part in that negotiation? A. I did. Q. On whose behalf were you acting in negotiating those notes and selling them to Bissell & Co.? A. In behalf of the Grand River Ditch Company. Q. When the notes were negotiated, who received the money?

A. The Grand River Ditch Company. Q. What consideration was moving from the Grand River Ditch Company to Lucius Cost in the warranty deeds to the land in controversy, that were delivered to him? A. The title to the land. Q. What was the consideration moving from Cost to the Grand River Ditch Company? A. The trust deed. Q. Anything else? A. And the title, if I understand that question. Q. In other words, what did Lucius Cost pay the Grand River Ditch Company for this land? What did he give for it? A. I don't remember what the consideration was. You mean how much it was? Q. In other words, what did the Grand River Ditch Company receive from him? A. They received a deed of trust. Q. Well, what else besides the deed of trust? What goes with the deed of trust, in other words? A. Why, a note and deed of trust. Q. They received Mr. Cost's two notes and the deeds of trust? A. Yes. Q. And you have already stated, as I remember, when those notes were negotiated, the money was received by the Grand River Ditch Company? A. Yes, sir. Q. Do you remember how the deeds were delivered to Lucius Cost? A. I do not. Q. You know that they were delivered, however? A. I know that they were delivered; yes. Q. Do you know, Mr. Aldrich, whether or not any other officer or director of the Grand River Ditch Company knew of the making of these deeds to Lucius Cost, and the loaning of this money, and the reception of it from Bissell & Co. for the benefit of the Grand River Ditch Company, as you have stated? A. I knew Mr. Henry and Mr. Coulson. Q. Were Mr. Henry and Mr. Coulson both directors of the Grand River Ditch Company? A. They were. Q. And Mr. Henry was its president? A. He was."

Mr. Barrows, who was a clerk in the loan department of the defendant in error, was called and testified for both parties, in effect, that he, as clerk, prepared all the deeds in question, four or five in number, and delivered them to Mr. Aldrich, the secretary; also prepared the deed of trust from Cost upon the land and the notes; also that he filled up the application for a loan. The deeds testified to embraced those to water rights conveyed at the same time from the company to Cost. Here his testimony upon this part of the controversy stops. He does not say whether the name of Mr. T. C. Henry had been previously written by Henry on the blanks used, or whether the signature was blank; nor does he testify who signed the name of Mr. Henry. The impression from his testimony would be that the name of Mr. Henry was written by Mr. Aldrich, or some one else, and not by Mr. Henry, but here is a clash between his testimony and that of Henry. Barrows testifies to the making out by him of all the papers, water deeds included, and that they were all in the same condition when delivered to Mr. Aldrich, the secretary; while Henry, upon the stand, was sworn to the deeds to the water rights, and swore that his name to them was written by himself. The deed to the land was not there.

Taking all the testimony, it is perhaps unnecessary to say that it falls to show

the perpetration of any crime or fraud, or any attempt or intention to perpetrate either. There is an absolute lack of proof of intention, which is an indispensable element. If the evidence establishes anything it is of an irregular manner of transacting business; a want of technical compliance with the requirements of the law in regard to the conveyance of real estate. We do not wish to be understood as intimating that strict compliance with the statutory requirements can be dispensed with, and that, if the supposed facts and irregularities had been satisfactorily established, they would not have vitiated the conveyance. But here we have the anomaly of three different officers of a corporation who had exclusive control of the conveying, testifying, when called, to discredit their own conveyance to three different and incompatible sets of facts in the same transaction, and establishing neither. Forgery is defined to be "the fraudulent making or alteration of a writing, to the prejudice of another man's rights." 3 Greenl. Ev. § 103. "A false making, or making male animo, of any written instrument, for the purpose of fraud and deceit." 2 Russ. Crimes, 318; Com. v. Ayer, 3 Cush. 150. "To constitute this offense it is also essential that there be an intent to defraud." 3 Greenl. Ev. 103; 4 Bl. Comm. 247. "It is the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 1 Bl. Crim. Law, § 572. It will readily be observed that there was no forgery. The intention to defraud was entirely lacking, which is the very basis of the crime. The property conveyed was that of the party who is charged with the forgery. The owner cannot be guilty of forgery in the execution of a conveyance of his own property for the benefit of another in pursuance of a legitimate contract of sale. It may have been irregular, lacking in legal formalities, which would have avoided it if challenged by a bona fide purchaser without notice of its existence; and that is the most that could be said, even if the plaintiff in error had fully established the irregularity attempted.

The testimony of the officers of defendant conclusively shows that Cost's application for the loan was made to the Colorado Loan & Trust Company direct; that Cost was not to receive the proceeds of the loan; that the Grand Valley Canal Company was to be the beneficiary through the plaintiff in error; and that the proceeds of the loan went through the office of the plaintiff in error. Mr. Henry said: "I don't now recollect whether the notes were sent to me or sent from the office of the Colorado Loan & Trust Company direct to Mr. Bissell; but the applications were sent to me, which stated the basis of the loan, and I negotiated for the loan as called for in the application." This fully fixes these important facts: First, the knowledge of the plaintiff in error of the entire transaction; second, its participation in securing the loan, giving credit to the securities, and getting the money from Bissell & Co.; third, the participation of the officers of the defendant in error, and that its presi-

dent personally negotiated it, and, of necessity, indorsed and vouched for its legitimacy and validity; consequently the plaintiff cannot claim to have been an innocent purchaser under the other trust deed without knowledge of the lien of Bissell & Co., nor can the defendant in error set up its own irregularities to defeat a security that both plaintiff and defendant were connected with, and placed upon the market, and received the proceeds of.

It is contended in argument that, prior to the conveyance to Cost, the Grand Valley Canal Company had conveyed all its property, including the land conveyed to Cost, in trust to secure the payment of \$85,000 borrowed; that such indebtedness remained unpaid, and became a part of the \$200,000,—the subsequent loan,—which was to that extent a renewal, and, being such, took precedence of the Cost conveyance. No such allegation is contained in the pleading nor any issue. The allegation is that the property was conveyed to Davis (trustee) "to secure the payment of its bonds in the sum of \$200,000." Another difficulty arises. If the contention could prevail, it could only be effective as to the \$85,000. The Cost claim could not be subrogated to the entire \$200,000, as attempted in argument. Neither in pleading nor argument is there an effort made to make the \$85,000 superior to, or to separate it from, the remaining \$115,000, so as to give it precedence of the Cost claim. The equitable principle contended for and sustained by the numerous authorities cited is clearly correct where it can be invoked and made applicable, but in our view of the present case it cannot avail under either the facts or pleading.

We conclude—First, that the plaintiff in error, having had full knowledge of the Cost transaction, and having participated in the placing of the security with Bissell & Co., and in establishing its regularity, is precluded and estopped to assert its invalidity, and give its own claim precedence. The application for the loan was made by Cost directly to the plaintiff in error. The defendant in error was to and did receive the proceeds through the plaintiff in error. The legal title of Cost was conveyed to the plaintiff in error to secure the notes. The placing of the security with Bissell & Co. was done by plaintiff in error through the agency of Mr. Henry, who testified to the fact, but did not recollect whether the securities were sent by plaintiff to him or directly to Bissell & Co. The proceeds went in the first instance directly to the plaintiff in error. It does not appear in evidence, but, the notes and trust deed having been made directly to the plaintiff, it is evident the notes could only have passed to Bissell & Co. by the indorsement or assignment of plaintiff. These being the facts, there is no question of the applicability of the law of estoppel, "estoppel in pais," or "equitable estoppel." The rule, as deduced from all the authorities, and which is as well established as any general rule of law, is: "Where one, by his words or conduct, willfully causes another to believe a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is

concluded from averring against the latter a different state of things as existing at the same time." The leading case is *Pickard v. Sears*, 6 Adol. & E. 469. See, also, *Heane v. Rogers*, 9 Barn. & C. 576; *Graves v. Key*, 8 Barn. & Adol. 318; *Keate v. Phillips*, 18 Ch. Div. 577. The American rule, as stated in *Branson v. Wirth*, 17 Wall. 42, is, in effect, the same. Mr. Justice Bradley states it: "If one person is induced to do an act prejudicial to himself in consequence of the acts or declaration of another on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations." The same rule, in effect, though differing somewhat in phraseology, has been applied in the courts of every state. The application of this well-settled principle would estop the plaintiff in error from asserting the invalidity of the security in the hands of *Bissell & Co.*, regardless of the finding as to title in the transactions between defendant in error and Cost.

Second. That no case was made by the evidence in regard to the conveyance by it to Cost to invalidate his title and the security by him made. If fraudulent, they were the frauds of the company, of which he had no knowledge, and in which he in no way participated, and certainly could not invalidate the security in the hands of *Bissell & Co.*, where the company had placed it, and had received and appropriated the proceeds to its own use. It follows that the district court erred in finding the securities executed by Cost void in the hands of *Bissell & Co.* The decree will be reversed, and the cause remanded.

(3 Colo. App. 113)

**McMEEL et al. v. O'CONNOR.**

(Court of Appeals of Colorado. Jan. 23, 1893.)

**SALE UNDER INVALID TRUST DEED.**

Where a trust deed given to secure a note is by mistake made to the beneficiary instead of the trustee, and purports to be to secure the trustee instead of the beneficiary, a subsequent sale of the land by the intended trustee, and purchase thereof by the beneficiary, after default in payment of the note, are void, and the maker of the note, on payment thereof, is entitled to receive his property clear of the cloud cast on it by the pretended conveyance and purchase.

Appeal from district court, Arapahoe county.

Action by Thomas L. O'Connor against Owen McMeel and others to compel defendant to accept payment of a note past due, and to reconvey property purchased from an alleged trustee, who, on default in payment of the note, sold the property under an alleged deed of trust. From a decree for plaintiff, defendants appeal. Affirmed.

Wm. Knapp, for appellants. Sullivan & May, for appellee.

REED, J. It appears by the pleadings of both parties that O'Connor (appellee) borrowed \$250, for which he gave his note, payable to McMeel, and secured it by a

trust deed upon two building lots, which were conveyed in trust by mistake to McMeel, as trustee, to secure money alleged in the trust deed to be due and payable to John C. Keegan. The parties were reversed in the trust deed,—the property was conveyed to the beneficiary, instead of the trustee. It was evidently the intention to convey to Keegan, as trustee, to secure McMeel, but the conveyance was to McMeel, as trustee, to secure Keegan. The note was also described in the trust deed as payable to Keegan. The note having matured, and being unpaid, Keegan, assuming to act as trustee, advertised and sold the property to McMeel as purchaser, and executed a deed as trustee purporting to convey the property. Some time after, O'Connor tendered the amount due upon the note, which McMeel refused, claiming to be owner of the property. The suit was brought to compel McMeel to take the amount due, and, by proper conveyance, to clear up the title. The facts stated in the complaint are admitted in the answer, and a cross complaint was filed alleging that the conveyance was the result of a mutual mistake, and asking for a reformation of the deed of trust, and that McMeel be declared the owner of the property. A demurrer was filed to the answer and cross complaint, and sustained by the court. Defendants elected to stand by their answer, and a decree was entered for the plaintiff, and an appeal from such decree.

The decree must be affirmed. No title whatever passed to Keegan by virtue of the conveyance by trust deed, nor was he invested with any powers as trustee; hence, in assuming the duties of trustee, and attempting to advertise and sell, he was only a volunteer, and the proceedings and supposed deed made by him as trustee were void and of no effect. No title having passed, the right of O'Connor to pay off the indebtedness and receive a release of his property clear of the cloud cast upon it by the pretended sale and conveyance was unquestionable. If a reform was needed of the trust deed to make it conform to the intention of the parties, it should have been reformed before attempting to dispose of the property under it.

Affirmed.

(3 Colo. App. 115)

**DESSAUER et al. v. KOPPIN.**

(Court of Appeals of Colorado. Jan. 23, 1893.)

**PARTNERSHIP—JUDGMENT AGAINST PARTNER INDIVIDUALLY.**

Where an action is brought against a firm for a partnership debt, and service is had on one partner only, a judgment rendered against him as for a personal debt is invalid. *Craig v. Smith*, 15 Pac. Rep. 337, 10 Colo. 220, and *Bank v. Ford*, 3 Pac. Rep. 449, 7 Colo. 314, followed.

Error to district court, Montrose county.

Assumpsit by Matt L. Koppin against Max L. Dessauer and another. Judgment for plaintiff. Defendants bring error. Reversed.

Gray & Selig, Chas. M. Campbell, and F. C. Goudy, for plaintiffs in error.

**BISSELL, J.** This case is clearly controlled by the principles announced in *Bank v. Ford*, 7 Colo. 314, 3 Pac. Rep. 449, and *Craig v. Smith*, 10 Colo. 220, 15 Pac. Rep. 337. According to the record the plaintiff declared on a debt due from a firm, and the proof established a copartnership liability. Koppin was the publisher of a paper called "The Montrose Enterprise," and at various times had published in that journal advertisements and local notices at the request of Dessauer & Disman, who were doing business as a firm in the town of Montrose. The complaint embraced other causes of action against the partners, but in the account which Koppin sought to recover, if there was any indebtedness at all against them, it had been contracted by the partners, and for the benefit of their joint enterprise. The suit was brought in July, 1891, and the court acquired jurisdiction by the service of the summons on Ben Disman, one of the copartners. There was no service on the other member of the firm, and, although the answer appears to be that of the copartnership, there was evidently no appearance by Dessauer, since in the entry of judgment this lack of service is recited. Under these facts the court entered judgment that the plaintiff "have and recover of and from Ben Disman, one of the defendants, judgment in the sum of \$75.55," etc. There is nowhere in the record any entry showing the rendition of judgment against the firm, or any other recovery by the plaintiff, save what has already been cited. Under these circumstances it is manifest the judgment cannot stand. In the facts disclosed by the record, and in the character of the judgment entered, there is no difference between this case and that of *Craig v. Smith*. Judgment was rendered against Disman, the partner served with process, as if for an individual debt. As is decided in the case last referred to, the only judgment which may be entered in a case of this description is one against the copartnership. The reasons given for that decision are entirely satisfactory. The plaintiff is entitled to enforce his claim against the copartnership property, and the partner who is served with process has clearly the right to turn out partnership assets for the satisfaction of the claim. Since the judgment entered was not in harmony with this well-established rule, it must be judged erroneous, and the cause reversed, and remanded for further proceedings in conformity with this opinion.

(3 Colo. A. 131)

**LYNCH v. METCALF.**

(Court of Appeals of Colorado. Jan. 23, 1893.)

**INJUNCTION BOND—ACTION AGAINST SURETY.**

Laws 1887, § 161, provides that in suing on an injunction bond suit need not be brought in the first instance against the principal to ascertain the amount of damages sustained, but principal and surety may be sued together, and at the trial damages may be assessed and awarded against principal and surety in the action. *Held* that, where action in injunction is dismissed by plaintiff on his motion, and the injunction dissolved at his cost, an ac-

tion can be brought against the surety on the undertaking to recover for attorneys' fees and expenses incurred in the dissolution of the injunction, though no damages were awarded on the dissolution of the injunction.

**Error to district court, Arapahoe county.**

Action by J. Thomas Lynch against Orlando Metcalf, surety on an undertaking in injunction. From a judgment sustaining a demurrer to complaint, plaintiff appeals. Reversed.

R. D. Thompson, for plaintiff in error. Rogers, Cuthbert & Ellis, for defendant in error.

**RICHMOND, P. J.** The record in this case discloses that on February 1, 1890, in an action brought by Clement B. Smythe against the River & Rail Electric Company and one Stetson Leach and J. Thomas Lynch, plaintiffs below, an injunction bond was issued out of the district court of Arapahoe county enjoining Leach and Lynch from commencing an action upon a certain promissory note executed by the River & Rail Electric Company. That in that action an injunction bond was given in the following words and figures: "Clement B. Smythe, Plaintiff, vs. The River and Rail Electric Co., J. Thomas Lynch, and Stetson Leach, Defendants. Undertaking in injunction. Whereas, the above plaintiff has commenced, or is about to commence, an action in the district court of the second judicial district of the state of Colorado, in and for the county of Arapahoe, against the above-named defendants, and is about to apply for an injunction in said action against the said defendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in said action is more particularly set forth and described: Now, therefore, we, the undersigned, in consideration of the premises, and of the issuing of said injunction, do jointly and severally undertake, in the sum of \$12,000, and promise to the effect that, in case said injunction shall issue, the plaintiff will pay to the defendant all costs and damages as shall be awarded against the complainant in case the said injunction shall be modified or dissolved, in whole or in part. Dated this 30th day of January, A. D. 1890. [Signed] Clement B. Smythe. By Edward Ferris, Attorney in Fact, Orlando Metcalf." Lynch and Leach filed a demurrer to the complaint, and, while the demurrer was under advisement by the court, plaintiff in the original action, on his own motion, dismissed it, and said injunction was thereby dissolved at cost of plaintiff. This action is brought to recover for attorneys' fees and expenses incurred in and about the dissolution of the injunction. A general demurrer was filed to the complaint in this action, which was sustained. Plaintiff in error elected to stand by his complaint, and prosecutes this writ of error to reverse the judgment of the court below.

The grounds urged in the court below and in the briefs on file herein are that the complaint failed to aver that damages had been awarded on the dissolu-



tion of the injunction, or at any other time; therefore there was no breach of the conditions of the bond, and consequently no independent suit could be maintained against the principal and sureties for damages. The attorneys for the respective parties have cited many authorities in support of their contentions, but we deem it wholly unnecessary to review them, in view of the fact that the Code of Procedure of this state permits the institution of this action. Section 161, Sess. Laws 1887, provides that in suing on any undertaking provided for in this act it shall not be necessary to bring suit in the first instance against the principal on such undertaking to ascertain the amount of damages sustained or awarded by the court, but the principal and surety may be sued together, and at the trial damages may be assessed and awarded against principal and surety in the action. This provision clearly allows the institution of the suit against principal and surety or sureties upon an injunction bond without any previous adjudication against the principal, and is conclusive of the question. The very purpose of the statute was to cover the grounds of objection raised by the demurrer, and supported by the authorities cited by defendant in error. We assume that the section referred to was not called to the attention of the court below, and that, had it been, it would not have fallen into the error of sustaining the demurrer to the complaint. *Tabor v. Clark*, 15 Colo. 434, 25 Pac. Rep. 181. Our conclusion is that the court erred in sustaining the demurrer to the complaint, and therefore the judgment must be reversed, and the cause remanded.

(3 Colo. A. 127)

#### SLATER v. JACOBITZ.

(Court of Appeals of Colorado. Jan. 23, 1893.)

##### INDEMNIFYING BOND—PAROL EVIDENCE.

1. F. was convicted for selling liquor unlawfully, and appealed, plaintiff becoming surety on his appeal bond. Thereafter F. and defendant executed a bond to plaintiff, conditioned that if F. "shall duly appear at the said term of said court, and answer the demands of the law thereat, then this obligation to be null and void, and of no effect; otherwise to remain in full force and effect;" but did not recite that, in case plaintiff should be compelled to pay the penalty of the appeal bond, they would indemnify him. F. failed to appear at court, and judgment on the bond was rendered against plaintiff. Plaintiff sued defendant as surety on the bond to him. *Held*, that it was not an indemnifying bond, and plaintiff could not recover.

2. In such case it was error to admit oral proof contradicting the recital of the bond, and making it a bond of indemnity.

Appeal from district court, Bent county. Action on a bond by A. Jacobitz against J. H. Slater. Judgment for plaintiff. Defendant appeals. Reversed.

O. G. Hess, for appellant. J. C. Coad, for appellee.

RICHMOND, P. J. In July, 1887, one N. W. Flaisig was prosecuted in Marion, Kan., before a justice of the peace, for sell-

ing intoxicating liquor. He was adjudged guilty, and sentenced to pay a fine of \$100, and to be confined in the county jail for a period of 80 days. He prayed an appeal to the district court, and executed an appeal bond in the sum of \$600, with A. Jacobitz as surety. Thereafter a bond, in words and figures as follows, was executed by Flaisig and J. H. Slater, appellant therein: "Know all men by these presents, that we, N. W. Flaisig, as principal, and Fourth National Bank of Wichita, Kansas, J. H. Slater, cashier, as sureties, are held and firmly bound to A. Jacobitz, as bondsmen of N. W. Flaisig, in the sum of six hundred dollars, the payment of which sum well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents. The condition of this obligation is such that, whereas the said N. W. Flaisig was on the 1st day of July, 1887, prosecuted before E. Baxter, justice of the peace for said county, on the charge of selling intoxicating liquor in the city of Marion, Kansas, contrary to the statutes made and provided in such cases; and whereas the said N. W. Flaisig was by said E. Baxter adjudged guilty as charged, and was sentenced to pay a fine of \$100 to the state of Kansas, and to be confined in the jail of said county for a period of thirty days; and whereas said N. W. Flaisig has appealed from the decision of the said E. Baxter; and whereas the said E. Baxter has adjudged that the said N. W. Flaisig give bond in the sum of six hundred dollars for his appearance at the next regular term of the district court of said county; and whereas the said A. Jacobitz has signed the said appeal bond with the said N. W. Flaisig: Now, therefore, if the said N. W. Flaisig shall duly appear at the said term of said court, and answer the demand of the law thereat, then this obligation to be null and void, and of no effect; otherwise to remain in full force and effect. Witness our hand this — day of July, 1887. N. W. Flaisig, J. H. Slater, Cashier. Fourth Nat. Bank, Wichita, Kansas." Upon this last-mentioned bond suit was instituted in the third judicial district of Colorado to recover the penalty mentioned therein. The complaint alleges the execution of the bond by Flaisig and Slater for the purpose of indemnifying the plaintiff as surety for Flaisig upon the appeal bond; that Flaisig did not appear before the district court in conformity with the condition of the appeal bond, but made default thereof. Thereafter judgment was rendered, and plaintiff compelled to pay the sum of \$672.75. Trial was had to the court, and judgment rendered for Jacobitz in the sum of \$600.

Many errors are assigned why this judgment should be reversed, but we are inclined to the opinion that we need consider none save one urged upon our attention in the oral argument, to the effect that the complaint fails to state a cause of action. A careful reading of the bond sued upon conclusively shows that it is not an indemnifying bond. The condition of the bond is that Flaisig shall appear at the term of the district court; but it in no sense recites that in case the plaintiff, Jacobitz, shall suffer by reason of becom-

ing surety for Flaisig, or in case Jacobitz shall pay or be compelled to pay the penalty of the appeal bond, then and in such case the parties will indemnify him. Taking the bond as it reads, it would allow Jacobitz the right of action against the defendant, regardless of whether or not he satisfied the conditions of the appeal bond, and paid the penalty nominated therein, provided Flaisig failed to appear in the district court. Besides, we may add, oral proof contradicting the recital in the bond, and making it a bond of indemnity, was clearly inadmissible. No rule of law is better settled than that parol testimony is admissible to explain latent or inherent ambiguity, but in this case none exists. The effect of the testimony was to make a new and different contract from that made by the parties, and should not have been received. Our conclusion is that the complaint fails to state a cause of action, wherefore the judgment must be reversed.

(3 Colo. App. 42)

MITCHELL et al. v. HUGHES.<sup>1</sup>

(Court of Appeals of Colorado. June 18, 1892.)

SETTING ASIDE WILL—EQUITY JURISDICTION.

In an action to set aside a will, plaintiff alleged his marriage with the devisee; the continuance of the marriage relation until her death; the execution of the will, devising all of her estate to another; the death of devisee; the proceedings in probate; his nonnotice thereof; and his nonappearance therein. Held, that the complaint was demurrable, as it did not state any ground for interference by a court of equity.

Appeal from district court, Weld county.

Proceeding by William Hughes against Joseph Mitchell, Jr., and John Probert, as executors, and Rachel Hillier, as devisee, to set aside the will of Jane Hughes, known at the time of her death as Jane Mesclon. From a decree declaring the will void, and setting aside the proceedings for its probate, defendants appeal. Reversed.

B. L. Carr and F. P. Secor, for appellants. George S. Adams, for appellee.

BISSELL, J. By a bill, which was good in form if it had been sufficient in substance, William Hughes, the appellee, sought to set aside what purported to be the last will and testament of one Jane Hughes, known at the time of her death as Jane Mesclon. In its substantial averments the complaint set forth a marriage on the 20th day of April, 1870, between Hughes and the decedent, who was then Jane Stevens, and alleged the continued existence of the marriage relation to the time of her death, on the 13th day of August, 1887. The will bore date the 9th of April, 1886, and bequeathed all of the estate of the decedent, both real and personal, to Rachel Hillier, her daughter. After the death of the devisee, and on the 11th of October, 1887, the will was presented for probate to the county court of Weld county, and was duly probated. There

is no question concerning the regularity of the proceedings in that tribunal, the qualification of the executors, and their entry upon the discharge of their duties. Mitchell and Probert were appointed guardians of the minor devisee, Rachel E. Hillier. They took possession of all the decedent's property. When this suit was started, they were managing the estate, collecting its rents, issues, and profits, and disposing of it according to the terms of the will. Hughes prayed that the will be set aside, and he be decreed the sole heir and entitled to the immediate possession of all the property; for an accounting, and general relief. The defendants, by their answer, denied all the material averments of the complaint, and then set up an affirmative defense, which substantially stated that Hughes and the decedent, Jane, lived together and cohabited as man and wife for about a year in the state of Pennsylvania, when Hughes deserted her, and came to Colorado to live. Jane followed him to the state within a year, when they resumed their apparent relations of husband and wife, and continued to live in that fashion for about six months. In 1872, Hughes again deserted her, and removed to Illinois, where he remained until after her death, in 1887. This plea likewise set up a marriage and cohabitation between Hughes and another woman, with whom he lived until he brought this suit. It was averred that the desertion in 1872 was absolute and final; that the wife had never heard of or from Hughes from that time to the day of her death; that he failed to contribute to her support; and generally stated that he continued in good health, and possessed of his full earning capacity. During all those years of separation the decedent carried on business as a feme sole, and accumulated all the property which she attempted to dispose of by her last will and testament. The plaintiff moved to strike out the affirmative defense, and it was eliminated from the pleading. The defendants moved to dismiss the action. This motion was argued and denied. Leave was then given to the plaintiff to amend, and he inserted an allegation that he was never served with process, and did not appear at the probate of the will in the county court. Thereafter the defendants withdrew their general denial, and demurred to the amended complaint. The demurrer was overruled, and a decree was entered declaring the will to be null and void, and setting aside the proceedings for its probate in the county court, and ordering costs against Mitchell and Probert.

Neither the complaint nor the answer were sufficient in substance. The demurrer to the complaint ought to have been sustained. The limitations on the power of a feme covert at the common law to dispose of her property by will are well established. Aside from property which might be put in the hands of trustees subject to her testamentary disposition, any will made by a married woman which disposed of freehold estates was entirely void. Several exceptions were ingrafted on this limitation. According to the earlier

<sup>1</sup>Rehearing denied February 16, 1893.

cases, if a woman lived alone, and transacted business as a feme sole, her husband at the time having been banished, or having abjured the realm, she was permitted to exercise many of the rights enjoyed by a feme sole. She could sue and be sued; was held liable for her debts, and on her commercial paper; might maintain necessary actions for the protection of her freehold estates; and, at her death, might dispose of the property of which she died seised. 1 Co. Litt. (1st Amer. Ed.) § 200; Countess of Portland v. Progers, 2 Vern. 104; Derry v. Duchess Mazarine, 1 Ld. Raym. 147; Newsome v. Bowyer, 3 P. Wms. 37. By an insensible process of extension, resulting probably from a misapprehension of the basis of the principle of abjuration, the doctrine was applied to cases in which originally it was without force. Some of the English cases, as well as some of the early ones in this country, conceded to the feme covert the power of testamentary disposition, the power to bring suit, and to contract commercial obligations, where the husband was out of the country, and maintained none of the ordinary marital establishments, and exercised none of his conjugal rights. Gregory v. Paul, 15 Mass. 30; Troughton's Adm'rs v. Hill's Ex'rs, 2 Hayw. (N. C.) 614; Cornwall v. Hoyt, 7 Conn. 420. The later decisions, which reviewed most of the cases establishing a different rule, re-established the principle which inhibits a feme covert from doing those things as to which she was originally under disability by reason of her coverture, unless the established exceptions, springing from banishment, technical abjuration, or war between the different nations of their residence and allegiance, were clearly shown. Marshall v. Rutton, 8 Term R. 545; Boggett v. Frier, 11 East, 301; Robinson v. Reynolds, 1 Aikens, 174; Williamson v. Dawes, 9 Bing. 292; Dean v. Richmond, 5 Pick. 461; Vreeland's Ex'rs v. Ryno's Ex'r, 26 N. J. Eq. 160. It may thus be taken to be tolerably clear that, unless the rule be varied by some facts other than what appear on the face of the present complaint, the decedent could not at the common law execute a will disposing of her estate. If the will is to be supported under the statutes of Colorado, she is likewise under disability to dispose of the whole of it. Her statutory testamentary power is limited to the disposition of one half of her estate as against her husband, if he be living at the time of the execution of the will. These concessions, however, do not operate to support the complaint. The common-law rule which deprived the feme covert entirely of testamentary power is inoperative in Colorado, since the statute expressly gives the right to the married woman to dispose of one half of her property, dying while married. Since this power is possessed by the feme covert, the only effect resulting from the execution of a will which disposes of all of her property without recognition of the husband's rights is to render it invalid as to the one half of the estate, and to subject all legacies to a proper and pro rata deduction. Logau v. Logan, 11 Colo. 44, 17 Pac. Rep. 99; Doane v. Lake, 32 Me. 268. It follows

that the decree which set aside the will and the proceedings for the probate of it in the county court were entirely erroneous, and cannot be sustained. According to what is contained in the record, the will may have been entirely valid. The proceedings certainly must be presumed to be regular in the absence of any showing to the contrary. To reverse the decree for these errors alone would not result in an accurate disposition of the controversy. It must be reversed, with directions to the court below to dismiss the complaint. This necessity springs from the absence of jurisdiction in the district court, under the case as laid, to enter any decree whatsoever in the premises. It is the general rule, well established in this country, that a court of equity will not entertain jurisdiction of a suit to set aside a will, and proceedings for its probate, unless some special circumstances be averred by reason of which the general equitable jurisdiction of courts will attach. According to our constitution and the statutes which have been enacted to carry out its provisions, county courts are courts of probate, fully clothed with original jurisdiction to hear and determine all this class of controversies, and to proceed to such final determinations as shall settle the rights and interests of all parties concerned. It is not necessary to go to the extent of holding that the jurisdiction conferred by the constitution is exclusive, nor to the limit of the rule sometimes enunciated that courts of equity generally are without jurisdiction in the premises; but the conclusion can be safely rested upon the principle, to which all courts subscribe, that no bill for such purposes will be entertained unless it presents some special features, or the case involves some exceptional circumstances, which warrant the interference of the court upon some well-recognized basis of equitable jurisdiction. 1 Pom. Eq. Jur. § 349; Case of Broderick's Will, 21 Wall. 503; Chipman v. Montgomery, 63 N. Y. 221; Heirs of Adams v. Adams, 22 Vt. 50. There was no allegation in the complaint which even tended to bring the present case within the limits of that well-settled doctrine. The only substantial averments upon which the jurisdiction of the court was made to depend were those stating the marriage, the execution of the will, the death of the testator, and the proceedings in probate. Evidently, of themselves, these facts suggest none of the diverse grounds which are recognized as legitimate bases of equitable interference.

It is urged that the plaintiff did not prove that he was legally married to Jane Stevens. None of the evidence is before the court. It is not possible, therefore, to say whether the complainant offered that strict proof of marriage, valid by the laws of the state where it was entered into, which is essential to uphold the finding on that subject. It is exceedingly doubtful whether the answer filed on behalf of the testator and the executors would admit proof of what was alleged by way of defense. It contained many averments which, if supported by other proper allegations, might possibly have brought it

within the principle of some of the adjudicated cases. Vide *Abbot v. Bayley*, 6 Pick. 89; *Gregory v. Pierce*, 4 Metc. (Mass.) 478; *Arthur v. Israel*, 15 Colo. 147, 25 Pac. Rep. 81. It is not deemed necessary to precisely settle this question, or determine the particulars with respect to which the affirmative defense was apparently insufficient. It was stricken out of the pleading, the balance of the answer was withdrawn, and a demurrer was interposed to the complaint, and on this the defense rested. What has been said with reference to it springs from the apparent importance attached to it in the argument by counsel. While the question may possibly rearise in the county court, if the appellee still has a right to proceed in that forum, the facts on which the defense must rest are not sufficiently before the court to warrant an expression of a definite opinion on their sufficiency as a defense to the proceeding. For the reasons expressed, the judgment of the court overruling the demurrer will be reversed, and the cause remanded, with directions to the court below to dismiss the complaint, at the costs of the plaintiff.

(3 Colo. A. 95)

**SAGERS v. NUCKOLLS et al.**

(Court of Appeals of Colorado. Jan. 23, 1893.)

**DEATH BY WRONGFUL ACT—TORT OF SERVANT—LIABILITY OF MASTER—UNLAWFUL ENTERPRISE.**

1. An action to recover damages for the death by wrongful act of plaintiff's husband, under Gen. St. c. 27, § 2, was brought against three persons as partners, and against two of them individually. The complaint alleged that N., who killed deceased, was in the employ of defendant partners, who were engaged in herding and dealing in cattle; that the two partners sued individually had in their cattle business taken possession of a large tract of unsurveyed government land, which they were holding by force, being armed, and having armed N. for such purpose; that deceased was the lawful claimant of the land; and that, while entering on it, he was shot by N. as a trespasser. There was no allegation that defendant firm had any interest in the land thus claimed by two partners. *Held* that, as against the firm, no cause of action was shown.

2. The two partners, sued individually, who were alleged to be holding the land illegally by force of arms, and in the attempt to maintain which possession N. killed deceased, were not liable, because there was no allegation of the relation of master and servant between such defendants and N., the only employment alleged in the complaint being that by the firm.

3. Such defendants also were not liable in such a suit, for, to render an employer liable, the employment must be lawful, and the business lawful; and in this case the fraud on the government and the public by taking illegal possession of public land, and preventing by force and violence its occupation and sale, under the laws of congress, was not a lawful business in which the relation of master and servant could exist, but in such case all are principals in the criminal enterprise, and all are criminally responsible, jointly or individually, for any wrong perpetrated.

Error to district court, Garfield county. Action by Rachel Sagers against Emmet Nuckolls, G. Harvey Nuckolls, and J. S. Reef, partners, and Emmet Nuckolls and G. Harvey Nuckolls, to recover damages

for the death of plaintiff's husband, who was shot by an alleged servant of defendants. From a judgment for defendants, entered on an order sustaining their demurrers to the complaint, plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by REED, J.:

This was an action at law brought under the provisions of chapter 27, Gen. St., by plaintiff in error, widow and heir at law, to recover damages for the death of her husband, George W. Sagers, alleged to have been shot and killed by William E. Nuckolls. The following are the important allegations contained in the amended complaint: "That on said last-mentioned date, and from the month of October, A. D. 1883, hitherto the above-named defendants, Reef & Nuckolls, as plaintiff is informed and believes, were, and now are, copartners in business, and doing business in Garfield county, in buying and selling, pasturing, herding, raising and handling, slaughtering, and dealing in cattle, beef, and stock; that, in their cattle and stock business, said defendants Emmet and G. Harvey Nuckolls took possession and used and claimed a large tract of the unsurveyed government lands, situated upon the east branch of Mamm creek, in said Garfield county, state of Colorado, and which said tract said defendants occupied and claimed as their headquarters or home ranch for their said cattle and stock business, and occupied and improved the same by and through their agents and employees and the said G. Harvey Nuckolls, and pretended to own the same and have the right to sell and dispose of the same; but plaintiff alleges that said defendants so claimed and occupied the said public lands without a legal right, under or by virtue of the laws of the United States or of the state of Colorado, so to do. Second. That on the said 7th day of September, and for a long time prior thereto, to wit, from the month of January, A. D. 1888, William E. Nuckolls was serving said defendants as an employee, agent, or servant, at and upon the said headquarters, aforesaid; that he worked and labored for the said defendants thereon in farming and herding the stock of said defendants, and among the duties and requirements of said William E. Nuckolls as such servant and employee, and for which he was employed by said defendants, it was his duty, by general direction and instruction of said defendants, to aid and assist said defendants in holding the possession of their said ranch claim, and guns and pistols were provided thereat by said defendants for that purpose, for the use of said William E. Nuckolls and his coservants at all times during said occupation and claim of said ranch claim, and especially on, to wit, the said 7th day of September, 1888, bore (and since said 7th day of September, and now, said coservants are bearing) said arms for said purpose, to wit, the purpose of defending with force and arms, if necessary, the possession of said claim and property for said defendants Emmet and G. Harvey Nuckolls against all comers and claimants, and particularly against the said George W. Sagers, the then law-

ful claimant of a portion thereof. Third. That said defendants, by and through their said servant, William E. Nuckolls, aforesaid, who was then and there engaged and employed and armed and directed by said defendants, as their servant as aforesaid, to hold and maintain them in their possession of said land, and, while the said George W. Sagers was in the act of peaceably and lawfully proceeding through the same, the said William E. Nuckolls pretended and claimed that said George W. Sagers was committing a trespass upon and interfering with the alleged and pretended rights of said defendants, and did, on, to wit, the 7th day of September, A. D. 1888, on the said pretended land claim of said defendants aforesaid, negligently, unlawfully, and wrongfully cause the death of him, the said George W. Sagers, being then and there in the peace of the people, by the act of the said William E. Nuckolls, in that said William E. Nuckolls did then and there assault and shoot him, the said George W. Sagers, with a pistol, commonly called a 'revolver,' a deadly weapon, of the size usually carried as a concealed weapon, giving to said George W. Sagers a mortal wound, of which he then and there died; whereby plaintiff was deprived of the care, maintenance, support, and protection of her said husband, George W. Sagers, deceased, to her great damage, to wit, in the sum of five thousand (5,000) dollars, under the statute in such case made and provided." To this complaint demurrers were filed by the defendants individually, the only ground of demurrer being that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were sustained by the court. The plaintiff elected to stand by her complaint. A writ of error was sued out to the supreme court, and the case transferred by that court to this.

Bennett & Bennett and J. E. Havens, for plaintiff in error. Jos. W. Taylor, for defendants in error.

REED, J., (after stating the facts.) The only question presented is the correctness of the judgment of the court in sustaining the demurrers; in other words, whether the employe is liable in damages, under the statute, for the killing of a person by a servant or employe under the circumstances as stated in the complaint. The provision of the statute upon which the action is based is section 2, c. 27, Gen. St., entitled "Damages:" "Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured." An examination of the section of the statute under consideration will show that it provides generally for compensation "whenever

the death of a person shall be caused by a wrongful act, neglect, or default of another." The circumstances must be such as to entitle the injured party to damages if death had not ensued, but affording no guide as to the circumstances under which the principal or master shall be held liable; hence the liability must be determined by the rules and principles of the common law. In 1880 (43 & 44 Vict. c. 42) an act entitled the "Employers' Liability Act" was passed by the English parliament, which, while more elaborate, explicit, and detailed than our statute, legally amounts to the same thing; and in fixing the liability the courts, in every instance, are compelled to have recourse to the common-law adjudications. The solution of the question presented is one of great difficulty. While the general principles and rules of law controlling in such cases are so clearly stated as to render them almost axiomatic, and each rule is stated many times in different language, the principle and result being the same, the trouble has been, and still is, the application of the rules. The conflicting decisions in applying the principles are so numerous as to produce confusion as soon as an examination is undertaken. The liability of the master for the wrongful acts of a servant is predicated upon the maxim "qui facit per alium facit per se," and is in direct conflict with the broad and universal doctrine of personal liability for wrongs perpetrated. Consequently, in applying it, great care is taken in restricting it clearly within legal limits. The great multiplication of corporations, where all acts are necessarily performed by agents or servants, has latterly led to the extension and widening of the application in many cases, in order to afford the requisite protection, and from such necessity courts have gradually extended the principle to cover cases not formerly supposed to be embraced.

The complaint in the case is very carefully drawn. In order to apply the law, an analysis of the complaint is necessary: First. It is alleged that Reef & Nuckolls, a firm composed of J. S. Reef, Emmet Nuckolls, and G. Harvey Nuckolls, "were buying and selling, pasturing, herding, raising and handling, slaughtering, and dealing in cattle, beef, and stock." In the second paragraph it is alleged that "William E. Nuckolls was serving said defendants as an employe, agent, or servant at and upon the said headquarters, aforesaid; that he worked and labored for said defendants thereon in farming and herding the stock of the said defendants. \* \* \* Second. Taking up the other branch, it is alleged, in the first paragraph, "that, in their cattle and stock business, Emmet and G. Harvey Nuckolls took possession of and claimed a large tract of the unsurveyed government lands, \* \* \* which said tract said defendants occupied and claimed as their headquarters or home ranch for their said cattle and stock business, and occupied and improved the same by and through their agents and employes and the said G. Harvey Nuckolls, and pretended to own the same and have the right to sell and dispose of the same;

but plaintiff alleges that said defendants so claimed and occupied the said public lands without a legal right under or by virtue of the laws of the United States or of the state of Colorado." In the third paragraph it is alleged that William E. Nuckolls, who was engaged, employed, and armed by defendants "to hold and maintain them in their possession of said land," shot and killed Sagers for a pretended trespass upon the land. Though not fully and affirmatively stated, it is fairly inferable that the trouble and controversy resulting in the killing grew out of the possession of the land; for it is said, in speaking of the land, "George W. Sagers, the then lawful claimant of a portion thereof."

The sufficiency of the complaint, in the first instance, must be tested by the following general principle controlling in all cases of this character: "Was the act done under such circumstances that, under the employment, the master can be said to have authorized the act? For if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim does not apply." Wood, Mast. & S. § 279. The test of the liability of the master in all cases is whether the act was done by his express authority, or fairly implied from the nature of the employment and the duties incident to it. See *McManus v. Crickett*, 1 East, 106, which is a leading case on the question under discussion. Among the earliest reported cases is that of *Middleton v. Fowler*, 1 Salk. 282. Holt, C. J., said "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." The rule is clearly laid down in 1 Bl. Comm. 429, 431. It is said: "The master is answerable for the act of his servant if done by his command, either expressly given or implied." Again: "If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service; otherwise, the servant shall answer for his own misbehavior." In *Foster v. Bank*, 17 Mass. 479, the court said: "It may be inferred from the cases, as a general rule, that, to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously towards another, the master is no more liable than any stranger." See *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Ellis v. Turner*, 8 Term R. 533. In *Cooley on Torts* (page 625) it is said: "That which the superior has put the inferior in motion to do must be regarded as done by the superior himself." And at page 627: "But the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant has stepped aside from his

employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do." See, also, *Railroad Co. v. Downey*, 18 Ill. 259; *Railroad Co. v. Baum*, 26 Ind. 70; *Crocker v. New London, etc., Co.*, 24 Conn. 249; *Wright v. Wilcox*, 19 Wend. 343; *Turnpike Co. v. Vanderbilt*, 1 Hill, 480, 2 N. Y. 479.

The next and one of the most important distinctions and considerations is that, to render the master liable, the act must be done in the prosecution of the service of the master. On any deviation so as to render it the act of the servant, the responsibility of the master ceases, and the fact of the relation of master and servant has no bearing. It is said in *Pickens v. Diecker*, 21 Ohio St. 212: "The person for whose acts he is sought to be charged must, at the time when the act complained of was done, not only have been acting for him, but must also have been authorized by him, either expressly or impliedly, to do the act." It follows that there must be an employment,—the relation of master and servant must exist; that the wrong of the servant was incidental to or in the line of his employment, and within the authority given. It is also imperative that the employment be in the prosecution of a lawful business. In a conspiracy or confederation of individuals to do criminal acts, or acts in violation of the law, there is and can be no such relation as master and servant. All are principals. They are all jointly and severally responsible for the legal consequences of the wrong perpetrated. In cases where the master is attempted to be held liable for the acts of the servant, it is a well-settled rule of law that, where the servant acts in obedience to an express order given by the master, the master is liable for all the consequences of the servant's acts, either civilly or criminally. Wood, Mast. & S. § 278; *Reg. v. Bleasdale*, 2 Car. & K. 766; *Reg. v. Michael*, 9 Car. & P. 357; *Rex v. Palmer*, 1 Bos. & P. (N. R.) 97.

The troublesome question in all the cases is not of express but implied authority,—whether the act done was so far incidental to the service for which he was employed that it may be supposed to have been done "in the line of his duty, and in the furtherance of the master's business." A carefully considered case involving this question is that of *Phelon v. Stiles*, 43 Conn. 426. See, also, *Rounds v. Railroad Co.*, 64 N. Y. 129. A well-settled principle of law lying apparently at the very foundation of this action is "that a servant can have no implied authority to do that which it could not be lawful, under any circumstances, for either him or his employer to do." *Shear. & R. Neg.* § 61; *Lyons v. Martin*, 8 Adol. & E. 512; *Poulton v. Railway Co.*, L. R. 2 Q. B. 534; *Thames Steamboat Co. v. Housatonic Ry. Co.*, 24 Conn. 40; *Church v. Mansfield*, 20 Conn. 284; 2 Hil. Torts, c. 40, § 6a. In recent English decisions of cases decided since St. 43 & 44 Vict., referred to above, an important test of the liability of the principal seems to be whether he had the authority to do the act performed by the servant; and, if he

had not, there could be no authority implied from him to the servant. Consequently the principal would not be liable for the act of the servant on the ground of an implied authority. And, to render a principal liable for the acts of the servant in a matter that could not lawfully be done by himself, there can be no implied authority; there must be an express authority. In *Poulton v. Railway Co.*, L. R. 2 Q. B. 534, Blackburn, J., said: "It is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business, in order that an authority to do it may be implied." See *Edwards v. Railway Co.*, L. R. 5 C. P. 445; *Lucas v. Mason*, L. R. 10 Exch. 251. See, further, on points stated above, *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556, 2 C. P. Div. 205; *Rayner v. Mitchell*, Id. 357; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Allen v. Railway Co.*, L. R. 6 Q. B. 65; *Cobb v. Railroad Co.*, (S. C.; filed September, 1892,) 15 S. E. Rep. 878; *Goddard v. Railway Co.*, 57 Me. 202.

The following conclusions are inevitable from the allegations of the complaint: First. That the business of Reef & Nuckolls as a firm, and of Reef as an individual, was legitimate and lawful; second, that William E. Nuckolls, as the servant of Reef & Nuckolls in farming and handling stock, was employed for legal and legitimate service; third, that the land attempted to be held was claimed by Emmet and G. Harvey Nuckolls, and that neither the firm of Reef & Nuckolls nor Reef individually had any connection with it whatever; fourth, that the killing grew out of a controversy over the possession of land claimed only by Emmet and G. Harvey Nuckolls, and was in no way connected with the employment of William E. Nuckolls by the firm of Reef & Nuckolls, nor in any way incidental to or growing out of it. This disposes of the case as far as the firm of Reef & Nuckolls, and Reef individually, are concerned. As to them no cause of action whatever is shown.

Taking up the other branch of the case, it is alleged that Emmet and G. Harvey Nuckolls took illegal possession of a large tract of unsurveyed government land, a part of which was claimed by the deceased; that they and their servants were armed, and were, by force and arms, maintaining the illegal possession of the land; and that William E., in attempting to maintain such possession for Emmet and G. Harvey Nuckolls, shot and killed Sagers. No hiring of William E. by Emmet and G. Harvey Nuckolls is alleged; no relation of master and servant alleged as existing in the attempted holding of the land. The employment alleged, as before stated, was by Reef & Nuckolls in a lawful business. If any liability of any of the parties can be predicated upon the supposed relation of master and servant, it must be that of Emmet and G. Harvey Nuckolls, in whose interest the alleged wrongs were perpetrated, in a matter entirely distinct and separate and disconnected from the business of the firm. Applying the principles of law to the facts and circumstances as stated, it is obvious that Emmet and G. Harvey Nuckolls can-

not be held liable for the act of the killing. First. It is indispensable that the relation of master and servant existed in the line of employment in which the trouble arose and the wrong was perpetrated. No employment by the parties for any such business or purpose is alleged. It is only alleged as being incidental to his employment by Reef & Nuckolls in farming and the handling of cattle. Second. As above shown, to render the employer liable, the employment must be lawful, and the business lawful. The wrong and fraud upon the government and the public by taking illegal possession of a large tract of the public domain, preventing its occupation, settlement, and sale by and to those who had legal right to occupy, under the laws of congress, and maintaining such possession by force and violence, resulting in the taking of life, cannot be regarded as the prosecution of a lawful business, and one in which the relation of master and servant could have existence. Under such circumstances, all are principals—confederates—in the prosecution of a criminal enterprise, and all jointly, or each individually, may be held criminally responsible for any wrong perpetrated. It follows that guarding and protecting the illegal possession of the land claimed by the individuals as alleged was not an incident of the alleged employment, but a criminal and wrongful act as a confederate or a volunteer, in which the question of master and servant could have no place. It matters not, as stated in the complaint, that it was a duty required by others by virtue of his employment, that he was armed by his employers, and even had express orders to eject or kill any person invading the possession. The remedy for such criminal acts cannot be found in a civil suit for damages, but must be reached by another branch of the law. I have carefully examined all the authorities cited, supposed to establish the liability of the supposed principals, but the case under consideration is clearly distinguishable. In each and every of those cases it will be seen that the relation of master and servant existed; that the employment was in legal and legitimate business; and that the wrong complained of grew out of the negligence or wanton and excessive exercise of the authority supposed to have been expressly or impliedly conferred as pertaining to the lawful employment, or as incidental to it. In every instance where the servant stepped out of the line of his employment for his own purposes, or in performing acts for another, it has been held that the liability was personal, and the doctrine of "respondeat superior" had no application. The judgment of the district court in sustaining the demurrers must be affirmed.

(21 Nev. 378)

STATE ex rel. TORREYSON, Attorney General, v. GREY, Secretary of State. (No. 1,375.)

(Supreme Court of Nevada. Feb. 8, 1893.)

CONSTITUTIONAL AMENDMENTS—PUBLICATION.

Const. art. 16, § 1, requiring proposed amendments to the constitution which are to



be acted on by the next legislature to be published for three months next preceding the time for electing the legislature, is complied with by printing the same in the statutes, though they are issued 16 to 18 months prior to the election, especially where this has been the uniform mode since the adoption of the constitution.

Application for mandamus on the relation of J. D. Torreyson, attorney general, against O. H. Grey, secretary of state, to compel the return to the legislature of certain proposed constitutional amendments. Writ granted.

J. D. Torreyson, Atty. Gen., in pro. per. Thomas Wren and Tremore Coffin, for relator. Sardis Summerfield and R. M. Clark, for respondent.

MURPHY, C. J. At the session of the legislature of 1891 there were introduced and passed by the senate, and concurred in by the assembly, 26, and introduced and passed by the assembly, and concurred in by the senate, 2, (making 28 in all,) proposed amendments to the constitution of this state. Said proposed amendments were agreed to by a majority of all the members elected to each of the two houses, entered in their respective journals, with the yeas and nays taken thereon, and were published, in full, with the statutes and the printed proceedings of the senate and assembly during the year 1891, and distributed generally throughout the state, more than three months next preceding the general election held in November, 1892. This was the only publication had of such proposed amendments. On the 3d day of February, 1893, the senate and assembly, being in session, through their proper officers, requested the secretary of state to return to each of the respective houses the proposed amendments acted upon at the fifteenth session of the legislature, for such further action as may seem to them proper and just, and as provided for in section 1 of article 16 of the constitution. But the secretary of state refused, and still refuses, to return said proposed amendments, or any of them, giving as his reason for such refusal that the said proposed amendments were not in a condition to be referred to the present legislature, for the reason that the same had not been published, "for three months next preceding the last general election;" he claiming that a publication in the statutes and journals was not a publication "for three months next preceding the general election," and was not such a publication as is required by the constitution. At the request of the senate and assembly, the attorney general applied for, and was granted, the alternative writ of mandamus.

Section 1 of article 16 reads as follows: "Any amendment or amendments to this constitution may be proposed in the senate or assembly, and, if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the legislature next to

be chosen, and shall be published for three months next preceding the time of making such choice; and if, in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become a part of the constitution."

The only question we are required to pass upon is, what is meant by the sentence "and shall be published for three months next preceding the time of making such choice?" It is insisted by the attorneys for the respondent that a publication in the statute does not comply with the requirements of section 1 of article 16 of the constitution, because, the statutes being printed and distributed as expeditiously as possible after the adjournment of the legislature, and therefore printed and published some 18 months before the election of members to the next legislature to be chosen, or, putting it in another form, the statutes being printed and distributed for more than 8 months preceding the general election, it was not a publication for 3 months next preceding the election. It is a well-established principle of law, and one that does not require the citation of authorities, "that the greater includes the lesser." Therefore the statutes being printed and published from 16 to 18 months before the election is publication for 3 months next preceding the election, for a statute is a continuous publication; it is the publication of edicts which the people in the state are bound to take notice of and act under. A "publication" is defined in the dictionaries: "The act of publishing or making known; notifying or printing; proclamation; divulgation; promulgation,—as the publication of the gospel; the publication of statutes or edicts." "Published" is defined by Worcester as the act of publishing or making public; by Webster, the act of publishing or making known; notification to the people at large, either by words, writing, or printing; by Bouvier, as the act by which a thing is made public. The design of publication prescribed by the constitution was to convey to the voters in this state the information that certain constitutional amendments had been proposed, and to afford them an opportunity to discuss the advisability of such proposed amendments, and to govern them in their choice for members of the next legislature; and that object was as well accomplished by a publication in the statutes as it could have been by any other course. It was not only sufficient to satisfy the requirements of the spirit of the constitution, but, in our opinion, the proceeding in the manner of publication was in conformity with the letter of the section under discussion. From the reading of the section it

is evident that the framers of the constitution intended that the legislature should be the sole judges as to the manner in which such publication is to be made, there being no restraint on them whatever, except requiring the publication to commence at least three months before the holding of the election; and we cannot, from reason or authority, come to any other conclusion than that a publication for 18 months must be deemed a publication for 3 months, so long as that publication continued up to and including the date of the happening of the event for which the publication was intended to give the notice to the voters of the state.

The attorneys for the respondent admit that the legislative department is vested with this discretionary power, in so far as authorizing the method of publication of the amendments, so long as they were published for just three months next preceding the election. They admit that, by resolution, the legislature could authorize publication to be made in one weekly newspaper; or by printing posters, at the state printing office, and posting them in conspicuous places throughout the state; or by printing circulars, and distributing them generally to the voters; and, as we understand them, the publication might be made in any conceivable way, excepting in the statutes. This is an attempt to place a construction upon the section never intended by the framers of the instrument, nor the people when they ratified it. If we were to apply the rule of construction contended for,—then if the legislature should introduce a resolution that the notice of the proposed constitutional amendments should be published in one weekly newspaper, and the first issue of such paper, containing such notice, should be struck off 95 days before the election, then it would not be a good publication, because it was published for more than 3 months next preceding the election,—such a “narrow and technical reasoning” would be misplaced when brought to bear on an instrument framed and adopted by the people themselves.” In construing constitutional provisions, courts ought not, on the one hand, to indulge in ingenious speculations which may lead us wide from the sense and spirit of the instrument; nor should we apply to it such a narrow construction as would exclude the main object and intention of its framers. Therefore, where the words of a constitution are unambiguous, and, in their commonly received sense, lead to a reasonable conclusion, then such instrument should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction, for the purpose of limiting or extending its operations.

The section under consideration contemplates a publication in the statutes or in the newspapers, as the legislature may determine, and that department has in one instance given to section 1 of article 16 of the constitution a construction which we think we are in duty bound to adopt. That was during the twelfth session. St. 1885, p. 150, “Senate joint and concurrent resolutions relative to the manner in which

resolutions proposing constitutional amendments shall be treated.” The fifth subdivision of that resolution reads: “Fifth. That said duplicate enrolled copies of said resolutions shall be published in the printed copies of the statutes and resolutions of the present session of the legislature, in the same order and manner as if they were the original enrolled resolutions.” Showing conclusively that it was their understanding from the reading of the section under discussion that a publication in the statutes was all that was required under its provisions, and in this we think that they gave to the section the construction that was intended to be placed upon it by the framers of that instrument. From an examination of constitutions, in relation to proposed amendments of other states, we find that in quite a number no publication is required. In others publication is made in the statutes; and in others publication is required from 3 to 12 months, and the manner of publication is provided for in the constitutions or by a general law. Section 8 of article 15 of the constitution provides “that the legislature shall provide for the speedy publication of all statute laws of a general nature.” On the 14th day of February, 1865, the legislature did enact a law, which law is still in force, requiring the printing, free distribution, and sale of all laws, resolutions, and memorials passed at each session of the legislature. That course having been pursued for such a length of time by the legislature, and acquiesced in by the people, it is fair to presume that they deemed the publication in the statutes a compliance with the constitutional requirements. For “frequent exercises of power, uniform and long acquiescence of the people in it, constitute a fundamental law, as binding as though it had been formulated expressly in the constitution.” James, Const. Con. 574b; Cooley, Const. Lim. 82; Sedg. St. Const. 412. Our constitution having been adopted in the month of October, 1864, and numerous amendments having been proposed and acted upon by the people, and some of them having been ratified, they are now a part of the constitution, under which laws have been enacted, and property rights acquired. The executive department of the state government has in many ways recognized them; and, this court having sustained the constitutionality of laws enacted to carry into effect the provisions of the amendments so proposed and ratified by the people, publication in the statutes having the sanction of long and general approval, were there ever a doubt existing as to the legality of the publication, the people having acted under the construction placed upon the section by the legislature, under such circumstances it is our duty to hold that a publication in the statutes is a compliance with section 1 of article 16 of the constitution, and the proposed amendments should be referred to the present session of the legislature for such further action as to them may seem just. It is therefore ordered that the peremptory writ of mandamus issue forthwith.

BIGELOW, J., (concurring.) This case turns upon a determination of the question whether the constitutional amendments proposed by the legislature of 1891 have been published in accordance with the requirements of section 1 of article 16 of the constitution of this state. No other point has been discussed or presented, and, in view of the great importance of this matter, we propose to consider it without raising any other question ourselves. These amendments were proposed as joint resolutions of the two houses at the fifteenth session, and, it is admitted, were regularly entered upon the legislative journals, with the yeas and nays of those voting upon them; were properly referred to the succeeding legislature; and were published, according to law, in the printed journals and statutes of that session; but there has been no official publication in any other manner, and it is claimed that this is insufficient, under the constitution. Section 1 of article 16 reads as follows: "Any amendment or amendments to this constitution may be proposed in the senate or assembly, and, if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months next preceding the time of making such choice; and if, in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe; and, if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become a part of the constitution." It must be admitted that this provision, concerning publication, is not self-executing, except, perhaps, in the sense that anything done contrary to its provisions would be null and void; but it does not place the duty of making the publication upon any officer or board, nor does it prescribe what shall constitute the publication required. To this extent, at least, it must have been intended that the legislature proposing the amendments should exercise its discretion. If it be conceded that the provision means some kind of a publication extending through the three months preceding the election, as is contended by respondent's counsel, it does not follow that it must be made in a newspaper. A regular publication and distribution of the amendments during that time, either daily, weekly, or monthly, by the state printing office or other instrumentality, would comply with its language, and doubtless result in as wide a dissemination among the people of knowledge concerning the amendments as would their publication in any one newspaper. If we

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concede that the clause requires a publication in a newspaper, it is still for the legislature to say how often it must be published, and whether in one newspaper in the state, or one in each county, or more or less than those numbers. So, in any view, within lines more or less circumscribed, it is a matter for the legislature to deal with. I think it must also be admitted that the construction to be placed upon this language is to some extent a matter of doubt. Whether the publication in the journals and statutes is a compliance with its requirements is a question concerning which men may reasonably differ. This is shown by the fact that, since the adoption of the constitution, 64 amendments have been proposed by nine different legislatures, and no provision has ever been made for any other publication than this. Some courts have held that similar language was satisfied by one publication made the necessary time before the event, and that such publication constituted a continuous publication for the required time. *Mayor, etc., v. Gear*, 27 N. J. Law, 265; opinion of Beck, J., in *Koehler v. Hill*, 60 Iowa, 579, 14 N. W. Rep. 738, and 15 N. W. Rep. 609. Heretofore in this state there has been no question made, either in the courts or before the people, that the publication in the journals and statutes was not sufficient. Many able attorneys are now of the opinion that such publication is in strict accordance with the constitution, and that is the judgment of my honorable associate upon the bench, Chief Justice Murphy. Under these circumstances, it is safe to say that, if such publication is not sufficient, there has been, at least, reasonable grounds for believing that it was. Such being the case, although, if the question were now res integra, I should, perhaps, come to a different conclusion, I feel constrained to follow the practical construction that has been so long placed upon this clause.

Since the adoption of the constitution, commencing within 10 years thereafter, some 64 amendments have been proposed by the different legislatures. A large number of these have been agreed to by the succeeding legislatures, and submitted to the people. They have acted upon them, and some, having received a majority of all the votes cast, have been incorporated into the fundamental laws, and been recognized as a part of the constitution by the people, the legislatures, and the courts. The legislature of 1877 proposed what is now known as "Section 10 of Article 11," prohibiting the use of public funds for sectional purposes. It was agreed to by the legislature of 1879, and adopted by the people at the election of 1880. In 1881 (*St.* 1881, p. 122) the legislature directed the payment by the state to the several orphan asylums therein of the sum of \$75 per annum for each orphan. Under this act the Nevada Orphan Asylum presented a claim for a sum of money, but the comptroller refused to draw a warrant for it, upon the ground that the act was in conflict with the section of the constitution just mentioned. In the case of *State v. Hallock*, 16 Nev. 373, this contention

was sustained, and the law declared unconstitutional, by this court. The orphan asylum was there represented by as able counsel as were to be found in the state, including two who had ornamented the supreme bench, but no suggestion was made, either by them or the court, that the amendment had not been constitutionally adopted. Seven other amendments have also been made in the same manner, which are now recognized as being a part of the state constitution, and have been treated as such for years past by the legislature, the courts, and the people. No argument has been made that the amendments could be valid if not published as required by the constitution; and doubtless, under the decisions, particularly of this court, (*State v. Tuffy*, 19 Nev. 391, 12 Pac. Rep. 835; *State v. Davis*, 20 Nev. 221, 19 Pac. Rep. 894.) they would not be. I know of no principle upon which those amendments can be held to be a part of our constitution if the publication now under consideration is held insufficient.

All of these acts constitute such a practical construction of a doubtful clause of the constitution as should now, in my judgment, conclude the court from placing any other upon it. This principle is laid down by all the text writers, and has often been recognized and adopted by the courts. Judge Cooley states it thus: "But, where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention, and where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight." Cooley, Const. Lim. 82. In *End. Interp. St.* § 527, it is said: "The greatest deference is shown by the courts to the interpretation put upon the constitution by the legislature in the enactment of laws and other practical application of constitutional provision to the legislative business, when that interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when injurious results would follow the disturbing of it." Sutherland says: "A construction of a constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive." St. Const. § 307. "The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has

great weight." Id. § 311. To the same effect are Sedgwick, St. Const. 412, and Story, Const. §§ 404, 1093. In *Bingham v. Miller*, 17 Ohio, 445, the authority of the legislature to grant divorces came before the supreme court, and, although the court was unhesitatingly of the opinion that the legislature had no constitutional right to grant them, yet the early assumption and long-continued exercise by that body of the power to do so were held to have established their validity. A similar ruling was made in *Cronise v. Cronise*, 54 Pa. St. 255, where the court, speaking by Agnew, J., said: "I repeat a common thought when I say that a constitution is not to be interpreted, as private writing, by rules of art which the law gives to ascertain its meaning; but is to be studied in the light of ordinary language, the circumstances attending its formation, and the construction placed upon it by the people whose bond it is. Judged by these tests, special divorce laws are legislative acts. \* \* \* 'Communis error facit jus' would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction by the people of their own instrument." So in *Mining Co. v. Seawell*, 11 Nev. 394, Hawley, C. J., delivering the opinion, said: "But in this connection it must, as we think, be admitted that, although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government; and, in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." The supreme court of Illinois, in considering the construction to be placed upon a constitutional provision, used this language: "Again, this question is purely political. No private rights are involved. It is a rule of law, well established, that where questions involved are purely political, and depend upon the construction to be given to provisions of doubtful interpretation, the court will not only give great consideration to a construction given by the political departments of the state, but will generally follow such construction implicitly." *People v. La Salle Co.*, 100 Ill. 495. The supreme court of the United States has given the principle the weighty sanction of their authority, by declaring that a contemporary exposition of the constitution, practiced and acquiesced in for only about 12 years, fixes its construction, (*Stuart v. Laird*, 1 Cranch, 299;) and in pronouncing the practical construction of a statute to be the one that must be enforced, although clearly not authorized by the terms of the law itself, (*McKee v. Delancy's Lessee*, 5 Cranch, 22.) It would be unprofitable to make further extracts from the decision. Suffice it to say that the cases wherein the doctrine has been recognized and applied are both numerous and well considered. *Mayor v. Board*, 15 Md. 458; *Scanlan v. Childs*, 33 Wis. 666; *Johnson v. Railroad Co.*, 23 Ill. 202; *Harrington v. Smith*, 28 Wis. 43; *Packard v. Richardson*, 17 Mass. 144; *Rogers v. Goodwin*, 2 Mass. 477; *Moers v. Reading*,

21 Pa. St. 188; State Line, etc., R. Co.'s Appeal, 77 Pa. St. 429; Holmes v. Hunt, 122 Mass. 505, 516; Opinion of the Judges, 126 Mass. 594.

Perhaps a word should be added in explanation of the language used in the opinion in *State v. Davis*, 20 Nev. 220, 19 Pac. Rep. 894, to the effect that the amendments then under consideration had been published in a newspaper according to the requirements of the constitution. The point was not involved in that case. The record shows neither pleading nor proof concerning it, nor was it referred to in the briefs of counsel. The judges must have obtained the knowledge asserted by them extraneously. Inquiry at the bar, upon the argument here, developed the fact that, while those amendments were pending, they were published by a proprietor of a newspaper in Carson, who was of the opinion that they should be so published; but this was done without the sanction of any law, or the direction or order of any board or officer. This is probably what was referred to, but such an unauthorized publication could, of course, have no validity, (*Clark v. Janesville*, 10 Wis. 136, 181,) and amounted to no more than the publication that is always made by the newspapers of the state, as a matter of interest to their readers. This, consequently, is no variation of the constant practice to publish only in the journals and statutes, of which I have spoken.

While the principle of following a contemporaneous and practical construction of a statute or constitution should never be applied except in cases of reasonable doubt, and perhaps not where it is calculated to work wrong or injury to any class or interest, yet, within these lines where it has been so uniformly followed, as has been the case here, and a different construction would be fraught with such serious consequences, it should be held to have fixed the meaning of the language, although, without this, it might be held to mean something different. For this reason I concur in the order directing the writ to issue.

(3 Idaho [Hasb.] 567)

#### CASEY v. MILLER.

(Supreme Court of Idaho. Jan. 31, 1893.)

##### NOVATION—STATUTE OF FRAUDS.

1. Where G. owes C., and M. owes G., C. demands payment of G. G. gives him an order on M. C. agrees to release G., provided M. accepts order. M. accepts the order, and pays \$45 thereon, and promises to pay balance at future time. M. is released as G.'s debtor, and becomes the debtor of C. M. thereby accepts C. as his creditor in place of G.

2. This a novation. C. has a new debtor in place of G., and M. a new creditor in place of G.

3. M., at request of G., agrees to pay to C. money that he owes by contract to G. Such contract is not within the statute of frauds, requiring the promise to pay the debt of another to be in writing. M. simply pays his own debt to a different person than the one he originally agreed to pay it to. He is paying his own debt, not the debt of another.

(Syllabus by the Court.)

Appeal from district court, Kootenai county; J. Holleman, Judge.

Action by James Casey against Robert Miller to recover the sum of \$275, due on two orders accepted by defendant. Judgment for defendant. From the judgment, and an order overruling a motion for a new trial, plaintiff appeals. Reversed.

R. E. McFarland, for appellant. Chas. L. Heltman, for respondent.

SULLIVAN, J. This action was brought by the appellant to recover the sum of \$275, interest, and costs. The amended complaint states two causes of action. In the first cause of action appellant alleges that one Charles M. Gates was indebted to appellant in the sum of \$315; that said Gates, in payment of said indebtedness, gave to appellant an order on the respondent for said sum; that thereafter respondent accepted said order, and paid appellant thereon the sum of \$45, leaving a balance due of \$270. It is alleged in the second cause of action that one Frank Leighton, on or about the 2d day of July, 1891, made and delivered to appellant an order in writing on the respondent, directing him to pay the appellant the sum of \$25, and that on the 3d day of July respondent accepted said order, and thereafter paid \$20 thereon; that there is still due a balance of \$5. The respondent by answer denied many of the allegations of the complaint, and set up a counterclaim for lumber sold and delivered to the appellant, of the value of \$40, and prays for judgment therefor, with interest and costs. The cause was tried by the court with a jury, and judgment on the verdict was rendered against the appellant for the sum of \$36. A motion for a new trial was interposed, and overruled by the court. This appeal is from the order overruling the motion for a new trial, and from the judgment rendered.

The appellant assigns four errors. The first is that the court erred in taking the first cause of action set forth in the complaint from the consideration of the jury. The record shows that one Gates was indebted to the appellant in the sum of \$315 for a team of horses, some straw, barley, a cant hook, and a swamp hook, and that appellant made a demand upon Gates for the payment of said sum on or about the 13th of July, 1891. Gates replied that he could not pay said sum, but that respondent, Miller, was owing him, and that he would give appellant an order on Miller for the said sum, whereupon the appellant replied: "All right. If Miller will accept the order, I will release you. If he won't accept the order, I am going to bring this back to you." It appears from the record that the appellant went to see Miller immediately after receiving said order from Gates, and presented the order to Miller for payment. Miller replied that he could not pay the order at that time. The appellant informed Miller that his creditors were crowding him, and that he would have to have the money, and informed Miller that, unless he (Miller) paid said order, he would have to attach Gate's stock, or get it out of him in some way. Miller replied: "You cannot get anything out of

Gates, for all the money he gets has got to come through me." Casey replied: "Then you pay the order." Whereupon Miller said: "I will tell you what I will do. I will pay you \$100,—\$45 on the Gates order and \$55 on the McLeod order." Casey replied that that was better than nothing, and inquired when he could pay the balance. Miller replied: "In about sixty days." Casey replied: "All right. I will take that, and release Gates." It further appears that in about 10 days Casey presented the order to Miller, and he paid \$45 thereon, and also paid the McLeod order of \$55, making the \$100 which he had agreed to pay. The order is as follows: "Fish Lake, July 17, 1891. Mr. Miller: Please pay to Mr. James Casey the sum of three hundred and fifteen (\$315) dollars, and charge to my account, and oblige, [Signed] Charles M. Gates." At the time Miller paid the \$45 on the said order he made the following indorsement upon the back of said order. "July 30th, 1891. Paid on Gates order \$45." Gates further testifies that, about three weeks after Miller had paid the \$45 on said order, he saw Gates, and told him that Miller had accepted the order, and had paid \$45 on it, and promised to pay the balance in about 60 days. On cross-examination Casey testified that Gates became indebted to him for a span of horses in the sum of \$175, for which sum Gates had executed two promissory notes to appellant,—one in the sum of \$75, and the other in the sum of \$100; and that the balance of the \$315 was due on book account, and that the only contract he made with Miller in regard to the payment of said order was that appellant should release Gates from his liability to him, and Gates should release Miller from his liability to him, which was done, and Miller thereupon agreed to pay said order, and did pay \$45 thereon. At the close of Casey's testimony the attorney for the respondent moved "that the claim of the plaintiff as to the amount of the \$175 and two notes in question be stricken out of the complaint;" whereupon Casey was recalled for further examination, and testified as follows: "It was agreed all around that I should release Gates if Miller accepted the order, and that Gates should release Miller,—that I should become Miller's creditor instead of Gate's creditor;" at the close of which testimony the court made the following ruling: "The first cause of action is hereby taken from the consideration of the jury,—that the first cause of action set forth in the complaint is not to be considered by the jury." The motion of counsel for respondent was to strike out of the complaint the amount of \$175, represented by the two notes referred to in appellant's testimony. The court in ruling on that motion not only struck out the \$175 represented by the two notes, but the entire first cause of action, which claimed \$270 as the amount due.

The record is silent as to the reason entertained by the court for withdrawing the first cause of action from the consideration of the jury, and we are unable to perceive any reason that would justify it, and know of no authority that would sus-

tain said ruling. It is true, under the evidence, that the attorney for the respondent stated to the court that he did "not think there had been any novation of these notes on that contract," and we presume that the court concluded that novation was not shown, and struck out the sum of \$175 for that reason. The record is silent as to the reason entertained by the court for striking out the \$95, making the balance claimed in the first cause of action. From the evidence, as it appears in the record, we think that novation is clearly established, and Casey, creditor of Gates, consented to accept Miller as his debtor, and canceled the debt so far as Gates was concerned. This was a novation. Pol. Cont. p. 254. Miller was owing Gates, Gates was owing Casey, and Miller simply agreed to pay the sum of \$315, due from him to Gates, to Casey; or, in other words, he had agreed to accept Casey as his creditor instead of Gates. Miller did not, under said agreement, agree to pay the "debt of another," within the meaning of that term as used in the statute of frauds, but simply agreed to pay the debt owing by himself to appellant instead of to Gates. In *Barringer v. Warden*, 12 Cal. 311, the court, in referring to the statute of frauds, said "that the statute requires the promise to pay a debt of another to be in writing expressing the consideration; but this requirement has no reference to the promise by A. to pay money that he owes by contract with B. to C. This is his debt, and the mere direction in which he pays it does not alter the character of the contract from the original obligation. There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, or promising his creditor to pay a third person the same sum, by an agreement between the three. The promisor is paying his own debt, and his own obligation, and not assuming another's. This has been often decided, and is too obvious to require authority or further illustration to make the proposition evident." In the case at bar the record clearly shows that Miller agreed to pay to Casey the sum of \$315, which sum he was owing to Gates. The record further shows that he not only promised to pay \$315 to Casey, but that he actually did pay \$45 on said claim. Counsel for respondent contends that the evidence fails to show any such agreement on the part of Miller; that when Casey presented the order the second time to Miller, and demanded payment of the balance due thereon, Miller asked him, "What order?" and claimed to know nothing about the order. Casey swears that Miller promised to pay the order, and did pay \$45 thereon, and indorsed said sum on said order by his own hand. This evidence stands uncontradicted in the record, and clearly shows that Miller promised to pay said order. The court erred in withdrawing the first cause of action from the consideration of the jury.

In *McLaren v. Hutchinson*, 22 Cal. 187, the court says: "Here is a mutual agreement by the parties interested, and it can make no difference that this mutual agreement was not presented at the same mo-

ment of time, or that all were not present at the time of its completion. Beach and the defendant assented to it when the agreement was signed and delivered, and the creditors afterwards assented when informed of the agreement by the defendant. This assent to the agreement gave them a right of action against the defendant, and the case is not within the statute of frauds." So, in the case at bar, Gates assented to such arrangement, and gave Casey an order on the respondent. Casey assented to the arrangement by accepting the order; Miller assented by agreeing to pay the order. The pretense that Miller never accepted said order, because, when presented to him the second time, he stated to the appellant that he knew nothing about the matter, is too transparent to deserve any consideration whatever. Appellant thereafter met Gates, and told him that he was going to bring suit against Miller if he (Miller) did not pay the order, and Gates thereupon replied that he would try to raise the money and pay it himself, —that he would take up the order himself. This statement of Gates has no bearing on this matter whatever. The evidence clearly shows that the appellant looked to Miller only for the payment of said order after his acceptance thereof. That appellant neglected to deliver said two promissory notes to Gates is no concern of the respondent. After accepting the order on Miller, and Miller's acceptance of the same, appellant swears positively that he released Gates, and Gates was no doubt entitled to the delivery of said promissory notes on demand; but the nondelivery of said notes to Gates is no defense in this action. In the above view of the case it is not necessary for us to pass upon the instructions to the jury, for upon a retrial of the case, on the issues as made by the pleadings, the court would certainly not instruct the jury as it did at the former trial. The court should have granted appellant's motion for a new trial. The judgment of the court below is reversed, and the cause remanded for a new trial in accordance with the views expressed in this opinion, with costs of this appeal in favor of the appellant.

HUSTON, C. J., and MORGAN, J., concur.

(3 Idaho [Hast.] 530)

#### Ex parte COX.

(Supreme Court of Idaho. Jan. 18, 1893.)

#### ASSAULT WITH INTENT TO MURDER—SENTENCE NOT AUTHORIZED BY LAW—HABEAS CORPUS.

1. The applicant, John P. Cox, was indicted for the crime of an assault with intent to murder, and was convicted of an assault with a deadly weapon likely to produce great bodily harm, and sentenced to confinement in the state prison for a term of five years. Section 6732, Rev. St., prescribes the punishment for the crime of which the applicant was convicted to be imprisonment for a term not exceeding two years, or fine of \$5,000, or both such fine and imprisonment. The court sentenced the applicant to five years' imprisonment. Held, that the judgment was not authorized by law, and is void.

2. Jurisdiction to render the particular sen-

tence imposed is as essential to its validity as jurisdiction of the person or subject-matter.

(Syllabus by the Court.)

Ex parte proceedings by John P. Cox for a writ of habeas corpus. Writ granted.

James W. Reid, for applicant. Geo. M. Parsons, Atty. Gen., for the State.

SULLIVAN, J. This is an application for a writ of habeas corpus for the release of John P. Cox, who, it is alleged, is unlawfully imprisoned and restrained of his liberty by John P. Campbell, warden of the Idaho state prison at Boise City, Idaho. It is alleged in the petition that said Cox was indicted at the June term, 1891, and tried at the October term, 1891, of the district court of the second judicial district of the state of Idaho, in and for the county of Idaho, for an assault with intent to commit murder, and that the jury returned the following verdict: "We, the jury in the above-entitled case, find the defendant guilty of an assault with a deadly weapon likely to produce great bodily harm." And the court thereupon entered judgment against and sentenced the prisoner to confinement in the state prison for a term of five years. That said judgment and sentence are void, for the reason that said court had no jurisdiction to impose said sentence and judgment under said verdict. A copy of the indictment, verdict, and judgment are made a part of the petition. The court, on the filing of the petition, issued a writ of habeas corpus to the said warden, commanding him to have the body of said John P. Cox before this court at a time therein fixed, and to show cause why the said prisoner should not be released. At the time fixed said warden made his return to said writ, which shows that the cause of the detention of the said John P. Cox was by virtue of a judgment and sentence of the district court of the second judicial district of Idaho, in and for the county of Idaho, and annexed to and made a part of his return the commitment and judgment of said court, which show substantially the same facts as shown by the petition, the substance of which is above stated.

The prisoner was indicted for the crime of an assault with intent to murder, and was convicted of the crime of an assault with a deadly weapon likely to produce great bodily harm. The punishment for the crime of an assault with intent to commit murder is prescribed by section 6594, Rev. St., and is imprisonment in the state prison not less than 1, and not more than 14 years, while the punishment for the crime of an assault with a deadly weapon likely to produce great bodily harm is prescribed by section 6732, Id., and is imprisonment in the state prison not exceeding two years, or by fine not exceeding \$5,000, or both. The court evidently considered that the prisoner had been convicted of an assault with intent to commit murder, and sentenced him to imprisonment for five years, while in fact the verdict of the jury finds him guilty of the crime of an assault with a deadly weapon likely to produce great bodily harm. Un-



der said section 6732 the maximum imprisonment for the offense of which the prisoner was convicted is two years, and there is no provision of law authorizing a longer term of imprisonment for that crime.

It is conceded by the attorney general that the sentence, under the verdict, could not exceed two years; but he contends that the prisoner should not be released by writ of habeas corpus, because said judgment is merely erroneous, and not void, and cites some very respectable authority in support of that proposition, to wit: *Ex parte Shaw*, 7 Ohio St. 81; *Ex parte Bond*, 30 Amer. Rep. 20; *Petition of Crandall*, 34 Wis. 177; *State v. Stordock*, (Minn.) 39 N. W. Rep. 65. The counsel for the prisoner contends that the court had no jurisdiction to sentence the prisoner for a longer term than two years, and that the court exceeded its jurisdiction in rendering said judgment, and that the judgment, for these reasons, is absolutely void. There is no question but what the court had jurisdiction of the prisoner, and had jurisdiction to try him for the crime of which he was convicted, and to sentence him for that crime; but the question is whether the judgment or sentence which was rendered and pronounced was a mere erroneous exercise of power, and therefore voidable only, or is in excess of, and without, its jurisdiction, and therefore absolutely void. If the sentence is voidable only, the prisoner must be remanded; but, if it is absolutely void, he should be set at liberty. If a court having jurisdiction of the person of a prisoner, and jurisdiction to try and sentence the prisoner for the crime charged, on conviction sentences him to a longer term of imprisonment than the statute authorizes, is such judgment or sentence void, or voidable only? That is the precise question before us. If jurisdiction includes pronouncing the particular judgment authorized by statute, and no other, then the judgment pronounced is absolutely void, for the statute did not authorize such judgment.

19 Cent. Law J. p. 102, contains an able article entitled "The Modern Idea of Jurisdiction." The author says: "The idea of jurisdiction entertained by the old jurists appears to have been that jurisdiction is simply the power to decide something in a given controversy, to proceed to judgment, to render some kind of a judgment, and that beyond this everything else related to the propriety of the judgment rendered;" and cites authorities in support thereof. The distinguished author further says: "The modern idea, as distinguished from this, is that jurisdiction is not merely the power to proceed in a cause, and to render some judgment therein, but it is the power to render the particular judgment rendered. This modern idea has been taken up by several respectable courts, including the supreme court of the United States. \* \* \* It will also be perceived that nearly every reported case in which the courts have asserted the power to inquire by habeas corpus whether other courts, in rendering a particular judgment, were cases where the courts so issuing the writs of habeas corpus were courts

possessing appellate or superintending jurisdiction over the courts whose judgments were thus inquired into." It is stated in 12 Amer. & Eng. Enc. Law, p. 247, that "there is a very clearly defined attempt in the latest cases in the United States, however, to escape from the position that the judgment of a court having jurisdiction to hear and determine is conclusive by adding to the definition of 'jurisdiction' a new element, viz. that jurisdiction is not merely the power to hear and determine, but also the power to render the particular judgment which was rendered;" and cites in support thereof cases decided by the supreme court of the United States, and decisions from the courts of last resort of several states. On page 251, supra, the following conclusion is reached: "The question, therefore, cannot be said to be definitely decided. The great weight attached to the decisions of the supreme court of the United States makes it at least probable that, if that court continues to hold the views expressed in the late cases cited supra, the courts of the various states will sooner or later adopt them; but the decisions thus far scarcely authorize a stronger statement than that there is a tendency in the later cases to hold that jurisdiction includes, not only the power to hear and determine, but also the power to render the particular judgment entered in the particular case." Black, *Judgn.* § 258, holds that jurisdiction to render the particular sentence imposed is as essential to its validity as the jurisdiction of the person or the subject-matter. In commenting on certain decisions which held that if a court had authority to pronounce sentence, and, while in the legitimate exercise of its power, committed a manifest error, in the number of years of confinement imposed on the defendant, the sentence was not void, but erroneous, and refused to release the prisoner on habeas corpus, the learned author says: "But the argument is far from satisfactory. It involves the error of overlooking the fact that jurisdiction to render the particular sentence imposed is equally as essential to its validity as the jurisdiction of the person or subject-matter. If either of these three elements is wanting, the judgment is a nullity. Now, in respect to the sentence, the court has precisely the jurisdiction which the statute gives it,—no more and no less; and if the statute prescribes that the sentence shall be for not less than three years the court is utterly without power to sentence for one year. This seems too plain for argument. And, indeed, the great preponderance of authority sustains the proposition that if the court did not have the authority to render the particular sentence; if the sentence is different from that prescribed by law, or is below the minimum or above the maximum,—that is good ground for releasing the prisoner on habeas corpus." In support of that proposition the author cites: *Ex parte Lange*, 18 Wall. 163; *Ex parte Milligan*, 4 Wall. 131; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte Bernert*, 7 Pac. Coast Law J. 460; *Ex parte Page*, 49 Mo. 201; *People v. Walters*, 15

Abb. N. C. 461; *People v. Liscomb*, 60 N. Y. 559; *Ex parte Kearny*, 55 Cal. 212; *In re Petty*, 22 Kan. 477; *Ex parte Bulger*, 60 Cal. 438; *Miller v. Snyder*, 6 Ind. 1; *Ex parte Smith*, 2 Nev. 338. In *Ex parte Lange*, supra, the point is illustrated in the following clear and forcible manner. The court say: "If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void." In *Ex parte Page*, 49 Mo. 291, a case, in principle, very similar to the one at bar, the court says: "The statute provides that persons convicted of grand larceny shall be punished as follows: First. Stealing a horse, mare, gelding, colt, filly, mule, or ass, by imprisonment in the penitentiary not exceeding seven years. Second. In all other cases of grand larceny, by like imprisonment, not exceeding five years. Wagn. St. p. 457, § 26. In no case, therefore, does the statute authorize, for any of the offenses which constitute grand larceny, a sentence for more than seven years' imprisonment. Hence the judgment for imprisonment for ten years was in violation of the statute, and palpably illegal. It would have been reversible on writ of error or appeal, as a matter of course. Can this court furnish the required remedy in this proceeding? The general principle is that on a hearing of a writ of habeas corpus, when it appears that the prisoner is detained by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, no inquiry into the regularity of the proceedings which resulted in the judgment can be had. For all such errors or irregularities the law provides other remedies. \* \* \* But the statute, by an express enactment, declares that when a prisoner is brought up on habeas corpus, if it appears that he is in custody by virtue of process from any court legally constituted, or issued by any officer in the service of judicial proceedings before him, such prisoner can be discharged only in one of the following cases: First. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person. \* \* \* Sixth. Where the process is not authorized by any judgment, order, or decree, nor by any provision of law. Wagn. St. p. 690, § 35. It seems to me that the court, in passing the sentence, exceeded its jurisdiction in the matter, and that it did not act by authority of any provision of law. The application, therefore, I think, comes within the meaning of the statute." The provisions of the statute of Missouri just quoted are substantially the same as the provisions of section 8354 of the Revised Statutes of Idaho, which prescribes the cases in which a prisoner may be released on habeas corpus by this court. The court further says: "But in the case just quoted it will be perceived that the error was one of fact, provable by extrinsic evidence de-

hors the record. The record, as it stood, warranted the judgment, and the error of fact produced the difficulty. In such a case the court would not, in a collateral proceeding, undertake to revise the judgment. But, in the case we are now considering, the question presented is far different. The error here does not arise out of matter of fact, but is patent on the face of the record. The record proper shows that the judgment of the court in passing sentence was illegal; that it was not simply erroneous or irregular, but absolutely void, as exceeding the jurisdiction of the court, and not being the exercise of an authority prescribed by law."

In the case at bar the statute authorized the court to sentence the prisoner for a term not exceeding two years; but, without any authority whatever, the court sentenced him to a term of five years, and clearly exceeded its jurisdiction in so doing. It has been suggested by the attorney general that, as the court had authority to sentence the prisoner for a term of two years, a writ should be denied, at least until the prisoner had served a term of two years. If the case was before us on appeal the court would no doubt be justified in reversing the judgment, and perhaps in remanding the case for resentence. We are not aware of any authority that would permit us to reduce said sentence, in this proceeding, to the term of two years, or to remand for a resentence. We have only authority, in this proceeding, to release or remand the prisoner to custody, as said judgment is an entirety. We certainly cannot, in this proceeding, modify it in any manner. In *Ex parte Kelly*, 65 Cal. 154, 3 Pac. Rep. 673, a case in which the defendant was convicted of battery, and sentenced or adjudged to pay a fine of \$650, or to be imprisoned in the county jail until the fine was paid, at the rate of one day's imprisonment for every dollar of fine, and that he perform labor on streets or public works during such imprisonment, an application for a writ of habeas corpus was made, and the court say: "Battery is a misdemeanor, and is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both. \* \* \* It was clearly the intent to impose a penalty of a fine, and, in case it was not paid, imprisonment until the fine was satisfied at the rate indicated in the judgment. This is justified by section 1446 of the Penal Code. \* \* \* But this statute nowhere allows any addition to this substituted mode of payment. We look in vain to find any authority in any tribunal, in the Penal Code or any other Codes, to annex to this substitution of incarceration for coin any other punishment. We find no power in the justice to add, as is done by the judgment, that the defendant, while so imprisoned, perform labor on the streets or other public works in the city of Los Angeles. This portion of the judgment is clearly beyond and outside the jurisdiction of the tribunal which rendered it. Now, the judgment is a unit, and, if one portion of it is without the jurisdiction of the justice, the judgment is

void." No, in the case at bar, the judgment is a unit, an entirety; and we cannot, in this proceeding, reduce it to two years. See, also, *Ex parte Bernert*, 62 Cal. 524. In *People v. Liscomb*, 60 N. Y. 559, the court say: "A party held only by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released by habeas corpus. It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law, and contrary to law, is merely voidable, and not void, and must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of rights and the constitution, and creating a judicial despotism. It would be to defeat justice, nullify the writ of habeas corpus by the merest technicality, and the most artificial process of reasoning. \* \* \* No court is or can be competent to pronounce a sentence and give judgment in open and palpable violation of a positive statute, and a judgment thus given is void. With us, all punishments are prescribed by statute, as well as to character as extent; and a sentence not conformable to law, as not warranted by statute, or which is in excess of the legal punishment, is ultra vires, and like ever other act, whether judicial or ministerial, done without legal authority, is void." The opinion of the court in that case is a very able and exhaustive one, and we think peculiarly applicable to the case at bar. In *Ex parte Reed*, 100 U. S. 13, the court say: "If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void." The sentence in the case at bar was not warranted by statute, was in excess of the punishment prescribed by law, and is absolutely void; and when a prisoner is held under such a sentence, and the matter is properly brought to the attention of this court, it has authority to inquire into the matter, and to discharge the prisoner, if it be found that the court had no jurisdiction, under the law, to render the particular judgment rendered, or to pass the sentence imposed. In *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152, in regard to this class of cases, the court say: "It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of habeas corpus into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party, and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further." In the case at bar the court did exceed its powers in the sentence, which it pronounced. There

was no provision of law authorizing such sentence, and it is void. We are of the opinion that jurisdiction to render the particular sentence imposed was as essential to the validity of the judgment as the jurisdiction of the person or subject-matter, and that the sentence of the district court under which the said John P. Cox is held a prisoner was pronounced without authority of law, and is void, and that the prisoner should be released; and it is so ordered.

HUSTON, C. J., and MORGAN, J., concur.

(3 Idaho [Hast.] 538)

AH KLE et al. v. McLEAN et al.

(Supreme Court of Idaho. Jan. 21, 1898.)

MINING LEASE TO ALIEN—VALIDITY.

Prior to the act of Congress of March 3, 1887, known as the "Alien Act," there was nothing in the laws of the United States nor of the territory of Idaho prohibiting aliens from holding and working mining ground under a lease from one qualified, and who had made a proper location of such mining ground.

(Syllabus by the Court.)

Appeal from district court, Idaho county; Willis Sweet, Judge.

Action by Ah Kle and others against A. C. McLean and others to recover the possession of mining grounds and for damages for ouster. From a judgment dismissing the complaint, plaintiffs appeal. Reversed.

James W. Poe and James W. Reid, for appellants. Forney & Tillinghast, for respondents.

HUSTON, C. J. In the year 1862 one A. Thornton and certain other persons, all being citizens of the United States, located certain placer mining claims in Elk City mining district, in the county of Idaho, in the then territory of Idaho. Said locators held and worked the claims so located, under the laws of the territory of Idaho and the rules and regulations of said mining district, until the year 1872. In the year 1872 said locators sold and transferred said mining claims, and the improvements thereon, consisting of flumes, ditches, etc., to one James Witt, a citizen of the United States, who continued to occupy, hold, and work the same until the year 1882. In the year 1892 said James Witt executed to the plaintiffs, Ah Kle et al., who are all aliens, (Chinamen,) the following indenture of lease: "This agreement, made on the 8th day of July, in the year of our Lord, one thousand eight hundred and eighty-two, between James Witt, of Idaho county, Idaho territory, the party of the first part, and Ah Kle, Slam Hing, Ah Linn, Tong Ock, Mon Gue, Ah Toy, Sing Fook, and Gue Hing, all of Idaho county, Idaho territory, the parties of the second part, witnesseth: That the said party of the first part, in consideration of the covenants, promises, and agreements on the part of the said parties of the second part hereinafter contained, covenants, promises, and agrees to and with the said parties of the second part that the said party

of the first part will permit the said parties of the second part to go upon and take the gold and other precious metals from all of his mining ground on or near Buffalo hill, near Elk City, Idaho county, I. T., comprising sixteen hill claims on Buffalo hill of 100 feet each, 1,600 feet; also six flat or gulch claims at the base of said hill, of 150 feet each, 900 feet,—all of which are marked and bounded by notices and stakes; also all tunnels and flumes, races, tools, hose, and pipes now upon said claims belonging thereto; also all the water and ditches conveying the water from Elk creek and Buffalo creek and their tributaries upon said ground; also the dwelling house and all property belonging to said mining claims; and work and take said precious metals therefrom, and use said property as they may deem advantageous for the purpose of getting gold from said ground, and to construct for me any new tunnels, races, ditches, etc., that they may deem necessary for a period of twenty-five years. And the said parties of the second part, in consideration of the said covenants, promises, and agreements on the part of the said party of the first part hereinbefore contained, covenant, promise, and agree to and with the said party of the first part that the said parties of the second part will take charge of the aforesaid property and hold the same for the said party of the first part for the period of twenty-five years, reasonable wear and tear and working of said ground excepted, and further agree to pay to said party of the first part, his heirs, executors, or administrators, the sum of eighteen hundred dollars in good, merchantable gold dust from said mining claim, at the rate of sixteen dollars per ounce, said gold dust to be paid on or before one year after date; and we further agree and covenant with the said party of the first part to represent said mining ground according to the local laws and customs of the mining camp, or any other laws to be hereinafter enacted, for the period of said lease or occupancy, (twenty-five years;) and further agree to keep the ditches in good repair during the whole of said time. And for the true and faithful performance of all and every of the said covenants, promises, and agreements the said parties to these presents bind themselves each unto the other in the penal sum of one hundred dollars lawful money of the United States of America, as fixed, settled, and liquidated damages, to be paid by the failing party. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year above written. James Witt. [Seal.] Ah Kle. [Seal.] Slam Hing. [Seal.] Ah Linn. [Seal.] Tong Ock. [Seal.] Mon Gue. [Seal.] Ah Toy. [Seal.] Sing Fook. [Seal.] Gue Hing. [Seal.] Signed, sealed, and delivered in presence of Benjamin F. Morris, T. Wall, Giles Mathen. Territory of Idaho, county of Idaho—ss.: On this 8th day of July, in the year of our Lord A. D. 1882, personally appeared before me the undersigned clerk of the district court, first judicial district, Idaho territory, James Witt, and Ah Kle, Slam Hing, Ah Linn, Tong Ock, Mon Gue, Ah

Toy, Sing Fook, Gue Hing, all of whom, after first being made acquainted with the contents of the foregoing instrument, acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned. In witness whereof I have hereunto set my hand, and affixed the seal of said court, this the day and year in this certificate above written. Hazen Squier, Clerk District Court, 1st Judicial District, Idaho Territory. By Benjamin F. Morris, Deputy Clerk. Filed for record this 21st day of July, A. D. 1882, at 6 o'clock P. M. J. B. Chamberlain, County Recorder Idaho County, Idaho Territory."

Plaintiffs, Ah Kle et al., entered under said lease, and continued to occupy and mine and work said ground thereunder until on or about the 18th day of October, 1889, when the defendants by force and violence entered upon said premises, and ousted and ejected plaintiffs therefrom. Plaintiffs bring this action to recover possession of the premises, and for damages for ouster. To complaint of plaintiffs, which sets forth the facts as hereinbefore stated, defendants interpose a demurrer upon the following grounds: (1) A misjoinder of parties plaintiff; (2) incapacity to sue, of all the plaintiffs named, except Witt, because of the failure to allege citizenship in complaint; (3) that said complaint does not state facts sufficient to constitute a cause of action. Upon argument of demurrer the court held: "The demurrer is sustained upon the second ground, and as to all the parties plaintiff whose citizenship is not averred the action is dismissed,"—the court reserving, however, the question of water rights, and the right of a person not a citizen to purchase, locate, or hold the same." This ruling and decision was made April 21, 1890. On October 9, 1890, the court made the following additional finding and decision: "Considering the question above named, for the reasons given in No. 19 the demurrer is sustained as to the holding or appropriating of water rights as set forth in the complaint." On September 19, 1891, judgment was entered dismissing the complaint of plaintiffs with costs. From the judgment so entered this appeal is taken.

The demurrer of defendants not having been sustained as to the plaintiff Witt, it is not readily discernible upon what the court predicated its judgment against him. Perhaps this is explainable from the fact, which appears by the record, that another case (referred to by the court in its decision on the demurrer herein as No. 19) was heard, together with the case under consideration, by the district court. But there is this difference between the facts in case No. 19 and the case under consideration: In case No. 19 all the plaintiffs were allens, (Chinamen,) and there had been an absolute sale by the owners of the mining claims to said allens, (Chinamen,) which sale was made in August, 1887, and after the passage of the act of congress (March 3, 1887) known as the "Allen Act." Thus it will be seen that there is no similitude between the two cases,—a fact evidently overlooked by the district court. The Chinamen plaintiffs were the tenants of

Witt at the time of the alleged ouster by defendants. Their possession was his possession. An ouster of the tenants by one claiming adverse to the landlord is an ouster of the landlord, and this action might have been very properly brought by Witt alone. There was nothing in the laws, either of the United States or of Idaho, prior to the act of congress of March 3, 1887, at least, which prohibited the renting or leasing, by one holding under a valid location, of mining ground to an alien. "A mining claim perfected under the law is 'property' in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." *Belk v. Meagher*, 104 U. S. 283; *Forbes v. Gracey*, 94 U. S. 762. The cases cited by the judge of the district court, in his decision in case No. 19 have no application to the case under consideration, as they all arose upon an entirely different state of facts. The judgment of the district court is reversed, and the cause remanded, with instruction to the district court to overrule the demurrer and permit defendants to answer.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Hasb.] 554)

#### STATE v. REED.

(Supreme Court of Idaho. Jan. 26, 1893.)

REVIEW BY SUPREME COURT—INTERMEDIATE ORDERS.

1. Where the statutes fail to provide for an appeal from a final judgment of the district court to the supreme court, the supreme court will entertain a writ of error, or other proper writ, to bring such judgment before it for review, under the provisions of section 9 of article 5 of the state constitution.

2. The statutes of Idaho provide for the reviewing, on appeal, of an order of the district court, overruling an application for a change of place of trial in a criminal case. Such order, not being final, can only, under the provisions of the Penal Code, be reviewed on appeal from the final judgment.

(Syllabus by the Court.)

Error to district court, Shoshone county; J. Holleman, Judge.

Frank Reed was indicted and arraigned for murder. His motion for a change of venue was overruled, and he applied for and obtained a writ of error. The state moves to dismiss the writ. Writ dismissed.

Albert Hagan, Ganahl & Bushnell, and A. A. Fraser, for plaintiff in error. Geo. M. Parsons, Atty. Gen., (Selden B. Kingsbury, of counsel,) for the State.

HUSTON, C. J. The defendant was indicted at the September term, 1892, of the district court of Shoshone county for the crime of murder. On October 3, 1892, he was arraigned, and demurred to the indictment, and, the same being overruled, on the 6th day of October, 1892, he entered his plea of not guilty, at same time giving notice in open court that he would apply for a change of venue, and on same day filed his petition and certain affidavits in support thereof. The motion for change of venue being overruled, defendant ap-

plied to this court for a writ of error, and brings said ruling of district court to this court for review. Writ of error was issued, and upon the return thereof the attorney general moves to dismiss the same upon the ground that such writ will not lie from an order overruling a motion to change the place of trial of a criminal case. Argument was heard upon the motion and case together.

Section 9, art. 5, of the constitution of Idaho provides as follows: "The supreme court shall have jurisdiction to review upon appeal any decision of the district courts or the judges thereof;" and it is contended by defendant that there being no provision in the statutes of Idaho for an appeal from an order of the district court overruling a motion for a change of venue in criminal cases, such order being final, it is within the power and jurisdiction of the supreme court to review the same upon writ of error. It is conceded by counsel for the defendant that the term "and decisions," as used in the section of the constitution above referred to, is not to be construed as meaning all decisions made by said courts, or the judges thereof, during the progress of a trial, but only such as are final; and he claims that an order of the court overruling a motion for a change of place of trial is final, and counsel have argued ably and ingeniously in support of such contention, and cite many authorities which they claim support their view. Thus far we may go with counsel for defendant in their contention. If there is no provision in the statute by which a defendant in a criminal case may have the order of the district court overruling his motion for a change of place of trial "reviewed on appeal," then, under the provision of section 9, art. 5, of the constitution, he may have his writ of error, or such other proper writ as this court may see fit to issue to reach that end. The decisions in *Ex parte Thistleton*, 52 Cal. 220, *People v. Jordan*, 65 Cal. 644, 4 Pac. Rep. 683, and the other cases cited by defendant's counsel, all recognize and proceed upon this principle.

It would seem, then, that the questions involved in this case are simply these: (1) Is the order of the district court overruling defendant's motion for a change of venue a final order? (2) Do the statutes of Idaho provide for a "review on appeal" of such order? We have not been cited to, nor have we been able to find, a case where a direct appeal has been allowed from an order overruling a motion for change of venue in a criminal case, nor have we seen any authority holding that such an order is final. Powell on Appellate Proceedings, § 15, treating of proceedings in error, says: "It was an established principle in such proceedings in error that the appellate court would not sustain such proceedings in error except upon the final judgment in the court below; for, if there were further proceedings in the court below previous to final judgment, the proceedings in error would not be sustained for two reasons: First, because in such further proceedings in the case the error excepted to might be so far corrected as that the party would have

nothing to complain of; and, secondly, because otherwise the case might be brought up on error repeatedly, while by waiting until the final judgment the appellate court could dispose of the errors in the case at once." In the case under consideration the defendant has not, by reason of the action of the district court in overruling his motion for a change of venue, been deprived of the right to make it again, should his counsel deem such a course advisable in the further progress of the case, nor is it necessarily presumable that the court would adhere to its first ruling should the circumstances under which the second application is made warrant the court in coming to a different conclusion. It is by no means an unheard-of proceeding for the trial court, after having once refused a change of venue in a criminal case, to conclude in the further progress of the case, as by the failure, after repeated efforts, to secure a jury, to then announce to the defendant that it will entertain another motion for change of venue; and we do not know that such action on the part of the trial court has ever been considered erroneous or irregular. I know of nothing in the law that limits the number of times a defendant may apply for a change of venue; and if a direct appeal is allowable, or a review of every decision adverse to defendant on such motion is permissible, it is perceivable that the limit of appeals or writs of error in a given case would be the limit of the ingenuity of a defendant or his counsel in devising new grounds upon which to base his application, and the ends of justice might thereby be practically defeated. While the law guarantees to every defendant charged with crime a speedy trial, experience teaches us that it is not every defendant who is anxious to avail himself of that privilege. Again, should a trial result in the acquittal of the defendant, he would then, in the language of the authority above quoted, "have nothing to complain of." The court will not presume that a ruling adverse to a defendant in the progress of the trial of a case has been injurious to, or has substantially affected, his rights, until such fact has been established by final judgment in the case. Says Chief Justice Marshall in *U. S. v. Bailey*, 9 Pet. 272: "Policy would forbid writs of error or appeals until the judgment is final. If an interlocutory judgment or decree could be brought to the court of error, the same case might be again brought up after a final decision, and all the delay and expense incident to a repeated revision of the same case be incurred." It has been repeatedly held by the supreme court of California that a writ of error would not lie in any case where an appeal is given to the supreme court by statute. *Adams v. Town*, 3 Cal. 247; *Middleton v. Gould*, 5 Cal. 190; *Haight v. Gay*, 8 Cal. 297; *Railroad Co. v. Harlan*, 24 Cal. 334; *Ex parte Thistleton*, 52 Cal. 220. Without the aid of the statute, no exceptions were allowed to a defendant in a criminal case. Bills of exception in a criminal case were unknown to the common law. Chapter 1, tit. 9, p. 838, of the Revised Statutes of Idaho provides for appeals in criminal cases, and

that such appeals can be taken on questions of law alone, which must be presented by a bill of exceptions. Chapter 5, tit. 7, of the Penal Code enumerates the exceptions allowable to a defendant in a criminal case, among which are, (section 7943:) "Subdivision 1. In refusing to grant a motion for a change of the place of trial. Subd. 2. In refusing to postpone the trial on motion of the defendant." Various other exceptions are given in said chapter 5, a decision upon any one of which would be as final as a decision upon a motion to change the place of trial.

Said chapter 5 also provides the manner in which such exceptions may be brought before the supreme court for review on appeal. It cannot then be claimed in verity that our statutes do not provide for an appeal in the case under consideration. Not only is it provided for, but the manner in which it shall be taken is fully and succinctly set forth in the statutes referred to. The case of *People v. Jordan*, 65 Cal. 644, 4 Pac. Rep. 683, cited by defendant's counsel, turned upon the very ground we have been considering,—that is, that the Penal Code of that state made no provision for an appeal in criminal actions except "in criminal actions amounting to felonies." Pen. Code Cal. § 1235. But the supreme court of that state, by article 6, § 4, of the constitution of California, has appellate jurisdiction "in all criminal cases prosecuted by indictment or information." The defendant was prosecuted by indictment. From an order sustaining defendant's demurrer to the indictment the people appealed. The court held that the order appealed from was a judgment. The question of the frivolity of the judgment sustaining a demurrer to the indictment was not mooted in that case, nor do we see how it could be, seriously. It disposed of the case. There was nothing further to be done under that indictment, it not being amendable; and, the statutes of California making no provision for an appeal from such final judgment, the court, under the provisions of the constitution referred to, issued its writ of error, and denied the respondent's motion to dismiss the same. We see nothing in this case that conflicts with the conclusion we have reached in the case under consideration. *Regan v. McMahon*, 43 Cal. 625, was an appeal from an interlocutory decree in an action of partition. The statutes of California then in force provided for a direct appeal from such a decree, and the court held, adopting the language of same court in *McCourtney v. Fortune*, 42 Cal. 387, that, "upon appeal from a final judgment, an order made in the cause which is itself, by the statute, made the subject of a distinct appeal, cannot be reviewed;" and to the same effect is the decision in the case of *Hihn v. Peck*, 30 Cal. 280. An appeal lies under the statutes of Idaho from an order granting or refusing a motion for a change of place of trial in a civil case, (Rev. St. § 4507, subd. 3,) but it is solely by reason of such provision of the statute that such an appeal will lie. The statutes of Idaho having provided for the review on appeal of an order of the district court overruling a motion for a

change of the place of trial in a criminal case, a writ of error will not lie for the review of such order by this court. The writ of error in this case will be dismissed.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Hasb.] 614)

CRONIN et al. v. BEAR CREEK GOLD MIN. CO.

(Supreme Court of Idaho. Feb. 10, 1898.)

MINES AND MINING—APPLICATION FOR PATENT—ACTION TO CONTEST—SUFFICIENCY OF COMPLAINT.

1. A complaint in an action under Rev. St. U. S. § 2326, to contest an application for a patent for mining land, must show that the plaintiff has filed his adverse claim within the prescribed period of section 2325, and brought his action within the time thereafter allowed by section 2326.

2. It must also contain such a description of the property as will enable the court to determine to what extent, if at all, the claim of plaintiff is covered by the claim of defendant, upon which patent is applied for.

(Syllabus by the Court.)

Appeal from district court, Elmore county; Charles O. Stockslager, Judge.

Action by Michael Cronin and Thomas Finnegan against the Bear Creek Gold Mining Company to determine an adverse claim to mining ground. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by MORGAN, J.:

This is an action to quiet title, or, more properly, to determine an adverse claim to mining ground. It appears from the notice offered in evidence that the location of what is alleged to be the claim in controversy was made September 13, 1889, named in the notice of location the "Reeser Mine." That said location was made in the names of Pasco Veal, Jake Reeser, James Fleming, and three others. What is termed an "amended location" of the same claim was made January 29, 1891, by Michael Cronin and Thomas Finnegan and Jacob Reeser. That these plaintiffs now hold and own all rights that may have been acquired by these locators by virtue of said location. The same ground substantially is claimed by the defendant, by virtue of a location made on or about the 20th day of February, 1877. The defendant claims to be in possession, and the owner thereof, as against all persons except the United States. In November, 1890, the defendant made an application for a patent in the United States land office at Halley, Idaho, that being the district in which the said claim is situated. Notice thereof was duly published for a period of 60 days, as required by the United States statutes. That within said 60 days the plaintiffs filed in said land office an adverse claim to the defendant's application for patent, and, within 30 days thereafter, commenced this suit, to determine the respective rights of the parties to such mining claim. The complaint is substantially one to quiet title, and simply alleges ownership and possession of the claim, describing it; that defendant claims an in-

terest therein, adverse to plaintiffs; that such claim is without right; and that defendant has no right or title thereto,—and prays that plaintiffs may be adjudged to be the owners thereof, etc. The defendant, in its answer, denies plaintiff's title, and asserts title and possession, and right to possession by means of a prior location; and, for second defense, sets up the statute of limitations. Plaintiffs introduced in evidence their notice of location, which was rejected by the court, and an exception taken. They then offered in evidence the amended notice of location, which was also rejected, and an exception taken. No further evidence on the part of the plaintiffs being offered, the defendant moved for a nonsuit on the ground of the failure of plaintiffs to prove a valid location. This motion was allowed, and an exception taken. Motion for a new trial was made and overruled, and an appeal taken to this court.

Wyman & Wyman, for appellants. R. Z. Johnson, for respondent.

MORGAN, J., (after stating the facts.) An objection is made to the form of the complaint by the defendant for the reason that it contains no allegation that would indicate that the suit was brought to determine an adverse claim. There is no allegation that the claim was located by the plaintiffs or their grantors; nor is there any allegation that the defendant had made application for patent, nor that the plaintiffs had filed an adverse claim in the land office to contest the right of the defendant to such patent; nor is there any sufficient allegation defining just what land is claimed by the plaintiffs, nor how much of said land is claimed by defendant. The case of *Mattingly v. Lewisohn*, (Mont.) 19 Pac. Rep. 310, was an action of a similar character, in which the court say: "The fact of filing an adverse claim within the statutory time, and the institution of the suit within the time limited by law, must doubtless be conclusively established by proof to enable the adverse claimant to recover. If these facts are necessary in proof, are they not also necessary as allegations? Is the complaint in this case sufficient without them? We think not; and, on the familiar principle that allegations and proofs should correspond, one is futile without the other." A complaint in an action, under the Revised Statutes of the United States, (section 2326,) to contest an application for a patent for mining land, which fails to show that plaintiff has filed his adverse claim within the period prescribed by section 2325, and brought the action within the time thereafter allowed by section 2326, is defective. See, also, *Anthony v. Jillson*, (Cal.) 23 Pac. Rep. 420. In this case the court says: "We think that the pleading of both plaintiff and defendant should set forth the facts upon which they rely. This is a rule in reference to the pleadings in actions to determine the right to purchase other public lands." In *Woods v. Sawtelle*, 46 Cal 389, Rhodes, J., said: "When action is brought to determine which of the parties has the better



right to make the purchase, it becomes necessary for each party to state directly all the facts upon which he relies to show that his is the better right." In *Cadlerque v. Duran*, 49 Cal. 356, the same learned justice, speaking for the court, said: "Each party must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser; all the steps he has taken to avail himself of and secure his right to make the purchase, —applies to the answer as well as the complaint." In this case, however, there was no demurrer filed to the amended complaint, probably for the reason that the complaint is sufficient in an action to quiet title, and having no reference to a contest between the parties seeking to obtain a patent from the United States under sections 2325 and 2326 of the Revised Statutes of the United States.

In the bill of exceptions, which appears as a part of the record in this case, is the following stipulation: "Michael Cronin et al., Plaintiffs, vs. The Bear Creek Gold Mining Co., Defendant. It is stipulated and agreed by and between plaintiffs and defendant that plaintiffs now have and own by mesne conveyances all the rights acquired by William Richan, A. D. Craig, Michael Cronin, Pasco Veazt, Jacob Reeser, James Fleming, by and under their notice of location of the Reeser lode, dated September 13, 1889; and the defendant now has and owns by mesne conveyances all the rights acquired by S. B. Dilley by and under his notice of location of the Duncan lode claim, dated in January, 1879; and that said plaintiffs filed in the proper land office at Halley, in this state, an adverse claim to the defendant's application for patent for said Duncan lode claim, within the sixty days' publication of notice of said application, which adverse claim is founded upon and sets forth said notice of September 13, 1889, as the source of plaintiffs' title. That plaintiffs' action was commenced within thirty days after the filing of said adverse claim; and that the plaintiffs are citizens of the United States; and that the above-named locators, under which plaintiffs claim, are, and S. B. Dilley is, a citizen of the United States, and were such at the time of their respective locations. [Signed] R. Z. Johnson, Attorney for Defendant. Cahalan & Badger, Attorneys for Plaintiff." Indorsed as follows, to wit: "In the district court of Elmore county. *Michael Cronin et al. vs. The Bear C. M. Co.* Filed November 3, 1891. A stipulation." This stipulation, together with the pleadings in the case, shows that this is an action brought in accordance with section 2326 of the Revised Statutes of the United States, in support of the adverse claim to the mining land in question, and to determine the right to the possession thereof. To sustain such suit, it is necessary to prove that the adverse claim was filed in the land office within 60 days of the publication of the notice of application for patent, and also that said suit was brought in support of such adverse claim within 30 days of the filing of the same. If necessary to prove these facts, it is also necessary to allege them in the complaint. The complaint contains no

such allegations, and is fatally defective in this respect. The complaint does not show wherein the location alleged to have been made by the defendant conflicts with that made by the plaintiffs, or whether it conflicts at all. The judgment must follow the complaint. It would be impossible to construct a judgment in this case which would determine the right of the plaintiffs to the mining claim in controversy, or which would sufficiently inform the officers in the land office that the land described in the application for patent was owned by the plaintiffs, without going outside of the complaint, to the proofs or maps or charts, to identify the claim in such manner as to make it sufficiently certain. The complaint, therefore, is not only insufficient to permit proofs to be introduced, but is also insufficient to support a proper judgment in this case, and nonsuit was properly allowed. *Mattingley v. Lewisohn*, supra; *Lalande v. McDonald*, (Idaho,) 13 Pac. Rep. 347. Defective allegations in the complaint are sometimes cured by the answer, but the entire absence of a material allegation is not supplied by the answer. Neither does the stipulation cure defects in the complaint. The complaint being insufficient to support the judgment, it is unnecessary to go further in this case. The judgment of the court below must be affirmed, and it is so ordered. Costs awarded to defendant.

HUSTON, C. J., and SULLIVAN, J., concur.

(3 Idaho [Hasb.] 560)

WESTHEIMER et al. v. THOMPSON et al.

(Supreme Court of Idaho. Jan. 30, 1893.)

MORTGAGES — MERGER — PRESUMPTION — PAROL EVIDENCE.

1. When the grantee of mortgagor buys in and takes assignment of a mortgage upon the premises conveyed, the mortgage so purchased does not merge, except in the case when the grantee has assumed payment of mortgage as part of consideration for the conveyance of the fee, or has manifested or declared an intention to have it merge.

2. Presumptions are against merger where it is manifestly for the interest of the grantee that the charge should not merge.

3. Parol evidence is admissible to show all the facts and circumstances attending the transfer, to establish the intention of the purchaser of mortgage.

(Syllabus by the Court.)

Appeal from district court, Elmore county; Charles O. Stockslager, Judge.

Action by Ferdinand Westheimer and others against Archibald D. Thompson and others to foreclose a mortgage. From a judgment for plaintiffs, defendants' line-han appeal. Reversed.

W. C. Howie, for appellants. Hawley & Reeves and Chas. H. Reed, for respondents.

HUSTON, C. J. Action to foreclose mortgage on real estate. The facts, as near as we can make them out from the record, which is very incomplete and unsatisfactory, are, in substance, as follows: On the 15th day of December, 1886, one

Archibald D. Thompson made and executed to one John E. Byrne a mortgage, to secure the payment of the sum of \$2,900 and interest, upon certain real estate situated in Mountain Home, (then) Alturas county, Idaho T. Afterwards, on the 24th of August, 1887, said Archibald D. Thompson made and executed to the plaintiffs, as Ferdinand Westheimer & Sons, another mortgage upon the same premises, for the sum of \$320 and interest, to foreclose which last-named mortgage this action is brought. On the 18th of March, 1889, John E. Byrne, the mortgagee in the first-named mortgage, for a valuable consideration, to wit, the sum of \$2,000, assigned said first-mentioned mortgage to the defendant Norah Linehan; and on the 30th of March, 1889, said Archibald D. Thompson executed and delivered to said defendant Norah Linehan a warranty deed of the same premises, covered by the two mortgages aforesaid. At same timesaid Norah Linehan made the following indorsement upon the assignment of said mortgage from J. E. Byrne to said Norah Linehan: "Have received the within money to satisfy the mortgage that this refers to by deed from A. D. Thompson,"—and also at the same time made the following writing across the promissory note accompanying said mortgage, and to secure the payment of which said mortgage was given, to wit: "Received payment in full. [Signed] Norah Linehan." On the ——— day of June, 1887, one C. A. Morrill recovered a judgment in the probate court for Alturas county against said Archibald D. Thompson, upon which the property described in the deed and mortgages aforesaid was subsequently sold. That on February 21, 1889, said Morrill, having become the purchaser under the sale upon said judgment in his favor and against said Thompson, and having received the sheriff's deed of said property under said sale, conveyed the same by deed to said defendant Norah Linehan. That said real estate was on February 4, 1889, sold for the taxes of 1888, and on March 19, 1891, said Norah Linehan having become by assignment the owner and holder of the certificate on such tax sale, the assessor and tax collector of said Alturas county executed to her, said Norah Linehan, a deed of said premises. Although all of the above-mentioned instruments are referred to in the "stipulation of facts," only the two mortgages and accompanying notes, and the assignment from Byrne to Norah Linehan, appear in the record. It seems the case was heard in the district court upon what is denominated in the transcript as an "agreed stipulation of facts," and the same is incorporated into the bill of exceptions, as settled and allowed by the district judge. Judgment was rendered in the district court in favor of plaintiffs. Defendants Patrick Linehan and Norah Linehan appeal from said judgment. The case was heard by the court without a jury, in the court below, and is submitted here upon briefs.

Respondents contend that appellants have no standing in this court, because their notice of appeal, as the same appears in the transcript, "is not directed to the

clerk of the court below." We know of nothing in our Code requiring such a direction. Section 4808, Rev. St. Idaho, cited by respondents, is as follows: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." The notice of appeal, as it appears in the record, is in strict compliance with the provisions of said section. The record shows that the notice of appeal was duly filed with the clerk, and served upon the attorney of the adverse party. The proposition that the appeal must fail because the notice of appeal does not appear to have been "directed" to the clerk of the court below is decidedly attenuated.

Respondents further contend that "this being an appeal from the judgment, and no part of the evidence being before the court to explain any objection or exception taken at the trial," this court can only look to the complaint to see if the allegations are sufficient to sustain the judgment. The transcript contains what is denominated therein an "agreed stipulation of facts," "which shall be used upon the trial and hearing of this case as the evidence therein," and this stipulation is embodied in, and made a part of, appellants' bill of exceptions; and the following is the closing paragraph of said stipulation: "We agree that the above is all the evidence in this case, except that of Norah Linehan, this day taken,"—and is signed by both the attorneys for the plaintiffs and defendants. It is in the bill of exceptions, and constitutes a part of the judgment roll, and is therefore before this court.

The answer of defendants to the amended complaint of plaintiffs admits all the material averments therein, and then proceeds to set forth the matters of defense relied upon, to wit: The execution of the mortgage by Thompson to Byrne; the assignment of same to defendant Norah Linehan on March 18, 1889; the execution of the deed of the premises covered by the said mortgage, by Thompson to Norah Linehan, on March 30, 1889; the deed from Morrill to Norah Linehan, of same premises, on February 21, 1889; and the deed from the assessor and tax collector of Alturas county to said Norah Linehan, of the same premises, on the 9th day of March, 1891. All of these conveyances were admitted in evidence and considered by the court, upon the hearing of the case, as appears by the "agreed stipulation of facts" above referred to, and the bill of exceptions. Upon the trial the appellants offered to prove that the writing upon the assignment of the mortgage given by Byrne to Norah Linehan, to wit: "Have received the within money to satisfy the mortgage that this refers to by deed from A. D. Thompson. [Signed] Norah Linehan,"—as well as the writing on the face of the note accompanying said mortgage, to wit: "Received payment in full. [Signed] Norah Linehan,"—were so made by said Norah Linehan for the sole and only purpose of releasing the said A. D.

Thompson from any personal liability on said note or mortgage, and not for the purpose of canceling the said note or mortgage, or merging the same in the title to said property acquired by her under the deed from Thompson. This evidence was excluded by the court, on objection of plaintiff, upon the ground "that the writing could not be set aside or varied by parol, and that by said writings said note and mortgage were paid, and ceased to exist, as against everybody." It was held in some of the earlier cases "that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a prior mortgage which he has purchased, against subsequent incumbrancers, of which he had notice, or, in other words, that the mortgage would, in equity, always merge." This dictum has been repeatedly disapproved by the ablest judges, and must be regarded as completely overthrown by modern decisions." 2 Pom. Eq. Jur. § 790, note 3. So at section 791 of said volume the learned author quotes the following language from Sir William Grant: "The question is upon the intention, actual or presumed, of the person in whom the interests are united;" and again, in the same section, quoting the language of Sir George Jessel: "In a court of equity, it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance, although he has not declared his intention of keeping it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee pays off or becomes entitled to a charge, the presumption is the other way. But he can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." (The italics are in the text.) "In short," pursues the learned author, "where the legal ownership of the land, and the absolute ownership of the incumbrance, become vested in the same person, the intention governs the merger in equity. To this rule there is, however, one exception, which is the case where the owner of land, who is primarily bound to pay the debt secured, pays off, or takes an assignment of, the mortgage." 2 Pom. Eq. Jur. § 791, note 1. And this rule applies to a grantee of the mortgagor, who takes a conveyance of the land subject to the mortgage, and expressly assumes to pay it, as a part of the consideration.

There is nothing in this record which warrants us in assuming that the defendant Norah Linehan either took the conveyance of the property in question from Thompson subject to the mortgage of plaintiffs, or ever assumed or agreed to pay the same, as a part of the consideration for said deed, or otherwise. In the absence of any such agreement or assump-

tion of liability on her part, we do not see upon what principle she should be made liable by the giving of precedence over her mortgage to that of the plaintiffs. When plaintiffs took their mortgage, they took it with notice of the prior mortgage from Thompson to Byrne, and subject to the lien created thereby: Are they to be placed in any better position because the owner of such prior mortgage has taken a deed of the premises from the mortgagor? We do not think such a view is sustained by either principle or authority. Parol evidence is admissible to show all the surrounding circumstances of the transaction, and for the purpose of discovering the intention. 2 Pom. Eq. Jur. § 792. We think the district court erred in deciding that the note and mortgage given by Thompson to Byrne, and by the latter assigned to defendant Norah Linehan, by reason of such assignment and the indorsements thereon by her, "cease to exist as against everybody." We think the district court erred, also, in refusing to permit parol evidence of the purpose and intention of Norah Linehan in making such indorsements.

The second exception of appellants is covered by what we have said in reference to the first, and the same may be said of the third exception. We are not informed by the record what, if any, ruling the district court made upon the deed from C. A. Morrill to Norah Linehan.

We find no error in the holding of the district court that the tax deed to Norah Linehan should have been made by the assessor and tax collector of Elmore county, he being the successor in office of the assessor of Alturas county, so far as the land in question was concerned.

There appears what purports to be a supplemental complaint, and an answer to supplemental complaint, in the record, but we are unable to discover what figure they cut in the consideration or decision of this case. There were no findings by the court upon any of the issues presented by the answer of the defendants; but, as no exception was taken thereto, we are not called upon to consider the matter. The judgment of the district court is reversed, and the cause remanded for a new trial.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Hasb.] 603)

MILLER v. PINE MIN. CO.

(Supreme Court of Idaho. Feb. 6, 1893.)

STAY OF EXECUTION—BOND—EFFECT OF APPEAL.

1. An undertaking placed on file to stay the execution of a judgment, although the jurat to the affidavit of justification is not signed by the officer administering the oath to the sureties, if sufficient in other respects, will stay the issuance of execution therein; and, if the clerk issue execution, it should be quashed by the district court on motion.

2. An appeal to the supreme court carries with it only such proceedings as were had in the district court down to time of the perfecting of said appeal; and any process issued in said cause after said appeal, whether with or without authority of law, is under the control of the district court.

(Syllabus by the Court.)

Appeal from district court, Elmore county; Charles O. Stockslager, Judge.

Action by James Miller against the Pine Mining Company. Judgment for plaintiff. Defendant appealed, and filed bond and affidavits to stay proceedings, and moved to quash an execution in the hands of the sheriff. From an order overruling his motion, defendant appeals. Reversed.

Wyman & Wyman, for appellant. Thos. D. Cahalan, for respondent.

MORGAN, J. On the 29th day of April, 1892, a judgment was made and entered in the district court of Elmore county, in favor of James Miller and against the Pine Mining Company, for the sum of \$410 debt, and \$384.45 costs. An appeal to the supreme court from said judgment was duly taken by the defendant, and a bond for the stay of execution was filed on the 6th day of June, 1892, with C. W. Moore and A. G. Redway as sureties. The bond was in due form of law, and the sureties, in accordance with section 4934, Rev. St. Idaho 1887, accompanied the bond with an affidavit that each of the sureties was a resident and freeholder of the state of Idaho, in the county of Ada; that each was worth the sum mentioned in the undertaking, over and above all just debts and liabilities, exclusive of property exempt from execution. These affidavits were sworn to before Frank T. Wyman, a notary public, as appears by a supplemental affidavit filed August 16, 1892; but the notary omitted to sign his name to the jurat, and the bond was placed on file in this form. On the 25th of July, 1892, the clerk of the court, at the request of the attorney for the plaintiff, issued an execution to collect said judgment, and placed the same in the hands of the sheriff, and said execution appears to be still in the hands of the sheriff, not having been returned to the clerk's office. On the 7th day of October, 1892, the attorney for the defendant filed in the said court a motion to quash said execution; and on said day the judge of the court ordered that all proceedings on said writ be stayed until the 31st day of October, 1892, pending the hearing of said motion. On the 1st day of November, 1892, the court overruled the motion to quash said writ. From the order of the court overruling this motion this appeal is taken.

The affidavit which is usually attached to a bond contains the justification of the sureties, under section 4934. It is, however, no part of the undertaking; and the undertaking is complete without it, and in this case could be collected of the sureties, in case the judgment of the court below had been affirmed by the supreme court. 2 Haynes, New Trials & App. § 213. The plaintiff could have excepted to the bond, because the affidavit of the sureties was not attached thereto in proper form, at any time within 30 days after the filing of the undertaking, as provided in section 4816, and the sureties would have been compelled to justify in form according to law. The undertaking was not void, and the plaintiff could not so consider it. An appeal is perfected when the no-

tice of appeal is served and filed, and the proper undertaking is placed on file, according to law. Section 4814 provides that, whenever an appeal is perfected as provided in the foregoing sections of this chapter, it stays all further proceedings in the court, and releases from levy the property which has been levied upon under execution. This execution should not have been issued, as the proper bond was placed on file. The execution having been issued without authority of law, it should have been quashed upon motion of the defendant.

It is true that the case had been taken from the jurisdiction of the district court by the appeal. The appeal includes all proceedings down to the perfecting of the appeal; but this execution was issued by the clerk after the appeal had been perfected, and without authority of law. The court had authority to order it quashed, under the eighth subdivision of section 3862. The order overruling the motion to quash the execution is reversed, and the execution quashed. Costs awarded to defendant.

HUSTON, C. J., and SULLIVAN, J., concur.

(3 Idaho [Hash.] 544)

MURPHY v. BRAASE, Sheriff.

(Supreme Court of Idaho. Jan. 25, 1893.)

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—SUFFICIENCY—ATTACK BY CREDITOR.

1. M. loaned K. \$1,500 in money, and took a bill of sale of some 13 head of horses, and some other articles of personal property. At the time the bill of sale was taken K. called Nelson Bros., who then had possession of the property, and, in the presence of M., told Nelson Bros. that he had transferred the property to M. for the purpose of securing the indebtedness above mentioned. He told Nelson Bros. to hold the property for M. The horses had then just been gathered from the range, and were in the corral of Nelson Bros., in the town where the transaction took place, to be taken to the winter range, and cared for during the winter by said Nelson Bros. Nelson Bros. were also informed by K. that M. would pay for the wintering of the horses, and that they were to be turned over to him in the spring. Two horses that were included in the bill of sale were in the charge of one Lufkin. K. notified Lufkin that he had turned the horses over to M., and that he must deliver them to him. In the spring Nelson Bros. returned the horses from the winter range, and delivered them to Murphy, who hired a man to look after them on the range during the following summer. Held, that there was such a delivery and continued change of possession as would relieve the property from the provisions of section 3021, Rev. St. Idaho.

2. The defendant, as sheriff, levied upon the property, by virtue of attachment at the suit of one La Barge against K., in September of the year following the transfer of the property. Held, that the property was not subject to levy for the debts of K. A creditor desiring to contest the validity of a sale must prove a debt or judgment, if it has been reduced to a judgment, before he can be permitted to question the validity of the transfer of property as a pledge.

(Syllabus by the Court.)

Appeal from district court, Alturas county; Charles O. Stockslager, Judge.

Action of claim and delivery by John Murphy against C. H. Braase, as sheriff. Judgment for plaintiff. From an order

overruling a motion for a new trial, defendant appeals. Affirmed.

The other facts fully appear in the following statement by MORGAN, J.:

This is a case of claim and delivery. The plaintiff alleges that he is entitled to the possession of certain property described in the complaint, as pledgee; that said goods and chattels, consisting of horses, mares, and colts, are of the value of \$1,500; that the defendant wrongfully took the said goods and chattels from the possession of the plaintiff, without his consent; that the defendant still unlawfully and wrongfully withholds and detains said goods and chattels from plaintiff, to his damage in a sum of \$500,—and demands judgment. The defendant, in answer, denies that plaintiff was entitled to possession of said goods as pledgee, or otherwise; (2) denies that the property is of any greater value than \$700, and admits that plaintiff demanded possession; (3) denies that defendant, on or about September 11, 1890, or at any other time, wrongfully took said goods or chattels from the possession of the plaintiff; denies that he wrongfully withholds the same; denies the damage; and alleges that the property was, at the time stated in the complaint, the property of Patrick H. Kinney, and not the property of the plaintiff. On the 3d day of September, 1890, an action was duly commenced by one Felix La Barge against Patrick H. Kinney et al., in the district court of the second judicial district of Idaho, to recover the sum of \$600 on an express contract for the direct payment of money. A summons was duly served on said Kinney, and writ of attachment issued in due form in said last-named action, at the time of the issuance of the summons therein, and placed in the hands of the defendant as sheriff. Defendant served a copy of the writ of attachment upon Kinney, and levied on the property described in the complaint, claiming that said property was the property of P. H. Kinney, and took it into his possession. Trial was had before the court and jury, and the jury returned the following verdict: "We, the jury, find for the plaintiff, and that the plaintiff is entitled to the possession of the property, and that the property is of the value of fifteen hundred dollars." Judgment followed the verdict. Motion for a new trial was made upon the statement of the case, and overruled by the court. From the order overruling the motion for new trial, an appeal was taken to this court.

Texas Angel, for appellant. S. B. Kingsbury, for respondent.

MORGAN, J., (after stating the facts.) The plaintiff, being introduced as a witness in his own behalf, says that he loaned P. H. Kinney the sum of \$1,500 in the fall of 1889; that Kinney turned over the horses in controversy to him, together with some other personal property, as security for said money; that, at the time of said loan, a portion of the horses were in the possession of Nelson Bros., ready to be taken to the winter range, and a portion at the Lufkin ranch. At the time of

said contract of loan, a written bill of sale of the horses, duly executed, was delivered to plaintiff by said Kinney. In January, 1891, another bill of sale was executed, covering the same, with some additional property. The bills of sale are identified and introduced in evidence. Plaintiff further states that, when said loan was made, said Kinney promised and agreed that the property should remain in the possession of the plaintiff until said debt was paid, and so notified Nelson Bros. and Lufkin; that in the spring, when Nelson Bros. returned the horses from the winter range, they were turned over to him, (the plaintiff;) that he hired a man to look after them, and that they were in his possession until they were taken by the defendant, Braase, under the writ of attachment; that he paid charges claimed by Lufkin for breeding the mares; that he paid Nelson Bros. \$25, which was all they demanded for wintering the horses in their possession; that he also paid the taxes on the horses; \$25 was paid to Nelson Bros. at the time they delivered the horses to the plaintiff in the spring; that he only held the horses and other property as security for a debt of \$1,500; that, at the time of said loan, the property was not pointed out to him, but he had frequently seen the horses before that time, and knew them well; that, at the time the loan was made, Nelson Bros., who had the horses in their corral, were present, and Kinney and this plaintiff (Murphy) called them out, and explained that the property had been turned over to Murphy, and that they were to hold it for him. The testimony introduced on the part of the defendant was—First. The writ of attachment by virtue of which the property was levied upon. Second. The defendant was introduced as a witness, and testified as follows: "I took into my possession the property specified in this writ. I found two of the horses in Nelson Bros.' corral; also two upon Indian creek, and two at Lufkin's ranch. The balance were in the mountains between Greenhorn and Deer creeks. There were three on Deer creek, and two on Indian creek." He said further: "I do not know of Kinney exercising any control over these horses except what I have heard. They were always called the 'Kinney Horses.'" Peter Weher, on behalf of the defendant, swears: "I could not tell who had charge or control of these horses during the summer of 1890 prior to the attachment. I think Jack Harris was a deputy here for a while, under Kinney, and worked for him. Jack Harris was working for Kinney, and looking after the mares, going back and forth, and keeping track of them." Sutherland testified that Kinney claimed these horses during the summer of 1890; that "Kinney said the horses were his, and he did not want us to be running them around. We were chasing them around the barn, to drive them away."

The appellant contends that there was no such delivery of the property to Murphy as would constitute an immediate and continued change of possession, and quotes section 3021 of the statute, which is substantially as follows: "Every transfer

of personal property, other than a thing in action, and every lien thereon, other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc.,—and cites, in support of his contention, *Bell v. McClellan*, 67 Cal. 283, 7 Pac. Rep. 699. The facts in that case, however, were as follows: It appeared that some hay presses were the property of one Duncan, and were stored on the farm of one McNulty, his brother-in-law. Duncan sold the presses to the plaintiff, in satisfaction of the indebtedness then due from him to the plaintiff. Plaintiff received a bill of sale of the presses, and immediately wrote to McNulty stating that he had bought them from Duncan, and asking McNulty to hold them for him. Duncan gave McNulty no notice of the sale, and the presses remained in McNulty's shed until the 2d day of June, following the sale, which was in January, when the plaintiff again wrote to McNulty, telling him to let Duncan take them and use them. Under this permission, Duncan took the presses, and had them repaired at the blacksmith shop, and used them to bale hay on his own account until the 29th day of August following. On the 29th day of August, Duncan and McNulty went to the plaintiff's store at Oroville, and Duncan then told the plaintiff that he was sick, and did not want the presses any longer. The plaintiff then told McNulty to take them, and continue to bale hay with them for him, (plaintiff.) McNulty took the presses, and continued to bale hay with them for plaintiff until the 4th of September, when they were seized by the sheriff under a writ of attachment, at the suit of one Davidson vs. Duncan. Under that state of facts, it was held that there was no sufficient delivery to the plaintiff, inasmuch as Duncan, the vendor, never directed McNulty, who had the presses in charge, to deliver them to the plaintiff, and they were never actually delivered to plaintiff at all. No one ever gave McNulty any notice that the presses had been transferred to the plaintiff, except the plaintiff himself.

In the case at bar the evidence shows that, at the time of the pledge of the property to Murphy, (the plaintiff,) Kinney, (pledgor,) Murphy (the plaintiff) being present, called Nelson Bros., who then had the property in their possession, to them, and Kinney then told Nelson Bros. that he had turned the property over to Murphy, (the plaintiff:) that they were to keep the property for him, and take them to the winter range for Murphy, to which all consented, all parties being present; that a portion of the horses were then in the corral of Nelson Bros., to which place they had been gathered for the purpose of taking them to the winter range. The evidence shows, further, that Nelson Bros. took these horses to the win-

ter range, and in the spring returned them, and delivered them to the plaintiff, Murphy, who paid for caring for them during the winter. This was the case with all the horses but two, which were in the possession of Lufkin. Lufkin was also notified by Kinney that he had transferred these horses to plaintiff, Murphy; that he was to keep them for him, (plaintiff.) The bills of sale were introduced in evidence, not for the purpose of showing ownership of the property in the plaintiff, Murphy, but as a part of the evidence showing that the property had been turned over to Murphy as a pledge for the indebtedness. For such purpose they were proper evidence. The fact that the horses during the summer were looked after to some extent by an agent or employee of Kinney does not militate against the claim of Murphy that the property was pledged to him, and was, as a matter of fact, in his possession. The fact that they were called the horses of Kinney is no evidence against the claim of Murphy. Whatever might have been said during the summer of 1890 by Kinney as to the horses being his was not in the presence of Murphy, the plaintiff, and was therefore not evidence against the plaintiff's right to the possession. Statements of vendor not in the presence of the vendee cannot be permitted to impugn the title of the vendee, where there is no claim or evidence of fraud in the transfer. The evidence of the defendant, introduced on his own behalf, shows that the horses were on the range when the writ of replevin was given to him, and it was necessary to gather them in before he could make the levy. Stock on the range is held to be in the possession of the owner, or the person entitled to the possession. The stock, having been pledged to plaintiff, and, as we think, substantially delivered to him at the time of the pledge, remained in his possession until they were gathered by the sheriff for the purpose of the levy. In this case, the stock being upon the range, and there being no question about the good faith of the whole transaction, we think the evidence of delivery is of a different character from that required in the case of other personal property.

In the case of *Harkness v. Smith*, (Idaho,) 28 Pac. Rep. 423, cited by counsel, there was no delivery whatever, not even a pretended delivery. The property before the alleged transfer was in the possession of Gallagher and remained in his possession afterwards. The stock of goods was being sold by him in the same manner after the alleged sale as before. The case of *Williams v. Lerch*, 56 Cal. 333, is precisely in point. In that case the vendor sold the horses to Williams. The horses were then on the range, and in the possession of the vendor's agent, one Drew. The vendor told Drew that he had sold the horses to Williams, and directed him to deliver them to Williams. Williams was not present. Drew wrote to Williams to come and get the horses. Williams replied that he could not then go for them, but said, "I want you to take care of them for me." Drew replied that he would do so. The court say that the sale was complete.

The stock being in the possession of Scotcher, the vendor's agent, at the time of the sale, they were, in law, in the possession of the vendor. Scotcher made and delivered to plaintiff a bill of sale of the horses, and told him that his agent would deliver the horses to him on the range. "It was satisfactory to the plaintiff. He knew when he bought them that the horses were in the charge of Scotcher's agent, and he accepted them as they ran on the range, and, without any knowledge of any existing creditor of Scotcher, paid in good faith the stipulated price. Everything was done that was necessary to a sale. It was complete and perfect if Drew subsequently delivered them to the plaintiff, or took charge of them for him." In the case of *Morgan v. Miller*, 62 Cal. 492, it was held that "H., having cattle running at large with those of his tenant, sold them to the plaintiff. The cattle were driven into the corral, where H. said to the plaintiff, 'Here are your cows that you bought.' Thereupon the plaintiff requested B. to take care of the cattle. B. agreeing to do so, they were turned back into the pasture." This was decided to be an immediate and actual change of possession, valid as to creditors.

There is no question in this case as to the good faith of the plaintiff and Kinney. The plaintiff had furnished the money to Kinney; and Kinney had pledged this property to Murphy as security for the loan, gave him a bill of sale thereon, and put them in his possession. It is different from a case where there is actual fraud, and where the vendee or pledgee of the property is seeking to hold it for the purpose of defrauding the creditors of the vendor.

The point is made by the respondent that there is no evidence before the court that La Barge was a creditor of Kinney at the time of the transfer of this property; in fact, there is no evidence in the record at all that La Barge is a creditor of Kinney; therefore he is not in a position to question the validity of the transfer of the possession of the property to the plaintiff. It is true a creditor desiring to contest the validity of the sale or transfer of personal property must prove a debt or judgment, if it has been reduced to a judgment, before he can be permitted to question the validity of the transfer of the property. It appears, however, from the record in this case, that proofs regarding the question of the transfer of the property to the plaintiff were introduced on the trial, without any objection from the plaintiff that the debts on which the attachment rested had not been proved. No instruction was asked concerning the point; nor the attention of the court below in any manner called to it. We think the plaintiff cannot avail himself of the absence of the proof of the attachment debt by objection raised for the first time in the appellate court. See *Mamlock v. White*, 20 Cal. 598. We think, also, considering the character of the property at the time of this transfer, that the delivery to the plaintiff, Murphy, was sufficient to sustain the verdict.

The first instruction given at the request

of plaintiff is as follows: "Every contract by which the possession of the personal property is transferred as security only is to be deemed a pledge; and if the jury find that P. H. Kinney (the owner) transferred the possession of the property in question to secure a debt to the plaintiff, and the plaintiff so held it at the time the defendant took the property, then they will find for the plaintiff." The appellant excepts to this charge, but we think that it correctly states the law.

The second instruction is also objected to, which is: "You are instructed that a contract, in writing, though absolute on its face, yet made to transfer personal property to secure a debt, is a pledge merely." This is also a correct statement of the law.

The defendant excepts to instruction No. 3, which is: "In considering what is possession, and what the giving of possession, you must consider the nature of the property, and the manner in which it is usually held and transferred." We see no fault in either of these instructions.

The first instruction requested by the defendant is not the law, and was properly refused, for the reason that there appears in the record no evidence that, at the time of the transfer of the possession of the property, Kinney was indebted to La Barge in any sum whatever.

The second instruction requested by the defendant was also properly refused, for the reason that we think there was sufficient delivery of the property at the time of the execution of the bills of sale.

We think the instructions given by the court, in view of the evidence, were correct, and the refusal of the court to give the instructions requested by the defendant was proper. For the reasons stated above the judgment must be affirmed; and it is so ordered; costs awarded to respondent.

HUSTON, C. J., concurs.

SULLIVAN, J., having been of counsel in this case, did not take part in the hearing or the determination thereof.

(Wash. 509)

#### BILES v. TACOMA, O. & G. H. R. CO.

(Supreme Court of Washington. Jan. 13, 1893.)

DEED—RESERVATION—RAILROAD—BRANCH LINE.

1. A deed of railroad land "reserving and excepting" a strip 400 feet wide, to be used for a right of way or other railroad purposes, in case the line of said road, or any of its branches, shall be located on or over the same, does not operate as an exception of the strip from the grant, but merely as a reservation of a right of way or easement in the land, and the title to the whole tract vests in the grantee by virtue of the deed.

2. Where a charter of a railroad company empowers it to construct only one specified branch road, another road, incorporated under the laws of a different state, though constructed and operated by the first road, is not a "branch" of such road, within the meaning of a deed reserving a right of way over the granted premises in favor of such road or any of its branches.

3. 1 Hill's Code, § 1535, which authorizes railroad companies incorporated under the laws



of the state or of the United States to build branch roads, does not apply to a company which has failed to designate the route of a proposed branch on its records, and to file a copy thereof with the secretary of state, as further required by such section.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by J. B. Biles against the Tacoma, Olympia & Gray's Harbor Railroad Company to recover the possession of land. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Mitchell, Ashton & Chapman, for appellant. Linn & Bridges, for respondent.

ANDERS, J. On May 11, 1876, the Northern Pacific Railroad Company, then being the owner of the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 1, in township No. 17 N., of range 6 W. of the Willamette meridian, conveyed the same to the respondent by a warranty deed containing the following clause: "Reserving and excepting therefrom, however, a strip of land extending through the same (or so much of such strip as may be within said described premises) of the width of four hundred feet,—that is, two hundred feet on each side of the center line of the Northern Pacific Railroad, or any of its branches,—to be used for a right of way or other railroad purposes, in case the line of said railroad or any of its branches has been or shall be located on or over or within less than two hundred feet of said described premises." The appellant is a corporation organized and existing under the laws of this state, and about the 1st of November, 1890, it entered upon the land so conveyed to the respondent, and has since constructed a railroad across the same. The respondent brought this action to recover the possession of the land so occupied by appellant, and alleged, in substance, in his complaint, that on or about the 1st day of October, 1890, he was seized in fee and possessed, and entitled to the possession of, a certain tract of land described as "a strip of land 400 feet in width, being 200 feet on either side of the center line of the railroad track constructed by the defendant across the tract of land above described," and that while he was so seized and possessed, and entitled to the possession thereof, the defendant (appellant here) on or about November 1, 1890, without any right or title, entered into the possession of said premises, and ousted and ejected the plaintiff therefrom, and now unlawfully withholds possession from plaintiff, to his damage in the sum of \$500. The defendant denied that the plaintiff was ever entitled to the possession of the premises sought to be recovered, or that it ousted or ejected the plaintiff therefrom, or that it unlawfully withheld the possession thereof from the plaintiff, and justified its possession on the grounds (1) that the Northern Pacific Railroad Company, and not the plaintiff, was the owner of the strip of land described in the complaint, and that the defendant was in possession by and with the consent of that company; and (2) that it was entitled to hold and possess the premises by virtue of being a branch line of the Northern Pacific Railroad Company, and thus entitled to

the reservation or exception contained in the deed of that company to the plaintiff. The court below held that the plaintiff was the owner, and entitled to the possession, of the demanded premises, and gave judgment accordingly; and the first question presented for our determination on this appeal is whether the title to the strip of land in dispute passed to the respondent by the deed of May 11, 1876. There is no question but that the fee of the whole 40-acre tract described in the deed is in the respondent, unless the 400-foot strip was withdrawn from the operation of the conveyance by the clause above mentioned. It is claimed by the appellant that the restriction in the instrument amounts to an exception of so much of the land as is contained in the 400-foot strip, and that the title to the same did not pass to the grantee, but that the Northern Pacific Railroad Company is still the absolute owner thereof. On the contrary, the respondent insists that the clause in the deed at most is but a mere reservation of a right of way over the land in favor of the Northern Pacific Railroad Company, and that the appellant, being a stranger to the reservation, can claim no rights under it. While it is true that there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends not so much upon the words used as upon the nature of the right or thing excepted or reserved. Martind. Conv. p. 106, § 118. An exception is a clause in a deed, which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description. The part excepted is in existence at the time of the grant, and remains in the grantor unaffected by the conveyance. A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. 5 Amer. & Eng. Enc. Law, p. 455, tit. "Deeds;" Tied. Real Prop. § 543. But frequently the words "exception" and "reservation" are used as synonymous, and the term "exception" will be held to mean "reservation" whenever it may be necessary to effectuate the intention of the parties to the instrument. Winthrop v. Fairbanks, 41 Me. 307; Whitaker v. Brown, 46 Pa. St. 197; Cowdrey v. Colburn, 7 Allen, 13; Stockwell v. Couillard, 129 Mass. 231; Martind. Conv. supra. In the deed before us the language is, "reserving and excepting therefrom," etc. These words must be construed to mean either a reservation or an exception, for, strictly speaking, a thing cannot be both reserved and excepted at the same time; and the meaning can best be arrived at by ascertaining, if possible, the intention of the parties, as evidenced by the words of the deed, the object they had in view, and the circumstances under which the deed was executed. At that time the Northern Pacific Railroad Company was the owner of a vast area of land, which had been granted to it by the congress of the United States to aid it in

the construction of its railroad and telegraph line from Lake Superior to Puget sound. It desired to sell these lands, and the respondent desired to purchase the particular legal subdivision above described, and the whole thereof. But the railroad company deemed it possible that it might at some time in the future extend its railroad, or build a branch line over this land. In that event, a right of way across the premises would be necessary; and to provide for such a contingency it "reserved and excepted" in its deed a strip of the land 400 feet wide, "to be used for a right of way, or other railroad purposes, in case the line of said road, or any of its branches, has been or shall be located on or over or within less than 200 feet of said described premises." At the time the deed was executed no road had been located on or over or within less than 200 feet of said premises, and there was no particular portion of the land identified and described, as it doubtless would have been had it been the intention of the grantor to except it from the operation of the grant. We think the clause referred to simply reserved a right of way over—an easement in—the land conveyed, and that the ownership of the whole tract passed to the respondent by virtue of the deed. *Barlow v. Railroad Co.*, 29 Iowa, 276; *Dunstan v. Railroad Co.*, (N. D.) 49 N. W. Rep. 427. Indeed, it seems to have been so understood, both by the appellant and the Northern Pacific Railroad Company, at the time the former was about to appropriate the strip of land in question for the purposes of its road, for at that time both companies, by their attorney, served a notice in writing upon the respondent that the appellant company was a branch of the Northern Pacific Railroad Company, and, as such, was entitled to the right of way "excepted and reserved" in the deed of May 11, 1876, and that the appellant company would "use the said right of way at once for the construction and operation of its road now in course of construction."

The next question is whether the appellant corporation's railroad is such a branch of the Northern Pacific Railroad as entitled it to use, without the consent of the respondent, and without compensation first paid to him, the right of way reserved in his deed. It is not claimed that the appellant ever took any steps under the statute to acquire the right of way over respondent's land by condemnation, or that it ever paid anything to the respondent for such right of way. Nor is it claimed that appellant's railroad is either a part of the main line or a branch of the road which congress specially authorized the Northern Pacific Railroad Company to construct by the act of July 2, 1864, by which the company was incorporated, or by any subsequent act or resolution. By its charter that company was authorized and empowered to construct a railroad line with a branch from one designated point to another. See 18 St. at Large, 365; 16 St. at Large, 57, 378, 379. But it is argued by the learned counsel for the appellant that, inasmuch as the evidence shows that the Northern Pacific Rail-

road Company, or its officers, actually paid for the construction of appellant's road, and for the right of way for the same, whenever any payment was made therefor, and that it has operated the road ever since its completion, it is "for all practical purposes" a branch of the Northern Pacific Railroad, and, as such, entitled to the benefit of the reservation in its behalf. It is true, as claimed by appellant, that whether a particular portion of a railway is a branch railroad or not does not depend upon its length or direction; but it must be connected with, and lead from, a main line, already constructed, in order to be such, (*Keeling v. Griffin*, 56 Pa. St. 305; 1 Wood, Ry. Law, § 189,) and it must be a part, a section, or subdivision of the main road, (*McAboy's Appeal*, 107 Pa. St. 548.) See, also, *Carlson v. Railroad Co.*, (Minn.) 37 N. W. Rep. 341. No railroad company can construct branch lines unless the power to build them is conferred by its charter, either expressly or by necessary implication. 1 Wood, Ry. Law, § 189, and cases cited. As we have already seen, the charter of the Northern Pacific Railroad Company empowered it to construct one specified branch line of road, and we must presume that if congress had intended to authorize it to build branches generally it would have said so. We are constrained to hold, therefore, that the company, under its charter, is without legal power or authority to construct any other branch line than the one therein mentioned. As we understand it, the Tacoma, Olympia & Gray's Harbor Railroad Company was incorporated, under the laws of this state, for the express purpose of building this railroad. The two companies are distinct corporations, and derive their powers from separate sources. One was created by the state, and possesses only such powers and privileges, and is subject to such restrictions, as the state has granted or imposed; the other was chartered by congress, and its rights and duties were prescribed by its charter; and, this being so, it seems to us that neither can enlarge its privileges, or gain any immunities, under the law, by any arrangement it may make with the other. It is further insisted, however, by appellant, that section 17 of the charter of the Northern Pacific Railroad Company, taken in connection with section 1 of the act of the legislature of March 28, 1890, (1 Hill, Code, § 1535,) authorizes it to construct branch roads in this state. But, so far as the present case is concerned, it is not necessary to determine the effect of this legislation. It is sufficient to observe that the Northern Pacific Railroad Company has not brought itself within the provisions of the act of our legislature. By said section 1535 it is provided, among other things, that any railroad corporation organized under the laws of this state or of the United States may build branch roads, either from any point on its line of road or from any point on the line of any other road. But it is also provided that before building any such branch road such corporation shall, by resolution of its directors or trustees, to be entered in

the records of its proceedings, designate the route of such proposed branch, and file a copy of such record, certified by the president and secretary, in the office of the secretary of state, who shall indorse thereon the date of the filing thereof, and record the same; and thereupon such corporation shall have all the rights and privileges to build such branch, and receive aid thereto, which it would have had if it had been authorized in its charter or articles of incorporation. For aught that appears in the record, the railroad company failed to comply with the requirements of this statute, and it is therefore not in a position to claim any benefits thereunder. Nor do we think that the respondent is estopped by the recitals in the deed, or by the evidence, from denying the right of his grantor to build branch roads. The word "branches," as therein used, must be taken to mean such branches as the railroad company was or might be legally authorized to construct, not such as it might build or operate in the name of some other corporation.

Some minor matters were discussed by counsel, which, in view of what we have already said, it is not necessary to consider. Upon the whole case as presented in the record, we think the judgment of the lower court was right, and it is therefore affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

(5 Wash. 35)

BROWN v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Jan. 14, 1893.)

For former report, see 31 Pac. Rep. 313.

HOYT, J., (dissenting.) I think the judgment of the court below should be reversed. When those under whom the plaintiff claims dedicated the street to public use, it is conceded that they, in substance, said: "Take this street, and use it." I think it equally clear that they, in effect, further said: "Improve this street so as to adapt it for use as such." Such adaptation would, of course, include such change in the surface thereof as was necessary to best adapt it to the purposes for which it was designed. If such was the effect of the dedication, it seems clear that the dedicators could not claim damages against the public for doing that which they had said it should do; and, as the plaintiff could get no better right than these under whom she holds, it follows that for the injuries set out in the complaint there could be no recovery. In the case of Parke v. City of Seattle, 32 Pac. Rep. 82, (just decided,) I have at some length given my reasons for holding that for such injuries no action will lie. I shall not repeat them here.

Something is said in the opinion of the majority of the court as to the proper construction of that provision in our constitution which provides that no property shall be taken or damaged for public use without compensation. I am unable to agree with what is thus said, and if, in

my opinion, a construction of such clause was necessary to the decision of this case, I should feel it my duty at some length to express my dissent from the views thus expressed; but under my view of the effect of the dedication, as above stated, the decision of the case does not call for such construction; hence I shall not now discuss it.

(5 Wash. 422)

SEAL v. PUGET SOUND LOAN & INVESTMENT CO.

(Supreme Court of Washington. Dec. 22, 1892.)

CORPORATIONS—OFFICERS—RATIFICATION—PLEADING.

1. The action of the board of trustees of a corporation in arranging for the payment of, and actually making a part payment on, a mortgage executed by the proper officers, but without authority of the board, is a ratification of the mortgage; and the corporation is thereafter estopped, as against innocent purchasers of the mortgage, from attacking its validity because not authorized by the trustees.

2. On foreclosure of a mortgage executed by the proper officers of a corporation, proof of ratification by the corporation is admissible under an allegation that the officers were authorized to execute the mortgage, since a ratification has a retroactive effect, and is equivalent to an original authority.

Appeal from superior court, Jefferson county; James G. McClinton, Judge.

Action by C. F. Seal against the Puget Sound Loan & Investment Company for the foreclosure of a mortgage. From a decree in plaintiff's favor, defendant appeals. Affirmed.

John Trumbull, for appellant. Carroll & Rohde, for respondent.

DUNBAR, J. This action is for the foreclosure of a mortgage on certain real estate, in which appellant, a corporation, was mortgagor. The mortgage shows on its face that it was regularly executed by proper officers of the corporation. The defense sought to be established is that the mortgage was executed by officers of the corporation without authority from such corporation. The referee before whom the testimony was taken finds, as a question of fact, that the note and mortgage were executed and delivered by the president and secretary without being previously authorized by the board of trustees so to do. Whether, considering all the testimony and exhibits in this case, we should be inclined to adopt the referee's finding in this particular is not necessary now to determine; for there is no question of the correctness of the further finding that the action of the president and secretary was afterwards ratified by the corporation. This mortgage was executed July 1, 1889, for the sum of \$6,000. It was an instrument that the corporation had a right, under the law, to execute. It was prepared by the attorney of the corporation, who, by its by-laws, is made the legal adviser of the company and board of trustees, and who is required, by the by-laws, to draw all contracts required, and to examine and pass upon the legality and sufficiency of all instruments submitted by the board of trustees, or its officers. The testimony

shows that the corporation was aware from the first of the existence of this mortgage; that they never objected to it, or sought to refute it, in any manner whatever, but on the contrary they indorsed and ratified its execution; that on May 22, 1890, the board of trustees, at a regular meeting, considered and discussed this note and mortgage, and, instead of there being any talk of refuting it, they, on the other hand, by virtue of a motion made and passed by the board of trustees, appointed a committee to arrange for the payment of the same, and that on the 12th day of December, 1890, the corporation did actually make a payment out of its corporate funds on the note secured by said mortgage, of \$1,400, and on the 23d day of March, 1891, made another payment, of \$700. And no act looking towards the refutation of this mortgage was done until two years after its execution, and long after it had passed into the hands of innocent purchasers. The testimony shows that this was not the only transaction of this kind wherein the corporation had ratified the actions of the president and secretary, and accepted their acts as binding upon it. This was an executed contract, and the record in this case plainly shows such a state of facts as, under all the authorities, would be held to bear ratification of the acts of its officers; and the corporation will therefore be estopped from denying the authority of its agents.

We think the objection is not well taken that proof of ratification could not be admitted under the allegations of authority in the complaint. The ratification by a principal of an unauthorized act by an agent has a retroactive efficacy, and, being equivalent to an original authority, an allegation of due authority is sustained by proof of such ratification. 2 Estee, Pl. & Pr. § 1984; Abb. Tr. Ev. § 28. And, even if it were not authorized, this is an equitable action; and the court, in the furtherance of justice, will consider the complaint as amended to correspond with the facts proven, when it can be rightfully done, as in this case. We believe that no injustice has been done to the defendant, and that it has in no way been misled by the pleadings. The judgment is affirmed.

ANDERS, C. J., and SCOTT, STILES, and HOYT, J.J., concur.

(5 Wash. 429)

#### WINSOR v. JOHNSON et al.

(Supreme Court of Washington. Dec. 30, 1892.)

#### LOGS AND LOGGING—LIENS—MANUFACTURE OF LUMBER.

1. Gen. St. § 1679, provides that every person performing labor on, or who shall assist in obtaining or securing, saw logs, shall have a lien thereon for labor, or in securing the same. Section 1680 provides that every person performing labor on, or who shall assist in manufacturing, saw logs, has a lien on the lumber. *Held*, that such statutes provided for two distinct classes of liens, and that a lien for labor on, or in securing, saw logs, did not attach to the lumber into which such logs were afterwards manufactured.

2. An agreement was entered into between certain persons, claiming liens on logs, with the

owner thereof, whereby they were to be placed in the hands of a receiver for sale, and the proceeds to be paid into court to liquidate the lien claims. The logs were sold, and notes taken therefor in the name of the judge before whom the action was pending, and C., one of the claimants, got possession of the notes, and under an agreement with the owner, to which the other claimants were not parties, converted the proceeds to his own use. *Held*, that C., having entered into such agreement, could not thereafter object to the sufficiency of the notices of liens held by the other claimants, and that he would be required to pay the proceeds of the notes received by him into court, to be distributed among the lien claimants according to the agreement.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by Richard Winsor against Thomas Johnson and others to foreclose certain liens filed against saw logs. There was a judgment for defendants, and plaintiff appeals. Judgment as to defendant the Bank of North Seattle affirmed. Judgment as to defendant George W. Crane reversed.

Winsor, Farwell & Morris, for appellant. J. H. Cannon and Charles E. Patterson, for respondent George W. Crane. McClure & Wheeler and Thomas R. Shepard, for respondent Bank of North Seattle.

HOYT, J. This action was brought by the plaintiff against a large number of defendants for the purpose of foreclosing certain liens which had been theretofore filed against a lot of saw logs and a quantity of lumber. The defendant the Bank of North Seattle and the defendant George W. Crane are the only two who seem to have so appeared in the case as to make it necessary for us to discuss their rights. The rights of these two are somewhat different, and we shall, to a certain extent, have to discuss them separately. Both of them attack the lien notices as being insufficient to create a lien upon the logs which were attempted to be described therein. The conclusion to which we have come as to other questions in the case makes it unnecessary for us to decide as to the validity of such lien notices. As to the defendant the Bank of North Seattle the other question—and the one which, under our determination thereof, is decisive of the controversy, as between it and the plaintiff—is as to whether or not a lien for labor upon, or in securing, saw logs, will attach to the lumber into which such saw logs may be manufactured. If such lien does not so attach, then it is conceded that the Bank of North Seattle is not liable to plaintiff, even although the liens held by plaintiff are valid and binding as against the saw logs. We feel constrained by our statute to hold that the lien upon saw logs cannot be so extended as to reach the lumber manufactured therefrom. Section 1679, Gen. St., provides that every person performing labor upon, or who shall assist in obtaining or securing, saw logs, has a lien upon the same for the work or labor done upon, or in obtaining or securing, the same. Section 1680 provides that every person performing labor upon, or who shall assist in the manufacture of, saw logs into lumber, has a lien

upon such lumber. Construing these two sections together, they provide for two classes of liens. It is true that the opening part of section 1680 might be so construed as to cover the same class of work as is provided for in section 1679. But, if we so construe it, we establish the fact that the legislature has unnecessarily twice enacted substantially the same provision. If it is to be thus construed, the whole object thereof could have been accomplished by a slight change in the wording of said section 1679. On the other hand, if we construe said section 1680 as being intended only to fully protect all laborers engaged in the manufacturing of saw logs into lumber, whether performing such labor directly upon the logs and lumber, or in assisting in the manufacture of such lumber, though not doing work directly thereon, force is given to every word of the section, and any repetition of the provisions already fully set out in the preceding section will be avoided. If it is held that this section applied to labor in securing the logs, and also to that done in transforming them into lumber, much uncertainty would arise in the determination of the respective rights of the lien claimants; and the difficulty of enforcing the statute, which at best is sufficiently great, would be greatly multiplied.

As to defendant Crane. The record is in a very unsatisfactory condition, and it is difficult therefrom to determine the exact status of the controversy. However, in view of the offers to prove made by the plaintiff during the progress of the trial, and the action of the court in regard thereto, and the remarks made by it in connection with its rulings thereon, with the apparent acquiescence of all the parties, and in view of the statement of facts in the brief of said defendant, it sufficiently appears that said defendant Crane and the plaintiff and the owner of the logs entered into a stipulation or agreement by which the logs were placed in the hands of a special receiver, to be by him sold, and the proceeds thereof paid into court for the pro rata benefit of the lien claims held by the plaintiff and the said defendant; that in pursuance of such stipulation and agreement the logs were sold by the receiver, and notes taken therefor in the name of one of the judges of the superior court; that, instead of said notes being deposited in court, they were held by the said defendant or his attorneys, and when paid the money was received by or on behalf of the said defendant, and by virtue of some arrangement between him and the owner of the logs, to which the plaintiff was not a party, appropriated to his own use. Such being the fact, the said defendant was not in a condition to attack the notices of lien claims held by the plaintiff. So far as he was concerned, it was the duty of the court to hold such claims good, regardless of the question as to whether or not the law had been strictly complied with in attempting to perfect the same. Nor do we think that the claim of said defendant that the force of said stipulation and agreement was lost by reason of the inability of the parties thereto to agree as to

the distribution of the money thereunder can be sustained. As to them the agreement was irrevocable, without the consent of all, so soon as the receiver had made sale of the logs. Upon such sale being consummated, the proceeds thereof rightfully belonged in the registry of the court; and it was the duty of such court to take jurisdiction of the same as a trust fund, and distribute it in accordance with the stipulation, even although some of the parties thereto objected to such a course being taken. We can see no reason why the case at bar did not give the court jurisdiction to proceed in the execution of said trust. The refusal of the court to allow the plaintiff to introduce proof of such stipulation was error, and would require the reversal of the decree, and a retrial upon that question, did not the full facts in regard thereto sufficiently appear in the record now before this court; but, as it does, a new trial is not necessary, as this court can now direct the entry of the proper decree.

It follows that the action of the lower court in refusing the plaintiff any relief against the Bank of North Seattle was correct, but that it should have required defendant Crane to have paid into court all the proceeds derived from the sale of the logs, and the same should have been, by proper decree, distributed pro rata among the holders of the several lien claims who were parties to such stipulation. The decree as to the defendant Crane must therefore be reversed, and the cause remanded, with instructions to enter a decree in accordance with this opinion.

ANDERS, C. J., and DUNBAR, STILES, and SCOTT, JJ., concur.

(5 Wash. 439)

#### DILLON v. FOLSOM et al.

(Supreme Court of Washington. Dec. 30, 1892.)

##### WITNESS—CROSS-EXAMINATION—APPEAL.

1. In an action by a real-estate broker to recover commissions under an alleged contract to sell land, defendants may ask plaintiff on cross-examination whether he was in the employ of the purchasers, and received compensation from them for his transacting such sale, in order to discredit his testimony in relation to the making of the contract on which suit was brought, though such defense was not pleaded.

2. Where there is a substantial conflict in the testimony upon the main issue, the appellate court will not disturb a verdict merely because there is a preponderance of evidence in favor of the other side of the issue.

3. A verdict returned in favor of both defendants after a nonsuit as to one of them, if not excepted to by plaintiff, will not be disturbed on appeal, unless he is deprived of substantial rights by reason thereof.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Joseph L. Dillon against Robert N. Folsom and another to recover commissions for selling defendants' lands. From a judgment for defendants, plaintiff appeals. Affirmed.

Ault & Munns, for appellant. Frater & Coleman, for respondent.

HOYT, J. This was an action brought by plaintiff to recover of the defendants an amount alleged to be due him as commission upon the sale of certain real estate. Three principal errors are alleged as grounds for reversal: (1) That the court erred in its rulings in the admission of testimony; (2) that the verdict was not supported by the evidence; and (3) that the verdict rendered by the jury was in favor of both of the defendants, when a motion for nonsuit had been granted before the rendition of such verdict in behalf of one of them.

Under the first subdivision it is claimed that it was error on the part of the court to allow certain questions to be asked the plaintiff, by way of cross-examination, and that it likewise erred in allowing questions upon the same subject to be put to defendant Folsom. These two exceptions present substantially the same questions; hence it is only necessary to discuss one of them. The court required the plaintiff to answer, by way of cross-examination, as to whether or not he was employed by Hiles & Burchans at the time he sold Folsom's place. Appellant alleges that this was error, for the reason that the answer did not set up by way of defense the fact that plaintiff, at the time he made the sale, received compensation, for his services in connection with such sale, from the purchasers. We think, however, that, under the general issue, the defendants were entitled to show any circumstances which would tend to throw discredit upon plaintiff's testimony in relation to the making of the contract upon which the suit was brought, and that the circumstance that, at the time said alleged contract was made, he was in the employ of the purchasers, and receiving compensation from them, would have such a tendency. The allowance of such cross-examination was clearly within the proper discretion of the trial court.

Upon the second question, it is argued that, taking all the testimony together, there was such a clear preponderance in favor of the contention of the plaintiff that a verdict in favor of the defendants should not be allowed to stand. An examination of the record satisfies us that there was a substantial conflict in the testimony upon the main issue, and, this being the case, the verdict must stand. If this court should set aside verdicts upon the ground that, in its opinion, a preponderance of the testimony was in favor of the other side of the issue presented to the jury, there would be little use in jury trials. All this court will do in any case is to investigate the record so far as is necessary to see whether or not there was substantial testimony to support all the issues necessary to be found by the jury, and, if such is contained in the record, the verdict will not be set aside for the reason that, in its opinion, there was a greater amount of testimony on the other side.

As to the third question. The returning of the verdict in favor of both of the defendants after one of them had had a judgment of nonsuit rendered in her favor was technical error, but, at the time such verdict was rendered, no objection or excep-

tion was taken thereto by the plaintiff; and, such being the case, the judgment rendered on such verdict will not be disturbed, unless the plaintiff was deprived of substantial rights by reason thereof. We are unable to see that this mistake in the verdict could have deprived the plaintiff of any substantial right. It is true that a judgment rendered upon such verdict might possibly be held to be a bar to another action, as against such defendant, when one rendered upon the nonsuit would not; but, under the peculiar circumstances of this case, it is evident that, if an action could not be maintained against the husband and wife, it could not be maintained against the wife alone; hence it follows that, if the action against the husband was barred, there would be no substantial right left to the plaintiff as against the wife. As we view the record, it presents no error of sufficient gravity to warrant us in reversing the judgment. It must therefore be affirmed.

ANDERS, C. J., and SCOTT, DUNBAR, and STILES, JJ., concur.

(5 Wash. 452)

#### CHILDS v. CITY OF ANACORTES.

(Supreme Court of Washington. Dec. 30, 1892.)

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL LIMITATION—REDUCTION OF VALUATION OF CITY.

1. The constitutional prohibition against a city's incurring any indebtedness in excess of 1½ per cent. of the valuation of the taxable property within its limits is not the source of the city's power to incur indebtedness, but a limitation on such power; and hence a newly-incorporated city has the power to incur indebtedness before the value of its taxable property is ascertained, the presumption being that it is acting properly in so doing.

2. The fact that after the valuation of property for taxation by county officers a portion thereof is segregated from the balance of the county by the incorporation of a city does not prevent the valuation of the property so segregated from being the basis on which to estimate the limit of the city's indebtedness until the regular city assessment for the succeeding year is completed and becomes effective.

3. Where a liability is incurred by a city when its total indebtedness, including such liability, is within the constitutional limit, the fact that a subsequent valuation of the city's property for taxation reduces the former valuation so as to increase the city's debt beyond the limit will not invalidate warrants thereafter issued to evidence such liability.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Thomas B. Childs against the city of Anacortes to enjoin it from paying certain warrants issued by it. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

B. B. Fowle, for appellant. Wells & Joiner, for respondent.

HOYT, J. On the 15th day of May, 1891, the city of Anacortes was duly incorporated under the general laws of the state, and became a city of the third class. On July 1st following, the city council, for the purpose of ascertaining the amount of taxable property within the corporate limits of said city, caused W. G. Beard,

the duly elected and qualified city assessor of said city, and also the duly appointed and qualified deputy county assessor, to return to the council the total amount of taxable property within the corporate limits of said city, according to the valuation of such property on the assessment roll for the county for the then current year. Thereafter said Beard certified to the council the total amount of said taxable property so ascertained by him to be \$5,120,000. On the 6th day of July, the city council, by ordinance duly passed and published, accepted and approved of the valuation so returned and ascertained, and declared that the true value of all the property within the limits of said city for city purposes was the said sum of \$5,120,000. Between the date of the incorporation of the city and the date when such valuation was ascertained and declared the city incurred indebtedness to the amount of \$84.50, and between said last date and the 31st day of May, 1892, it incurred a further indebtedness, and issued warrants upon its treasurer therefor, in the sum of \$59,383.34. Between said dates it also incurred a further indebtedness of \$7,707.65, for which warrants were duly issued after the said 31st day of May, 1892. On said May 31, 1892, the regular assessment roll for said city for that year was completed and became effective. From such assessment roll it appeared that the total valuation of the taxable property of the city was \$2,961,816. The plaintiff brought this action to enjoin the city from paying any of said warrants, and the question presented to us for consideration is as to whether or not the warrants issued under the circumstances above set out were valid obligations as against the city.

It is contended upon the part of the plaintiff that, until there had been an ascertainment of the value of the taxable property within the city, as shown by the regular assessment roll for city purposes, the city could incur no indebtedness; that the constitution prohibited the city from incurring an indebtedness in excess of 1½ per cent. of the valuation of the taxable property so ascertained; and that, until such valuation was made to appear, there was nothing to show what indebtedness the city could legally incur, and that, for that reason, it could incur none at all. It is further contended in his behalf that the attempted ascertainment of the valuation of the taxable property in 1891, as above stated, was entirely ineffectual for the purpose of establishing the data upon which the 1½ per cent. of indebtedness could be estimated. We are unable to agree with either of these contentions. In our opinion, the provision of the constitution as to the amount of indebtedness which may be legally incurred by a city is a limitation upon the powers thereof, and not a grant of the right to incur indebtedness. Without this provision of the constitution, it would have been competent for the city, acting under authority from the legislature, to have incurred any amount of indebtedness. This being so, it follows that the provision of the constitution is a limitation, and not a grant. If, without the provision of the constitution,

the city could incur not only an indebtedness to the amount herein named, but also to any further amount within the limitations of its charter, it cannot with any degree of consistency be claimed that it must look to such provision as the source of its power to incur indebtedness. Such provision being, then, a simple limitation, it could have no effect upon the city until the data which gave life to such limitation had been first ascertained. It will be presumed, in the absence of a showing to the contrary, that the city in incurring any indebtedness acted properly, and the fact that it exceeded the limitation authorized by the constitution could never be made to appear until the valuation upon which the percentage named in such provision is to be estimated had been established as required by law.

The conclusion to which we have come as to this question would make it unnecessary for us to discuss the other questions,—to determine the validity of the great bulk of the warrants in question; but since the total amount of such indebtedness exceeds 1½ per cent. of the total valuation as shown by the assessment roll for city purposes, it would follow that a portion of the same would be void unless the valuation of the property on July 6, 1891, is held to be effectual as a proper basis upon which to estimate the percentage to determine whether or not the limitation of the constitution has been exceeded. Under the constitutional provision the assessment roll of the county is made the basis for ascertaining the valuation of taxable property for the purposes of the limitation therein established. To this general provision is added a proviso, by which the assessment roll for city purposes is made such basis in cities. At the time the property was valued and placed upon the assessment roll for the county for the year 1891 the property afterwards included in the city of Anacortes was properly valued by the county officers and placed upon the county assessment roll. This being so, and the statute having contemplated the valuation for such purpose only once in each year, we are of the opinion that the basis thus established was the proper one upon which to estimate the percentage to show the limit of indebtedness during the year ending with the time when the regular assessment for the succeeding year should be completed and become effective. That this would be the fact if the property remained outside of the limits of the city, there can be no question; and, in our opinion, the fact that by the incorporation of the city it is segregated from the other property of the county could not change the rule. If such is not the fact, then it would follow from what we have heretofore said that until the date of the first regular assessment for city purposes there would be no data to aid the officers of the city in determining as to whether or not any indebtedness which they were about to incur was in excess of the constitutional limitation. Such officers would be, therefore, during what might be almost an entire year, working in the dark; and when the regular assessment for city purposes be-



came effective it might be found that indebtedness which had been incurred in the best of faith, supposing it to be within the amount authorized by the constitutional limitation, was in excess thereof, and for that reason entirely void. Under the facts above stated, the city council proceeded in what seems to us to have been a proper manner to ascertain the total valuation of the property within the city limits, as shown by the last assessment roll of the county, and duly ascertained and declared the same; and, until a regular assessment for city purposes had been made, we think that the valuation thus established must be held to be a proper valuation of the property of said city for the purposes of estimating the limit of indebtedness under the constitutional provision.

What we have said above shows that, in our opinion, all of the warrants issued prior to the 31st day of May, 1892, were valid and binding obligations against the city. It is claimed, however, that as to the \$7,707.65 issued after said 31st day of May, 1892, the basis for the limitation had, at the date of their issue, been duly established at the sum of \$2,961,816; and that, as the amount of outstanding warrants at the date these were issued was in excess of  $1\frac{1}{2}$  percent. of said last-named sum, these warrants came within the constitutional provision, and, being issued in excess of the percentage therein established, were void. This would doubtless be true if the indebtedness upon which these warrants were issued had been incurred subsequent to said May 31st, but such was not the fact. The liability was incurred when the total amount of the indebtedness, including the amount of such liability, was within the  $1\frac{1}{2}$  percent. named in the constitution. Such being the fact, the indebtedness, when incurred, was valid and binding, and warrants to evidence the same could properly be issued, even although at the time of such issue they constituted a part of an excess as estimated under the valuation then effective. The decree of the superior court must be affirmed.

ANDERS, C. J., and SCOTT, DUNBAR, and STILES, JJ., concur.

(5 Wash. 437)

# REALTY CO. v. APOLLONIO.

(Supreme Court of Washington. Dec. 30, 1892.)

## FOREIGN CORPORATIONS—DEALING IN REAL ESTATE.

1. Laws 1889-90, c. 9, § 1, which gives foreign corporations the same powers as domestic, provided that no foreign corporation "which is hereafter organized" for the purpose of dealing in and buying and selling real estate shall be permitted to transact such business within the state, does not apply to a foreign corporation organized before the passage of the act.

2. Terr. Laws 1885-86, p. 87, which prohibited foreign corporations thereafter organized for the purpose of dealing in real estate from transacting business within the territory, was not continued by the above statute of 1889-90, which was the first legislation on the subject under the state constitution, being an independent declaration of the law governing for-

eign corporations, and in no sense an amendment of prior laws.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by the Realty Company, a foreign corporation, against Theron Apollonio, for balance due on a contract for the sale of real estate. There was judgment in plaintiff's favor, and defendant appeals. Affirmed.

Plaintiff was organized September 30, 1889, under the laws of the state of Maine; its object and purpose being, as set forth in its articles of incorporation, "to own and manage real estate, and contract for, bond, buy, hold, mortgage, sell, convey, let, lease, improve, repair, build on land and real estate, and generally do all things incident to said business and the management thereof, throughout the United States and Canada, which said corporation may legally do."

Laws 1885-86, p. 87, provided "that no foreign corporation hereafter organized for the purpose of dealing in real estate, by buying and selling the same as a part of its business, shall be permitted to transact said business in the territory."

Laws 1889-90, c. 9, § 1, conferred on foreign corporations the same powers as are possessed by domestic corporations; "provided, further, that no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real-estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate and carrying on a brokerage business therein in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized."

John P. Gale, John P. Fay, and Park Henderson, (C. H. Gest, of counsel,) for appellant. Struve & McMicken, for respondent.

DUNBAR, J. It seems to us that the provisions of chapter 9 of the Laws of 1889-90 are so plain that they leave little room for construction. While there is some ambiguity and awkwardness in the recital of the powers of foreign corporations in the proviso to section 1, there is no ambiguity in the statement that it is only foreign corporations hereafter organized which fall within the proviso. Were it not for the proviso, there would be no discrimination in section 1 between foreign and domestic corporations. At least, there would be no inhibition on foreign corporations. While it is true that there was an inhibition under the laws of the territory, namely the Laws of 1885-86, we think there is nothing in the act of March 28, 1890, to indicate that the legislature intended to enlarge the prohibition against foreign corporations, or to carry forward those already in existence. This was the first legislation on the subject under the state constitution. It does not seem in any sense to be in the nature of an amendment to prior laws, but rather seems to

be an independent declaration of the law governing this character of corporations, complete within itself. The first part of the section gives full and equal powers to corporations, domestic and foreign, and the proviso is that "no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate," etc., "shall be permitted to transact such business of buying and selling," etc. The act repeals all acts and parts of acts in conflict with any of the provisions of this act; so that, if the contention of the appellant be true that the provisions of the former territorial laws are in conflict with the provisions of the later laws, those conflicting provisions are simply repealed by direct terms; and the fact that the conflicting provisions of the law were embraced in a proviso makes no difference, for a proviso can only be considered or construed with reference to the law immediately preceding it. There is, of course, a possibility that the legislature may have intended to carry forward the policy contended for by appellant, but the law, as enunciated by the legislature, does not warrant such a conclusion, and, in the absence of ambiguity in the legislative expression, the court would not be warranted in searching for a meaning which was not justified by the plain language of the law. There is nothing ambiguous in this law; there is nothing contradictory in its terms. It expresses purely a question of legislative policy, and there is nothing which would justify the court in giving it other than a literal interpretation.

It is conceded that this corporation was organized prior to the passage of the act of March 28, 1890. Consequently we conclude that it does not fall within the prohibitions expressed within that law. We have examined the other propositions discussed by appellant, but do not think the position taken on any of them is tenable.

The judgment is therefore affirmed.

ANDERS, C. J., and HOYT, STILES,  
and SCOTT, J. J., concur.

(5 Wash. 433)

HAYNES v. B. F. SCHWARTZ CO. et al.  
(Supreme Court of Washington. Dec. 30, 1892.)

JUDGMENT BY DEFAULT—VACATING.

The mere fact that a defendant in default files an answer without leave of court, after a motion for default has been served on him, which answer sets up a meritorious defense, does not show an abuse of discretion by the trial court in granting the default, and in afterwards refusing to vacate the judgment, in the absence of any showing why the answer was not filed within the time prescribed by law.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by Mary L. Haynes against the B. F. Schwartz Company and John F. Church to foreclose a mortgage. From an order overruling a motion by defendant Church to set aside a judgment by default, he appeals. Affirmed.

E. B. Mastick, Jr., A. R. Coleman, and W. S. Bush, for appellant. L. M. Lane and R. Gay, for respondent.

DUNBAR, J. This action was brought to foreclose a mortgage. Appellant, Church, who was alleged by the complaint to have a second mortgage on the property sought to be foreclosed, was made a party to the action, and served with summons. There never was any appearance by the defendant mortgagor. After the expiration of 20 days from the date of the service of summons upon appellant, Church, the respondent filed her motion for default, a copy of which was served upon appellant. On the same day, but after the motion for default had been filed, the appellant, Church, without leave of court, filed his answer. The court granted the default, and gave judgment in accordance with the prayer of the complaint. Appellant afterwards moved the court to set aside the default and vacate the judgment, which the court refused to do. The action of the court in refusing said motion is alleged as error. No statement of facts or bill of exceptions appears in the record.

It is conceded by the appellant that the power to set aside a default is discretionary with the court, but it is urged that in this instance the discretion of the court was abused, and many cases are cited in support of that contention. In most of the cases cited, however, the action of the trial court was sustained. In *Underwood v. Underwood*, 87 Cal. 523, 25 Pac. Rep. 1065, the appeal was from the order of the court granting a motion to set aside the judgment. The court was sustained, but the supreme court said: "The showing made on motion to set aside the judgment is a very weak one, but we are always unwilling to interfere with the decision of the court below in matters of this kind." Investigation of that case shows that the showing was a comparatively strong one. *Clavey v. Lord*, 87 Cal. 413, 25 Pac. Rep. 493, is another case where the action of the court was sustained; and the supreme court, in commenting upon the case, says: "Conceding that the court might have denied the motion to admit further evidence without any apparent abuse of discretion, as in the case of *Kohler v. Wells, Fargo & Co.*, 28 Cal. 613, cited by respondent, it does not necessarily follow that it was an abuse of discretion to grant the motion; for, in cases where the decision is governed entirely by the discretion of the court, it may even happen that a decision in favor of either party would not appear to be an abuse of discretion. To say that the law allows no latitude for the exercise of discretionary power is to deny that the power is discretionary. The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice." And in all the cases cited the appellate courts have discussed the merits of the case. But here there is no statement of facts by which this court can determine whether or not the trial court abused its discretion, and

in the absence of an affirmative showing to the contrary the presumption is that the discretion has been rightfully exercised. It is true that the answer on file states a good defense, but it does not appear that any showing was made by the appellant, meritorious or otherwise, why the answer was not filed within the time prescribed by law. The simple fact that the answer sets up a meritorious defense is not a sufficient showing to justify the court in setting aside a default, or in vacating a judgment. Under the law the plaintiff was entitled to her default, and remained entitled to it until the showing was made which, in the mind of the court, justified or excused the failure of the defendant to answer within the time prescribed by law. No attempt to make any showing of the kind was made in this case. The record shows that the appellant was served with notice of the motion for default, and that he appeared, but it does not appear that he made any objection whatever at that time to the granting of the default; and afterwards, when he sought to have the default set aside, and the judgment vacated, all the grounds of the motion were that he had a meritorious defense to the action, and that he was not in default at the time the default was granted, for the reason that his answer was on file. The law gave the defendant in this action 20 days in which to answer. It also gave him notice that if he did not answer within that time the plaintiff would be entitled to move for a default. He did not answer within 20 days, and the plaintiff had moved for a default, and had served him with notice of such motion; and, under the rules of the court, he could not then file his answer without leave of the court. The action of the court in granting the default must relate back to the time at which the motion for default was made. If defendant's theory is true, a defendant can forestall all default proceedings by filing his answer after the motion for default is served and filed, and the court would be deprived of all discretion in the very cases where the largest discretionary powers in the court are universally conceded. So far as the record shows, we are unable to say that any error was committed by the court, and the judgment is therefore affirmed.

ANDERS, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

**COLUMBIA & P. S. R. CO. v. BRAILLARD et al.**

(Supreme Court of Washington. Jan. 6, 1893.)

LANDLORD AND TENANT—RECOVERY OF POSSESSION.

In an action for the possession of land, where it appears that plaintiff, being in possession, leased the land to defendant, and placed him in possession, in the absence of fraud on the part of plaintiff in making the lease, it is no defense that the land is tide land, the title to which was in the United States when the lease was made. *Furniture Co. v. Wilbur*, (Wash. St.) 30 Pac. Rep. 665, followed.

Appeal from superior court, King county; R. Oshorn, Judge.

Forcible entry and detainer by the Columbia & Puget Sound Railroad Company against Henry E. Brailard and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ronald & Piles, for appellants. Andrew F. Burleigh, for respondent.

STILES, J. This case comes within the rulings made in *Furniture Co. v. Wilbur*, (Wash. St.) 30 Pac. Rep. 665; *Clancy v. Williams*, 31 Pac. Rep. 972, (decided December 13, 1892; ) *Clancy v. Reis*, Id. 971; and *Collins v. Hall*, Id. 972,—and for the reasons therein given must be affirmed.

So ordered.

ANDERS, C. J., and HOYT, SCOTT, and DUNBAR, JJ., concur.

(5 Wash. 471)

**TOWN OF SUMNER v. PEEBLES et al.**

(Supreme Court of Washington. Jan. 6, 1893.)

HIGHWAYS—ESTABLISHMENT—WIDTH OF ROADWAY—ALTERATION—OBSTRUCTION—EFFECT ON PUBLIC RIGHTS—VALIDITY OF PROCEEDINGS.

1. Under Laws 1859, p. 7, § 4, providing that the board of county commissioners shall enter in a book their action on all roads which they shall establish, alter, or vacate, and no county road hereafter established shall be opened until the same shall be fully recorded in said book, where such record book contains the entry of a petition for a road, the report of the viewers, a description of the road, and the adoption of the view, such road is established, even though the record book does not disclose that any order was made by the board declaring the road established, and directing it to be opened.

2. Under Laws 1859, p. 7, § 7, providing that all roads established by the county commissioners shall be 60 feet in width unless the commissioners determine upon a less width, where it does not appear from the record book of the commissioners that a road as established by them was less than 60 feet wide, the presumption obtains that the road was to be 60 feet wide.

3. Under Act Jan. 29, 1863, providing that upon the change of the location of an established road the new road shall equal the old in all respects, where the old road was 60 feet in width the new road must be of the same width.

4. The fact that upon the change of the location of such road the owner of the land through which the new road ran built his fences on either side 15 feet from the center of the road, and maintained such fences for 18 years, will not estop a town, the successor in interest of the county in the control of the road, from opening and maintaining the road to the width of 60 feet.

5. Where the action of the board of commissioners in changing the location of a road was not in conformity with Act Jan. 29, 1863, providing for such change, the opening of the changed road by the road supervisor, who was also the owner of the land through which the road ran, will estop him from denying the validity of the action by the commissioners in ordering a change in the location.

Appeal from superior court, Pierce county; John Beverly, Judge.

Submission without action of a controversy between the town of Sumner and J. E. Peebles and others as to the location of a certain road in plaintiff town. From

'Rehearing denied. See 32 Pac. Rep. 1000.

a judgment for defendants, plaintiff appeals. Reversed.

Arthur Remington. (Parsons & Corell, of counsel,) for appellant. Judson & Sharpstein, for respondents.

**STILES, J.** The first question for determination in this case is, did the proceedings before the county commissioners of Pierce county, in 1860, and the subsequent facts in regard thereto, constitute a certain road a county road, within the meaning of the general road law of 1859? Laws 1859, p. 7. The records of the county of Pierce show the following entries concerning the establishment of the road in question: "(1) At the regular May, 1860, term of the board of county commissioners of Pierce county, Washington territory, the petition of John B. Leach and twenty-three others of said district was presented by William M. Kincaid, the owner of the land on both sides of the road in question, setting forth the public necessity for a road on the north side of the Puyallup river, described in said petition. (2) Said petition was, by order of the commissioners, thereupon recorded in the proper record. (3) At the same term of the board, May 10, 1860, the board appointed viewers of said road, and said order was duly entered. (4) At a regular term of said board, August 6, 1860, the viewers made their report, containing a detailed statement of their doings, in which they say that they carefully marked their view from point to point. The report estimated the cost of the view, and was signed by two of the viewers. (5) The view was thereupon adopted, and duly recorded. (6) At the regular term of said board, in May, 1863, a petition was presented, signed by eighteen residents of the district named, among whom was John F. Kincaid, afterwards the owner of the land on both sides of the road in question, which petition is as follows: 'We, the undersigned, citizens of Puyallup valley, Pierce county, Washington territory, would ask your honorable body to change the road in said valley, beginning at a bridge on the Stuck creek, following the cedar grove on the south side, and running due east about seventy or eighty rods; from thence in a southeasterly direction on the west side of said cedar grove until it intersects the old road.' (7) Said last-named petition was thereupon recorded, and the board at the said term ordered that said petition be granted, and that the supervisor, F. C. Meade, be instructed to open the same 'as now laid out.' Said order was thereupon recorded. (8) The first location was traveled, used, and known by the public as a county road, and was worked and kept in repair by the county from 1860 to 1874. (9) The change petitioned for in the last-mentioned petition changed said road from one hundred to two hundred feet from its former location to the south, shortened said road, and placed it upon higher and better ground. (10) From 1874 on, as will be hereafter noted, the old road was abandoned, and the line was changed to the location petitioned for in 1863; and from

thence to the time of commencing this action the new location has constituted the county road."

Objection is made to the consideration of the original road as a county road, for the reason that, so far as appears, no order was made by the board declaring the road petitioned for to be established, and directing it to be opened. Section 4 of the act in question provides as follows: "The board of county commissioners shall cause their clerk to enter in a well-bound book their action upon all roads which they shall establish, alter, or vacate, which book shall be called the 'Road Book' of the county, in which book all the records concerning the roads at present established in the county shall be entered; and no county road hereafter altered or established shall be opened until the same shall be fully recorded in said book. Said road book shall be a public record, and be kept in the office of the clerk of the board of county commissioners, and shall be open to the inspection of the public." As we construe it, the action of the board in directing the petition of Leach and others for the opening of the road, in 1860, to be recorded in the road book, was substantially the granting of that petition. The appointment of viewers was the next step taken towards the opening of the road, and the adoption of the report of the viewers was the final step, and all that was necessary to constitute the establishment and legal opening of the road. The report of the viewers contained a detailed description of the line of the road, and showed that it was marked along its center line from point to point. There is nothing in the statute which definitely declares what shall constitute the establishment or opening of a county road, and it is not prescribed that there shall be any order declaring the same; but from the negative declaration that "no county road hereafter altered or established shall be opened until the same shall be fully recorded in said book" we understand that when in the road book there is entered a petition, the report of viewers, a description of the road, and the adoption of the view, the road is thereby and thenceforth established. *State v. Dover*, 10 N. H. 394. It was said in *Harrow v. State*, 1 G. Greene, 439,—a case arising upon a criminal indictment for obstructing the road,—that the road was established when the survey and plat were placed upon record as required by the statute. The statute in that state simply required survey and plat to be recorded. That disposes of the first question, and we think it must be conceded that, if the road was thus legally established, it was of the width of 60 feet, 30 feet on each side of the line marked by the viewers, since section 7 of the act in question prescribed that county roads should be 60 feet in width, unless the commissioners, upon the prayer of the petitioners, determine upon a less width.

The second point in the case grows out of the change ordered in 1863. The road as originally laid out lay entirely within the land of William M. Kincaid. In 1863, John F. Kincaid, who later became the owner of all the land through which the

road ran, was one of the petitioners for the change of the line of the road, but whether or not William M. Kincaid was also a petitioner does not appear. This change was ordered with very little formality, under the act of January 29, 1863, which was substantially, if not precisely, the same as the act of 1859. The petition was filed, and on the same day it was ordered granted, and the supervisor was instructed to open the road "as now laid out." Section 11 of the act provided for cases where persons through whose land a public highway was already established were desirous of turning said road over any other part of their land. Such an individual was himself authorized by petition to apply to the commissioners to permit him to turn the road through any part of his land on good ground, and without materially increasing the distance, to the injury of the public. The further provision in the section required the appointment of viewers, and authorized the commissioners, upon their favorable report, to order a road to be re-located as prayed for. It was also incumbent by the statute that the landowner open the proposed new road of the legal width, and in all respects make it equal to the old road for the convenience of travelers, and thereupon the new road should be declared to be a public highway, and a record made thereof, and so much of the old road as was made unnecessary by the new road should be vacated. In substance, this section was continued in force and is found in Code 1881, § 2981. Now, in this instance, many of the formalities were entirely dispensed with. The prayer of the petitioners was at once granted, and the supervisor was ordered to open the new road. We interpret the clause "as now laid out" to mean as laid out by the order making the change. But the actual opening of the new road did not take place until 1874, when John F. Kincaid, who was then the owner of the land through which both roads lay, was also the road supervisor of the district. He obstructed and closed the old road, and opened a new road along the line of the changed location. This he did as supervisor, at the public expense. It seems to us that there can be no question but that the road supervisor was acting, not upon his own responsibility, either as an individual or as owner of the land, but as road supervisor, in pursuance of his duty under the order of the board made in 1863, and until that time allowed to lie dormant and unexecuted. The effect of his action must be that as supervisor he took possession of the new line of road as a public road of the statutory width, and that as owner he assented to the proceedings had by the board of commissioners 11 years before. But he built a fence on each side of the road, only 15 feet from its center line; thus, it is claimed, asserting his claim that the road should only be 30 feet in width. But the individual Kincaid certainly could not be permitted to set up his claim against the act of the supervisor Kincaid in taking possession of the road of the statutory width for the use of the public; and the fact that he was permitted to maintain his fences

for many years can be taken for nothing more than a temporary concession on the part of the public that no more than 30 feet was actually necessary for the purposes of the road at that time. Subsequently, and in 1883, Kincaid and Ryan, to whom he had conveyed an interest in or a portion of the land, filed a plat of the town of Sumner, and showed thereon, along the line of this county road, a highway which they called "Division Street" or "County Road." Kincaid's dedication was on the south line of the road, and showed a road 32 feet in width, and Ryan's line on the north side of the road, in his portion of the dedication, fixed the road on the north as 30 feet in width. Whatever may be said of the efficacy of the records of the county commissioners, it is certain that this plat showed sufficient in itself to warn purchasers of either Kincaid or Ryan that Division street was on the line of what had been or was a county road, and such purchasers were bound to take notice that the statutory width of any county road was 60 feet.

Many questions are argued, and many authorities cited in the briefs of counsel, the citation of which is rendered unnecessary by the view we take of this action, viz. that the original road was laid out with a sufficient regard for the requirements of the statute to make it a legal county road, and that Kincaid's act in shutting up the legal road and opening the new road was in pursuance of the irregular order of 1863, and estopped him from saying that the new road was not also a legal road. It follows that the judgment should be reversed, and that the town of Sumner, which is now the successor of the county in the control of this highway, be permitted to take possession of the roadway to the extent of 30 feet on each side of its center line, and it is so ordered.

ANDERS, C. J., and HOYT, DUNBAR, and SCOTT, JJ., concur.

(5 Wash. 479)

#### CRANE v. DEXTER, HORTON & CO.

(Supreme Court of Washington. Jan. 6, 1893.)

REVIEW ON APPEAL—PAYMENT OF CHECK BY BANK—FORGERY AS DEFENSE—EVIDENCE—PROOF OF HANDWRITING.

1. The admission of incompetent immaterial evidence is not ground for reversal.

2. On an issue as to whether plaintiff had signed a certain check, or whether it had been forged by the payee, evidence by the payee that a criminal intimacy between herself and plaintiff had been discovered by her husband, and that the check in question had been paid by plaintiff in remuneration, is competent to show a state of affairs which would render it probable that plaintiff had given her the check.

3. On such issue it is not error to exclude from the evidence photographs of the disputed signature and certain genuine signatures, where the originals thereof are present.

4. The appellate court will not review a ruling of the trial court excluding certain photographs of signatures from the evidence, on the ground that they were not made with due care, where such photographs are not in the record.

5. It is not error to charge that a bank need not regard the handwriting in the body of the

check, but must know that of the signature only.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by George W. Crane against Dexter, Horton & Co., bankers, to recover a sum paid out by defendant, on an alleged forgery of plaintiff's name, and charged to plaintiff's account. From a judgment for defendant, plaintiff appeals. Affirmed.

Preston, Carr & Preston, for appellant. Blaine & De Vries, for respondent.

**STILES J.** The respondent bank had upon it the burden of showing that the check for \$600, which it had paid as the genuine check of the appellant, was in fact his check. The payee of the check, a married woman, was called as a witness, and testified to the fact that the check was signed by appellant in her presence, and immediately delivered to her. The check was not payable until six months after its date. At the end of that time she presented it, and received the amount it called for from the respondent.

Some questions were asked her about the amount of property she had at the time the check was made and paid, which were without any earthly relevancy to the case. These the court allowed, and much stress is laid upon the error thus committed. But it is impossible to see how the testimony could have had any effect upon the jury, one way or the other. Its admission would not justify a reversal.

The next error assigned is that of admitting the testimony of the same witness showing how the acquaintance between herself and appellant commenced and progressed, until it ended in criminal intercourse between them, which was discovered by her husband, and was remunerated by the delivery of the check in question. The case resolved itself into a pure question of forgery, appellant asserting that he had never signed the check, and the bank contending that he had. There was enough dissimilarity between the check and some 500 others which were admitted to be genuine, which were produced, to raise a serious doubt whether it was not a forgery. If forged, the payee was clearly the forger, or the knowing utterer of the instrument. Thus a sharp issue was before the jury, and it was not error for the court to admit evidence tending to show a state of things which would render it probable that this man should have given this woman a check. There were some entirely unnecessary details, but, upon the whole, we are not satisfied that any prejudicial matters went to the jury. When there is a charge of fraud in the procurement of a note, bond, bill, check, etc., or of forgery in its execution, a very large latitude is allowed to courts in the matter of admitting testimony to show the relations of the parties. *Robb v. Mann*, 11 Pa. St. 300; *Olmsted v. Hoyt*, 11 Conn. 375; *Burkholder v. Plank*, 69 Pa. St. 225.

The respondent had caused photographs of the disputed signature and of certain genuine signatures to be made on paper, so that all the signatures were close to-

gether. These the court rejected as immaterial and irrelevant. Photography has come to be a well-recognized aid to judicial investigation; but there would seem to be no call for its use in such a case as the present one. The disputed signature was present, as were also some 500 conceded genuine ones, so that some regard for convenience of comparison could be the only object to be gained. Where, as in *Luco v. U. S.*, 23 How. 515, the genuine signatures to be compared are so situated that they cannot be brought into court, or cannot be taken to an appellate court, the photograph becomes an almost perfect substitute for the original, and, if taken with proper care, is always received. *Leathers v. Salvor, etc., Co.*, 2 Woods, 680; *Rog. Exp. Test.* § 140.

Certain enlarged copies or magnified photographs of the same signatures were also offered, and they were rejected, because, upon examination of the photographs, the court decided that they had not been made with the requisite care. We cannot undertake to reverse this ruling of the court, which was probably based somewhat upon the appearance of the photographs themselves, because the copies are not in the record, they having been lost.

Complaint is made of several of the court's charges. The charge, taken as a whole, was perfectly fair, and gave to the jury clearly the real issues they were to determine. The alleged errors are more in the nature of verbal criticisms than substantial objections. The imagination must be drawn upon to argue prejudice from the court's telling the jury that interested witnesses are less likely to be honest and fair than those who are disinterested; or that one who saw a man sign a check was a better witness of the fact of signing than a mere expert in handwriting, who did not see the signing. Nor was there error in charging that a bank need not regard the handwriting in the body of the check it pays, but must know that of the signature only. *Redington v. Woods*, 45 Cal. 406. Several errors suggested do not seem to have existed as the record shows the transactions. Judgment affirmed.

**ANDERS, C. J.**, and **SCOTT, J.**, concur. **HOYT, J.**, did not sit at the hearing.

(4 Wash. 263)

**BOARD OF TRADE OF CITY OF SEATTLE et al. v. HAYDEN.**

(Supreme Court of Washington. June 14, 1892.)

For majority opinion, see 30 Pac. Rep. 87.

**SCOTT, J.** I concur in holding that a husband and wife cannot enter into a partnership with each other to carry on a business. This is the law in most of the states, and all arguments advanced in favor of such a holding elsewhere, in so far as their laws relating to the removal of the disabilities of married women are like our own, derive much greater force in a state where community property laws prevail

as here. Our statutes recognize but two kinds of property which can be held or owned by married persons,—separate property and community property. The statutes point out how this property may be acquired, and define what it is, according to the manner and time in which it is acquired. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, are her separate property, and the same is true with regard to like property owned by the husband. Section 1399, Gen. St., (formerly section 2409,) provides that all property not acquired as prescribed in any one of the ways mentioned, which is acquired after marriage by either husband or wife, or both, is community property. It has been held that their interests in this community property are indissoluble during the existence of the community, to the extent that the interests of either therein cannot be reached separately by any third party. The interest of each in the property is equal, and I do not think it would be contended that, by any mutual arrangement between themselves, they could agree that either could have a lesser interest than the other in said property, without destroying its community character. Section 1401, Gen. St., provides that "nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole, or any portion, of the community property then owned by them, or afterwards to be acquired, to take effect upon the death of either." This seems to me to clearly preclude the idea of their entering into any such agreement affecting their property interests to take effect prior to the dissolution of the community, except as expressly provided otherwise. Section 1443, Gen. St., authorizes the direct conveyance by one to the other of his or her interest in all or any portion of their community real property, which thereby becomes the separate property of the grantee; but it is apparent that such a deed, to be effectual, must convey the entire interest of the grantor in the property designated in the deed from the one spouse to the other. No lesser or partial interest of the grantor could be conveyed in any event, because this would have the effect of destroying its community character, and leave it neither separate nor community, which would effect a result the law does not contemplate. If a husband and wife can become partners in business, they can form the same kind of a partnership that other persons can, and enter into an agreement whereby one could take a small interest in the business, and the profits thereof, and the other a larger one. The property acquired through the pursuance of this business would not come under either head of the two classes recognized. It could not be held to be separate property, for it would not be acquired in any one of the ways specified; and it could not be community property, because, as said, in community property their interests must be equal, while, ac-

cording to the partnership contract, their interests might be very unequal. This would create a third species of property owned by husband and wife which the law does not recognize. It seems to me to be clearly the intention of the law that only the two species of property can belong to the community, or to either of its members; that the law is a limitation in this respect, and will not permit the holding or ownership of any other kind of property than that which is designated as "separate," and that which is designated as "community," and the distinguishing features of its acquisition have been clearly pointed out, and define its character. Especially for these reasons I think that in this state, where community property laws obtain, it would be contrary to the whole law on this subject to permit the husband and wife to enter into any contract or agreement whereby they might acquire property of a character other or different from that specified, which the law expressly permits them to hold and enjoy. It is true we have some statutes which, construed without reference to others, would seem to allow the wife to enter into any contract, and which remove all restrictions in this respect. I think our statute law upon this subject goes to a greater extent than those of the states from which the cases have been cited. Section 1408 of the General Statutes (section 2396 of the 1881 Code) provides that every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried; and section 1410 (section 2406 of the 1881 Code) provides that contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried; yet, when considered in connection with our other laws relating to the property rights of married persons, it is apparent that they are considerably restricted thereby, and it would be wholly incompatible and inconsistent with such provisions to hold that a husband and wife could enter into any joint arrangement or agreement between themselves creating a different kind of ownership in property from the ones specified, to take effect before the death of either, and it would be strongly against public policy to allow them so to do, and thus likely give rise to interminable and unfathomable complications.

Our laws cannot, in accordance with recognized rules of construction, be held to authorize the husband and wife to enter into a partnership with each other for the purpose of trade or business, although it may be possible they might form some particular kind of an agreement for such a purpose which might not conflict with their rights of property, as defined by the statutes. This is very doubtful, however; and, when considered in all its bearings with the rights, duties, and liabilities of partners to each other, and to creditors, it is evident that it is not the intent of the law to confer any such authority upon them. The effect that such an arrangement might have, or must necessarily



have, upon their property rights as classified, is the strongest argument that can be advanced against the position of the respondents, as it would destroy the distinction between the classes of property they may own as declared by the statutes. Section 1444, Gen. St., provides that a husband or wife may appoint the other attorney in fact, with full power to sell, convey, and incur his or her separate estate, both real and personal; and section 1446 makes similar provision with regard to their community property, and, with section 1443, further assisted by the broad scope of sections 1408 and 1410, practically subjects the wife to the influence of the husband as to the disposition and control of her property, separate or community, it seems to me, as fully as any partnership agreement between them could possibly effect; and I should be forced to the conclusion that they might become partners in trade with each other, were it not for the statutes prescribing and defining the kinds of property a husband and wife may own and acquire. It is a matter of experience that their property rights and relations become complicated, at best, under the practical workings of the law as expressed and interpreted; and, as a matter of public policy, it would be very undesirable to still further allow them to become involved in mercantile partnership relations, with all its possible resulting consequences, conflicts, and complications.

(97 Cal. 305)

**PERINE v. FORBUSH.** (No. 14,867.)

(Supreme Court of California. Feb. 15, 1893.)

**STREET IMPROVEMENTS—ACTION TO ENFORCE ASSESSMENT—COMPLAINT—DEFENSES—WAIVER OF OBJECTIONS.**

1. Where, in an action to enforce a street assessment, it appears from the complaint that the contract on which the assessment was based was not entered into within 15 days after the posting of the notice of its award, as provided by St. 1885, p. 147, and there is no averment that this delay was not caused by the fault of plaintiff, the complaint is demurrable as failing to state a cause of action.

2. Where a contract for certain street work was void because it was not made within the time prescribed by St. 1885, p. 147, the fact that the property owner did not appeal to the city council from the action of the superintendent of streets in entering into such contract will not validate an assessment made thereon.

3. In an action to enforce a street assessment it is no defense that the contract for the work contained a provision that there should be no assessment on the adjoining property for improving that part of the street occupied by a street-railway company, but that the company should pay therefor.

4. In an action to enforce a street assessment it is no defense that the property against which the lien is sought to be enforced is defendant's homestead.

5. In an action to enforce a street assessment it is no defense that plaintiff agreed orally to enter into a written contract by which plaintiff was to accept from defendant a conveyance of certain land in payment of the assessment against defendant's property, and then refused to enter into such contract.

6. An objection that a street assessment is void because the superintendent of streets included in the assessment the cost of certain bulkheads, will not be sustained in an action to

enforce the assessment, though the contract for the street work did not provide for those bulkheads, since defendant, not having appealed to the city council from the action of the superintendent, as provided by Act March 18, 1885, will be deemed to have waived his right to make such objection.

7. Act March 18, 1885, providing for work on streets, does not require a property owner to appeal to the city council in order to obtain relief from an assessment under a void contract, or from one which includes the cost of work which the council would not itself have jurisdiction to contract for, because not embraced in the resolution of intention.

8. Where, in an assessment made under a valid contract for street improvement, there is erroneously included the cost of work not falling within the provisions of the contract, though reasonably related thereto, and which might have been included in the contract without rendering it void, a failure by a property owner to appeal to the city council for redress is a waiver of the right to make the objection in an action brought to enforce the assessment.

**Department 2. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.**

Action by one Perine against one Forbush upon a street assessment. From a judgment for plaintiff, entered upon an order overruling a demurrer to the complaint, defendant appeals. Reversed.

R. B. Canfield and B. F. Thomas, for appellant. J. J. Perkins and Wright & Day, for respondent.

**DE HAVEN, J.** This action is upon a street assessment, and it appears from the complaint that the contract which is the foundation of the assessment was not entered into within 15 days after the first posting of the notice of its award to plaintiff. Section 5 of the act of March 18, 1885, (St. 1885, p. 147,) contains the following: "But if said original bidder neglects, fails, or refuses for fifteen days after the first posting of notice of the award to enter into the contract, then the city council shall again advertise for proposals, as in the first instance, and award the contract for said work to the then lowest responsible bidder." This provision of the law is not directory, as claimed by plaintiff. It is true that statutes which fix the time within which official acts are to be performed are often held to be merely directory as to the time so fixed, but such a statute is never so construed when its language indicates the contrary intention; as, for instance, when the statute attaches a consequence to the failure to perform the act within the time limited. "In such a case," said Mr. Justice Cope, in delivering the opinion of the court in the case of *Shaw v. Randall*, 15 Cal. 385, "the consequence can be avoided only by compliance with the statute." The provision of the statute above quoted, which fixes the time within which contracts for street improvements shall be executed, is mandatory, and when the bidder has neglected or refused for 15 days to enter into the contract awarded him the city council must again advertise for proposals, and the superintendent of streets is without power to relieve him from the consequence of his neglect or refusal to complete the contract within the time specified. As al-

ready stated, the complaint alleges that the contract for the street work was made more than 15 days after the first posting of notice of its award to plaintiff, but there is no averment therein that the delay in entering into the contract was not caused by the fault of plaintiff, and, in the absence of such an allegation, the complaint does not state a cause of action, as it fails to show any authority in the superintendent of streets to make the contract after the expiration of the 15 days named in the statute. The facts showing such authority cannot be left to inference, but they must be alleged. It is incumbent upon the plaintiff in this class of actions to show in his complaint, "by either special or general averment of the character permitted by our statute, that the various provisions of the statute under which it is sought to charge the defendant were complied with, for, unless they have been complied with, the defendant is not liable." *Himmelmänn v. Danos*, 35 Cal. 441. It is claimed, however, by plaintiff that the assessment cannot be held invalid because of the act of the superintendent in entering into the contract after the time fixed in the statute, as the defendant failed to appeal to the city council from such action of the superintendent, as provided for by section 11 of the act of March 18, 1885, (St. 1885, p. 147;) but, the contract being void, it was not incumbent upon the defendant to appeal to the city council. This was so held in *Brock v. Luning*, 89 Cal. 316, 26 Pac. Rep. 972, construing a similar section found in the act of April 1, 1872, (St. 1871-72, p. 804.) The court in that case said: "As the action of the superintendent of streets was void, it could not become valid by the failure of the property owner to appeal, under section 12 of the law of 1872, to the board of supervisors. He could not appeal unless 'aggrieved.' Such owner was not aggrieved, for the contract made was void, and affected his rights no more than would a void judgment." And in the case of *McBean v. Redick*, 96 Cal. 191, 31 Pac. Rep. 7, it was also held that the property owner is not required to appeal to the board of trustees or city council, when the assessment is based upon an invalid contract. It follows from what we have said that the demurrer to the complaint should have been sustained.

It is possible, however, that the plaintiff may be able to obviate this objection to the complaint by its amendment, and it is therefore necessary to pass upon other questions which have been argued, which we now proceed to do. There was no error in sustaining the demurrer to the answer of defendant. The fact that there was a provision in the contract to the effect that there should be no assessment upon the adjoining property for improving that part of the street occupied by the railway company, and that plaintiff would accept as payment for all work done thereunder "the warrant of said superintendent as the same may be issued by him, \* \* \* and also the amount which may be paid by any person holding a franchise for any operation of a street railroad throughout State street," did

not render the contract void. The contract was to do all the work specified in the resolution of intention, and the agreement of plaintiff to accept payment from the street railway company for a portion of the work was one which he had a right to make, and which could not possibly injure the defendant, or any property owner.

Nor is it any defense to this action that the property against which it is sought to enforce the lien constitutes the homestead of defendant. The cost of making improvements like those embraced in this contract is as much a charge against the homestead as against any other property fronting upon such improvements.

The third separate defense set out in the answer is equally without merit. The verbal agreement of plaintiff to enter into a written contract with defendant by which plaintiff was to accept from defendant a conveyance of certain land in payment of the amount which should be assessed against the property of defendant for the street improvements, and to pay to defendant the balance of the purchase price of said land, and the refusal of plaintiff to complete such written contract after doing the street work, constitute no defense to this action. Nor is the case of defendant strengthened by the averment that, if it had not been for such verbal agreement, he would have commenced an action to enjoin plaintiff from prosecuting the street work under his contract made with the superintendent of streets. As we construe the answer, the alleged agreement upon the part of plaintiff to purchase defendant's land, and in part payment therefor to credit defendant with the amount of the street assessment, was never completed; and it is unnecessary to consider what would have been its effect if it had been reduced to writing, as verbally agreed upon, and defendant had tendered a deed in accordance with its terms.

In making the assessment the superintendent of streets included \$444, the cost of 37 bulkheads, which were not named in the plans and specifications attached to the contract, and it is claimed by defendant that the assessment is for this reason void. This contention cannot be sustained. It is true that, as the contract did not provide for constructing these bulkheads, the superintendent of streets ought not to have included their cost in the assessment which he made, but for such erroneous action on his part the only remedy was an appeal to the city council, as provided for in section 11 of the act "to provide for work upon streets" \* \* \* within municipalities," approved March 18, 1885, (St. 1885, p. 147.) Such an objection to the assessment could have been corrected by the city council, and the defendant waived his right to now make it by not appealing to that body for its correction. *Himmelmänn v. Hoadley*, 44 Cal. 276; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. Rep. 1143; *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. Rep. 943; *Frick v. Morford*, 87 Cal. 579, 25 Pac. Rep. 764. When, however, an assessment includes the cost of work not falling within the general description of that which is referred to in the

resolution of intention, or when such work bears no relation whatever to that which is described in the contract, this rule would not apply. But this is not such a case. The construction of the bulkheads was not, so far as appears here, an entire departure from the general plan or scope of the improvement described in the resolution of intention, although mention of them is omitted in the plans and specifications attached to the contract. In such a case, the determination of the superintendent of streets that their construction was necessary in order to fully complete the work called for by the contract, was only an error of judgment, and his action in making an assessment to cover their cost was only a mere error, which it is too late now to correct, and which does not render the assessment wholly void. We do not regard the cases of *Dyer v. Chase*, 52 Cal. 440, and *Donnelly v. Howard*, 60 Cal. 291, cited by defendant, as being opposed to our conclusion upon this point, but, on the contrary, they are in harmony with the views here expressed. In each of those cases the assessment and the demand for its payment included the cost of work not authorized by the resolution of intention, although provided for in the contract upon which the assessment was based; and it was held that such assessment could not be enforced as a lien upon the property of the defendant, and that the owner was not required to appeal to the board of supervisors for its correction, or failing to do so, submit to it as a burden upon his property. We are satisfied that section 11 of the act of March 18, 1885, above referred to, does not require the property owner to appeal to the city council for relief from an assessment based upon a void contract, (*McBean v. Redick*, 96 Cal. 191, 31 Pac. Rep. 7; *Frick v. Morford*, 87 Cal. 579, 25 Pac. Rep. 764; *Brock v. Luning*, 89 Cal. 316, 26 Pac. Rep. 972;) or for relief from an assessment which includes the cost of work which the city council itself would not have had jurisdiction to contract for, because not embraced in the resolution of intention; but when the contract is valid, and the error complained of is only found in the assessment because it was made to cover the cost of work not falling strictly within the provisions of the contract, although reasonably related thereto, and which might have been included in the contract without rendering it void, as not being within the authority conferred by the resolution of intention, the failure to appeal to that body for redress is a waiver of the right to make such objection in the action brought to enforce the assessment. Judgment and order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

(97 Cal. 316)

**LIBBEY v. ELLSWORTH et al.** (No. 19,009.) (Supreme Court of California. Feb. 16, 1893.)  
**STREET IMPROVEMENTS—ACTION TO ENFORCE ASSESSMENT—SUFFICIENCY OF COMPLAINT.**

Under Act March 18, 1885, providing that the superintendent of streets "shall fix the time for the commencement, which shall not be

more than 15 days from the date of the contract, and for the completion of the work, under all contracts entered into by him," the complaint in an action to enforce an assessment for street improvements must show that the contract under which the work was done fixed the time for commencement and completion of the work as provided in the statute.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by one Libbey against one Ellsworth and another upon a street assessment. From a judgment for defendants, entered upon an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Jones & Carlton, for appellant. Julius Lyons, for respondents.

**DE HAVEN, J.** The action is upon a street assessment. The court below sustained a demurrer to the complaint, and thereupon rendered judgment in favor of defendants. The plaintiff appeals.

We think the demurrer was properly sustained. It appears from the complaint that the contract which is the basis of the assessment sought to be enforced was not entered into between the assignor of plaintiff and the superintendent of streets within 15 days after the first posting of the notice of its award to plaintiff's assignor, the plaintiff alleging that posting of such notice was first made on September 22, 1890, and the contract executed on the 8th day of October following. There is no averment in the complaint that this delay in executing the contract was not caused by the neglect, failure, or refusal of plaintiff's assignor, and we held in the case of *Perine v. Forbush*, 32 Pac. Rep. 226, (No. 14,867, recently decided,) that such an allegation is necessary in order to state a cause of action in this class of cases, when it also appears from the complaint that the contract was not entered into within 15 days after notice of its award was first posted, and the judgment here must be affirmed upon the authority of that case.

In addition to this, the complaint fails to show that the contract entered into between the superintendent of streets and the assignor of plaintiff fixed any time for the commencement or completion of the work therein provided for. Looking at the contract as stated in the complaint, it is not possible to say whether it was one authorized by the law or not. Section 6 of the act "to provide for work upon streets \* \* \* within municipalities," approved March 18, 1885, (St. 1885, p. 147,) provides that the superintendent of streets "shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the completion of the work, under all contracts entered into by him." This requirement of the statute is mandatory, and a contract not in accordance with its terms would be destitute of binding force; and, as the validity of the assessment must depend upon the validity of the contract upon which it is based, it is incumbent upon the plaintiff seeking to enforce the alleged lien of such assessment, to show by his complaint that the contract was one au-

thorized by law. "The complaint must show by either special or general averments of the character permitted by our statute that the various provisions of the statute under which it is sought to charge the defendant were complied with, for, unless they have been complied with, the defendant is not liable." *Himmelman v. Danos*, 35 Cal. 441. It is not sufficient to allege generally, as in this case, that the contract entered into with the superintendent of streets was one by which the contractor agreed to do the work named therein in accordance with specifications which are not set out, and under the direction and to the satisfaction of the superintendent of streets; but it must affirmatively appear from the statement of the contract, whether it is set out in *haec verba* or according to its legal effect, that it contained everything essential to make it a valid contract under the statute.

Judgment affirmed.

We concur: FITZGERALD, J; McFARLAND, J.

(3 Cal. Unrep. 765)

DREW v. COLE et al. (No. 19,143.)

(Supreme Court of California. Feb. 4, 1893.)

SURFACE WATER — OBSTRUCTING NATURAL FLOW.

Where, from time immemorial, surface water had flowed through well-defined channels, from the adjacent country, upon plaintiff's land, and would still but for the erection by plaintiff of an embankment which diverted the water upon defendants' land, the fact that a change in the conformation of the adjoining country, resulting from its cultivation by strangers, had obliterated the natural channels, and formed new ones, which would cause the water to overflow defendants' lands but for an obstruction erected by strangers many years before such change, will not justify plaintiff in maintaining his embankment, to the injury of defendants.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

(Not to be published in California Reports.)

Petition for injunction by H. L. Drew against Henry Cole and another. Defendants filed a cross bill for affirmative relief. Judgment for defendants. Plaintiff appeals. Affirmed.

Willis, Cole & Craig and C. W. C. Rowell, for appellant. Paris & Satterwhite, Rolfe & Freeman, and Harris & Gregg, for respondents.

HAYNES, C. Plaintiff appeals from the judgment and an order denying his motion for a new trial. The action was brought to enjoin defendants from constructing a bulkhead or embankment by which, it is alleged, certain waters would be turned upon plaintiff's premises, to his injury. Defendants answered, and also filed a cross complaint, seeking affirmative relief against the plaintiff. The findings of the court, upon all the issues, were in favor of defendants. The locus of the controversy is upon a subdivided portion of the San Bernardino ranch, northwesterly from the city of Redlands. Colton avenue runs east and west and California street crosses the avenue at right angles.

The plaintiff's land lies on the north side of Colton avenue, and the land of defendants, Cole and Hicks, on the south side. California street is the east boundary of the land of the plaintiff and of defendant Hicks, and defendant Cole's land adjoins Mrs. Hicks' land on the west. The Adams or La Pierce land, mentioned in the testimony, lies on the south side of Colton avenue, and is separated from Mrs. Hicks' land by California street, and the land of William Curtis, mentioned in the testimony, lies on the west side of California street, and adjoins the land of defendant Hicks on the south. The lands of plaintiff and defendants, Cole and Hicks, are highly cultivated, and planted in orange, lemon, and other fruit trees and vines. The complaint alleges "That to the southeast of plaintiff's premises is a large section of country comprising what is known as the 'Old Barton Ranch' and 'Redlands,' all of which is cultivated and irrigated; and since the cultivation and irrigation of the same, and during heavy storms of rain, the water flows down from the same to the southeast corner of plaintiff's land, and has cut itself a channel down through said Colton avenue, running westward along plaintiff's south line, but outside and south of plaintiff's improvements, and is flowing thereon in greater or less quantities at different times." The complaint then charges that defendants are proceeding to build a bulkhead across Colton avenue, on the line of California street, for the purpose of preventing the water from passing down Colton avenue, and compelling it to pass over plaintiff's premises, to the great injury of his orchards and improvements, by cutting channels, etc. The answer alleges that during storms of rain, from time immemorial, the water has naturally flowed from the section of country mentioned in the complaint, in a northwesterly direction, to the southeast corner of plaintiff's land, and would still naturally flow in the same direction, upon and across plaintiff's premises, but for a dam or embankment constructed by plaintiff in the spring of 1890 across the natural course of said water, whereby it was diverted, and caused to flow down Colton avenue and over the defendants' lands; that the construction of the embankment being built by them, and the construction of which plaintiff seeks to enjoin, was necessary to prevent the diversion caused by plaintiff, and to protect their premises. Defendants' cross complaint repeats these allegations, alleges that plaintiff threatens and intends to maintain his dam, and prays for an injunction, and that the dam may be abated as a nuisance. Plaintiff's answer to the cross complaint denies specifically the material averments thereof, and alleges that about 1887, owing to the cultivation of the land lying to the southeast, large bodies of water were accumulated thereon for the purposes of irrigation, and ditches and canals were constructed; that by natural and artificial causes, over which he had no control, the conformation of the country lying southeasterly from his premises was so changed that ancient channels were obliterated, and new channels created, "and that the

water since then coming through said channels will, if unobstructed, discharge itself over and through the place of William Curtis and the defendants in a north-west direction, and on through and over Colton avenue a long distance west of the southeast corner of his place;" and further alleges that defendants so graded California street, and constructed an embankment along the easterly side of said street, as to prevent the water from flowing as it otherwise would across their land, and that, if the water was permitted to flow as it naturally would across their land, the quantity would be insufficient to injure them. The court found (1) that all the matters and things stated in defendants' answer are true; (2) that plaintiff did, in the year 1890, erect a dam at the southeast corner of his land, with the intent and to the effect of diverting all of the water which flowed to said corner of his land through the natural drains of the country, down Colton avenue, and thereby caused a large wash or gulch to be made in the avenue, and also caused said waters to run over the defendants' lands, and wash and injure and greatly damage the same, and that the water never flowed down Colton avenue before the erection of said dam by plaintiff; and, as to the cross complaint, found all the allegations true, and all the denials and matters alleged in the answer thereto untrue. Judgment was rendered that plaintiff take nothing by his action, and upon defendants' cross complaint judgment was entered that plaintiff's dam be abated as a nuisance. Appellant's notice of intention to move for a new trial specified, as the grounds thereof, (1) insufficiency of the evidence to justify the decision of the court; (2) errors of law occurring at the trial, and excepted to by the plaintiff; and (3) that said decision is against law. Under the second ground of motion above mentioned, there are no specifications whatever. Several particulars are specified wherein the evidence is claimed to be insufficient to justify the findings; but these, so far as material, hinge upon the question whether there was a natural channel or drainage which conducted the water to plaintiff's southeast corner, and thence into and upon his premises, and not down Colton avenue, or over the lands of defendants. The evidence is very voluminous, and every fact bearing on the issues between the parties appears to have been fully developed. Careful surveys of the country from which water flows to the vicinity of plaintiff's and defendants' lands were made, and topographical and profile maps were prepared to illustrate the various contentions of the parties and the testimony of the witnesses.

After a careful examination of the maps and the testimony of the witnesses, the principal issue of fact is not difficult of determination. It is somewhat obscured by the large mass of testimony, much of which is immaterial and sharply conflicting. Counsel for appellant concedes that "it is in evidence, and not contradicted, that at some time in the past a dry gulch ran down through these places to the southeast corner of plaintiff's place."

Plaintiff's answer to the cross complaint would seem to show quite conclusively that such dry gulch existed until about 1887, when, by the improvement and cultivation of the land, "the conformation of the country lying to the southeast" was changed by natural and artificial means; that old channels were obliterated and new ones created; and that "the water since then coming through said channels will, if unobstructed, discharge itself over and through the places of William Curtis and the defendants, Cole and Hicks." The change in the conformation of the country, and the obliteration of the old channels, and the creation of new ones, were not upon defendants' lands, nor caused by them. Defendants' map shows, and there is much evidence tending to establish the fact, that the main gulch or arroyo came down from at or near the city of Redlands, and entered the Adams or La Pierce lot near the middle of the east line, and pursued its course to the southeast corner of plaintiff's land, and continued in the same general direction for some distance into plaintiff's lands, where it spread out into what one of the witnesses termed "a swale." Another arroyo, but a smaller one, came into the Adams lot on the south side, and continued across the lot, and entered the main gulch near the point where it left that lot and entered plaintiff's premises. California street, as before stated, runs north and south on the west line of the Adams place and the east line of Mrs. Hicks' land. On the west line of the street is an embankment, averaging about three feet higher than the level of the cultivated land. This embankment was made 21 years ago for the purpose of a fence, by digging a ditch, and throwing the earth upon one side, and this embankment is about a foot higher than the present grade of California street. It does not appear, however, that at the time this embankment was made, nor until recent floods, the water would have flowed over the land of the defendants, nor that it would now have any material effect, but for the changes made in the surface of the lands above, whereby the ancient channels have been obliterated to a greater or less extent. Appellant relies very largely upon his topographical survey to show that the natural flow of the water would now be over defendants' land. That the natural flow would be at right angles to the contour lines is true, and would be conclusive upon that point if the surface were absolutely even and regular, but slight obstacles lying between the contour lines may divert the water from the course it would otherwise pursue. But such evidence cannot overcome or change the course of natural channels conceded to exist or to have existed. Besides, these surveys were made shortly before the trial, and after the changes in the surface of the lands referred to by appellant in his pleadings and testimony, and for these changes the defendants are not responsible; nor are they responsible for the increased quantity of water reaching the east line of plaintiff's and defendants' property, resulting from clearing the lands above them, and the increased use

of water for the purpose of irrigation, the breakage or overflow of ditches, and the like. So far as the arroyos across the Adams place, if they had remained unobstructed, would have conveyed the water, as they formerly did, to appellant's southeast corner, and into his land, he is not injured by the same quantity of water being now turned to the same point by the grading up of California street, or by the embankment maintained by Mrs. Hicks; nor could the defendants in any manner be held responsible for the acts of the public authorities in grading the street, so far as that may, under present circumstances, operate to turn the water to plaintiff's corner. But no relief was sought against those who changed the surface of the land above, so as to change or divert the course of the water, or through whose agency the quantity of the flow was increased, nor against the public for raising the grade of the street, nor against Mrs. Hicks for maintaining an embankment made many years before; for, if the defendants could be held liable for all this in an appropriate action, it could not change the result in this action. Appellant erected a dam across what is conceded to be at that point a natural channel, and which at some time in the past was the continuation of a natural channel or drainage for storm water from the city of Redlands to that point; and by the erection of the dam, and the removal of earth from that part of Colton avenue next his premises, appellant diverted the water into a new channel, to the injury of the avenue and of defendants' premises. So far, therefore, as the judgment against appellant is concerned, the material facts necessary to support it, so far as the existence of the water course, the erection of the dam, and the diversion of the water down the avenue were concerned, could have been sustained upon his own testimony, while the injury to defendants resulting therefrom, as testified to by them, was practically uncontradicted; and the same facts found from the same evidence justified the dismissal of the plaintiff's bill for an injunction.

Appellant complains that there was no flooding upon the allegation that not more than 2,500 inches of water naturally flowed at the point where the channel entered his land. But it is immaterial whether the quantity naturally flowing there was 500 or 2,500 inches. If any material quantity—that is, any quantity capable of doing damage to others if diverted—naturally flowed there, he had no right to obstruct it, and divert it to other and new channels, to the injury of others; and hence the quantity diverted, within the limits above stated, could not affect the character of his dam as a nuisance. I think the findings cover all the material issues, and are fully justified by the evidence, and that the findings support the judgment.

Some exceptions to evidence are found in the body of the transcript, but which are not referred to in the specifications of error, nor in appellant's brief, and we therefore assume that they are not relied upon. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 270)

LABORY v. LOS ANGELES ORPHAN ASYLUM. (No. 19,111.)

(Supreme Court of California. Feb. 8, 1893.)

ADVERSE POSSESSION—CONSTRUCTIVE OCCUPANCY—RIGHT OF CORPORATION TO DEFEND SUIT—FILING ARTICLES.

1. In an action to quiet title to land included in a patent originally granted to a city, it appeared that plaintiff claimed title relying on adverse possession by his predecessors in interest, who had actually occupied a small portion of the grant the required period, and claimed constructive possession of much more, including the land in controversy, which the city deeded to defendant's predecessors. Held, that the city, being the owner of the land, was constructively in possession of all that was not actually occupied by others, and therefore plaintiff's title extended only to the amount actually occupied by him, and the deed to defendant, including only what plaintiff claimed by constructive possession, conveyed the valid title.

2. An objection that defendant corporation is not entitled to defend the suit because it has not complied with Civil Code, § 290, requiring that every corporation shall file a copy of its articles of incorporation in every county where it holds property, and on failing to do so it shall not maintain or defend any proceeding in relation to such property, will be deemed waived unless taken during the trial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action to quiet title by Leonard Labory against the Los Angeles Orphan Asylum. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. A. Meserve and M. W. Conkling, for appellant. Stephen M. White, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a tract of land in the city of Los Angeles, and the complaint is in the usual form. The defendant is a corporation, and by its answer it denies that the plaintiff is the owner or entitled to the possession of a described portion of the tract, and avers that it is the owner in fee, and in possession thereof; and it disclaims any claim to or interest in the remaining portion of the tract. The court below found the facts to be in accordance with the averments of the answer, and gave judgment accordingly. The plaintiff appeals from the judgment and an order denying his motion for a new trial.

The city of Los Angeles was incorporated by an act of the legislature in 1850, and was made to succeed to all the rights, claims, and powers of the pueblo of that name in regard to property. In due time it presented to the board of land commissioners, appointed under the act of congress of March 3, 1851, its claim for four square leagues of pueblo lands, and its title thereto was thereafter duly and regularly confirmed. The decree of confirma-

tion became final on February 1, 1858, and on August 9, 1866, the United States issued its patent for the lands to the city. The land in controversy is included within the four leagues so confirmed and patented, and the principal question is, had the plaintiff's predecessors in interest acquired a title thereto by prescription as against the defendant and its predecessors in interest, who claimed title under conveyances from the city? To establish his title the plaintiff relies upon deeds, executed by his predecessors in interest, of a tract of land including the land in controversy, and an actual occupancy of a small part of the tract, under claim in good faith and color of title to the whole. The first deed was executed on May 31, 1866, and the last to the plaintiff on August 26, 1890. The tract described was situated on the east side of and adjoining the Los Angeles river, and was in form a parallelogram, having a length from west to east of 400 varas, and a width of 250 varas. Next to the river was a small flat, containing two or three acres, then a rise or hill, and back of that a level plain or mesa, extending east for many miles. The flat next to the river was inclosed and planted with fruit trees, and on it was an adobe house, which was occupied by each of the grantors, or his tenants, during the time of his claimed ownership. The balance of the tract was never inclosed or used by any of the plaintiff's predecessors in interest, but was a common pasture, used by any one and every one for that purpose who chose to do so, until the part of it in dispute was inclosed by the defendant in March, 1886. To establish its title the defendant relies upon two deeds executed by the city to its predecessors in interest, both deeds conveying the land in controversy and other land, and one dated August 12, 1875, and the other March 8, 1886.

The plaintiff claims that the entry of each of his predecessors into the actual possession of the flat by the river was made in good faith, and under claim and color of title to the whole tract; and that under section 322 of the Code of Civil Procedure a title to the whole tract, denominated a "title by prescription," (section 1007, Civil Code,) which was good as against the city and the whole world, had vested in his predecessors before the city made its first deed to one of defendant's predecessors. This claim cannot, in our opinion, be sustained. At all the times named the city was the owner of all the pueblo lands, except such parcels thereof as private parties had acquired title to by purchase or otherwise; and the court will take judicial notice that the city had actual possession of certain parcels of such lands and constructive possession of the balance. This being so, no mere intruder could obtain a constructive possession which would oust or supersede the constructive possession of the real owner. "The rule is well settled that title draws to it the possession, and it remains with the owner of the legal title until he is divested of it by an actual adverse possession; and while he is in possession of a part of the premises his possession is entitled to the constructive possession, and

can only be ousted by and to the extent of the actual occupation of a mere intruder." Wood, *Lim. Act*, § 261. In *Hunnicut v. Peyton*, 102 U.S. 368, it is said: "It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be disseised to the extent of the boundaries described in that title. Still his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this though the owner's actual possession is not within the limits of the defective title. The reason is plain. Both parties cannot be seised at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title." And in *Temple v. Cook*, 50 Cal. 26, it was held that if one who claims title under a deed to a large tract of land enters upon it and erects a house, and acquires actual possession of a small part around his house and constructive possession of the whole, and the owner of the true title afterwards enters on the same tract in another place, claiming the whole, the constructive possession thus acquired by the one who first entered is overcome by the constructive possession of the true owner, so that the statute of limitations does not run in favor of the one who had not the true title. In view of these authorities,—and many more to the same effect might be cited,—it is clear that, as to the premises in controversy, the statute of limitations did not begin to run in favor of any of the plaintiff's predecessors in interest before August 12, 1875, the date of the city's first deed of the property. It is also clear that after the first deed was made no title by limitation could have been acquired, for the reason that to create such title an adverse possession for five years, and after April 1, 1878, the payment by the adverse claimant of all taxes assessed against the property, were required. Section 325, Code Civil Proc. But it was proved that, beginning with 1878, the land had been assessed to the defendant and its predecessors in interest, and that all the taxes thereon had been paid by them. It is also claimed that the judgment should be reversed for the reason that the defendant failed at the trial to show that it had complied with the provisions of section 299 of the Civil Code. That section requires every corporation to file a copy of the copy of its articles of incorporation, duly certified by the secretary of state, in the office of the county clerk of every county in this state in which it holds any property, except the county where the original articles are filed; and it declares that "any corporation failing to comply with the provisions of this section shall not maintain or defend any action or proceeding in relation to such property." The complaint alleges "that the defendant,



the Los Angeles Orphan Asylum, is now and ever since the 21st day of June, 1869, has been, a corporation organized, existing, and doing business under and by virtue of the laws of the state of California." At the trial the defendant offered all its testimony, and it was received without objection or suggestion by the plaintiff that it had no right to defend the action. The case was then argued, submitted, and decided, and after that the point seems to have been first raised by a specification attached to the statement on motion for new trial, to the effect that the finding that the defendant was the owner of the land in controversy was not justified by the evidence, because it was not shown by the evidence that defendant had complied with the provisions of the section named. We do not think the point can be thus raised for the first time. The objection should have been made when the defendant was introducing its evidence, or at least at the conclusion of it. Not having been made at any time during the trial, the objection must now be deemed waived. We advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 775)

LOS ANGELES COUNTY v. REYES et al.  
(No. 19,106.)

(Supreme Court of California. Feb. 8, 1893.)

EMINENT DOMAIN—PROCEEDING TO OPEN PRIVATE ROAD—VALIDITY.

1. Where defendant, through whose land a private road was surveyed, refused to accept the compensation awarded, and the case was tried by a jury, he cannot complain of the jury's action in assessing damages on the ground that the evidence is insufficient to justify the verdict, as the burden of proving damages rests on defendant.

2. Pol. Code, § 2692, provides that a private road may be opened for the convenience of one or more residents or freeholders in the same manner as public roads are opened, except that only one petitioner shall be necessary. *Held*, that while the principal use of such private road may be for the petitioner, as a means of egress from his farm, it is also for the use of the public, in deriving the benefit of his products, and in going to his place, and the legislature has the power to declare it a public use, for which the right of eminent domain may be exercised. *Monterey Co. v. Unshing*, 23 Pac. Rep. 700, 83 Cal. 511, followed.

3. The appellate court will not consider an objection to oral instructions given by the trial court, where no exception was taken, nor the attention of the court called to anything objectionable therein.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

(Not to be published in California Reports.)

Action by the county of Los Angeles against Pablo Reyes and others. From a judgment opening a road through de-

fendants' property, and awarding damages therefor, defendant Reyes appeals. Affirmed.

Roberts & Robinson, for appellant. James McLachlan, Dist. Atty., Waldo M. York, and B. M. Marble, for respondent.

HAYNES, C. This is an action to condemn certain lands for road purposes, by virtue of the provisions of article 6, tit. 6, pt. 3, of the Political Code, and of title 7, pt. 3, of the Code of Civil Procedure. The contemplated road is one designated in section 2692, Pol. Code,<sup>1</sup> as a private road. Proceedings were duly taken by the board of supervisors, under the statute, upon the petition of Cheesebrough, to lay out and establish the road. Viewers were appointed, and reported. But defendants, through whose lands the road was surveyed, refused to accept the compensation awarded; and this proceeding was ordered by the board to be taken in accordance with the statute. The cause was tried by a jury, who found the special facts authorizing the condemnation of the land for the purposes of a private road, and assessed the damages and benefits accruing to the defendants, and the value of the land proposed to be taken; and the court, having made its findings to the effect that all the allegations of the complaint were true, and the allegations of the answer untrue, rendered the appropriate judgment. A motion for a new trial made by defendants was denied, and this appeal from the judgment and order denying a new trial is taken by the defendant Pablo Reyes alone.

The first point urged by appellant is that the evidence is insufficient to justify the verdict of the jury and the findings of the court, especially as to the damages awarded the defendants, and the practicability of some other route than that selected by the viewers, and adopted by the court and jury. As to the first of these particulars the appellant cannot complain, if, as urged by counsel, there was no evidence, since the burden of proving the damages in condemnation cases rests upon the defendant. Counsel contend that the true rule is to determine the effect of the proposed change upon the market value of the property effected. Such evidence would, of course, cover the entire question of compensation, viz. the value of the land taken, and the damage to the land not taken, diminished by the benefits accruing to the defendant from the opening of the road; but it is not contended that defendant was prevented from giving evidence of such market value. The jury assessed the damages to the

<sup>1</sup>Pol. Code, § 2692: "Private or by roads may be opened, laid out, or altered, for the convenience of one or more residents or freeholders of any road district, in the same manner as public roads are opened, laid out, or altered, except that only one petitioner shall be necessary, who must be either a resident or freeholder in said road district, and the board of supervisors may, for like cause, order the same to be viewed, opened, laid out, or altered; the person for whose benefit said road is required paying the damages awarded to landowners, and keeping the same in repair."

land not taken at \$50, and the benefits at the same sum, and we think there was sufficient evidence to sustain each of those findings; and, as to the value of the land taken, there was evidence which, if uncontradicted, would have justified a less valuation than that found by the jury. All the facts necessary to enable the jury to make a proper estimate of the compensation to be awarded the defendant were as fully presented as could be reasonably required, and upon most points the evidence was sharply conflicting. As to whether it was practicable to locate the road upon section or quarter section lines, or by the route of Macala Canon, the evidence was also conflicting, but, we think, largely preponderated against each of those routes, and that the selection made is fully justified by the evidence.

Counsel for appellant refer to the case of *Sherman v. Buick*, 32 Cal. 242, and question its correctness. They admit that as a general rule a legislative declaration that a specified use is a public use, for which the right of eminent domain may be exercised, is not open to review by the courts, yet that when it appears plainly that property sought to be taken is for a purely private use, the courts are not bound by the declaration. But that is not this case. The use is not "a purely private use." The principal use will doubtless be by Mr. Cheesebrough, but every one of the public at large who may have occasion to visit his place has the right to use the road. Besides, the state and all its inhabitants have an interest in having the products of his land brought to market, thus adding to the wealth of the state, and the comfort of its inhabitants. Not that the state will do that for a man which he can do for himself; but where he is powerless to do that which is necessary to be done, and which is essential to the use and enjoyment of his property for purposes in which the public have an interest, it is clearly in the power of the legislature to declare the use a public one. This question must be regarded as settled by the case of *Monterey Co. v. Cushing*, 83 Cal. 511, 23 Pac. Rep. 700, where the case of *Sherman v. Buick* is approved. Nor is there any inconsistency between these cases and *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269, cited by counsel. For a more extended discussion of this subject, see the recent case *In re Madera Irrigation Dist.*, 92 Cal., especially pages 309 to 313, 28 Pac. Rep. 274, 275, 675.

It is further contended that the oral instructions given by the court were erroneous. This point cannot be considered, because no exception was taken to it, nor the attention of the court called to anything objectionable therein. *Rider v. Edgar*, 54 Cal. 130.

We see no objection to the instructions given to the jury at the request of the parties, nor do we think that the court erred in refusing to give the instructions requested by defendants which were not given. So far as they correctly stated the law, they were covered by instructions

given; so that the court could properly decline to modify them, and none of them could properly be given without modification.

Several exceptions were taken to the rulings of the court upon the admission and exclusion of evidence; but, as the questions presented by these exceptions do not present any new or important principles of the law of evidence, it is sufficient to say that a careful consideration of them does not disclose any error which could prejudice appellant, or justify a reversal of the judgment. We therefore advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(97 Cal. 281)

In re *KIMBERLY'S ESTATE*. (No. 19,082.)  
(Supreme Court of California. Feb. 9, 1893.)  
SETTING APART HOMESTEAD TO WIDOW—ADVERSE TITLE.

On a petition to set apart as a homestead property inventoried as belonging to the decedent's estate, the probate court has no jurisdiction to try adverse claims to such property.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Petition in probate by the widow and minor children of one Kimberly, deceased, to have the homestead set apart. From the order denying the petition, petitioners appeal. Reversed.

B. F. Thomas, for appellants. E. B. Hall and Richards & Carrier, for respondents.

DE HAVEN, J. Appeal from an order refusing to set aside a homestead for the widow and minor children of deceased out of property claimed to belong to the estate of the deceased, and inventoried as such. In refusing to set aside a homestead for the widow and minor children of deceased the court erred. The question of the validity of the adverse title claimed by the contestants to an undivided interest in the property sought to be set apart as a homestead is one not proper to be litigated in this proceeding. In *re Groome's Estate*, (Cal.) 29 Pac. Rep. 487; *Estate of Burton*, 64 Cal. 428, 1 Pac. Rep. 702. Whether the contestants acquired by virtue of the foreclosure proceedings referred to in the findings of the court any interest in the land described in the petition for homestead must be determined in some appropriate action brought for the purpose of settling that question. The question is not involved here, and we express no opinion in relation to it. Order reversed.

We concur: FITZGERALD, J.; McFARLAND, J.

(3 Cal. Unrep. 779)

**SCHALLERT-GANAHL LUMBER CO. v. SHELDON et al. (No. 19,044.)**

(Supreme Court of California. Feb. 9, 1893.)

**Mechanic's Lien—Time of Filing—Completion of Work.**

Under Code Civil Proc. § 1187, as amended by St. and Amend. 1887, p. 154, providing that every person, save the original contractor, claiming a lien, must, within 30 days after the "completion" of the building, file his lien, but that any "trivial imperfection" in the construction shall not be deemed such a lack of completion as to prevent the filing of the lien, a lien filed before the doors of a house were hung, the plumbing finished, the closets and bath room completed, ventilators placed, and mouldings put in, is premature, and cannot be enforced, as such things are not "trivial imperfections," but are necessary to be done to effect a "completion" of the building.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

(Not to be published in California Reports.)

Action by the Schallert-Ganahl Lumber Company against H. A. Sheldon and others to foreclose a material man's lien. From a judgment for defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

H. A. Barclay, for appellant. W. P. Gardiner, for respondents.

**HAYNES, C.** Action to foreclose a material man's lien. Appellant is a corporation engaged in the lumber business. Sheldon & Son are copartners, and contracted in writing with the defendant Annie C. Severance to furnish the material and erect upon her separate property a dwelling house. Appellant furnished lumber to Sheldon & Son for the building, and a notice of lien therefor was filed. Both parties to this appeal concede that the contract was void. Sheldon & Son abandoned the work early in January, 1889, before completion, and Mrs. Severance employed mechanics, and proceeded with the work. In May, 1889, she, with husband and servants, moved into and occupied the rear portion of the house, and continued such occupation while work proceeded upon the remainder of the building; and upon August 22, 1889, appellant filed its notice of lien. Sheldon & Son made no defense, and judgment passed against them. Mr. and Mrs. Severance answered, and upon the trial rested upon plaintiff's evidence, and had judgment. This appeal is from the judgment and order denying plaintiff's motion for a new trial.

The court found that the building was not completed at the time the notice of lien was filed; and, if that finding is justified by the evidence, it will not be necessary to consider any other specification of error. The occupancy of the rear portion of the house was known to appellant on June 25th, but appellant makes no point upon such occupancy. The complaint alleges completion "on or about August 22d," and whether the building was then completed was a question of fact to be determined by the court. *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 237, 238, 29 Pac. Rep. 629. The only witness who testified upon the subject of

the completion of the building was Mr. Driscoll, the secretary of the plaintiff corporation. He testified in substance that he visited the building on August 21st; that workmen were there on that day, doing some little things; that there might be one or two men there for several months doing little things, waiting the arrival of material from the east; that Mr. Cranton was working in the house; that Cranton said there were 24 doors to hang, ventilators to make, water-closet traps, bath room not completed, wardrobe not completed, a painter working on the house; that the doors were made, and only had to be hung; that the oxidized hardware, door knobs and locks were not on; that it was stated the locks costs \$35 each,—a couple of thousand dollars on the whole house, he heard; that he did not know whether the tiling was in the bath room, nor whether the picture mouldings were up in the second story, nor whether the front chamber was completed, nor whether the closets were finished, or the plumbing finished, but thought the house was substantially completed; and, further, that the oxidized hardware and the tiling he thought were not in the contract. Such was the condition of the building on August 21st, the day before the lien was filed, and that was the last time the witness visited the house. Upon this evidence we think the court correctly found that the notice of lien was prematurely filed; that the building was not substantially completed, and that what remained to be done constituted something more than "trivial imperfections." The burden of proof was on the plaintiff to show completion of the building within 30 days prior to the filing of the lien. Mr. Driscoll testified that he "thought the house was substantially completed," but admitted that certain things, which it is apparent are necessary to completion, had not been done, while his testimony that he did not know whether certain other things had been completed, and which he could have ascertained by inspection, destroys any weight which his statement that he "thought the house was substantially completed" might otherwise have had. It is immaterial whether the oxidized hardware and tiling were in the written contract attempted to be made with Sheldon & Son, or whether they were to be furnished by the owner or the contractor. If the use of these materials was necessary to the completion of the building, the purchase of them by the one party or the other could not affect the question whether the building was completed. As was said in a recent case: "In the absence of any statutory qualification or definition of the term 'completion,' there would be no room for its construction by the court, but it would be construed to mean 'completion,' and would be a question of fact in each case." *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 237, 29 Pac. Rep. 629. For a statement of these qualifications and definitions, and their application, see *Id.* It may be quite true that it would not takelong to do what remained to be done, and that what remained to be done was trifling, compared with the whole work of

building an elegant residence; but it must be obvious that if the erection and completion of the house had been provided for in a valid contract, the contractor could not have successfully insisted on the day the lien was filed that he had complied with his contract within the meaning of any of the qualifications or exceptions contained in the statute. That the filing of a lien before the completion of the building is premature and confers no right, see *Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 20 Pac. Rep. 573, and *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, supra. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(97 Cal. 276)

PEOPLE v. MONTECITO WATER CO. et al. (No. 19,074.)

(Supreme Court of California. Feb. 9, 1893.)

CORPORATIONS — VALIDITY OF INCORPORATION — FORFEITURE OF FRANCHISES — PARTIES TO PROCEEDING.

1. In an action by the state to forfeit a corporation's charter for want of substantial compliance with the statutory requirements in its formation, the corporation is a necessary party defendant, and making it such is not an admission of its corporate character, so as to preclude the state from questioning its right to corporate existence. *People v. Stanford*, 18 Pac. Rep. 85, 19 Pac. Rep. 693, and 77 Cal. 360, distinguished.

2. Civil Code, § 292, provides that articles of incorporation must be subscribed by five or more persons, and acknowledged by each. *Held*, in an action by the state to forfeit a charter, that a complaint showing that the articles of incorporation were signed by five persons, and acknowledged by four only, stated a cause of action.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; John L. Campbell, Judge.

Action by the people against the Montecito Water Company, C. B. Hall, and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

W. H. H. Hart, Atty. Gen., John J. Boyce, and Richards & Carrier, for the People. W. C. Stratton, for respondents.

TEMPLE, C. Plaintiff appeals from a judgment entered upon demurrer to complaint. The demurrer was general, and on the ground of insufficiency of the facts. It is a proceeding taken by the attorney general of the state, in the nature of a quo warranto, to deprive the defendant corporation of its corporate charter, and procure its dissolution on two grounds—First, for want of a substantial compliance with the statutory requirements in its formation; and, second, for abandonment and misuse of its corporate franchise and powers, and for alleged violations of law.

In answer to the first point the respond-

ent raises the preliminary objection that, by making the corporation a defendant, its corporate character is admitted, and cannot be questioned in this proceeding. As authority for this proposition the case of the *People v. Stanford*, 77 Cal. 360, 18 Pac. Rep. 85, and 19 Pac. Rep. 693, is chiefly relied upon. In that case it was alleged in the complaint that the assumed corporation had never been a corporation. If it were not a corporation of any character, it had no legal existence, and could not be sued. By making it a party, plaintiff conceded that it was a person that could be sued. It was said that the corporation could not be treated as a person which could be sued simply to obtain a judgment; that it was not and never had been such a person. There is no such inconsistency here. It is averred that the corporate defendant is a corporation de facto, but it is claimed that it did not become a corporation de jure, because the persons who attempted the incorporation did not comply with the conditions which the statute makes conditions precedent to its rightful incorporation. Under such circumstances, although the association is a legal entity, which may be sued, its right to corporate existence may be questioned by the state in a proceeding of this character. Section 358, Civil Code. This court said in *People v. La Rue*, 67 Cal. 530, 8 Pac. Rep. 84, and repeated the language in *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. Rep. 60: "A corporation de facto may legally do and perform every act and thing which the same entity could do or perform were it a de jure corporation. As to all the world, except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." Under such circumstances it seems clear that the corporation is not only a proper, but a necessary, party. *People v. Flint*, 64 Cal. 49, 28 Pac. Rep. 495; *People v. Gunn*, 85 Cal. 244, 24 Pac. Rep. 718.

It is contended that the corporation is not rightfully such because, while five incorporators signed the articles of incorporation, only four acknowledged the same. Section 292 of the Civil Code reads as follows: "The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." It was said in *People v. Selfridge*, 52 Cal. 331: "The right to be a corporation is in itself a franchise; and, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with." Still, a substantial, rather than a literal, compliance will suffice. *People v. Stockton & V. R. Co.*, 45 Cal. 313. Was there substantial compliance in this case? Because a substantial compliance will do, it does not follow that any positive statutory requirement can be omitted, on the ground that it is unimportant. They are condi-

tions precedent to acquiring a statutory right, and none can be dispensed with by the court. What is a substantial, rather than a literal, compliance, may be illustrated from the cases. In *Ex parte Spring Valley Waterworks*, 17 Cal. 132, the certificate stated the place of business, but did not describe it as the "principal place of business," as required. The court said: "The statement that San Francisco was the place of business would seem to imply that it was not only the principal, but the only, place of business." In *People v. Stockton & V. R. Co.*, 45 Cal. 306, the affidavit required in such cases to be attached to the certificate stated that 10 per cent. of the amount subscribed had been actually paid in, omitting the words "in good faith," which the statute required. In the certificate it was stated that more than 10 per cent. had been actually in good faith paid in. It was held sufficient, and it would seem that, if it was actually paid in cash, it must have been paid in good faith; and it was further held that payment by checks drawn against sufficient funds in a bank, which was ready to accept and pay the checks, was substantially payment in cash. In *People v. Cheeseman*, 7 Colo. 376, the acknowledgment taken by the notary omitted to state that the persons whose acknowledgments were taken were personally known to the notary. The certificate did state that the persons who signed appeared before him and acknowledged it. The statute did not prescribe what the acknowledgment should contain, and it was held a substantial compliance with the requirement, although the form prescribed for acknowledgments to deeds was not followed. It was acknowledged. In all these cases it will be seen that the thing required was done, but not literally as directed; but there was no omission of any requirement. No case has been cited where the entire omission of a thing prescribed has been excused, unless it be the case of *Larrabee v. Baldwin*, 35 Cal. 155. That was not an action instituted by the state to disincorporate on the ground of noncompliance. As we have seen, unless the state complains, a de facto corporation must be considered, under our Code, as possessing a corporate character; and the stockholders, when sued upon their individual liability, should not be allowed to make the point that they did not comply with the law. In that case the certificate was signed by five directors, but two failed to acknowledge it. Other questions are discussed at great length in the opinion, but in regard to the point made on the certificate it was simply remarked: "It is not clear that any fatal defect exists in the certificate of incorporation. If so, it is cured by the act of April 1, 1864." Plainly it was unnecessary to consider the question. The curative act referred to declares: "All associations or companies heretofore organized, and acting in the form and manner of corporations, and that have filed certificates for the purpose of being incorporated, but whose certificates are in some manner defective, or have been improperly acknowledged before a person not authorized by law to

take such acknowledgments, are hereby declared to be, and to have been, corporations from the date of the filing of such certificates, in the same manner and to the same effect and intent as if such certificates were without fault, and properly acknowledged before the proper officer; and all such certificates are hereby validated, and declared to be legal, and shall have the same force and effect as if such certificates were free from all fault or defect, and were properly acknowledged," etc. St. 1863-64, p. 303. Section 292 of the Civil Code requires the articles to be subscribed and acknowledged by each. As this is an express condition precedent to a valid incorporation, it is not of consequence to the court whether it be a wise or necessary requirement or not. Still, it is easy to see a reason for it. The certificate secures the state, and all concerned, against the possibility of any fictitious names being subscribed to the articles, and furnishes proof of the genuineness of the signatures. If the acknowledgment can be dispensed with as to one, why not as to two or three, or all? Ordinarily, no doubt, the state would not be expected to institute a proceeding of this character for such a defect alone, and we must presume that the attorney general would not have instituted this inquiry if he were not convinced that there were reasons sufficient to justify it. Other reasons are alleged; but, as the statute authorizes a proceeding to forfeit the charter where the statute has not been complied with, although the corporation is acting in good faith, and is a de facto corporation, the complaint must be held to state a cause of action, and the demurrer should be overruled. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

(97 Cal. 283)

JOURNAL PUB. CO. v. WHITNEY, Tax Collector. (No. 19,110.)

(Supreme Court of California. Feb. 11, 1893.)

COUNTIES—PUBLICATION OF TAX LIST—LOWEST BIDDER—MANDAMUS.

1. Under St. 1891, c. 216, § 25, subd. 23, providing that the board of supervisors shall fix the price of all county advertising, and each county officer shall procure such advertising, at a price no greater than is so fixed, mandamus will not lie to compel a tax collector to publish a delinquent tax list in a certain newspaper, even though such newspaper has tendered the lowest bid for such publication.

2. St. 1891, c. 216, § 25, subd. 23, providing that the board of supervisors shall fix the price of all county advertising, repeals Pol. Code, § 3766, providing that county advertising must be contracted for with the lowest bidder.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Mandamus at the relation of the Jour-

nal Publishing Company to compel A. B. Whitney, tax collector, to publish a delinquent tax list in relator's newspaper. From a judgment dismissing the petition, entered upon an order sustaining a demurrer to it, relator appeals. Affirmed.

E. A. Meserve, for appellant. Stephen M. White, for respondent.

**PER CURIAM.** This appeal is taken from a judgment of dismissal of a petition for a writ of mandate, after sustaining a demurrer to said petition. The object had in view by the petitioner was to compel the defendant, who is the tax collector of the county of Los Angeles, to advertise and publish the delinquent tax list in the newspaper of the plaintiff, a publishing company. The demurrer is general in its nature, and is to the effect that the complaint does not show facts sufficient for a good cause of action. The whole matter turns upon the question whether or not, under the law of this state, it is the duty of the tax collector to publish the delinquent tax list about which this controversy has arisen, in such newspaper as has tendered the lowest bid to do such advertising. Prior to the enactment of the county government act of 1891, section 3766 of the Political Code, as to such publication, ran thus: "The publication must be made once a week for three successive weeks in some newspaper, or supplement thereto, published in the county; and the publication must be contracted for with the lowest bidder, and after ten days' public notice that such will be let. The bidding must be by sealed proposals. If there is no newspaper published in the county, then by posting a copy of the list in three public places in each township." Section 3764 of the Political Code provides, among other things, that the tax collector must publish the list, and that such publication is a charge against the county. These two sections, among others, were construed by the supreme court in *Publishing Co. v. Alameda Co.*, 64 Cal. 469, 2 Pac. Rep. 246, before the county government act of 1891 became a law; and it was there held to be the duty of the board of supervisors, and not that of the tax collector, to advertise for proposals to print the delinquent tax list, and to contract for the publication of such list; the duty devolved on the tax collector being held limited to preparing the list for publication, and causing it to be published as contracted for by the board of supervisors. But the new statutory provision (subdivision 23 of section 25 of the county government act, just mentioned) defines the duties of the board of supervisors in such a matter thus: "The board of supervisors shall annually fix the price at which the county shall be supplied with job printing and blank books, and also the price of all county advertising; and each county officer shall procure such blank books, job printing, and advertising at a price no greater than is so fixed, and certify the bills therefor to the board of supervisors." This changes the rule as declared in section 3766 of the Political Code, and the board of supervisors, of the

own motion, now are to fix the price of county advertising, such as here involved, without advertising for bids or sealed proposals. When that duty is performed by them, the tax collector must "procure" some newspaper to do the advertising, not by any bid which may have been made, but at the price previously fixed by the board of supervisors in their discretion. Such being the force and effect of the statute, the tax collector, against whom this petition is filed, is not shown to be violating any law in not procuring the advertising in question to be published in the paper of the plaintiff. Its bid and his advertisement for sealed proposals amounted to nothing. The tax collector could, notwithstanding this unnecessary proceeding, select any paper he saw fit in the county, and procure the advertising to be done, provided it was done at the price fixed by the board of supervisors, and he cannot be compelled to publish the delinquent tax in any other way.

The argument of the appellant that the county government act does not operate to repeal any part of section 3766 of the Political Code is without force, in view of the decision of the appellate court in *Mendocino Co. v. Bank of Mendocino*, 86 Cal. 255, 24 Pac. Rep. 1002, and *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. Rep. 23.

The judgment is affirmed.

(97 Cal. 286)

YOAKAM et ux. v. WHITE et al. (No. 19, 114.)

(Supreme Court of California. Feb. 11, 1893.)

MORTGAGES—RIGHTS OF MORTGAGEE—FORECLOSURE ON NONPAYMENT OF INTEREST.

Code Civil Proc. § 726, provides for an "action for the recovery of any debt, or the enforcement of any right, secured by mortgage," and that the court may "direct the sale of the incumbered property," and apply the proceeds to the payment of "the amount due to the plaintiff." Section 728 provides that if the mortgage debt is not all due the sale must cease as soon as enough is realized to pay the amount due, and afterwards, as often as more becomes due, the court may order more property to be sold. *Held*, where the mortgage note was payable five years after date, with interest payable annually, "and, if not so paid, to be compounded annually," and the mortgage provided for payment of the note "according to the terms and conditions thereof," and "in default of the payment of the note by its terms" the mortgagee might foreclose, that the mortgagee could foreclose for the first year's interest on nonpayment thereof when due. *Broadbitt v. Tibbets*, 58 Cal. 6, distinguished.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by George B. Yoakam and wife against W. Y. White and others. From a judgment dismissing the action without prejudice, plaintiffs appeal. Reversed.

Clarence A. Miller, for appellants. Burnett & Gibbon, for respondents.

**BELCHER, C.** On February 10, 1891, the defendant White executed to the plaintiffs his promissory note and mortgage to secure payment of the same. The note was for \$7,800, and was payable five years

after date, "with interest at the rate of eight per cent. per annum from date until paid; interest payable annually, and, if not so paid, to be compounded annually, and bear the same rate of interest as the principal." The mortgage stated that it was given as security for the payment of the note, a copy of which was set out in *hæc verba*, and then contained the following agreement: "And the mortgagor promises to pay said note according to the terms and conditions thereof, and, \* \* \* in default of the payment of note by its terms, the mortgagee or their assigns may foreclose this mortgage, and may include in such foreclosure a reasonable attorney's fee, to be fixed by the court." After the mortgage was executed, and on the same day, the mortgagor conveyed the mortgaged premises to the defendants Childress and Park; and as a part of the consideration for the conveyance, the grantees covenanted and agreed to pay, according to its terms, the said mortgage, and to do and perform the covenants and agreements upon the part of the said White in said mortgage mentioned and contained. On February 13, 1892, the plaintiffs commenced this action to foreclose their mortgage, and they alleged, among other things, that no part of the principal or interest of the note had been paid; that the sum of \$624, being one year's interest upon the note, was due, owing, and unpaid from the defendants to plaintiffs, though demanded by plaintiffs after the same fell due; and that the property described in the mortgage could not be sold in portions without injury to the parties. Wherefore, they prayed for a decree of foreclosure for the entire debt evidenced by the note. The defendants demurred to the complaint, and their demurrer was overruled. They, however, failed to answer, and their defaults were duly entered. When the case came on to be heard the plaintiff introduced the formal proofs usual in such cases, and moved the court for a decree granting the relief demanded in their complaint. This motion was denied, and they then asked for so much relief as the court would grant upon the pleadings and evidence; but the court refused to grant them any relief, and entered judgment dismissing the action without prejudice. From the judgment so entered the plaintiffs appeal.

In *Jones, Mortg.* (section 654) it is said: "A provision for the payment of interest annually, and that if not so paid it shall be compounded, is in waiver of the right to enforce payment when due." Respondents, in effect, admit that this is a correct statement of the law, and that there was no right of election on their part to pay the interest when it became due, or to let it be compounded, and have its payment deferred until the maturity of the note. They, however, contend—and this is the only point made—that the note and mortgage, when properly construed according to the intention of the parties, gave no right to foreclose for nonpayment of an installment of interest. In support of this position counsel cite *Broadbent v. Tibbets*, 58 Cal. 6. In the case cited the mortgage was given "as security for the

payment to said mortgagee of the sum of twenty-one hundred dollars \* \* \* on the 16th day of September, A. D. 1881, with interest thereon, according to the terms and conditions of a certain promissory note of even date of this mortgage, in the words and figures following." The note was dated September 16, 1879, and was payable two years after date, "with interest thereon, in like gold coin, at the rate of ten per cent. per annum from date, payable monthly until paid." An inspection of the transcript in the case shows that the mortgage contained no provision for foreclosure. It was said by this court, sitting in department: "By the terms of the mortgage the lien was to be foreclosed only when the principal sum named in the promissory note became due. The parties might have agreed that the mortgage should be foreclosable, to the extent of the interest due, whenever any installment should become due. But they have not so agreed in terms or by implication." And after rehearing in bank it was said: "Neither the note nor mortgage contains any agreement for foreclosure of the mortgage on default of the payment of interest. In the absence of such an agreement the mortgage cannot be foreclosed until the note shall become due." This decision does not seem to be in harmony with the general current of authority upon the subject; but, assuming it to be correct, it is not, as we think, in point here. In this case the mortgagor promises to pay the note "according to the terms and conditions thereof," and that, "in default of the payment of the note by its terms, the mortgagee might foreclose. The terms of the note were that the interest should be payable annually, and the principal at the end of five years. The words, "by its terms," cannot be construed to mean that there must be a default in the payment of the whole note, principal and interest, before a foreclosure can be had, but only that there must be some default in paying the note by or according to its terms. At the end of the first year the interest for that year became due and payable, and was a debt secured by the mortgage. Section 726 of the Code of Civil Procedure provides for an "action for the recovery of any debt, or the enforcement of any right, secured by mortgage," and that "in such actions the court may, by its judgment, direct a sale of the incumbered property," and the application of the proceeds of the sale to the payment of "the amount due to the plaintiff." And section 728 of the same Code provides: "If the debt for which the mortgage, lien, or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But, if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid; there being a rebate of interest, where such rebate is proper." In our opinion the plaintiffs were entitled to a foreclosure for the interest then due; but



whether, under section 728 of the Code, above cited, they were entitled to all the relief asked, is a matter which must be determined by the court below on a rehearing of the case. We advise that the judgment be reversed, and the cause remanded.

I concur: HAYNES, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

(3 Cal. Unrep. 733)

**LOS ANGELES CEMETERY ASS'N v. CITY OF LOS ANGELES.** (No. 19,028.)

(Supreme Court of California. Feb. 11, 1893.)  
DEDICATION—WHAT CONSTITUTES — ACCEPTANCE.

1. In an action to quiet title to a strip of land, it appeared that plaintiff company filed for record a map of its land, platted as a cemetery, on which map the strip in question, 40 feet wide along the west side of the tract, was left blank, with an entrance indicated therefrom into the cemetery. Subsequently, in cutting the land up into cemetery lots, the company left another strip, 20 feet wide, adjoining the former strip, and the whole was known as "E. Avenue," which was used by the public for three years without objection. *Held*, that the facts showed an intention to dedicate the strip to the public for street purposes.

2. User by the public of a strip of land as a street for four years is sufficient to show acceptance of a previous offer to dedicate the land for street purposes.

**Commissioners' decision.** Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

(Not to be published in California Reports.)

Action by the Los Angeles Cemetery Association against the city of Los Angeles to quiet title. Judgment for defendant. Plaintiff appeals. Affirmed.

A. H. Judson and M. C. Hester, for appellant. C. McFarland, for respondent.

**BELCHER, C.** This is an action to quiet the plaintiff's title to a strip of land, 40 feet wide and 1,236 feet long, in the city of Los Angeles. The court below gave judgment for the defendant, from which, and from an order refusing a new trial, the plaintiff appeals. The facts found by the court are in substance as follows: On October 26, 1877, the plaintiff, a corporation, was the owner of a tract of land in the city of Los Angeles, which included the land in controversy, and on that day it filed for record a map of the tract, on which were delineated the usual plats and avenues of cemetery grounds, and along the southerly and westerly sides of which were left blank colored strips, 40 feet in width, the one on the southerly side being now a portion of First street, and the one on the westerly side being the land in controversy. The map also showed that the only entrance to the cemetery was from the strip in controversy, and that the strip opened out at one end into First street, and at the other end into Broderick avenue, public streets of the city. About the time of the filing of this map, plaintiff planted along the easterly and inner line of the street in controversy a hedge fence, leaving an

opening therein where the entrance to the cemetery was located, and also planted pepper trees for a short distance on each side of such entrance, which hedge fence is still intact, and is now, and has been since the year 1885, a good and substantial fence. In 1885 plaintiff moved a fence which had been erected upon the outer or westerly line of the strip into the inner line thereof, and adjoining the hedge fence on the easterly side thereof. Some time about the year 1885, the lands adjoining the strip in controversy on the west side were laid out in lots, and spaces between them for streets, and among other spaces was one 20 feet in width, the full length of and adjoining the said strip, and making therewith a 60-foot strip, known as "Evergreen Avenue." Previous to and since 1885, plaintiff has sold to divers persons a great number of lots in its cemetery, and the only carriage entrance thereto fronts on the strip of land in dispute, about midway between the north and south ends thereof. Since the year 1885, the said strip of land has been continuously used and traveled by the public as a public street, which use has been with the knowledge and consent of plaintiffs. On December 15, 1890, the city council of the city of Los Angeles duly passed an ordinance accepting all streets theretofore dedicated, or offered to be dedicated, by property owners for public use. And, as conclusions of law, the court found that the said strip of land was a part and portion of a public street in the city of Los Angeles, known as "Evergreen Avenue;" that the plaintiff had no right to its possession; and that the defendant was entitled to its possession as a public street. Judgment was entered in accordance with these conclusions.

In support of the appeal it is claimed that the findings that the plaintiff moved the fence which had been erected along the westerly line of the disputed strip in the year 1885; that the lands adjoining the strip on the west were laid out in lots, etc., about the same year; and that since that year the said strip had been continuously used and traveled by the public as a public street,—were not justified by the evidence, in so far as the year named is concerned; and it is said that the evidence clearly shows that none of the acts referred to were done or commenced before the year 1887. It is admitted that the fence on the south side of the tract was removed in 1885, and there was some evidence that the fence on the west side was removed about the same time, and that the use of the strip for public travel commenced shortly after the fence was taken away. But whether the findings were right as to the year named or not is, in our opinion, not material. The only real question is, do the findings show a dedication of the strip, or offer to dedicate, for the purposes of a street, and an acceptance by the public? And if they do, it can make no difference whether the dedication or offer to dedicate was in 1885, or not till 1887.

It is further claimed that the first conclusion of law was erroneous, and not justified, for the reason that the plaintiff,

having been organized as a corporation for cemetery purposes, "had no power, directly or indirectly, to dedicate its land to the public for street purposes." This claim is sufficiently met and answered by the decision of this court, reported in 95 Cal. 420, 30 Pac. Rep. 523. That case was between the same parties as this, and the question involved related to the dedication of the 40-foot strip along the south side of the plaintiff's track. It was held that the dedication was made and accepted, and that the strip formed a part of First street.

It is also claimed that, admitting an offer to dedicate was made by the plaintiff, still there was no direct finding, and no sufficient evidence to show, that the offer was ever accepted by the public. The court found, as we have seen, that, after the fence was removed, the strip was continuously used by the public as a public street, and with the knowledge and consent of the plaintiff. The correctness of the finding in this respect is not questioned, nor could it be here, there being ample evidence to support it. The user then commenced as early at least as 1887, and was continued up to the time of the trial in 1891. This was sufficient to show an acceptance without the formal ordinance passed by the city council in 1890. The question of the admissibility of that ordinance in evidence need not therefore be specially considered.

Did, then, the plaintiff intend to dedicate the strip to the public for street purposes? It is true that the law is well settled in this state and elsewhere that, where there is no grant in writing, a dedication of land can only be established by proof of acts on the part of the owner which manifest clearly and unequivocally the intention of the owner to make such dedication; but, in our opinion, the probative facts found do show acts and conduct on the part of the plaintiff from which the ultimate fact that there was an intention to dedicate the strip must necessarily result. If not, why was the strip marked out on the map, extending the whole length of the tract, with an entrance therefrom into the part laid out for cemetery purposes? The surveyor who laid out the grounds and made the map says he was simply told to leave a 40-foot strip on the south and west sides, and "I supposed they were left for streets." And why did the owners of the adjacent land on the west leave an additional 20-foot strip? Judson, who had been president of the corporation, testified that he was one of such owners, and that they "left twenty feet along there for street purposes. There is a twenty-foot strip left there." So, after the hedge had been growing for 8 or 10 years, why was the fence removed, and the strip, in connection with the additional 20-foot strip, left open so that it could be used and traveled over by the public? And why was the public permitted to use the strips which had become known as "Evergreen Avenue" for more than three years at least without objection on the part of the plaintiff? It seems to us that these undisputed facts can be rationally account-

ed for only upon the theory that there was a clear intention to dedicate the strip for the purposes of a street.

The offer on the part of the plaintiff to prove that the fence was removed "because it had become out of repair, and for the purpose of using it in repairing the breaks in the hedge," does not require serious consideration. Surely, if the fence needed repairs, the repairs could have been made more cheaply and better where it had stood for 8 or 10 years than by moving the whole line of it a distance of about 40 feet; and if there were breaks in the hedge, which does not appear, they could have been protected by the fence in its original location, as they had been ever since the hedge was planted in 1878. We see no error in the ruling of the court upon this offer. It follows, in our opinion, that the conclusions of the court below were warranted, and were correct, and that the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(3 Cal. Unrep. 788)

In re WILLIAMS' ESTATE. (No. 15,012.)

Appeal of MAGEE.

(Supreme Court of California. Feb. 14, 1893.)

SALE BY EXECUTOR UNDER POWER — CLAIM AGAINST ESTATE—APPEALABLE ORDER.

1. An executor, as devisee in trust, acting under the provisions of the will, sold property of the estate, and applied to the probate court for a confirmation. Plaintiff filed an advanced bid with the court, whereupon the executor conveyed the property to the first bidder. The court denied confirmation, and ordered and confirmed a sale to plaintiff, he paying the amount of his bid to the executor. The first bidder appealed from the order of confirmation, which was reversed. Plaintiff then filed a petition to compel the return from the estate to him of the money paid to the executor. Held, that plaintiff held no debt or claim against the estate.

2. An appeal cannot be taken to the supreme court from an order dismissing the petition, under Code Civil Proc. § 963, subd. 3, which provides for an appeal from a judgment or order refusing, allowing, or directing the payment of a debt or claim against an estate.

3. In such case plaintiff's remedy is in an action against the executor individually.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. (Not to be published in California Reports.)

Proceeding by Thomas Magee against the executor of the estate of Thomas H. Williams to recover money paid. From an order dismissing the petition, plaintiff appeals. Affirmed.

W. S. Goodfellow, John A. Stanley, and George R. B. Hayes, for appellant. Adams & Adams, for respondent.

TEMPLE, C. This appeal is from an order denying and dismissing the petition of appellant for an order that the executor of the estate of Thomas H. Williams restore to him \$11,000 purchase money paid for the

interest of the testator in certain real estate in pursuance of an order of the court confirming the sale. The executor filed a report of a sale made by him under a power of sale contained in the will. Appellant's agent and assignor thereupon filed in the probate court an advanced bid. The matter was postponed for some time, but the sale was finally confirmed to appellant's assignor, who thereupon paid \$11,000—the amount of his bid—to the executor, who executed and delivered to him a deed in due form. By the will, the real estate had all been devised to the executor, in trust. After the advanced bid was filed, but before the confirmation of the sale to appellant's assignor, the executor, in his capacity of trustee, conveyed the property to the first bidder, who, after appellant had paid his money and had received his deed from the executor, appealed from the order of confirmation to this court. This court held (92 Cal. 183, 28 Pac. Rep. 227, 679) that under the circumstances the sale was properly made by the devisee in trust, and therefore reversed the order of confirmation. The remittitur having been filed in the court below, this petition was presented.

The respondent now makes the point that the order dismissing the petition is not appealable. I think the point well taken. If an appeal is allowed in such case, it must be on the ground that appellant has a claim or debt against the estate for the amount so paid to the executor, and that the order dismissing his petition is an order refusing to allow, or refusing to direct the payment of, a debt or claim, within the meaning of the third subdivision of section 963 of the Code of Civil Procedure. It may well be doubted whether appellant's demand is a claim or debt against the estate in any sense. After the order of confirmation was reversed, and the property had been legally sold, and the proceeds accounted for to the estate, it is difficult to see how the executor can be made to account for this amount. But if we examine the section of the Code alluded to we shall find that it contains no general language giving this court jurisdiction of appeals from probate rulings, but the appellate jurisdiction is conferred by specially enumerating certain orders and judgments from which appeals may be taken. All reference to acts which the Code expressly authorizes, and very nearly in the order in which such action is likely to be taken in the course of administration. Such an enumeration is necessarily a limitation. The words "claim" and "debt" are used interchangeably in the Code, as in section 1497, Code Civil Proc., and elaborate provision is made, running through many sections, for their presentation, allowance, rejection, and finally for an order directing their payment. Section 1647 et seq. Manifestly, in the subdivision of section 963 reference is made to debts and claims which can be so allowed, rejected, or ordered paid. It will not be contended that the demand of petitioner is of that character, even if it be conceded that it is a demand against the estate. In the case of *Stuttmelster v. Superior Court*, 72 Cal. 487, 14 Pac. Rep. 85, it was held that a demand

for an attorney's fee for services rendered the administrator was not a claim within the meaning of section 963, Code Civil Proc. In that case the appellate jurisdiction was sustained on the ground that the demand had in fact been presented and allowed, and therefore ranked among the acknowledged debts of the estate. The court said: "In this instance it is apparent the demand was presented, allowed, and ordered paid as a claim against the estate, to be paid, not as costs, but in the due course of administration. When so allowed, it became one of the 'acknowledged debts of the estate, to be paid in due course of administration.' Code Civil Proc. § 1497. When thus treated, an order for its payment was appealable, under section 963, supra." The order was held appealable as an order directing the payment of a debt. Whether it was thus rightly held to be a debt or not, in view of section 1643, Code Civil Proc., and other sections, may be doubted, but the case is express authority for the proposition that to authorize an appeal under section 963 the order allowing, refusing to allow, or directing the payment of a debt refers to debts and claims, which by the Code are expressly mentioned as debts to be allowed, rejected, or ordered paid. Courts may always order the expense of managing trust funds paid from the estate held by the trustee. The debts of an estate, which include all other payments authorized, are classified in section 1643, Code Civil Proc. The debt of appellant—if it be one—is not included in that section, unless in the fifth class, which supposition would be absurd. The word "claim" is applied to a demand against an estate, in the Code, after it has been allowed as well as before. Sections 1636, 1645, 1649. In section 1636 it is provided that an heir may contest a claim against an estate upon final settlement of the account of the administrator or executor. If this be a claim against the estate, it should not be ordered paid until the final settlement, after the heirs or devisees have had an opportunity to contest the appellant's right to it. Whether the payment was voluntary or not raises a question not passed upon by this court on the former appeal.

Whether the probate court had jurisdiction to confirm the sale or not, the money is not now held by the executor for the estate. To recover it from him by suit it would not be necessary to make the estate a party. Any property in the hands of the executor, which is not a legal asset, may be recovered by the rightful owner, without presenting a claim against the estate. So held in *People v. Houghtaling*, 7 Cal. 348, *Gunter v. Janes*, 9 Cal. 643; *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. Rep. 192; *In re Allgier*, 65 Cal. 228, 3 Pac. Rep. 849; *Stanwood v. Sage*, 22 Cal. 517. The decisions seem to be uniform upon this point. Property, though lawfully possessed by the administrator as assets, may be recovered in an action against him individually by one who asserts title adverse to the estate. *Merrick's Estate*, 8 Watts & S. 402; *Beach v. Forsyth*, 14 Barb. 499. At first impression, *Vallengin v. Duffly*, 14 Pet. 282, may seem to be an authority to the effect that a claimant may

elect to sue the administrator individually or in his representative capacity. Decedent had been vested by the claimant with the legal title to personal property, which was afterwards taken from him wrongfully. After his death his administrator recovered the value of it. The claimant sued to recover the money. Pending the suit the administrator died. The question was whether the suit could be continued against the administrator de bonis non. It was held that it could be, on the ground that the money constituted assets of the estate, and that the administrator de bonis non could recover it as such from the estate of the administrator. It was said the defendant would not be held liable unless he so recovered it, or failed through his neglect. After all, then, it was against the administrator individually, and the decision is in accord with those quoted from this state. A trustee cannot make the estate liable for his own wrongful act. Suppose the executor had absconded with the money, could it then have been recovered from the estate? Are the beneficiaries of a trust sureties for their trustee? They did not procure the erroneous order. Evidently the mere custody of the funds would not make the beneficiaries of the trust responsible. To hold them it must not only appear that it came to the hands of their trustee, but that it has been actually paid to them, or used for the benefit of their estate. There is no mode in which an action could be brought against the estate upon this demand. Section 1500, Code Civil Proc. No mode is provided in which it could be paid in course of administration. Unless, therefore, it be a claim which could be enforced against the executor individually, the claimant has no remedy. The only ground upon which it could be plausibly argued that the court had the power to grant the relief prayed for is that the executor is an officer of the court. This is suggested in the briefs, but, if that be the basis of the power to grant the petition, this order is not appealable. I think the appeal should be dismissed.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the appeal is dismissed.

DE HAVEN, J. I concur in the judgment. The order from which this appeal is taken is not appealable.

(97 Cal. 296)

**RALPHS v. HENSLER et al.** (No. 19,012.) (Supreme Court of California. Feb. 14, 1893.)

PRINCIPAL AND AGENT—RATIFICATION—EVIDENCE—ACTION BY EXECUTOR—WHEN MAINTAINABLE—JUDICIAL NOTICE.

1. In an action to foreclose a mortgage executed by M. as defendant's attorney, defendant answered that the power of attorney given by her to M. did not give authority to execute mortgages or notes; and also that M., as her agent, and on her behalf, made a written agreement with the mortgagee, whereby he agreed to extend the time of payment of the sums mentioned in the mortgage on certain conditions; that as her agent, and on her behalf, M. had performed those conditions, and that by

reason thereof the mortgage did not become due till after the commencement of the action. Held that, in the absence of evidence that defendant ever repudiated the execution of the notes or mortgage by M., her averment that she authorized the procurement of the agreement for the extension of time was *prima facie* sufficient evidence of her ratification of such execution.

2. Whether or not the power of attorney was sufficiently specific to authorize the execution of the notes and mortgage, it was admissible to strengthen the other evidence of a ratification by showing the relation between defendant and M.

3. An action to foreclose a mortgage, brought by an alleged executor of the mortgagee, cannot be maintained when there is no evidence as to when the mortgagee died, or to prove that his will, if he made one, was ever admitted to probate, that letters testamentary were ever issued to plaintiff, or that he was in any way qualified to act as executor.

4. A court's judicial knowledge does not extend to the contents of its records in former actions.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by George A. Ralphs, executor of Kimball Hardy, deceased, against Mrs. L. E. Hensler and J. Irving Weed, to foreclose a mortgage. From a judgment for plaintiff, defendant Hensler appeals. Reversed.

Willis & Appel, for appellant. Jones & Carlton, for respondent.

VANCLIEF, C. Action to foreclose a mortgage on defendant Hensler's real property, given to secure the payment of three several promissory notes. It is alleged in the complaint that the notes and mortgage were executed by defendant Hensler to Kimball Hardy in his lifetime, (on July 9, 1887;) that on or about February 18, 1889, Hardy died; that his will was admitted to probate on March 12, 1889; that letters testamentary were duly issued to plaintiff on March 18, 1889; and thereupon, that the plaintiff duly qualified and entered upon his duties as such executor. By her answer the defendant Hensler specifically denied each of the above allegations. Weed, who was made a party defendant on the ground that he had or claimed some interest in the mortgaged property, failed to answer, and his default was duly entered. The court found upon all the issues in favor of plaintiff, and decreed a sale of the mortgaged property in the usual form, ordering that a judgment be docketed against the defendant Hensler for any deficiency of the proceeds of the sale to pay the amount found due on the notes. The defendant Hensler appeals from the judgment, and from an order denying her motion for a new trial.

When the notes and mortgage were offered in evidence they were objected to by defendant on the ground that they appeared to have been executed through the agency of James P. McCarthy, as attorney in fact, being signed as follows: "Mrs. L. E. Hensler by her attorney in fact, James P. McCarthy." To prove the authority of McCarthy the plaintiff then offered the following instrument, the execu-

tion of which in the state of New York was properly attested: "Know all men by these presents that I, Mrs. L. E. Hensler, of the state of New York, have made, constituted, and appointed, and by these presents do hereby make, constitute, and appoint, James P. McCarthy, of the city and county of Los Angeles, and state of California, my true and lawful attorney for me and in my name, place, and stead, in all transactions of whatsoever nature which may effect any property situate in the said state of California which I may now hold, or which I may hold at any time hereafter; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, and hereby ratifying and confirming all that my said attorney, James P. McCarthy, shall lawfully do or cause to be done by virtue of these presents. In witness whereof I have hereunto set my hand and seal the 19th day of February, one thousand eight hundred and eighty-seven. [Seal.] Mrs. L. E. Hensler." This instrument was objected to on the ground that it conferred no authority to make the notes, nor to mortgage defendant's real property. To obviate this objection, the plaintiff claimed that the acts of McCarthy in making the notes and executing the mortgage had been ratified by defendant on the 28th day of December, 1888, and that such ratification was shown by the following paragraph of defendant's answer: "And for another, further, and separate defense to said action defendant alleges that prior to the commencement of this action, to wit, on December the 20th, 1888, Kimball Hardy, the deceased named in plaintiff's complaint, for a valuable consideration paid to him by James P. McCarthy, as agent of and for and on behalf of defendant, agreed to and with said McCarthy for and on behalf of this defendant that he would extend the time for the payment of the sum of money mentioned in said promissory notes and mortgage to May the 1st, 1890, upon payment to said party by said McCarthy for and on behalf of this defendant, each two months after said agreement was executed, of the accrued interest on the said mortgage and notes, and which then and there amounted to \$860 given with said interest. That defendant is informed and believes that her said agent, James P. McCarthy, acting for her and on her behalf, has well and truly performed the conditions of said agreement, and the terms thereof, for and on behalf of this defendant, and has fully paid and satisfied, as defendant is informed and believes, all of the said payments and interest within the time required to be paid in said agreement aforesaid. That by reason thereof the said notes and mortgage became due and payable on May the 1st, 1890, and after the commencement of the said action." The court overruled defendant's objection, and admitted the power of attorney, notes, and mortgage, as evidence; to all which defendant excepted.

1. Appellant contends that the court erred in admitting the power of attorney, notes, and mortgage; and also contends that the finding that defendant executed the notes and mortgage is not justified by the evidence. Conceding, without deciding, that the power of attorney was not sufficiently specific to authorize the execution of the notes and mortgage, yet defendant was not injured by the rulings of the court excepted to, if she had ratified the acts of McCarthy in executing the notes and mortgage; since such ratification was equivalent to original authority, and justified the finding that defendant executed the notes and mortgage. I think the paragraph of defendant's answer above quoted, and the deposition of McCarthy to the same effect, substantially tend to prove the ratification claimed. They show that in the lifetime of Kimball Hardy the defendant knew that the notes and mortgage had been executed and remained unpaid. In her answer she alleges that "McCarthy as agent of and for and on behalf of defendant," made a written agreement with Hardy, whereby he agreed to extend the time of payment "of the sums of money mentioned in said promissory notes and mortgage to May the 1st, 1890," on certain conditions; that, as her agent, and on her behalf, McCarthy had performed those conditions; and "that by reason thereof the said notes and mortgage became due and payable on May the 1st, 1890, and after the commencement of the said action." The alleged agreement is attached to McCarthy's deposition, and is as follows: "Los Angeles, Cal., Dec. 29, 1888. Received from James P. McCarthy, agent, the sum of fifty dollars, to apply on interest on mortgage of Mrs. L. E. Hensler, now all due; the said mortgage being given to secure balance of payment on the five acres sold James P. McCarthy off from my place on south side of Pico street, 'Arlington Heights,' and for value received, to wit, above payment. I agree to extend time for the payment of the said mortgage to May 1, 1890, upon payment each two months hereafter of the accrued interest on the said mortgage notes, now amounting to \$860.00 balance. [Seal.] Kimball Hardy. James P. McCarthy, witness." There was no evidence tending to disprove the genuineness of this writing, or the signature of Hardy; but the testimony of McCarthy that the interest had been paid was disputed by the testimony of the plaintiff. But for the purpose of the question now being considered (that of ratification) it is immaterial whether the defendant paid the interest or not, for, whether she complied with the conditions upon which Hardy agreed to extend the time of payment or not, her averment, in her answer, that she authorized the procurement of the agreement for the extension of time, in the absence of evidence that she ever repudiated the execution of the notes or mortgage by her assumed agent, is prima facies sufficient evidence of her ratification of such execution. In *Taylor v. Association*, 48 Ala. 229, Brickell, C. J., said: "We do not mean that it was shown that there was assent to and confirmation of the transaction

expressed in words. That is not essential, for ratification is more often implied from the acts and conduct of parties having an election to avoid or confirm than expressed in words; and it is implied whenever the acts and conduct of the principal, having full knowledge of the fact, are inconsistent with any other supposition than that of previous authority, or an intention to abide by the act though it was unauthorized." See, also, Mechem, Ag. §§ 146-157. I think the power of attorney was admissible as a circumstance tending at least to strengthen the other evidence of a ratification, by showing the relation between defendant and McCarthy. It showed that McCarthy was not a stranger to defendant; that he was authorized to act as her attorney to some extent in regard to all her real property in this state, even though he may not have been authorized to mortgage it. "All the authorities," says Mr. Mechem, (section 160,) "agree that the relations of the parties have much to do in determining whether or not there has been a ratification." Where an authorized agent transcends his authority, the liability of the principal to be held to have ratified the unauthorized acts by mere acquiescence is much greater than it would be in case an utter stranger had assumed to act as agent without any authority for any purpose whatever; because, "in general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, \* \* \* else he will be bound by the act as having ratified it by implication." Ward v. Williams, 26 Ill. 447. But where an utter stranger assumes to act as agent, without any authority for any purpose, the assumed principal is not required to repudiate so promptly, in order to repel the charge of having ratified the unauthorized acts by acquiescence; since in the latter case the assumed agent bears no ostensible relation as agent to the person for whom he assumes to act, and therefore third persons are not so liable to be deceived by his pretensions, it being their own fault if they deal with him as agent without some apparent evidence of his authority. And since the undisputed evidence made a prima facie case of ratification, the finding that the notes and mortgage were executed by defendant was thereby justified, the ratification being equivalent to original authority.

2. Appellant further contends that the evidence does not justify the findings that Hardy died before the commencement of this action, that his will was admitted to probate, that letters testamentary were issued to the plaintiff, or that plaintiff ever qualified to act as executor. I think these points should be sustained. While the evidence tends to show that Hardy died before the trial of the action, it does not show when he died. There is no evidence tending to prove that his will (if he made a will) was ever admitted to probate, or that letters testamentary were ever issued to plaintiff, or that plaintiff was in any way qualified to act as execu-

tor. It is not claimed by counsel for respondent that there was any evidence of these alleged facts; but it is claimed that the court took judicial notice of them, inasmuch as the probate proceedings in the matter of the estate of Hardy were in the same court. In the first place, there is no evidence of any such proceedings in any court; and, in the second place, it is too clear to admit of question that the judicial knowledge of the court does not extend to the contents of its records in former actions or proceedings. I think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; HAYNES, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

DE HAVEN, J. I concur in the judgment and in the foregoing opinion. The amended complaint is defective, as the mortgage therein referred to is not set out in terms or according to its legal effect, nor does the amended complaint contain any description of the property described in the mortgage. The allegation of the amended complaint as to the mortgage is that a copy of "said mortgage, with the indorsements thereon, is annexed to the original complaint herein, marked 'Exhibit A,' and made a part of this complaint." This is not sufficient. Records and papers cannot be made a part of a pleading by referring to them in this manner.

(3 Cal. Unrep. 792)

SAN DIEGO FLUME CO. v. CHASE. (No. 19,083.)

(Supreme Court of California. Feb. 14, 1893.)

CONTRACTS—PAROL EVIDENCE TO EXPLAIN.

Where a contract has been interpreted on an appeal to this court, such contract is not ambiguous or uncertain, and on a new trial parol evidence cannot be introduced to show the intention of the parties, under Civil Code, § 1649, and Code Civil Proc. § 1864, authorizing parol evidence in cases of doubtful and ambiguous contracts; for these sections do not apply when the courts are able to declare the true intent of the parties.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county: George Puterbaugh, Judge.

(Not to be published in California Reports.)

Action by the San Diego Flume Company against Levi Chase for the reformation of a contract. From the judgment, defendant appeals. Affirmed.

For prior reports, see 25 Pac. Rep. 756, and 26 Pac. Rep. 825.

Levi Chase and Hunsaker, Britt & Goodrich, for appellant. Shaw & Holland, for respondent.

TEMPLE, C. This is an appeal from the judgment, with a bill of exceptions, and is the second appeal in the case. See 87 Cal. 561, 25 Pac. Rep. 756, and 26 Pac. Rep. 825. The nature of the case, and

most of the facts necessary for understanding it, are there stated. As stated, the action was brought to have a contract reformed to accord with the alleged intention of the parties, which, it was averred, was to sell  $2\frac{1}{4}$  inches of water, miners' measure, under a 4-inch pressure, whereas, by the fraud of defendant, the contract was so drawn as to entitle defendant to all the water which would run through two connections of a 2-inch iron pipe, entering the side of plaintiff's flume near the bottom, to be carried through  $1\frac{1}{4}$  inch standard pipes. The defendant answered, and filed a cross complaint asking for a specific performance of the agreement, and a restoration of the pipes which had been removed by plaintiff, etc. Upon the first trial he had judgment, and the plaintiff appealed to this court, when it was held that the contract meant, and could only mean, without rendering some part of it inoperative, that "two and one quarter inches of water, miners' measure, under a four-inch pressure, it is the privilege of the defendant to take and distribute daily, as he pleases, over his land, through his pipe system attached to plaintiff's flume." It was also said of the two provisions, one in regard to the pipes, and the other in regard to the quantity of water: "The one clause refers to the amount of water to be taken; the other, to the manner of taking." After the remittitur was filed in the lower court, the defendant, on due notice, asked leave of the court to amend his cross complaint by adding thereto an allegation to the effect that at the time the contract was executed both parties understood, and plaintiff knew that defendant understood, that the true interpretation of the contract was that defendant was entitled to have all the water he might need for uses specified, and might draw from the pipes, regardless of the amount that might be required, and was not limited to  $2\frac{1}{4}$  inches mentioned as a water right. Leave to so amend was refused, and defendant excepted. Evidence was offered at the trial to prove the facts stated in the proposed amendment. The evidence was rejected, and defendant again excepted. Whether these rulings were correct is the question on this appeal.

These rulings are attacked as a violation of section 1649<sup>1</sup> of the Civil Code, and section 1864<sup>2</sup> of the Code of Civil Procedure. These two sections seem intended to accomplish the same purpose, although expressed in different words; and if they authorize the introduction of parol evidence to ascertain the intention of the parties, where the contract is ambiguous or uncer-

tain, this does not mean whenever the proper interpretation of a contract is a difficult matter, or one about which men may differ. They are qualified by section 1639 of the Civil Code and section 1859 of the Code of Civil Procedure. If, after a full consideration, with a full knowledge of the surrounding circumstances, the court is able to declare with certainty what the intention of the parties was, from the writing itself, no matter how difficult the task may be, it is not ambiguous or uncertain, within the meaning of the rule, and the court cannot, as it is said, travel outside the four corners of the instrument. That the instrument in question here can be so interpreted is manifest from the fact that its meaning was clearly ascertained and determined by this court. That counsel have held different views, or courts have otherwise decided, or have held divers views upon the subject, does not tend even to establish such ambiguity or uncertainty. No matter how much this court may have doubted what the true construction ought to be, if finally satisfied that the intent can be certainly ascertained from the writing, parol evidence cannot be introduced, as to the intention of the parties, on the ground that its terms are ambiguous or uncertain.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(97 Cal. 292)

HARRIS v. FOSTER. (No. 19,104.)

(Supreme Court of California. Feb. 14, 1893.)

MORTGAGE—FORECLOSURE—LEASE OF PROPERTY BY MORTGAGOR—RIGHTS OF PURCHASER AT SALE.

1. Where the owner of land mortgages it, and, after a judgment of foreclosure, leases it for five months, and receives the rent in advance, the purchaser at the foreclosure sale, after the time of redemption expires, can compel the tenant to pay again the rent accruing after the foreclosure sale, when his mortgage is recorded, since the case is not governed by Civil Code, § 1111, providing that no tenant who, before notice of grant, shall have paid rent to the grantor, shall suffer any damage thereby, but by Code Civil Proc. § 707, providing that the purchaser from the date of the sale until redemption shall be entitled to receive the rents from the tenant in possession.

2. Where, in such case, the tenant holds over, he does not cease to be a tenant in possession, or acquire any right to use the purchaser's property without paying for it.

Department 2. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Harris against Foster to recover for use and occupation of land. Judgment for plaintiff. Defendant appeals. Affirmed.

B. F. Thomas, for appellant. A. C. Freeman, for respondent.

DE HAVEN, J. On March 12, 1888, L. D. Stone and his daughter Harriet each owned an undivided half of the Sisquoc rancho in Santa Barbara county. Upon that day the father mortgaged his interest therein to the plaintiff in this action. In

<sup>1</sup>Civil Code, § 1649, provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

<sup>2</sup>Code Civil Proc. § 1864, provides: "When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it, and, when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."



January, 1890, the plaintiff commenced an action to foreclose this mortgage, and at the same time filed and recorded a notice of the pendency thereof. Stone was thereafter declared insolvent, and one Bush was appointed his assignee, and as such was made a party to the foreclosure suit. Judgment of foreclosure was entered in that action September 1, 1890, and, two days thereafter, Bush, the assignee of Stone, and F. W. Burke, as the guardian of Stone's daughter Harriet, executed to the defendant a lease of lots 4 and 6 of the Sisquoc ranch, giving him the right to pasture his stock thereon from that date until January 1, 1891; and the defendant went into possession under his lease, paying the rent in advance, in accordance with its terms, and occupied the premises until February 1, 1891, and thereafter until April 1, 1891, under an agreement made with the guardian of Harriet Stone, as to her undivided interest therein. On October 6, 1890, the land described in the mortgage made by Stone to the plaintiff was sold under the judgment of foreclosure, and the plaintiff became the purchaser at such sale; and, as there was a failure to redeem from this sale, he received the sheriff's deed therefor April 14, 1891. This action was brought to recover from the defendant, as tenant in possession, one half the value of the use and occupation of the property from the date of the sale under the judgment of foreclosure until April 1, 1891. The court below found the facts as above stated, and gave judgment in favor of plaintiff for one half the value of the use and occupation of the land from the date of his purchase until February 1, 1891; the value of its use during the time it was occupied by defendant under the lease made to him on September 3, 1890, by the assignee of Stone and the guardian of Harriet Stone, being the amount reserved in that lease. The defendant appeals, and claims that the findings do not sustain the judgment appealed from.

1. The defendant contends that as he leased the land before it was purchased by the plaintiff at the foreclosure sale, and paid to the then owners the rent in advance for the whole term, in accordance with the agreement contained in the lease, he is not liable to the plaintiff, as successor in interest of one of his lessors, for any portion of the value of his use and occupation of the premises under that lease; and, to sustain this position, defendant cites section 1111 of the Civil Code, which is as follows: "Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage hereby." The language of the section just quoted is plain, and, as held in the case of *Dreyfus v. Hirt*, 82 Cal. 621, 23 Pac. Rep. 193, the last clause thereof affords "protection to the tenant who pays rent to his landlord before notice of the grant of the reversion;" but it has no application to the facts as presented here. Not only was the mortgage of plaintiff on record, but a judgment foreclosing it, as against one of defendant's lessors, had been entered before the defendant obtained his lease or paid any rent thereunder.

This being so, it must be held that the defendant was not without notice of the rights of plaintiff under his mortgage and the judgment foreclosing it; but, on the contrary, that he accepted the lease, and paid the rent, with knowledge that plaintiff then had the right to have an undivided half of the land so leased sold to satisfy the judgment of foreclosure, and that "the purchaser, from the date of the sale until a redemption," would be "entitled to receive from the tenant in possession the rents of the property, or the value of the use and occupation thereof." Code Civil Proc. § 707. The plaintiff having become the purchaser of the land, under a decree foreclosing a mortgage made long before the date of defendant's lease, and of which mortgage the defendant had notice, it is no defense to this action that defendant paid the rent in advance. The lessor, to whose title plaintiff has succeeded, was not entitled to the rent accruing, or to the value of the use and occupation of the property, subsequent to the sale under the judgment of foreclosure, unless such lessor effected a redemption from the sale; and the payment of rent for the period extending beyond the date of such sale was made by defendant at his peril. This necessarily results from the well-established rule that a subsequent grant or lease of mortgaged premises is subject to the prior mortgage, if the purchaser or lessee had either actual or constructive notice of such mortgage. If the law were otherwise, it would be in the power of the mortgagor to materially diminish the value of the mortgaged property, as security for the debt for which the mortgage was given, by simply leasing it for a long period and collecting the rent in advance, or by leasing it for such period for a nominal rent. It was held in the case of *McDevitt v. Sullivan*, 8 Cal. 593, in accordance with the views we have here expressed, that where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant, the purchaser under the mortgage sale can require the tenant to pay the rent over again. We think the court below was clearly right in holding that the defendant was liable to the plaintiff for his proportion of the value of the use and occupation of the premises during the time defendant was in possession under the lease made to him by Stone's assignee and the guardian of the other cotenant.

2. The defendant continued in possession for one month after the expiration of the lease just referred to, and the court below found the value of the use and occupation for that period to be \$100, and also gave judgment against defendant for one half that sum. This ruling of the court was right. The defendant did not, by holding over, cease to be a tenant in possession, or acquire any right to use the plaintiff's property without paying for it.

As to the other points made by appellant, it is only necessary to say that the findings are within the issues made by the pleadings, and fully sustain the judgment. Judgment affirmed.

We concur: **McFARLAND, J.; FITZGERALD, J.**

(97 Cal. 290)

**COALTER v. HURST.** (No. 14,961.)  
(Supreme Court of California. Feb. 14, 1893.)

## APPLICATION OF PAYMENTS.

Where, in an action to recover for services, payment is averred as a defense, plaintiff may show that defendant was indebted to him on other transactions had between them prior to the performance of the services, and that the money so paid was not in settlement of any specific demand, and, if there is nothing to show the date at which such payment was made, the court will presume that it was in extinguishment of the obligations maturing prior to the debt due for services, and apply such payment thereon; Civil Code, § 1479, providing that where a debtor owing several debts makes a payment which is applicable to either of them, and indicates no intention as to which debt it shall be applied, such payment must be applied to the one earliest in date of maturity.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Coalter against Hurst to recover for services performed by him for defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

Sullivan & Sullivan, for appellant. Taylor & Craig, for respondent.

**HARRISON, J.** The statement of the account between the parties upon all of their transactions with each other which the court made in its findings was not a finding upon issues not presented, by the pleadings, but was a direct finding upon the issue of payment presented by the defendant's answer. The defendant had alleged in his answer that he had fully paid for the services for which the plaintiff brought the action. Under this averment he showed that he had paid to the plaintiff various sums of money, amounting in other aggregate to more than the court found to be the value of the services; but, as the plaintiff had alleged in his complaint that he had not been paid for his services, there was an issue upon this averment, and the plaintiff was at liberty to show that the moneys had in fact been paid upon other transactions. The court, in its findings, stated the account between the parties, and in effect found that \$1,090 of the amounts paid by the defendant was upon other transactions, \$900 of which was for moneys that had been received by the defendant from the plaintiff before any services were rendered. As the defendant did not make application of any of the moneys paid by him to a discharge of his obligation for the services rendered by the plaintiff, or to any specific demand of the plaintiff, the court was at liberty to apply them to the extinction of the obligations earliest in date of maturity, (Civil Code, § 1479, subd. 3, par. 3;)<sup>1</sup> and, as the record does not disclose the dates

<sup>1</sup>Civil Code, § 1479, provides that when a debtor, under several obligations to another, does an act by way of performance, in whole or in part, which is equally applicable to two or more such obligations, and it does not appear that the debtor intended to apply such performance to the extinguishment of any particular obligation, it must be applied to the obligation earliest in date of maturity.

at which the respective payments were made, we may assume that it appeared from the evidence that all of the obligations matured prior to those dates, and that the court applied the payments thereon. The judgment is affirmed.

We concur: **GAROUTTE, J.; PATERSON, J.**

(3 Cal. Unrep. 795)

**KLAUBER et al. v. VIGNERON et al.** (No. 14,809.)

(Supreme Court of California. Feb. 14, 1893.)

## CONVEYANCE IN CONSIDERATION OF MARRIAGE — VALIDITY—MORTGAGES.

1. A conveyance by the owner of mortgaged premises, in consideration of marriage and money received, of his interest in the premises, to his intended wife, is valid.

2. Where such mortgagor, after marriage, substitutes for the previous mortgage, which is canceled, one of larger amount, the last-named mortgage is void.

3. If the mortgagee is entitled to any relief, he should declare on the previous mortgage, and ask to have the satisfaction set aside on the ground that it was made through mistake, accident, or fraud.

Commissioners' decision. Department 2. Appeal from superior court San Diego county; George Puterbaugh, Judge.

(Not to be published in California Reports.)

Action by A. Klauber and another, partners as Klauber & Levi, against George Vigneron and another, and Joanna Vigneron, to foreclose a mortgage. Judgment for plaintiffs. Joanna Vigneron appeals. Reversed.

Hunsaker, Britt & Goodrich, for appellant. A. E. Cochran, for respondents.

**BELCHER, C.** The material facts of this case are as follows: On December 16, 1887, the defendant George Vigneron executed to John A. Watson his promissory note for \$300, and a mortgage to secure its payment on certain real property which he then owned. This note and mortgage were subsequently assigned to the plaintiffs. On January 28, 1888, Vigneron executed to the plaintiffs his promissory note for \$700, due one year after date, and a mortgage to secure its payment on the same real property. On July 16, 1888, Vigneron, for the expressed consideration of one dollar, executed, acknowledged, and delivered to Joanna Ford a deed conveying to her the mortgaged property, which deed was duly filed for record on October 1, 1888, and was thereafter duly recorded. On July 17, 1888, Vigneron and Joanna Ford were married, and have ever since been husband and wife. On May 7, 1889, Vigneron executed to the plaintiffs his promissory note for \$1,200, due six months after date, and a mortgage to secure its payment on the same real property mortgaged and conveyed as before stated; and on the same day the plaintiffs marked "paid" their \$700 note, and delivered it to the maker, and also satisfied of record the mortgage given to secure its payment. On January 1, 1890, Vigneron and his wife, Joanna, executed to C. H. Hill their promissory note for \$3,500, due one year after date, and a mortgage to secure its payment on the same real property.

Each of the before-mentioned mortgages was duly recorded on the day or the day after its date. On June 27, 1890, the plaintiffs commenced this action to foreclose their \$300 and \$1,200 mortgages; and Vigneron, Mrs. Vigneron, and Hill were made parties defendant. The complaint, among other things, alleged that the \$1,200 mortgage "was given in lieu of, and substitution of, and in renewal of" the \$700 mortgage which had been satisfied, and that neither of said mortgages had been paid; and that Mrs. Vigneron claimed an interest in the mortgaged property by virtue of the conveyance to her of July 16, 1888, but that the said deed was accepted by the grantee "with full knowledge of the existence of said debt, and of its nonpayment," and her interest or claim was subsequent to the lien of the plaintiffs' mortgage. And the prayer was that plaintiffs have judgment for the amounts due for principal and interest on the \$300 and \$1,200 notes, together with attorneys' fees and costs; that the deed from George Vigneron to Joanna Ford be ordered delivered up, and canceled, and that plaintiffs be subrogated to the rights of the payees of the \$700 note; that the mortgaged land be decreed to be subject to and sold under the \$1,200 mortgage, and that the proceeds of the sale be applied in payment of the amount due the plaintiffs; that the defendants, and all persons claiming under them, be barred and foreclosed of all rights and claims in and to the said premises, and every part thereof; and that the plaintiffs have judgment and execution against George Vigneron for any deficiency, etc. George Vigneron failed to answer, and judgment was rendered against him by default. Mrs. Vigneron answered, and admitted that she claimed an interest in the mortgaged premises under and by virtue of the conveyance made to her on July 16, 1888; denied that her interest in the premises was subject to the lien of plaintiffs' \$1,200 mortgage, but, on the contrary, averred that it was prior and paramount to said mortgage; denied that said deed was made or accepted by her with any knowledge of the existence of the said debt, or its nonpayment; and, upon information and belief, denied that the \$1,200 mortgage was given in lieu of, substitution of, or renewal of the \$700 mortgage; and also, in like manner, denied that the last-named mortgage had not been paid. Hill answered, making substantially the same denials and averments as are made by Mrs. Vigneron in her answer, and then, by way of cross complaint, set up his note and mortgage, and asked for a foreclosure. The case was tried, and the court found the facts as to the notes and mortgages, the conveyance, and the marriage of defendants, to be as before stated. It also found that the \$1,200 mortgage was given in lieu of, substitution of, and as renewal of the \$700 mortgage, and that all the allegations and averments of the plaintiffs' complaint were true, and all the denials and allegations of the defendants' answer were untrue. It further found the amount due Hill upon his note and mortgage.

And as conclusions of law it found, among other things, that the plaintiffs were entitled to the relief sought under the note and mortgage for \$1,200, to the extent of the amount due upon the note and mortgage for \$700, with interest thereon to the date of the decree, making in all \$965.08, for which amount plaintiffs had a priority of lien over the claims of defendants Hill and Joanna Vigneron. A decree was accordingly entered in favor of the plaintiffs, and from that decree, and an order denying her motion for a new trial, Mrs. Vigneron appeals.

When the deed of July 16, 1888, was executed, the parties to it intended to be, and were in fact, married on the next day. The consideration for the deed, as stated therein, was one dollar, but the real consideration, as shown by the uncontradicted testimony, was the proposed marriage, and about \$1,000 in money advanced and paid by the grantee to the grantor. Marriage alone is a good and sufficient consideration for an antenuptial settlement, and such a settlement will not be set aside, in the absence of the clearest proof of fraud, participated in by both parties. *Prewitt v. Wilson*, 103 U. S. 22. The deed was therefore not a fraudulent transfer, and the contention of respondents on this point cannot be sustained.

When the deed was delivered and accepted, it operated to vest the title to the premises conveyed in the grantee, subject, of course, to any valid subsisting liens thereon; and the grantor had thereafter no power to convey, mortgage, or incumber the same. As said in *Barber v. Babel*, 36 Cal. 20, after citing numerous authorities, the cases "establish the principle that after a conveyance of the mortgaged premises, or the transfer of an interest therein, the mortgagor has no power to create, revive, renew, or prolong a charge upon the premises, or interest therein, so conveyed or transferred, while such interest remains in another party." The mortgage to secure the \$1,200 note was therefore void; and whether or not it was given in lieu of, substitution of, and in renewal of the \$700 note and mortgage, is a matter entirely immaterial for the purposes of this case. If the plaintiffs were entitled to any relief by reason of the last-named mortgage, they should have declared upon it, and asked to have the satisfaction set aside upon the ground that it was made by or through mistake, accident, or fraud. The judgment rendered upon the \$1,200 mortgage cannot be sustained; and we advise, therefore, that the judgment and order appealed from be reversed, and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to the plaintiffs to amend their complaint, if so advised.

(3 Idaho [Hasb.] 606)

CONANT et al. v. JONES.

(Supreme Court of Idaho. Feb. 8, 1893.)

**PLEADING—WAIVER OF DEFECTS—IRRIGATION—RIGHTS OF APPROPRIATORS.**

1. When cross complaint is not answered, and defendant proceeds to trial as though answer had been filed, he thereby waives answer.

2. Appropriators of water for irrigation purposes, after conducting water to point of intended use, have a reasonable time in which to apply it to the use intended. They may add to the acreage of cultivated land from year to year, and make application of water thereto for irrigation as their necessities demand, or as their abilities may permit, until they have put to a beneficial use the entire amount of water at first diverted by them; provided that that amount is needed for the reasonable irrigation of the land.

3. Findings sufficient to sustain judgment. (Syllabus by the Court.)

Appeal from district court, Cassia county; Charles O. Stockslager, Judge.

Action by E. Conant and others against B. F. Jones to determine priority of right to the use of certain waters. Judgment for defendant. Plaintiffs appeal. Affirmed.

Stewart & Dietrich and Chas. Cobb, for appellants. Hawley & Reeves, for respondent.

**PER CURIAM.** This is an appeal from an order overruling a motion for a new trial and from the judgment. The matter in controversy is the right to the use of the water of Black Pine creek, Oneida county. The appellants allege appropriation of all of the water of said creek in 1880 by their grantors and predecessors in interest. Respondent denied the allegations of appropriation, and by way of counterclaim or cross complaint claims all of the water of said creek, by appropriation made in May, 1894. The court without a jury tried the cause, and rendered judgment in favor of the respondent, who was defendant in the court below. There was no denial of the allegations of the cross complaint, and counsel for respondent contend that for that reason said allegations are admitted, and that the court would have been justified in finding said allegations true, regardless of the proof. The record fails to show that respondent moved for judgment on his cross complaint, but it does show that he went to trial, and introduced his proofs for the purpose of establishing the allegations of his cross complaint. We think that respondent waived an answer by going to trial without objection, the same as though an answer had been filed, and that he is estopped from claiming now that he is entitled to a judgment on the pleadings. In Bliss on Code Pleading, (section 397,) it is said: "The defendant may waive a reply, and if he shall go to trial as though a reply, by way of traverse, were in, he shall be deemed to have waived it, or it will be considered as having been filed." The question has been raised as to whether that part of the answer called a "cross complaint" is in fact a cross complaint, or merely a counterclaim, but in our view of the case it is not necessary for us to determine that question.

If it is a counterclaim, its denial is not necessary; and, if a cross complaint, an answer thereto has been waived. The appellants allege appropriation by their grantors and predecessors in interest of all the water of Black Pine creek in January, 1880, for the irrigation of the land described in the complaint. There is not a particle of evidence in the record even tending to prove said allegations, or that they are entitled to any of the water of said creek for any purpose prior to 1888. A stipulation purporting to have been made by Jason Wells and J. S. Houtz on November 11, 1885, whereby Wells agreed that Houtz should have the free use of one third of the water of the aforesaid creek, was put in evidence, and A. Heed was sworn as a witness on behalf of appellants, and testified that respondent was present when said stipulation was made, and consented to it; but respondent denies that he had anything to do with the making of said stipulation, or that he ever consented to the making of the same. Appellants thereafter introduced in evidence a deed of conveyance from George J. Wells to John S. Houtz, conveying the following described property, to wit: "All improvements situate on a possessory claim, as more fully appears in Book A of Possessory Claims, page 468; also a certain water right in Black Pine creek, Oneida county, Idaho." And also a deed from John S. Houtz and wife to the appellants, conveying the following described property, to wit: "All improvements situate on a possessory claim, as more fully appears in Book A of Possessory Claims of said Oneida county, at page 468; also a certain water right in Black Pine creek, in said county of Oneida, now and heretofore used in connection with said possessory claim." The stipulation and two deeds mentioned were all of the written evidence introduced. The possessory claim record referred to in said deed was not put in evidence. Conant, one of the appellants, testified on their behalf that he first became acquainted with Black Pine creek in 1886, and that they bought Houtz and Riche out, and afterwards bought Houtz's interest in said stream, and his inclosure; that they took a deed of all the property so purchased, including the water. Gillispee, a witness on behalf of the appellants, testified that he first became acquainted with said creek in 1885, and gave no testimony as to the date of the location or appropriation of any of the water thereof. The foregoing is substantially all of the evidence introduced by appellants in support of the allegations of the complaint. It is evident therefrom that they claim through deed from Houtz, and Houtz's claim is based on the stipulation and deed from Wells. Both deeds recite as a foundation of their rights the possessory claim referred to in said record; but the record is not introduced in evidence, and therefore the claim of title is not complete. It is not shown that Houtz ever put any of the water of said stream to a beneficial use, except in 1880, when he attempted to raise a small patch of potatoes. Nor is there any evidence to show that Wells ever appropri-

ated any of the water of said creek, except jointly with respondent, Jones, in 1884, which appropriation was made for the reclamation and irrigation of the quarter section then claimed jointly by Wells and Jones, and so claimed by them till 1883, and since that date by Jones.

In support of respondent's claim it is shown by the evidence that said Wells and respondent, Jones, settled upon the land described in respondent's cross complaint in May, 1884, and that said Black Pine creek has its source in several springs arising on said land. That they jointly diverted the water of said creek by means of a dam and ditch upon said land. That the ditch was 18 inches wide, and from 10 to 14 inches deep, and was of sufficient capacity to carry all of the water of said creek, shown to be from 20 to 30 inches. That a little plowing was done that season on said land, and some oats and potatoes planted. Some fencing was also done that year, and a log cabin gotten ready for the roof. That little was done towards raising crops till 1888, but each year they attempted to raise a small crop, and used a little water for that purpose. In 1888 some potatoes, half acre of garden stuff, and about five acres of oats were raised. It appears that there was an understanding or an agreement between Wells and Jones that they would jointly improve said quarter section of land, and divide it, or, in case one desired to sell out and go away, the other should purchase his improvements. Jones testified as follows: "If he went, I was to have the improvements; if he stayed, he was to have one half of the claim. That was the agreement." He further testified that he paid Wells part for his improvements. Hutchinson, a witness on behalf of respondent, testified that he had known said creek since 1877. Came to the Jones ranch in July, 1877. Berry was living there in 1878. He sold to Houtz, in 1879. Houtz, and possibly Riche, owned it till 1884. "Saw Jones there first in 1884. Saw him and Wells making a ditch. In 1880 Houtz put in a few potatoes, with water. Some time in July a heavy rain took his dam out, and from that time to 1884 the water ran unmolested in the old channel, and wasn't used at all. Jones was the next I saw there. Saw a small field fenced. Ditch ran to the field. Jones has been there right along since 1884." Horn testified on part of defendant that he came to Sublet with Hutchinson, and had known Jones' claim ever since. Helped Houtz plant potatoes in 1880. Don't remember of any other crop by those parties. They did not live there. Had a corral and closed field to put stock in. Had no inclosure for farming, to his knowledge. Jones came in spring of 1884. He and Wells made ditches, and plowed some. Put in a little crop. Jones had partially fenced about 100 acres. Austerhaus testified on behalf of respondent substantially as follows: That he had known Black Pine creek since 1875. No one was living there in 1880. Houtz and Riche claimed a summer ranch there. They were on the Gallagher ranch. They claimed it during 1881, 1882, and 1883. They were not doing any farming then.

Knew there was a cabin on Jones' ranch in 1884, and some little fence. Could see that Jones was adding a little fence all the time. It is about a mile from Gallagher's place to Jones' place, and about five miles to Conant's inclosure. We are of the opinion that the evidence is sufficient to support the judgment.

It is contended that respondent has not used or put to a beneficial use all of the water of said creek, and for that reason he has forfeited his right to all of the water not used for the purpose intended. It is true that the evidence fails to show that respondent has utilized the entire amount of water diverted. There is no question but what respondent had the right to appropriate, of unappropriated water, sufficient, not only for the present, but also for the future, needs of his land, when he shall get it into cultivation. The question arises as to the diligence to be exercised in the application of the water to the intended use. Section 3161, Rev. St. 1887, declares the diligence necessary to be exercised in conducting the water to the point of intended use after the location of the same; but the law is silent as to the diligence to be exercised in making application of the water appropriated. The appropriator would no doubt be entitled to a reasonable time in which to get his land in cultivation, and to make such application. If that be true, it follows that what constitutes reasonable time is a question of fact dependent upon the circumstances of each particular case. No inflexible rule should be made by which to decide what constitutes a reasonable time in this matter. We are of the opinion that a person who complies with the law as to locating and conducting the water to the point of intended use has such time as he may need or require, using ordinary diligence in getting his land into cultivation, to make application of such water to the intended use; such time, at least, as is reasonable under all of the circumstances of the case. Poor men, as a rule, have settled upon the arid lands of this state, and taken them under the laws of congress, many of them under the homestead law, and are able to clear but a small portion of such lands of sage brush from year to year, and put it in condition for raising a crop; and it will take years for many of them to prepare their entire farms for cultivation, and to make application of the water appropriated thereto. A decision that would defeat persons acting in good faith and using reasonable diligence from securing the full benefit of the water appropriated would be most unjust and inequitable. In the mean time, however, he is only entitled to such water, from year to year, as he puts to a beneficial use. A person may add from year to year acreage to his cultivated land, and increase his application of water thereto for irrigation, as his necessities may demand, as his abilities permit, until he has put to a beneficial use the entire amount of water at first diverted by him and conducted to the point of intended use.

Some objection is made to the findings of the court. The court evidently found all facts that the pleadings warranted,

and perhaps some facts not fully warranted by the proof; but we think the judgment entered is fully sustained by the findings that are clearly within the pleadings and proofs, and on the whole we think that the findings and proofs are sufficient to warrant the judgment. The judgment is affirmed, with costs in favor of respondent.

(3 Idaho [Habb.] 573)

**FERBRACHE et al. v. MARTIN.**

(Supreme Court of Idaho. Feb. 1, 1893.)

**BILL OF SALE—EVIDENCE—FRAUDULENT CONVEYANCES.**

1. A bill of sale made and executed on the 23d day of June, 1890, cannot be introduced in evidence unless it complies with the act of February 7, 1889, (15th Sess. Laws, p. 49,) in that it must be acknowledged before a notary public, or other officer authorized to take acknowledgments, and must be recorded in the office of the county recorder in the same manner as a deed.

2. Where fraud is alleged in a transfer of personal property, and that it was transferred for the purpose of defrauding, delaying, or hindering creditors, and facts appear in the evidence which have a strong tendency to sustain such allegation, much latitude is allowed in the examination of the parties to the transfer, and others in any wise connected with the affair.

3. The acts or declarations of a party to a fraudulent transfer of property are admissible in evidence, though he is not a party to the suit, and though not made in the presence of the party claiming to be the purchaser of the property.

(Syllabus by the Court.)

Appeal from district court, Kootenai county; J. Holleman, Judge.

Action by Hannah Ferbrache and P. A. Ferbrache against William Martin to recover the value of mules converted by defendant. Judgment for plaintiffs. From the judgment and an order overruling a motion for a new trial, defendant appeals. Reversed.

Chas. L. Heitman and Albert Hagan, for appellant. R. E. McFarland, for respondents.

**MORGAN, J.** This is an action brought by the plaintiffs to recover from the defendant the sum of \$500 damages, alleged to have been suffered by plaintiffs by reason of the conversion by the defendant of two mules, described in the complaint, and claimed by the plaintiff Hannah Ferbrache as her property. The complaint alleges that the said two mules were worth \$250 each, and that the plaintiff, by reason of such conversion, was damaged in the sum of \$500. The defendant's answer sets up that, at the time of the said alleged conversion, he was the sheriff of Kootenai county, and that on the 3d day of July, 1890, an action was commenced by John H. Stone against the firm of Ferbrache Bros., in the district court of the first judicial district of the state of Idaho, in and for the county of Kootenai, to recover the sum of \$990.19, alleged to be due to said John H. Stone from said Ferbrache Bros.; and that on said day a summons and a writ of attachment in said action were issued from said district court, and duly served upon Lincoln Ferbrache, a

member of the firm of Ferbrache Bros., by the defendant, as sheriff of Kootenai county, and that on the 4th day of July, 1890, the defendant, as aforesaid, levied upon the said mules in controversy in the action at bar, and attached them in behalf of the said John H. Stone; that on the 4th day of August, 1890, judgment by default was entered in said action against said Ferbrache Bros., in favor of John H. Stone, for the sum of \$990.19; and that on the 8th day of August, 1890, an execution was issued out of said district court in said action, and placed in the hands of the defendant as sheriff, as aforesaid, for service; and that the defendant, by virtue of said writ of execution, on the 8th day of August, 1890, levied upon all the right, title, and interest of the said Ferbrache Bros. in the said mules; and the said sheriff, after duly advertising, on the 18th day of August, 1890, sold the said mules at public auction to satisfy the said execution, at which sale said John H. Stone became the purchaser of the said mules, for the sum of \$300. Defendant denies ownership or possession in plaintiffs, and alleges that the plaintiff Hannah C. Ferbrache claimed title to said mules by virtue of a pretended bill of sale executed by Ferbrache Bros. to the plaintiff, and given about the time of the institution of the action against them by said Stone; and alleges, further, that the pretended bill of sale was made without any consideration; that Ferbrache Bros. were insolvent at the time of the execution of the said pretended bill of sale; that the bill of sale was made with the intention to hinder, delay, and defraud the creditors of said Ferbrache Bros., and especially said Stone. The case was tried by a jury, which resulted in a verdict for the plaintiffs for \$300. A motion for a new trial was made, upon a statement of the case, which was denied, and the defendant appeals, both from the judgment and the order overruling the motion for a new trial.

The plaintiffs introduced a bill of sale, executed on the 23d of June, 1890. The bill of sale was admitted in evidence, over the objection of the defendant, which is assigned for error. Section 19, p. 49, Laws Idaho, 15th Sess., provides that "It shall be unlawful for any person in this territory to sell any head of live stock without giving a written bill of sale therefor, and it shall be unlawful for any person in this territory to purchase any head of live stock without receiving a bill of sale therefor. Such bill of sale shall contain a full description of the marks and brands, or either, on said live stock, and must be witnessed by two reputable citizens of the territory, and acknowledged before a notary public, or other officer authorized to use a seal, and must be recorded in the office of the county recorder in the same manner that deeds are recorded." This act was approved February 7, 1889, and was repealed March 3, 1891, and was therefore in force at the time of the execution of this bill of sale. The bill of sale does not comply with the requirements of this act in any respect, except that it was in the ordinary form, and was witnessed by two citizens. It was not, however, acknowl-

edged before a notary public, or any other officer authorized to take acknowledgments, nor was it recorded in the office of the county recorder in the manner required by this act. It was therefore not admissible as evidence tending to prove the sale and transfer of this property, and to admit it for such purpose was error.

The next specification of error which it is necessary to notice was the refusal of the court to permit a series of questions to be propounded to R. L. Ferbrache, a member of the firm of Ferbrache Bros., and one of the parties to the bill of sale which was alleged by the defendant to be fraudulent, and made for the purpose of defrauding the creditors of said firm, as follows, to wit: "What other teams did you own besides these two? Did you not go down and make a bargain with Mr. Jacobs about these two teams of mules? [Meaning the team in controversy, and one transferred at another time.] What was Jacobs to pay you for those mules? Did you not tell Mr. Stone that you had on May 1, 1890, so many thousand ties, and that you had three teams, and asked him if he would sell you two wagons? Did you not propose to John Lyons that you would turn over to him a team if he would help you beat Stone?" All of which questions were rejected by the court, upon objection, to which ruling the defendant then and there excepted. It appears from the evidence that one of the teams claimed to have been sold to Hannah C. Ferbrache by Ferbrache Bros. was afterwards sold to one Jacobs by R. L. Ferbrache, a member of the firm of Ferbrache Bros., by whom it was taken out of the state. Hannah C. Ferbrache, to whom these teams were claimed to be sold, was the mother of the boys who comprised the firm of Ferbrache Bros. This evidence was rejected, on the ground that the conversations that were proposed to be proven were not had in the presence of the plaintiff. The acts or declarations of a party to a fraud are admissible, though he is not a party to the suit, and though not made in the presence of the party claiming to be the purchaser of the property. George W. Jacobs, being examined on the part of the defendant, testifies as follows: "About the 4th of July, 1890, R. L. Ferbrache was down here, and he was in my place of business, and was telling me something about him having some teams up there. I don't know whether he told me, or whether I broached the subject to him. I am inclined to think I broached the subject to him. In the first place, I asked him if he knew he was going to be closed out; that I understood that Joe Poirier was going up there to take the team; and I said, 'I understand you are going to lose the others that way too.' Well, he said, he wouldn't wonder. He said he was beginning to look for it. I said, 'What is the matter with making a little money yourself, and me making a little money. Here is a chance for us both to make some money, and, if you will take a cheap price for them, I will go up and buy them.' Well, we talked the matter over, and he told me he would sell me a team. I forget now how much he told

me he would take for it. I finally told him I would give him so much money for such a team, or for the two teams. He said he did not know anything about selling the two teams until he could go up there and see the folks, but one team he would sell me. I told him, 'All right.' So I went up there, and bought one of those teams. When we got up there, we talked with his brother about the other team. This team I bought was the team which Poirier attached. I think Stone attached it too. I know as soon as I got into Spokane. I wasn't there but a few minutes, when there was two or three attachments covering the team. They talked the matter over about the other team. I don't know whether it was Link with his mother, or with his father, or with his brother. I don't know who; but they talked the matter over, and I stood down by a spring or well. It looked to me like a spring, after night. I think they went up towards the house. There was one of the brothers there. He called 'Henry.' They told me finally that they would keep the one team; that their mother would hold that." The testimony shows that R. L. Ferbrache and one other of the boys composing the firm were bargaining with Jacobs to sell him the teams that they claimed to have sold to their mother; that they did sell him one of them, in the night time, and he took them out of the state; that it was done for the purpose of preventing Stone or Poirier from taking them under attachment. It appears, also, that this conversation between Jacobs and R. L. Ferbrache as to selling these teams to Jacobs was at plaintiffs' house, and one team was sold and delivered to Jacobs without consulting plaintiffs, or either of them, only a few days after the bills of sale were made to the plaintiffs. Under the circumstances, the questions put to R. L. Ferbrache were proper. See *Manlock v. White*, 20 Cal. 600; *Greenl. Ev.* § 190; *La Fltte v. Rups*, (Colo. Sup.) 22 Pac. Rep. 309.

The fourth error assigned was the striking out all the evidence of Jacobs above quoted. It appears from this evidence that the firm of Ferbrache Bros. was then insolvent, and this whole transaction with Jacobs was had for the sole purpose of defrauding their creditors; and it has a strong tendency to prove that the sale of both teams to the mother of the boys was a sham, and made to cover up this property. The mother testifies that she did not see Jacobs at all, did not know him, and first claimed that the Poirier team had not been transferred to her; that, when she learned it had been transferred to Jacobs, she did not object to it, but, as an excuse, said that the Poirier team was not of much value. She also admitted afterwards that she knew of the sale to Jacobs. The testimony of Jacobs was proper evidence, under the circumstances, and to strike it out was error. 8 Amer. & Eng. Enc. Law, p. 778; *Hart v. Newton*, 48 Mich. 401, 12 N. W. Rep. 508. "Where the question in issue is as to the good faith of an alleged purchase of a stock of goods, much latitude of inquiry should be permitted as to the conduct of



the parties, or circumstances of the transaction, and the consideration of the purchase, and as to the means of the vendee." *Douglass v. Hill*, 29 Kan. 527; *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. Rep. 296. "Evidence of similar transactions showing fraud occurring about the same time, or as a part of the same scheme, is usually admissible." *Day v. Stone*, 59 Tex. 612; *Heath v. Page*, 63 Pa. St. 108; *Adams v. Kenney*, 59 N. H. 133. In attacking the good faith of the sale or conveyance of property, it is also competent to show that the vendor or grantor was in embarrassed circumstances when the sale or conveyance was made. *Geisendorff v. Eagles*, 106 Ind. 38, 5 N. E. Rep. 743. Even common report of insolvency is admissible. *Gordon v. Ritenour*, 87 Mo. 54. In cases of fraud, subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. The dealing with property to-day by the vendor as his property is evidence to show a fraud committed in the sale of a month ago, and subsequent acts are indicative of the intent and character of the first. *Butler v. Collins*, 12 Cal. 457; *Flood v. McClure*, *infra*, (decided at this term.)

Instructions number 1 and 2 requested by the plaintiff, and 3 and 4 given at the request of the defendant, are proper. Instructions 1, 2, 3, 5, and 6 requested by the defendant are too long, and contain conditions that could not be approved by the court; for instance, number 2 contains these conditions: "If the plaintiff did not, at all times after the pretended sale of said mules, have exclusive possession and control of said mules, then the title of the plaintiff is void." This is not the law, and it was properly refused. It is not necessary that the purchaser of property shall at all times have exclusive possession of it. He may hire it out to others, or even to the same party from whom he purchased it; and, where the purchase is in good faith, it will not defeat his title. All the circumstances must be taken into consideration where the evidence of fraud is not positive and direct. Instruction number 4 requested by the defendant during the argument was the law, and should have been given. These latter instructions seem to have been submitted to the court at or about the time of the close of the argument in the case. They are long, and contain intricate clauses, and, as we have said, some of them contain provisions that are not the law. The attorney has the time to prepare the instructions before the trial closes, and frequently before it begins. They should consist of clear, concise, and brief statements of provisions of law, applicable to the evidence, and should be presented to the court at the beginning of the argument, if practicable, and not at its close; so that the court may have time to carefully consider them. If this practice should be followed by the bar, it is believed that members of the bar would have less reason to complain of the court, and the instructions would be much better. These remarks are not made because specially applicable to this case, but as applicable to all cases. The judgment in this case is reversed, and

a new trial ordered; costs awarded to appellant.

HUSTON, C. J., and SULLIVAN, J., concur.

(3 Idaho [Hasb. 587])

#### FLOOD v. McCLURE.

(Supreme Court of Idaho. Feb. 3, 1893.)

##### GAMBLING VERDICT—IMPEACHMENT BY JUROR.

1. Where a jury agree that each member thereof shall mark the sum which he thinks the plaintiff is entitled to recover, on a slip of paper, and then ascertain by addition the amount of the sums so marked, and to then divide said amount by 12, (the number of jurors,) and that the quotient resulting from such division shall be the amount of the verdict, such verdict is obtained by "resort to a determination of chance," within the meaning of that term, as used in subdivision 2, § 4439, Rev. St. 1887.

2. The affidavit of a juror is competent proof to show that the verdict was so obtained.

(Syllabus by the Court.)

Appeal from district court, Kootenai county; J. Holleman, Judge.

Action by Patrick Flood against W. J. McClure to recover damages for the conversion of personal property. Judgment for plaintiff. From the judgment and order overruling a motion for new trial, defendant appeals. Reversed.

R. E. McFarland and Hagan & Gorman, for appellant. Chas. L. Heitman, for respondent.

SULLIVAN, J. This action was brought by the respondent against the appellant to recover \$550 damages, alleged to have been sustained by reason of the appellant, as sheriff of Kootenai county, having levied upon certain property claimed by the respondent, to satisfy an execution issued in the case of Liebe & Co. against one Henry Farley. It is alleged that said property was of the value of \$470.08, and that, by reason of the levy and sale under said execution, respondent was damaged in that sum, and in the further sum of \$75 for certain rents. The answer denies the material allegations of the complaint, and avers that the property referred to in the complaint was the property of one Henry Farley, the execution debtor above referred to, and not the property of plaintiff, and alleges that the pretended transfer from Farley to Flood was fraudulent, and made with the intent to hinder, delay, and defraud Farley's creditors. The action was tried by the court, with a jury, and judgment rendered against appellant for the sum of \$300. During the trial the court withdrew the \$75 claimed for rent from the consideration of the jury. A motion for a new trial was interposed by the appellant, and overruled by the court. This appeal is from the order overruling the motion for a new trial, and from the judgment.

The assignment of errors contains 18 specifications. The first is the misconduct of the jury in arriving at their verdict by resorting to a determination thereof by chance. It is shown by the affidavits of Ernest Reinhardt, J. G. Hawkins, and O. J. Johns, three of the jurors who tried said cause, that the jury arrived at their ver-

dict by agreeing that each juror should mark on a slip of paper the amount which he considered the plaintiff entitled to recover, and thereafter the several sums so marked should be added together, and the amount thereof divided by 12, (the number of jurors,) and that the quotient arising from such division should be the verdict, and that said verdict was arrived at in that way, and in no other. It is also shown by the affidavit of Reinhardt that at least one of said jurors, in writing upon the slip of paper the sum which he thought plaintiff was entitled to recover, wrote thereon \$500, which sum was added with the other sums written by the remaining jurors, and that the aggregate sum was divided by 12, which resulted in making the sum mentioned in the verdict. The proof of the method used to determine the amount of the verdict was not disputed. Verdicts obtained in this manner have been condemned by many courts, and if the method used in arriving at the verdict comes within the prohibition of subdivision 2, § 4439, Rev. St. 1887, the verdict should have been set aside, and a new trial granted. Said subdivision 2 provides as follows: "Misconduct of the jury. And when any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any of the jurors." Counsel for respondent admits that a verdict so obtained is vicious and irregular, but contends that it is not a verdict obtained "by a resort to the determination of chance," within the meaning of that term as used in said statute, and cites *Turner v. Water Co.*, 25 Cal. 397, as an authority in his favor. In that case the jury arrived at their verdict in the same manner as in the case at bar, and the court said: "Under the facts of this case, as we have assumed them to be, the verdict is undoubtedly vicious, and ought to be set aside. The only question for us to determine is whether the affidavits of the jurors can be received for the purpose of establishing those facts. Although there is some conflict of authority upon this question, the better opinion seems to be that, by the common law, the affidavits of jurors cannot be received for the purpose of impeaching their verdict, but may be admitted in support of it. \* \* \* But this rule of the common law has been changed in this state to a certain extent by the statute." The learned court then quotes the second subdivision of section 193 of the California practice act, which is the same as subdivision 2, § 4439, Rev. St. Idaho, above quoted, and the court further says: "Being in derogation of the common law, this statute must be strictly construed, and cannot be held to include such kinds of misconduct as do not come clearly within the descriptive terms of the act." The court, after referring to a number of authorities on the point whether a verdict obtained in the manner therein set forth was "a resort to the determination of chance," within the meaning of that expression as used in said section, arrives at the following conclusion: "We are there-

fore of the opinion that the verdict in this case is not a 'chance' verdict, within the meaning of the second subdivision of the 193d section of the practice act, and that for that reason the affidavits of the jurors by whom it was rendered cannot be admitted to impeach it." In *Thompson & Merriam on Juries* (section 415) the eminent authors, after quoting from that part of the opinion of the court in *Turner v. Water Co.*, supra, which holds that there was no element of chance in the method used by the jury in arriving at the verdict rendered, but that the result was obtained by the most accurate of the sciences, say: "This reasoning seems hardly conclusive. It proceeds upon the hypothesis that, at the time the jurors consent to be bound by the result of the addition and division, it is certain what each juror will mark down as his estimate of the damages; hence this method of finding a verdict is as exact as the science of mathematics. But the contrary is the fact. The jurors consent that their verdict shall vary from abstract justice in that degree that each juror deviates from sound judgment. All the prejudices, whims, and caprices which sway a juror in his deliberations are given full play, and they measurably affect the final result. Nothing could well be more the sport of 'chance' than a conclusion reached in this manner." In the case at bar it is shown that prejudice, whim, or caprice led at least one of the jurors to mark a larger sum than the plaintiff was entitled to recover, in any view of the case. "Quotient" verdicts are often referred to as "chance" verdicts. *Thomp. & M. Jur.* p. 517, note 1. The conclusion was reached in *Turner v. Water Co.*, supra, by applying the rule of strict construction,—a construction forbidden by section 4, Rev. St. Idaho, which section is as follows: "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to these Revised Statutes. The Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions, and all proceedings under them, are to be liberally construed, with a view to effect their objects, and to promote justice."

It is contended that, as we adopted this statute from the statutes of California, we thereby adopted the construction given said section by the supreme court of that state. It is true that the rule is, when a state adopts a statute of a sister state, that it thereby adopts the interpretation and construction given such statute by the courts of last resort of the state from whence it is adopted; but when the statute is adopted from a state in which the rule obtains that all statutes in derogation of the common law must be strictly construed, and the rule in the state adopting such statute is that not only all statutes in derogation of the common law, but that all statutes, whether in derogation of the common law or not, must be liberally construed, the rule of liberal construction must prevail. Counsel for respondent, in support of his contention, in addition to *Turner v. Water Co.*, supra, 397, cites *Boyce v.*

Stage Co., 25 Cal. 460; Hoare v. Hindley, 49 Cal. 274; Hunt v. Elliott, 77 Cal. 588, 20 Pac. Rep. 132; People v. Gray, 61 Cal. 183. These decisions are most unsatisfactory, and especially so when tested by the rule of statutory construction that obtains in this state. In *Turner v. Water Co.*, supra, it is held that there is no element of chance in finding a verdict by the method therein set forth, but that it was the result of "the most accurate of the sciences," and that the statute authorizing the affidavit of jurors to be received as proof in certain cases is in derogation of the common law, and must be strictly construed. In *Hoare v. Hindley*, supra, a case in which the jury found a verdict by the same method as used in the case at bar, the court said: "The district court properly disregarded that affidavit, because it could not be assumed, in the absence of any proof to the contrary, that the defendant was present in the jury room, or had any personal knowledge of what took place there, while the jurors were considering their verdict,"—thus impliedly holding that if the facts had been set forth, showing by what means the affiant obtained the information set forth in the affidavit, the court would have considered the matter. In *Hunt v. Elliott*, supra, it was held (1) that the affidavit of a juror did not state facts which made the verdict a "chance verdict," within the meaning of subdivision 2, § 657, Code Civil Proc., and was therefore inadmissible to impeach it; (2) that affidavit was met and overcome by counter affidavits; and cited *Turner v. Water Co.*, supra, and reaffirmed the rule of strict construction, and held that a verdict found by the method therein set forth is not the result of a resort to the determination of chance, but that the result is reached by "the most accurate of sciences," which rule and conclusion this court declines to follow or adopt. The great weight of authority condemns verdicts arrived at by the method used in the case at bar, because they are the result of chance and of lottery, rather than the deliberation of the jurors. As stated in one case: "It substitutes the fluctuating and uncertain hazards of the lottery for the deliberate conclusions of their reflections and interchange of views." *Parham v. Harney*, 6 Smedes & M. 55; *Lee v. Clute*, 10 Nev. 149; *Kennedy v. Kennedy*, 18 N. J. Law, 450; *City of Pekin v. Winkel*, 77 Ill. 56; *Dorr v. Fenno*, 12 Pick. 520. In *Lee v. Clute*, 10 Nev. 149, the court said: "The cases where verdicts have been set aside proceed upon the theory that, if upheld, where jurors bind themselves in advance, it might lead to great injustice, because it would enable one inveterate juror, by marking down a very large or small sum, to produce an average and procure a verdict for an amount which would be unreasonable, and at utter variance with the judgment of other jurors. This would be a chance verdict, and, whenever such misconduct is properly shown, the verdict ought to be set aside. In every case the verdict ought to be the result of reason, reflection, and conscientious conviction." In *Parham v. Harney*, supra, the amounts

named by jurors varied from \$30 to \$10,000. In the case at bar, one juror, at least, marked \$500, which was a larger sum than plaintiff was entitled to recover, under the instructions of the court. In *Ditch & Improvement Co. v. Adams*, (Colo. App.) 28 Pac. Rep. 662, a case directly in point, and decided under a statute identical with our own, the court holds that a verdict obtained by the method used in finding the verdict in the case at bar must be set aside, and that such verdict is the result of chance, rather than the deliberation of the jurors. In the case at bar the misconduct of the jury was proved by the affidavits of three of the jurors, and said affidavits show that an understanding was had by which each juror was to mark on a slip of paper the amount which he considered the plaintiff entitled to recover; that said sums were to be added together, and divided by 12, and the quotient resulting from such division was to be accepted and rendered as the verdict. These affidavits were not contradicted, and we think that a verdict so found should be set aside. It was not only found by a method both vicious and irregular, but it was a resort to a determination of the same by chance,—a method fully as uncertain, and as much the sport of chance, as drawing lots, or tossing up a piece of money, to determine the amount of a verdict. The clear intent of the law is that the verdict shall be the result of intelligent discussion, deliberation, and conviction by and of the jury, and we think the method used comes clearly within the provision of subdivision 2, § 4439, Rev. St., and that the affidavit of a juror is competent to prove the same. If the rights of litigants are to be determined by juries by such methods, they had as well determine their own rights by drawing lots or tossing up a piece of money, and not pretend to submit their cases to juries for their careful deliberation, and for the result of their best judgment. This disposes of the first two errors specified.

The third specification is as follows: "The court erred in holding that it was not necessary that there should be a change of possession in the sale of personal property as against creditors if the creditors do not come in until a year after." This specification is quite obscure, but, if the court held that in the sale of personal property an immediate delivery, and an actual and continued change of possession, are not necessary to a valid sale, as against the seller's creditors and their successors in interest, the ruling was error. See section 3021, Rev. St.; also *Harkness v. Smith*, (Idaho,) 28 Pac. Rep. 424; *Murphy v. Brause*, 32 Pac. Rep. 208, (decided at present term of this court.)

The fifth specification of error is as follows: "The court erred in excluding from the consideration of the jury the following question: 'Question. Within the last two years, didn't you claim other property that Liebe & Co. attached in an action against James Graham as your property?'" We fail to comprehend the relevancy of any pertinent answer to this question. It was not error to exclude it.

The sixth error specified is not well tak-

en. The witness answered the question propounded.

In regard to seventh error specified, the court did not err in allowing Farley to testify to value of articles mentioned in the complaint. If he failed to give each article its true value, the appellant could have shown that fact by producing evidence of its true value.

There is nothing in the eighth error specified, as the witness answered the interrogatory referred to.

As regards the ninth error specified, the court erred in permitting Graham to testify on behalf of respondent to a conversation had between respondent and Farley. The admission of this testimony was clearly error.

The same may be said of the tenth error specified. The court erred in permitting Robertson to testify from whom Farley said he got money to pay for goods bought at auction. That was not the best evidence of that fact. The court erred in not permitting Solomon to testify as to what Farley had told him as to the ownership of the property referred to. The real point in issue is as to the transfer of the property from Farley to Flood, respondent. The appellant contends that such transfer was fraudulent and void, and Flood contends that it was in good faith and valid. Flood testifies that Farley still remained in possession of the property after giving bill of sale to Flood. Farley testified as a witness for Flood. The testimony excluded was proper to show that said witness had made statements in regard to the ownership of said property in conflict with the testimony given by him. The declarations of Farley as to the ownership of said property made to the sheriff at the time of the levy is proper testimony, and should have been received by the court. It was competent evidence to go to the jury. The fact that the license was taken out in Farley's name was a circumstance to go to the jury, and the court erred in excluding it. It was error to exclude the testimony of Martin as to conversations had with Flood and Farley in regard to their business relations, as touching the property in issue.

One of the issues made by the pleadings is that said property belonged to said Farley, and not to Flood, and that the sale from Farley to Flood was fraudulent and void, and made to hinder, delay, and defraud the creditors of said Farley. Much of the evidence excluded by the trial court would have a tendency to sustain the allegations of fraud. The acts and declarations of parties to a fraud, though not a party to the action, are admissible in certain cases. 1 Greenl. Ev. p. 219, § 190, note 2; Mamlock v. White, 20 Cal. 598; Ferbrache v. Martin, 82 Pac. Rep. 252, (decided at this term.) The grantee's knowledge of the fraudulent purpose of the grantor may be shown by any circumstance tending to show participation in the fraudulent design of the grantor. 8 Amer. & Eng. Enc. Law, p. 778. As to evidence of subsequent acts of ownership over property by grantor, see Butler v. Collins, 12 Cal. 457.

The first instruction given to the jury v.32p.no.3—17

at the request of plaintiff is not the law, and it was error for the court to give it. The same is true of the second instruction. Instruction No. 1 of defendant should have been given without modification, and it was error to give it as modified. Instructions 2 and 3 requested by defendant should have been given, and it was error to refuse them. The motion for a new trial should have been granted. The judgment of the court below is reversed and remanded, and a new trial ordered, with costs of this appeal in favor of appellant.

HUSTON, C. J., and MORGAN, J., concur.

(3 Idaho [Hast.] 581)

### STOCKTON v. HERRON.

(Supreme Court of Idaho. Feb. 2, 1898.)

#### EJECTMENT — PLEADING — AFFIRMATIVE RELIEF — SPECIFIC PERFORMANCE.

1. To entitle a defendant in an action of ejectment to relief by way of specific performance, his answer or cross complaint must show such a contract or agreement as would sustain a bill in equity for specific performance.

2. An averment in an answer seeking affirmation by specific performance in ejectment, alleging a contract entirely unilateral, without time, terms, or considerations or conditions, is bad on demurrer.

(Syllabus by the Court.)

Appeal from district court, Elmore county; Charles O. Stockalager, Judge.

Ejectment by William M. Stockton against Isaac Herron to recover the possession of certain real estate. Judgment for defendant. Plaintiff appeals. Reversed.

H. W. Weir, for appellant. Cabalan & Badger, for respondent.

HUSTON, C. J. Plaintiff brought his action of ejectment against defendant to recover possession of certain real estate situate in the town of Glen's Ferry, Elmore county, Idaho, described in the complaint. Complaint alleges title in plaintiff, ouster by defendant, and value of rents, etc., and prays judgment. A demurrer was filed to complaint, which was overruled, and the defendant then filed answer. The answer, after denying title of plaintiff and ouster, proceeds to set up the following as a defense, claiming affirmative relief thereunder: "That on or about the — day of July, 1888, a contract was made and entered into by and between plaintiff and defendant, whereby plaintiff contracted and agreed to convey, sell, transfer unto this defendant all of plaintiff's right, title, and interest in and to all the following described real estate, to wit: One lot fronting twenty-five feet on Idaho avenue, and extending 140 feet, same width, back to an alley, being lot numbered 18, in block 21, in plan of lots of Glen's Ferry, laid out by the said plaintiff, and surveyed by Sonnenkalb; one lot adjoining the above, fronting 25 feet on same avenue, and extending back, same width, 140 feet, to the aforesaid alley, and numbered lot 19 in the aforesaid block 21, and adjoining the lot above described; also a certain strip of ground fronting five feet on the

aforesaid Idaho avenue, and extending back, same width, 140, to the aforesaid alley, being part of lot 17, and adjoining the aforesaid lot number 18; also a certain other lot, numbered 10, in block 21, in the aforesaid survey and plan of lots, and being 25 feet front, by 140 feet, same width, back; also two other lots, numbered 5 and 6, in block 20 of the aforesaid plan of lots, each being 25 feet front, and extending back, same width, 140 feet. That at all times defendant has been, and now is, ready, willing, and anxious to fulfill and perform his part of said contract. That plaintiff fails and refuses to perform his part of said contract. (2) That afterwards, to wit, on or about the — day of —, 1888, defendant relying on the said contract and the promises of plaintiff, and with the full knowledge and consent of plaintiff, defendant erected or caused to be erected the following buildings on said land, to wit: Two plank frame buildings, one 10x20 feet, one story, and the other 20x60 feet, one story high, situated on lot numbered 19, in the aforesaid block 21; one plank frame house 14x20 feet, one story high, situated on lot numbered 10, in block 21 of the town of Glen's Ferry; one plank frame house 14x20 feet, one story high, on lots 5 and 6, in block 20, in said town of Glen's Ferry, in Elmore county, state of Idaho. That defendant is the legal and actual owner and holder of all said buildings, possessed, and entitled to the possession, of the same. (3) That the value of the rents and profits of said lots, or any part thereof, without said buildings, is nothing. Wherefore defendant prays that it be adjudged and decreed by this honorable court that defendant is entitled to the possession of each and all of said lots, and is the just and legal owner of each and all of said buildings situated thereon, and that defendant have judgment for the costs of this action, and for general relief."

Plaintiff filed the following demurrer to so much of defendant's answer as attempted to set up affirmative matter: "First, that said subdivisions of the answer are ambiguous, uncertain, and indefinite, in this, to wit, that the alleged contract of purchase of the land in dispute does not give date, price, terms of payment, nor when deed of conveyance was to be made, nor whether the alleged contract was by writing or parol; second, that the said 1, 2, and 3 subdivisions of the answer, which set up affirmative matter, do not state facts sufficient to constitute a defense." This demurrer was overruled by the court, which then proceeded to the trial of the case before a jury.

The evidence seems to establish the following facts: Some time prior to the year 1888 the plaintiff made entry of 160 acres of land, now comprising a part of the site of the town of Glen's Ferry, Elmore county, under the homestead laws of the United States. Before he had made his final proof under said entry, defendant proposed to him to erect certain buildings upon a portion of said tract. Plaintiff, not yet having made his final proof under his homestead entry, did not consider himself in a position to make any sale or disposition of any portion of the land in-

cluded in said entry, but permitted defendant to go on and erect certain buildings thereon, with the understanding that when plaintiff got his patent he would do what was right by defendant. Defendant erected the buildings mentioned in paragraph 2 of the second defense in his answer. That under such a state of facts the defendant would be entitled to relief in a court of equity needs neither argument nor authority to establish, but, in seeking that relief in a court, some little regard must be had to the rules which govern the practice in said courts. That portion of the answer of defendant which attempts to set up a claim for affirmative relief by specific performance of contract is entirely insufficient to support such a claim. The contract set up, or attempted to be set up, is no contract under any rule of law or equity; especially is it not such a contract as would support a bill for specific performance. The demurrer of plaintiff to that portion of defendant's answer which attempts to allege an affirmative defense should have been sustained. The trial of the cause seems to have been a sort of "go as you please" proceeding. To say that there is a palpable variance between the pleadings and the proofs is putting it altogether too mild. There seems to have been a complete abandonment of the pleadings in the introduction of the evidence. The defendant testified: "I never paid Stockton for the ground. I claimed the ground on the contract I had with Stockton. I had a contract with Stockton that, if I built on that ground, he would do the good part by me in case he got the title. I had never paid him anything. Question. Did you ever offer to pay him anything? Answer. I have not myself, to him direct. \* \* \*

I have never asked him for a deed. I have never said anything to him about a deed." Defendant, in answer to the question, "What were you to pay for the lots, —how much?" says: "There was no lots talked about. I was to pay, as he told me, a reasonable— That he would do the fair thing by me. There was no price fixed. He said he could not fix any price." The wife of the defendant, who seems to have been quite an active participant in the transactions involved in this litigation, and who by her testimony, it seems, had by authority, and at the request of her husband, made frequent attempts to come to a settlement with plaintiff in regard to the ground in question, testifies as follows: "I do not know how much it is, nor how many lots, because there was no lots on there, but sage brush and rocks, and we built as we could, and thought Stockton would sell to us when he got the title. \* \* \* My husband had no contract with him to buy the land. I don't think he had a contract, only he would do right by him is all the contract I guess there was between them. He had his word of honor, I guess. That is all. We do not claim the land now." Some evidence was offered as to the cost of the buildings upon the land, but no evidence was offered as to the value of the land. At the close of the evidence the court, upon request of the plaintiff, gave the following instruction to the jury: "That under

the evidence the plaintiff is entitled to a verdict in his favor for the property described in the plaintiff's complaint;" but any "flattering unction" the plaintiff may have "laid to his soul" on account of this instruction was suddenly and rudely dispelled by the several pages of instructions thereafter given by the court upon its own motion, and at the request of defendant. Most, if not all, of the instructions given by the court correctly state the law, but the difficulty is, there is nothing whatever in the pleadings to call for or warrant any of them, except the one given as above stated, at the request of plaintiff, and the further instruction that "the evidence established beyond controversy that the title to the land was in the plaintiff, Stockton." We do not deem it necessary to further discuss or consider the assignments of error in the record, as there is little probability of their recurrence on another trial. The judgment of the district court is reversed, and the cause remanded for a new trial.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Hae.] 597)

ROGERS v. HAYES et al., County Commissioners.

(Supreme Court of Idaho. Feb. 6, 1893.)

WRIT OF REVIEW — ACTION OF COUNTY COMMISSIONERS.

Writ of review does not lie from the action of a board of county commissioners, the statute having provided a speedy and adequate remedy by appeal.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

Proceedings by George Rogers against Hayes and others, board of county commissioners of Bingham county, to review an order of defendants remitting taxes assessed against the Union Pacific Railway Company. Defendants moved to quash the writ of review, and filed a demurrer to the writ. From an order overruling the demurrer, and refusing to quash the writ, and judgment holding the order of the board void, defendants appeal. Reversed.

Hawley & Reeves, for appellants. Smith & Smith, for respondent.

HUSTON, J. This is an appeal from a judgment of the district court for Bingham county, setting aside and vacating an order made by defendants, the board of county commissioners of said Bingham county, on the 15th day of January, 1892, by which said board canceled and remitted taxes assessed against the Union Pacific Railway Company for the year 1891, amounting to the sum of \$15,566.95, and costs, \$1,557.19. The case, as presented by the record, is as follows: On January 15, 1892, said board of commissioners made and entered the following order, to wit: "It is the opinion of this board of commissioners that the delinquent taxes of the Union Pacific Railway Company, amounting to \$15,566.95, and costs, amounting to \$1,557.19, cannot be collect-

ed. It is ordered that said taxes and costs be, and the same are hereby, canceled, the years and days being taken. Hayes and Breckenridge voted 'Yea,' and Garletz voted 'Nay.'" On the 16th day of January, 1892, plaintiff filed in the office of the clerk of the district court for Bingham county his application for a writ of review. On said 16th day of January the clerk of said court issued said writ as prayed for, directed to defendants, as the said board of county commissioners of said Bingham county, which was duly served. The return shows simply the order of the board as above given, made on January 15, 1892. On January 19, 1892, the defendants filed their motion to quash the writ of review, and also filed at same time a demurrer to the writ. On the 20th day of January, 1892, the district court made and entered the following judgment in said cause: "On this day the above cause came on to be heard, upon the writ and return thereto, and the demurrer interposed by defendants to the writ of review; and, upon the motion to quash said writ, and upon argument by James H. Hawley, special district attorney, on behalf of the defendants, and H. W. Smith, on behalf of the plaintiff, it was ordered that the demurrer to said writ be overruled, and that the motion to quash the writ of review is denied; and, it appearing that the order of the board of commissioners made on the 15th day of January, 1892, remitting and canceling the amount of unpaid taxes due from the Union Pacific Railway, is void, it is therefore ordered that the said order of said board, and the whole thereof, be set aside, vacated, and held for naught. It is further ordered that a copy of this order be served on the clerk of the board of county commissioners of Bingham county." From this judgment, defendants appeal to this court.

Various grounds are alleged in the motion to quash the writ of review, and the demurrer to the writ. It is necessary to consider but one of the purposes of this decision. Section 4962, Rev. St. Idaho, 1887, is as follows: "A writ of review may be granted by any court, except a probate court or justice court, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." The territorial supreme court of Idaho, in *Rupert v. Board*, 2 Pac. Rep. 718, decided that "the board of county commissioners is not a court, has no judicial functions or power, and cannot be vested therewith." We know of no reason why that decision is not good law still in the state of Idaho. With this view of the law, it must be apparent that a board of county commissioners is not one of the "tribunals, boards, or officers" referred to in section 4962, to which a writ of review may issue.

Again, section 4962 provides that the writ of review shall issue in those cases only where "there is no appeal." Now, section 1776 is as follows: "An appeal may be taken from any order, decision, or action of the board, [board of county

commissioners,] while acting in an official capacity, by any person aggrieved thereby, or by any taxpayer of the county where any demand is allowed against the county, or when he deems any order, decision, or action of the board illegal, or prejudicial to the public interests." Here, then, was provided, by express statute, a speedy and adequate remedy for the wrong perpetrated by the board of county commissioners of Bingham county upon the taxpayers of that county by the order entered on January 15, 1892, and by which action of said board over \$17,000 was taken from the taxpayers of said county, and donated to a corporation. Why was not this remedy adopted? The statute is plain and unequivocal, and the supreme court of Idaho, in *Picotte v. Watt*, 81 Pac. Rep. 805, held distinctly that appeal was the only means by which relief could be had from the action of a board of county commissioners. In the case of *Picotte v. Watt*, supra, an excuse was offered for not resorting to the statutory remedy; but in the case at bar, not only is no excuse or reason offered, but we can conceive of none that could be seriously. The application for the writ of review was made the day after the order was entered by the board; so it cannot be urged that there was not time to take the appeal within the period limited by the statute. We are not permitted to presume that the learned counsel who represented the plaintiff in the court below (no counsel appeared for plaintiff in this court, nor were any briefs filed in his behalf here) was not conversant with the statutes of our state and the rulings of this court. We must admit that we are entirely at loss to understand why in so important a matter the plain provisions of the statute were overlooked, and the interests of the taxpayers of Bingham county at least jeopardized to such an amount. The action of the board of county commissioners in this matter is another evidence that in Idaho the interest and welfare of the people are not subjects the intense consideration of which will be at all likely to produce insomnia with the average commissioner.

We do not know upon what law, or by what authority, the board acted in canceling the \$17,000 and upwards of taxes regularly assessed against the Union Pacific Railway. The board were not acting as a board of equalization. The taxes had become delinquent. If it is claimed that the board acted in accordance with instructions from the state board of equalization, we say, this court, on the 12th day of December, 1891, more than a month prior to the making of the order of cancellation by the board, had decided, in the case of *Orr v. Board*, 28 Pac. Rep. 416, that said board had no power to reduce the assessments of railroad property made by the county assessor. It really appears as though the interests of the taxpayers had been "lost in the shuffle" in this proceeding. The district court, in its zeal for the right, and its desire to defeat a most palpable wrong upon the people of Bingham county, overlooked the provisions of law by which the case must be governed.

and has thereby imposed upon this court the distasteful duty of making a decision which, of necessity, does not involve the merits of the case. The board say: "It is the opinion of this board of commissioners that the delinquent taxes of the Union Pacific Railway Company," etc., "cannot be collected." Upon what evidence this opinion of the board was predicated, or what potent arguments were brought to bear upon the board to induce them (or a majority of them) to reach such a conclusion, does not appear by the record, and is wholly a matter of conjecture; but surely the reasons must have been convincing that would induce a board of county commissioners to take \$17,000 from the taxpayers of their county, and donate it to a corporation, when such action on the part of the board was in direct contravention of a decision of the supreme court of the state. Verily, this is a sort of official charity not included in the category of St. Paul, and the recognition of which will strain the piety of the taxpayers of Bingham county fearfully. For the reasons above given, the order and judgment of the district court are reversed, with costs to appellants.

MORGAN and SULLIVAN, JJ., concur.

(3 Ariz. 141)

#### TERRITORY v. BRASH.

(Supreme Court of Arizona. Feb. 4, 1890.)

##### CRIMINAL LAW—ARRAIGNMENT.

A defendant in a criminal case, who is not given an opportunity to plead, as required by statute, does not, by remaining silent when the clerk states to the jury that defendant pleaded "not guilty," adopt the plea as thus stated by the clerk as his own, and a conviction will be reversed on appeal.

Appeal from district court, Pinal county; W. H. Barnes, Judge.

James Brash was convicted of assault. He appeals from the judgment and an order denying his motion for a new trial. Reversed.

Baker & Campbell, for appellant. Clark Churchill, Atty. Gen., and G. H. Oury, Dist Atty., for the Territory.

SLOAN, J. The defendant was indicted at the October term, 1889, of the district court of Pinal county for the crime of an aggravated assault. At the same term defendant was tried under said indictment, and convicted of an assault. From the judgment entered thereon, and the order overruling his motion for a new trial, defendant appeals.

The record in this case fails to show that any plea was ever made by the defendant or entered by the court. It is suggested by the attorney general that, in consenting to go to trial, and in remaining silent when the clerk in the usual form stated to the jury that the defendant pleaded "not guilty" to the indictment, the defendant made the plea as thus stated by the clerk his own. To this it is sufficient to say that, the statutory opportunity to plead having never been extended to the defendant, he was never under



any obligation to plead. No plea having been entered by the defendant, there was no issue for the jury to try, and the verdict of the jury and judgment entered thereon are therefore nullities. Judgment and order reversed, and cause remanded.

WRIGHT, C. J., and KIBBEY, J., concur.

(4 Ariz. 11)

LIEBES et al. v. STEFFY.

(Supreme Court of Arizona. Jan. 28, 1893.)

HUSBAND AND WIFE — SEPARATE ESTATE — ACQUIREMENT BY PURCHASE — FRAUDULENT CONVEYANCES.

1. Under Rev. St. tit. 34, c. 3, § 18, which gives married women over 21 years old exclusive control of their separate property, with power to convey or devise the same, and section 19, which gives them the same rights, as to property and contracts, as are possessed by men, a married woman may, by purchase, acquire personal or real property, and hold it as her separate estate, though section 17 provides that "all property acquired by either husband or wife during marriage, except that which is acquired by gift, devise, or descent, shall be deemed common property of the husband and wife, and during coverture may be disposed of by the husband alone;" the word "acquired," in this section, not being intended to include a purchase made by the wife with her separate estate.

2. Where cattle sold are in the possession of a third person, who is notified of the sale, and who several months afterwards separates the cattle so sold, and delivers them to the purchaser, the fact that there was no immediate change of possession is not conclusive that the sale was fraudulent as against the seller's creditors, since Rev. St. tit. 30, § 5, renders the failure to make an immediate delivery only "prima facie evidence of fraud."

Appeal from district court, Pinal county; Joseph H. Kibbey, Judge.

Proceedings instituted by Nelly B. Steffy to try her right to 50 cattle seized by Louis Liebes and Jacob Liebes on execution against William Steffy. From a judgment in favor of Nelly B. Steffy, the execution creditors appeal. Affirmed.

H. V. Jackson, for appellants. William R. Stone, for appellee.

GOODING, C. J. Appellants obtained a judgment against William Steffy, the husband of appellee, in the sum of \$156.42, on the 8th of June, 1889. Subsequently an execution was issued on said judgment, and levied upon 50 head of cattle of the "22" brand as the property of William Steffy. Nelly B. Steffy (appellee) claimed said property as her separate property, and instituted proceedings to try her right thereto under the provisions of title 61, c. 2, Rev. St. 1887, and filed bond as required, and took possession of said 50 head of cattle. The court below held that she was the owner of said cattle, and entitled to hold the same. The statement of facts and the evidence therein shows that William Steffy was a copartner with one Desmond, and the owner, before his marriage to appellee, of one half of the cattle branded "22," and so continued to be until the sale thereof to his wife, Nelly B. Steffy. That the consideration of said sale was \$1,300, which was

paid to him by his said wife, by a draft for that amount. The draft was drawn payable to and indorsed by her father, James P. Rutledge. That the amount of the draft was a gift to her by her father. That \$1,300 was the fair value of the cattle bought by her. That at the time of the sale of his interest to his wife in said cattle, the cattle were in the exclusive control and management of his copartner, Desmond, and so remained till the following spring, when a division was made, and the share of Nelly B. Steffy was delivered into her possession, and of this share the 50 cattle levied upon under plaintiff's execution were a part. That at the time of his sale to his wife he had no intent to cheat, hinder, or delay his creditors, and that \$1,300 was the full, fair cash value of the cattle sold by him to his wife; and that the sale was, in short, without any intent on the part of Steffy, or his wife, Nelly B. Steffy, to cheat, hinder, or delay creditors.

The motion for a new trial in this case sets up the following grounds: (1) That said judgment is contrary to law in this case; that the court decides that a married woman can purchase personal property, and hold the same as her separate property. (2) That the wife, during coverture, may purchase personal property from her husband, and thereby withdraw such property from the payment of the husband's debts. (3) That the court erred in ruling that the sale of the personal property in this case was valid notwithstanding the fact that when the same was made there was no immediate delivery thereof, and no change in the possession of such property, continued or otherwise. (4) That the judgment of the court is and was contrary to the law and the evidence. That a married woman can purchase personal property, and hold the same as her separate property, we think is quite clear. It is true that section 17, c. 3, tit. 34, provides that "all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife while," etc., "shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband alone." Section 18 provides: "Married women of the age of 21 years and upwards shall have sole and exclusive control of their separate property, and the same shall not be liable for the debts, obligations, or engagements of the husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by them in the same manner, and with like effect, as if they were unmarried." This last section gives the power to contract, sell, mortgage, convey, etc., "in the same manner, and with like effect, as if they were unmarried." To give the wife this plenary power to contract, sell, and convey her separate property without requiring even the consent of her husband, is not consistent with the idea that what she may receive in return for her separate property shall immediately become the common property of husband and wife. Section 19 provides as follows: "Hereafter married women of the age of 21 years and upwards shall have the same legal rights

as men of the age of 21 years and upwards, except the right of suffrage and holding office, and with the right to make contracts binding the common property of husband and wife," etc. It is the intent and purpose of the law, not the letter, that must control; and the whole statute must be considered. This word "acquired," in section 17 above set out, was not intended to include a purchase made by the wife with her separate money or property. Such a construction would be very unjust, and contrary to the spirit of the statute, as well as the drift of all modern legislation. We are clearly of the opinion that a married woman may, by purchase or exchange, acquire personal property or real property, and hold the same as her separate property. In this case the interest of the husband in the cattle was purchased by the wife with property, a gift to her by her father, and a full price paid to him (the husband) therefor. The interest in the cattle owned by the husband was acquired by him before his marriage to appellee. The property was therefore the separate property of the husband before the sale to the wife, and became and was her separate property thereafter. A bill of sale was given, and duly recorded, and the bona fides of the transaction is not questioned.

But it is further claimed by appellant that the title did not pass, because there was no immediate delivery. The statement of facts shows that she (Nelly B. Steffy) testified (and there was no evidence to the contrary) "that immediately upon the sale she notified Desmond of her purchase; that Desmond continued in possession of the cattle until the following spring, when a division was made, and her share thereof was delivered to her; that of this share the 50 cattle levied on are a part." A bill of sale was executed and duly recorded at the time of the purchase, but it is claimed that there must be an actual change of possession and immediate delivery, or the sale will, as matter of law, be held fraudulent as against creditors. Section 5, tit. 30, expressly provides that, unless there is immediate delivery, etc., it is "prima facie evidence of fraud." If prima facie only, the facts may overcome the "prima facie evidence." Section 8, same title, provides: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, and not of law." The judgment of the court below should be affirmed. It is so ordered.

SLOAN and WELLS, JJ., concur.

(4 Ariz. 72)

REILLY v. ATCHINSON.

(Supreme Court of Arizona. Jan. 28, 1893.)

ASSIGNMENT OF ERROR—LIABILITY ON APPEAL BOND.

1. An assignment of error referring the court to certain pages of the transcript is too general, and will not be considered.

2. An appellee, who has procured the dismissal of the appeal because of the noncompliance of the bond with statutory requirements, cannot afterwards recover against the sureties on such bond.

3. The delivery and filing of an insufficient statutory appeal bond with the clerk of court does not render it binding on the sureties as a voluntary bond, because it was not delivered to or accepted by appellee.

Appeal from district court, Cochise county; Richard E. Sloan, Judge.

Action by James Reilly against T. A. Atchinson on an appeal bond. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

James Reilly, in pro. per. C. S. Clark, for appellee.

WELLS, J. This action grew out of the following facts: The appellant recovered a judgment in the district court of the first district against Henry T. Baldridge on the 20th day of May, 1889, from which judgment Baldridge appealed to this court. The appeal was dismissed, upon motion of Reilly, on the ground that the purported appeal bond was not a sufficient bond, as required by the statutes, to give this court jurisdiction to hear the appeal. The appellant above brought this action to recover against the appellee as a surety on said purported bond. Appellee had judgment, and the plaintiff appealed.

The error complained of must be specifically specified, so that the court may know upon what the appellant relies. The first assignment refers the court to pages 13 to 18 of the transcript. The assignment is too general, and will not be considered.

The other assignment is that the court erred in deciding that the instrument sued on was not sufficient to sustain a recovery. The instrument sued on is not such a bond as is required by the statute for a bond on appeal, nor is it substantially a statutory bond. Such was the ruling of this court in dismissing the appeal in the case of Baldridge against Reilly. The dismissal was had upon the motion of said Reilly, on the ground of the insufficiency of such instrument as a bond on appeal. The bond, not being such as the statute required, did not, in law, operate to stay execution on the judgment referred to in it. It was not valid, as against the appellee, had he proceeded to enforce his judgment. He was not concluded by it. There was no consideration for it.

Appellant suggests that, if it is not good as a statutory bond, may it not be a good voluntary bond? We do not think it meets the requirements of a valid instrument of that character. There is no obligee or payee mentioned in the instrument, nor was it delivered to and accepted by the appellee. He in no manner expressed an assent to it. If anything, the giving of the bond was antagonistic to appellee's wishes. These are essential requisites. It must be delivered by the party, whose bond it is, to the other. Its delivery to and filing by the clerk of the court was not such a delivery as to make it a voluntary bond. It was not such a bond as the clerk was authorized to approve; nor was he the agent of the obligee, or received it in that capacity. Without a legal delivery the surety on a voluntary obligation is not bound.

The bond not conforming to the statute, so as to make it a statutory bond, or not becoming binding on the sureties as a voluntary bond because not delivered and accepted, the necessary conclusion is that no recovery can be had, where a defense is made upon that ground. The judgment of the lower court should be affirmed, and it is so ordered.

GOODING, C. J., and KIBBEY, J., concur.

(3 Ariz. 277)

CHARLES T. HAYDEN MILLING CO. v. LEWIS.

(Supreme Court of Arizona. Jan. 24, 1891.)

PARTNERSHIP NOTE—VALIDITY—EVIDENCE.

1. Where a partner gives his individual note, secured by mortgage on his individual property, to raise funds for the partnership business, a note executed in the partnership name to such partner, and indorsed by him to the holder of the individual note, to procure an extension of time on that note, is valid in the hands of such holder as against the partnership, though given merely for the accommodation of such partner, without the knowledge of one of the members of the firm.

2. In an action on the firm note, a question put to the holder whether he did not consider the mortgage ample security for the individual note at the time he took it is properly excluded, as an affirmative answer would not show that the partnership note, given months afterwards, was not taken as additional security for the first note.

3. Evidence that the partner executing the individual note was indebted to the firm at the time of such transaction is immaterial where it does not appear that the holder of such note knew of that fact, and it does appear that the money procured on such note was used in the partnership business.

4. Where the partner executing the firm note has testified to an alteration of the note by the erasure of certain words and the substitution of others, the exclusion of a question as to whether a certain chemical had been used on the note to make the erasure is not reversible error, the witness not having qualified himself as an expert, and the firm having had the benefit of his testimony as to the fact of the alteration.

Appeal from district court, Maricopa county; Joseph H. Kibbey, Judge.

Action by Sol. Lewis against the Charles T. Hayden Milling Company, a partnership, on a note executed by defendant. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

L. H. Hawkins and Goodrich & Street, for appellant. Baker & Campbell, for appellee.

PER CURIAM. Appellee, Sol. Lewis, brought suit against C. T. Hayden, A. J. Peters, and A. C. Webster, partners doing a mercantile business under the firm name of Charles T. Hayden Milling Company, upon the following promissory note: "No. 6,186. Phoenix, Arizona, August 20th, 1888. On the 18th day of November, A. D. 1888, without grace, for value received, we promise to pay to the order of A. C. Webster, at National Bank of Arizona, four thousand dollars in U. S. gold coin, with interest thereon at the rate of one and one half per cent. per month from

date until paid. Interest payable monthly. Note and mortgage, A. C. Webster. [Signed] Chas. T. Hayden Milling Company. A. J. Peters." The complaint alleges an assignment and delivery by Webster, the payee therein, to the plaintiff, for a valuable consideration. The answer denied the execution of the note by the Charles T. Hayden Milling Company, and alleged that it was executed by A. J. Peters, one of the partners of said firm, without consideration, for the accommodation of A. C. Webster, another partner, to be used by Webster in his private affairs, and without the knowledge or consent of Charles T. Hayden, the remaining partner in said firm; that said note was left by Webster with the National Bank of Arizona for the purpose of representing to others his financial worth, and that thereafter he indorsed the same, but instructed the bank not to collect the note unless so directed by him; that Webster never instructed the collection of the note, but directed that it be given up to the Charles T. Hayden Milling Company; that said bank delivered said note to the plaintiff, Lewis, who held the same as collateral security on a pre-existing debt owing him from Webster, which was already secured by a mortgage on property of Webster's; that none of these acts were ratified by the partner Hayden. The cause was heard by the court without a jury, and judgment entered for appellee. A motion for a new trial having been overruled, the defendant appealed.

The first assignment of error upon which we are asked to reverse the judgment and grant a new trial is "that the court erred in its judgment as to the legal effect and sufficiency of the evidence, and in considering the same sufficient to find for the plaintiff in any amount." In addition to the note, the only evidence offered by the appellee was the testimony of George W. Hoadley, the cashier of the National Bank of Arizona, who testified to the circumstances connected with the execution of the note and its transfer to the appellee. He stated, in substance, that on the 22d of May, 1888, Webster, as a partner in the firm of Hayden & Co., applied to witness, as the agent of appellee, for a loan of \$4,000 for the use of the firm. The security offered by him being unsatisfactory, Webster gave his individual note, secured by a mortgage on his own property, and received the amount applied for, from appellee. That the money so borrowed by Webster was at once placed to the credit of Hayden & Co. at the said National Bank of Arizona, and checked out by A. J. Peters for the use of said firm. That at the end of each month thereafter the appellants were charged with the interest on this note of Webster's, and had notice given to them of this fact, and that interest so charged was paid by said firm. That a short time before the note became due Webster came to the bank, and asked witness, as the agent of appellee, for an extension of three months' time on his note, and promised to give the note in suit as additional security in consideration of such extension. That, in pursuance to such promise, Webster appeared

with A. J. Peters, a member of the firm, who was known to Hoadley to have charge of the financial affairs of the firm, and authorized to sign its name to the firm's paper, and that Peters then executed the note in question in the name of the firm, and that Webster there and then indorsed the same, and turned it over to witness as the agent of appellee, to be by him held as additional security to the Webster note. The evidence produced by the defense establishes, rather than otherwise, the bona fide nature of the transaction, at least on the part of Hoadley. Peters, while on the stand, corroborated the statement of Hoadley that the money borrowed on the Webster note was for the benefit of the firm, and admitted to having been a member of the partnership, intrusted with the signing of the firm's name to its paper; and that at the time the note in question was executed nothing was said from which Hoadley might infer that the note was anything else than what it appeared on its face to be,—the valid obligation of the firm,—and made upon good consideration. It follows, therefore, that it is immaterial what may have been the real transaction relative to the execution of the note as between the partners constituting the firm of Hayden Milling Company. The law is well settled that in the hands of an innocent holder for value a promissory note made by one member of a trading partnership in the name of the firm is valid, notwithstanding it was not made in the usual course of the business of the firm, and that other partners did not give their consent and had no knowledge of its execution. *Bank v. Morgan*, 73 N. Y. 593; *Haldeman v. Bank*, 28 Pa. St. 440; *Boardman v. Gore*, 15 Mass. 331; *Rich v. Davis*, 6 Cal. 141. Even if it were true that the note was signed in the firm name by Peters for the accommodation of Webster, without consideration, and without the knowledge or consent of Hayden, the remaining partner, these circumstances not being known by Hoadley at the time of the execution and indorsement, and nothing appearing upon the face of the note to put him upon inquiry, appellee became an innocent holder for value upon the extension of the time for payment of the note held by him against Webster, and was entitled to recover from appellant. The fact that the promissory note was made payable at the expiration of three months' extension upon the Webster note, and the further fact that in the note itself were written the following words, "Note and mortgage, A. C. Webster," are sufficient in themselves to negative the statement of Webster that the firm note was assigned by him to Hoadley for collection, and not to be held by him, as appellee's agent, for additional security for his own note. We find, therefore, no error in the court rendering judgment upon the evidence as presented by the record.

Several errors are assigned in the rulings of the court upon the introduction of evidence. The first of these relates to the cross-examination of the witness Hoadley. The witness was asked by counsel for appellant "if at the time he took the note

and mortgage from Webster for Lewis he did not consider the mortgage ample security?" Why counsel seriously should claim the ruling of the court in sustaining the objection to this question to be error, is not clear to us. It is to be presumed that the witness did so consider the mortgage from the fact that he loaned the amount mentioned in the note upon the strength of the security taken. Nor is it to be considered as tending in any way to show whether the subsequent note was or was not given as additional security to the first note, given months after its execution. Appellant attempted to show by the witness Peters that Webster was indebted to the firm of C. T. Hayden Milling Company at the time he obtained the loan from appellee. This evidence was excluded by the court, and this ruling is made the ground of another assignment of error. This evidence, unless it were shown that Hoadley, as the agent of appellee, knew that he was so indebted, would not be material further than as indicating whether the loan was made for his own benefit or for that of the firm; but as Peters had previously stated that the \$4,000 had been used by the firm, and that this fact was known to Hoadley, he would be estopped from showing, as a member of the firm, that the transaction was otherwise than what it appeared to be. The appellant chiefly relies upon the rulings of the court as presented by bill of exceptions No. 6 in the record as error sufficient to reverse the judgment. The witness Peters stated on the stand that at the time he signed the note sued upon the words, "Note and Mortgage, A. C. Webster," did not appear upon it; that afterwards he saw the note, and it then had on it the words, "additional security, Crissmon ranch." He was asked by counsel for appellant whether he was familiar with bookkeeping and handwriting and the making and alteration of instruments and erasures and interlineations, to which he replied that "he was somewhat." He was also asked whether there was a preparation made for the erasure or blotting out of anything written, and whether he had seen its application, to which he replied that he had, and that he had some of the preparation in his possession; whereupon the counsel asked him if there had been any use of that chemical upon the note. This question was objected to, and the objection sustained by the court. Counsel then excepted, and stated that he wanted to prove the words, "Additional security, Crissmon ranch," had been erased, and the words, "Note and mortgage, A. C. Webster," put in its place. The court then said "it would not be a material alteration." The ruling of the court refusing to permit the witness to answer the question might be sustained on various grounds. In the first place, the question was suggestive and leading. Then, again, he had not sufficiently qualified himself as an expert to answer the question, and it did not appear that he had sufficient knowledge, based upon an inspection of the note, to testify concerning the fact. If it were sought by this question (which is not clear) to elicit from the witness tes-

timony to prove that an alteration had been made, the note itself would have been the best evidence of any erasure, or the use of any chemicals upon it. The note was not offered in evidence, nor was any other testimony proffered by counsel upon this point, nor was it suggested that the note bore any evidence of an erasure or alteration, for the purpose of showing that the words, "Note and mortgage, A. C. Webster," were not upon the note when executed. The direct and positive statement of the witness that the words were not there when he signed the same, but that afterwards he saw the words, "Additional security, Crissmon ranch," thereon, rendered the mere opinion of the witness, even if competent, based upon slight circumstances of discoloration or other evidence of the use of a chemical, of little or no additional value; and, besides, these appellants had thus the full value of the testimony of the witness as to the fact that an alteration had been made upon the face of the note. We find no errors in the rulings of the court upon the exclusion or rejection of evidence.

We have examined with care that part of the motion for a new trial based upon newly-discovered evidence, and the affidavits in support thereof. The showing is insufficient, in that much of the newly-discovered evidence would have been cumulative merely, and would not have changed the result of the trial. Besides, the affidavits fail to show diligence in the procurement of the evidence. The motion, therefore, was properly denied.

The judgment is affirmed.

(4 Ariz. 16)

**BUTLER v. SHUMAKER et al.**

(Supreme Court of Arizona. Jan. 25, 1898.)

**APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

In an action to establish a trust in land in plaintiff's favor on the ground that it was purchased with her property by defendant, who took title in his own name, a finding of the lower court that no trust resulted, made on conflicting evidence as to whether plaintiff or defendant furnished the purchase money, will not be disturbed on appeal.

Appeal from district court, Maricopa county; Joseph H. Kibbey, Judge.

Action by Pierce W. Butler, as administrator, etc., of Georgia Butler, deceased, against Trinidad Shumaker and H. Shumaker, to establish a trust in plaintiff's favor. From a judgment in defendants' favor, plaintiff appeals. Reversed.

Edwards & Buck, for appellant. H. N. Alexander, for appellees.

**WELLS, J.** Action in equity to establish a trust in defendant Trinidad Shumaker of certain real estate situate in the city of Phoenix, in this territory, for the benefit of plaintiff, Georgia Butler. Also to decree as a mortgage a certain deed given by said Trinidad to the defendant H. Shumaker, conveying the said real estate; to permit plaintiff to pay the alleged mortgage debt; and to decree the title of the said property in plaintiff. There was a trial by the court, and a judgment for

the defendants, from which, and the order overruling the motion for a new trial, plaintiff appeals.

The first assignment of error is that the court erred in overruling the motion for a new trial, for the reason that the verdict and judgment of the court is contrary to the law and the evidence. Notwithstanding the assignment is general in its character, we pass over any objection thereto, and consider the questions raised by the assignment. The first question presented by the plaintiff for the district court to determine was, did the evidence adduced at the trial establish a trust alleged and relied upon in the complaint? In fact this is the first step to be taken by plaintiff leading to a recovery. The facts upon which the trust is sought to be established, summarized from the testimony appearing in the record, are substantially as follows: On the part of the plaintiff it appears that in the month of September, 1879, the plaintiff, Georgia Butler, whose maiden name was then Georgia Swilling, and who is the daughter of the defendant Trinidad Shumaker, was the owner of about 30 head of cattle of the value of about \$500. That at about that time said Trinidad traded, sold, and delivered said cattle to one Woolsey, who, in consideration therefor, was to transfer the real estate in question, and finish the house thereon. That in the year 1880 Woolsey died, without having made the transfer. His estate was administered upon, the administrator in due course of his administration selling the property in question at public sale. That said Trinidad purchased the property at said sale for the sum of \$11, and took a deed to herself and in her name. The testimony for plaintiff, taken alone, tended to establish plaintiff's theory that the defendant Trinidad, in the transaction just indicated, was acting for and in behalf of the plaintiff, Georgia Butler. The defendant Trinidad Shumaker testified that she was a widow, having certain property after the death of her husband; that the cattle traded and sold by her to Woolsey for the real estate in question belonged to her; that she purchased them from a Mrs. Stevens, paying for them with her own property; that she traded them to Woolsey as her own and in exchange for the real estate to procure a home for herself; that, in addition to the lots, Woolsey agreed to build a house for her on the lots, which he commenced, but died before finishing; that she finished the house herself, and has lived in it and occupied it for 12 years, and since the purchase from Woolsey. After the death of Woolsey, at her instance, Capt. Hancock attended to the business of finishing the house and completing the title, and he purchased the property for her at the administrator's sale. The witnesses for the plaintiff and the defendants testified at some length, and the evidence in its entirety is contradictory and uncertain; the plaintiff's witnesses testifying to facts which are denied and contradicted by defendant Trinidad, who is corroborated in a measure by other evidence.

There is some contention between counsel as to the character or nature of trusts.

We do not consider it important whether there was a resulting or constructive trust in this case. The facts to be established are, was there a trust, and has plaintiff sufficiently established it? It is conceded that the trust is not in writing, but rests in parol, and, resting in parol, the proof in character is the same whether to establish a resulting or constructive trust. A trust may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, and contradictory. It must be full, clear, and satisfactory. The burden of proof is upon the one seeking to establish it, and, if the testimony is conflicting, under the well-established rules the judgment of the lower court will not be disturbed. The judgment of the lower court was for the defendants, for the reason that plaintiff failed in the evidence to establish a trust, it devolving upon him to produce sufficient and satisfactory proof; and what is sufficient and satisfactory proof is for the trial court to determine. We have looked into the whole evidence. Upon important points it is contradictory and conflicting. In its state we cannot say that the judgment of the district court was not authorized, even should it appear to us that the preponderance of the evidence was in favor of the plaintiff. It devolved upon the trial court to weigh the evidence, and to pass upon the credibility of the witnesses, who were personally before it; and, if he believed one rather than the other, we have no right of determining that his conclusions were wrong. We can only reverse when there is a want of evidence to sustain the judgment, or when the judgment is so manifestly against the weight of evidence as to show it to be the result of bias or prejudice. When the decrees sought to be reversed is based upon depositions which are so conflicting and of such a doubtful and unsatisfactory character that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusions to be deduced therefrom, the appellate court will decline to reverse the decree, although the testimony may be such that the appellate court might have rendered a different decree if it had decided the case in the first instance. *Alderson v. Commissioners*, (W. Va.) 8 S. E. Rep. 278; *Clift v. Clift*, (Tex. Sup.) 10 S. W. Rep. 339; *Sprague v. Locke*, (Colo. App.) 28 Pac. Rep. 142. This doctrine is so well established that we need cite no further authorities. The plaintiff failing to establish a trust estate, there is no necessity for inquiring into the merits of the deed from *Trinidad Shumaker* to *H. Shumaker*. We have come to the conclusion that the judgment of the lower court must be affirmed, which is accordingly done.

(3 Ariz. 204)

**KOONS et al. v. PHOENIX MIN. CO. et al.**

(Supreme Court of Arizona. Sept. 2, 1890.)

REVIEW ON APPEAL—NEW TRIAL—NECESSITY OF BILL OF EXCEPTIONS.

The appellate court will not consider errors assigned as a ground for a new trial where no bill of exceptions was preserved to

the ruling of the trial court on the motion for a new trial. *Sutherland v. Putnam*, (Ariz.) 24 Pac. Rep. 320, followed.

Appeal from district court, Maricopa county; Joseph H. Kibbey, Judge.

Action by A. B. Koons and others against the Phoenix Mining Company and others. From a judgment for defendants, and an order overruling a motion for a new trial, plaintiffs appeal. Affirmed.

Edwards & Buck, for appellants. Baker & Campbell, for appellees.

**PER CURIAM.** Upon the authority of *Sutherland v. Putnam*, (Ariz.) 24 Pac. Rep. 320, we cannot consider the errors assigned by appellant in this case, as no bill of exceptions was preserved to the ruling of the court upon the motion for a new trial. There is nothing but the minute entries of the clerk in this transcript showing that the motion was ever made or acted upon by the court. All the errors assigned might have been good cause for a new trial, and should have been urged in the court below in their motion, and, if an adverse ruling was made, this ruling excepted to, and presented to us by a proper bill of exceptions. As no error appears upon the face of the record, the judgment of the court below is affirmed.

(3 Ariz. 277)

**RICHARDS et al. v. GREEN, County Treasurer.**

(Supreme Court of Arizona. Sept. 3, 1890.)

REVIEW ON APPEAL—MOTION FOR NEW TRIAL—DAMAGES ON INJUNCTION BONDS—PLEADING AND PROOF.

1. The appellate court will not review any alleged error, which might have been good ground for new trial, where the record fails to show that any motion for new trial was made in the court below. *Sutherland v. Putnam*, (Ariz.) 24 Pac. Rep. 320, followed.

2. Comp. Laws 1877, §§ 2547-2555, provide for a bond, when an injunction is applied for, that the plaintiff will pay to the party enjoined such damages, not exceeding an amount specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. *Held*, that counsel fees are not recoverable on such bond, since, under the organic law of Arizona, its courts must follow the decisions of the United States supreme court, not only in cases involving federal questions, but in those involving the construction of local statutes, and such court has decided that counsel fees are not recoverable in such cases. *Oelricks v. Spain*, 15 Wall. 211, followed.

3. A party will not be allowed to introduce evidence to prove a cause of action different from the one set out in his complaint.

4. A county cannot recover interest on taxes, by way of damages, in an action to enjoin their collection, unless imposed by statute.

Appeal from district court, Yavapai county; James H. Wright, Judge.

Action by Nathaniel W. Green, treasurer of Apache county, against Hugo Richards and another, to recover, on an injunction bond, the damages sustained by plaintiff by reason of the injunction. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. C. Hazeldine, E. M. Samford, and J. A. Williamson, for appellants. Harris Baldwin and D. P. Baldwin, for appellee.

KIBBEY, J. On the 5th day of February, 1886, the Atlantic & Pacific Railroad Company, upon proper complaint, obtained in the district court for the third district a temporary injunction restraining the treasurer of Apache county from selling certain lands, and the improvements thereon, and the culverts, bridges, grading, rock and earth cuts and fills, etc., property of the said railroad company then advertised by said treasurer for sale for the payment of taxes assessed and levied against said railroad company. On said day said railroad company caused to be executed a bond, with Hugo Richards and Edward Wells, the appellants herein, as sureties, in the sum of \$9,732, conditioned for the payment to said treasurer of such damages as he might sustain by reason of said injunction, if the court should finally decide that said railroad company was not entitled thereto. On the 9th day of June, 1887, a motion to dissolve the temporary injunction was denied. On the 10th of November, 1887, after a trial upon the merits, the injunction was dissolved, and the complaint dismissed. The railroad company thereafter appealed from that judgment to this court, and the appeal was there, by the appellant, dismissed. See *Railroad Co. v. Lesueur*, (Ariz.) 19 Pac. Rep. 157. This action is for the recovery on the injunction bond of the damages sustained by said treasurer by reason of the injunction. Appellee alleged in his complaint that by reason of the injunction he was prevented from collecting taxes amounting to \$9,171.44, and penalty and costs, amounting to \$560, from the 9th day of February, 1886, until the 26th day of January, 1888, and that his damages occasioned thereby are \$1,863, interest on said taxes and penalties, and the further sum of \$1,680, expended as attorneys' fees in obtaining the dissolution of said injunction, and \$400 expended in procuring the attendance and testimony of witnesses in and about the obtaining of the dissolution of the injunction. The appellants demurred to the complaint (1) because appellee was not entitled to recover attorneys' fees as a part of his damages; (2) that the appellee was not entitled to recover interest on taxes, penalties, and costs. The demurrer was overruled. There was a trial, and judgment for appellee for the sum of \$200.89 and costs of suit, from which this appeal is taken. The overruling of the demurrer, and the admission of certain evidence at the trial, are assigned as errors.

As the error in admitting evidence, if error it was, was good ground for a new trial, and it not appearing from the record before us that any motion for a new trial was made in the court below, for that or any other cause, that alleged error is not before us for consideration. *Sutherland v. Putnam*, (Ariz.) 24 Pac. Rep. 320.

The only question properly presented for our consideration is the correctness of the ruling of the court upon the demurrer

to the complaint. The statute upon the subject of injunctions, in force at the time the bond in suit was executed, was copied from the statute of California. Comp. Laws Ariz. 1877, §§ 2547-2555; Code Cal. (Hittell,) §§ 10525-10533. It is by that statute prescribed that the undertaking shall be conditioned "to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled" to the injunction. Substantially similar provisions are found in the statutes of nearly all the states and territories. It is conceded by appellants that it is held by the courts in a very large number of states that counsel fees may be allowed in suits upon injunctions under statutes similar to our own; but they contend that we are bound by the decisions of the supreme court of the United States, and cite *Oelricks v. Spain*, 15 Wall. 211, where that court denies the right to recover counsel fees as part of the damages in such a suit. We do not entertain any doubt but that, had the statute provided that attorneys' fees incurred by the defendant in procuring the dissolution of a temporary injunction should be an element of damage recoverable in a suit on the bond, such provision would have been valid. But the statute has failed to do so and we are left to determine the question by reference to the analogies of the law, and a consideration of sound public policy; and in this, inasmuch as this court has never passed upon the question, we are to be guided largely by the declarations of other courts. As we have said, the preponderance of authority in the state courts is that counsel fees are recoverable in a suit upon an injunction bond, in a case like this. But the weight we may attach to the decisions of different courts as authority depends to a considerable degree upon the relation in which we stand to these courts. By virtue of the provision in the constitution of the United States that congress may make needful rules and regulations respecting the territory of the United States, (Const. art. 4, § 3, subd. 2,) or that that power is incident to the right to acquire territory, congress has undertaken to provide for the government of the territories, (*Insurance Co. v. Canter*, 1 Pet. 511; *Clinton v. Englebrecht*, 13 Wall. 434-447; *Nelson v. U. S.*, 30 Fed. Rep. 112.) The theory upon which the governments of the various territories have been organized has been to leave to the inhabitants all powers of self-government consistent with the supremacy of national authority, and within the limits prescribed by the organic acts. *Clinton v. Englebrecht*, 13 Wall. 434. By the organic act of Arizona the legislative power extends to all rightful subjects of legislation, not inconsistent with the laws and constitution of the United States. Section 1851, Rev. St. U. S. It is provided that the supreme court of the territory shall consist of the chief justice and two associate justices, to be nominated by the president; that the territory shall be divided into three districts, and a district



court shall be held in each district by one of the supreme judges. By section 1904 the judicial power in Arizona is vested in a supreme court, and such inferior courts as the legislative council may by law prescribe. These courts are in no sense United States courts, although there is vested in the district courts of the territories the exercise, in all cases arising under the constitution and laws of the United States, of the same jurisdiction as is vested in the circuit courts of the United States. *Clin-ton v. Englebrecht*, *supra*; *Good v. Martin*, 95 U. S. 98; *Reynolds v. U. S.*, 98 U. S. 154; *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780. It is, however, provided by the organic act that writs of error and appeals from the final decision of the supreme court of this territory to the supreme court of the United States, where the amount in dispute, exclusive of costs, shall exceed the sum of \$5,000; and this not only in cases arising under the constitution and laws of the United States, but those arising under the local laws of the territory. And herein is a very plain, and we think important, distinction to be observed between the relation of the courts of the territories to the supreme court of the United States, and the relation of the state courts to that court. The state courts are subordinate to the supreme court of the United States only in cases involving federal questions, and not in those involving only local questions. The territorial courts are completely subordinate to the United States court. It is the court of final resort, and its decisions are binding and conclusive upon us. The supreme court of the territory is really but an intermediate appellate court, and this is in pursuance of the theory that the governments of territories shall always be subject to the supervision of the national authority.

It is argued that the supreme court of the United States, in construing the local laws or statutes of the states, have almost universally adopted their construction given by the state courts, and that, therefore, if this court should determine the question before us, the supreme court of the United States would adopt our determination, notwithstanding they have held otherwise in another case. This we believe is the rule with reference to the construction of state laws, and it follows naturally from the relation existing between the state courts and the federal courts. The states have a right to determine what the rights of their citizens shall be among themselves, subject only to the limited sovereignty of the national government; and it would be a strange doctrine if the federal courts should, as between the citizens of one state and those of another within the territorial limits of the latter, by its judgment, accord to the former greater or different rights, as against such citizen, than a citizen of the state might have. The federal courts have no supervisory power over the local administration of justice in the states; and that different rights may not flow from the same transaction, depending simply upon a difference in the tribunal where it is sought to enforce them, the

federal court should, and they have, whenever called upon to enforce rights depending upon local laws, adopted and followed the construction given them by the state courts. They adopt, not only the construction placed by the local courts upon local statutes, but also the declarations of those courts as to the common law. As we have said, the supreme court of the United States cannot review the decisions of the state courts upon matters of purely local concern, arising under local laws. But our organic act confers upon every citizen of this territory the right of appeal, first to the territorial supreme court, and thence to the supreme court of the United States. To say that that court will be bound by the decisions of this court upon matters involving the construction of local laws is simply to divest the right of appeal of any benefit to the appellant. To argue that a litigant may appeal from this court to the supreme court of the United States, and then that that court will adopt the construction placed by this court on the law involved, and therefore affirm the judgment, is, it seems to us, an absurdity. This is a condition that cannot arise between the state and federal courts. It is a condition expressly created by congress to enable the national government to retain and exercise its supervisory control. These cases, then, cited by appellee, to the effect that the supreme court of the United States will adopt the construction of the local laws of the states placed thereon by the courts of the states are not pertinent to the question before us. Appellee cites *Good v. Martin*, 95 U. S. 98, in support of the theory that that court will adopt the construction of the territorial courts. But no question of construction was involved in that case. The question was as to the power of the territorial government to make a different rule as to the competency of witnesses than that prevailing in the courts of the United States, and the court says that such power existed, and was exercised. And so in *Reynolds v. U. S.*, 98 U. S. 154, it was not a question of adherence to the construction of certain laws by the territorial court. It was whether grand juries were to be impaneled under the provisions of the territorial or the United States statutes. And in *Hornbuckle v. Toombs*, 18 Wall. 648, the question was not one of construction, but of power of the territorial legislature to blend common law and equitable jurisdiction and procedure in the courts of the territory. And in *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780, it was decided that an alien was a competent grand juror because a statute of the territory made him so. It was not a question of adherence to a construction placed on a law by the territorial court. While we concede to the courts of California, Missouri, New York, Iowa, Indiana, Louisiana, etc., the greatest respect, we are bound by *Oelricks v. Spain*, *supra*. The demurrer should have been sustained, and the item for attorney's fees stricken out.

We next come to the consideration of the allowance of interest on the amount of tax due, for the time the county was

deprived thereof. We are relieved of much labor by the concessions of counsel for appellee. It is conceded by appellee that taxes do not bear interest unless imposed by statute, and the statute under which the taxes in dispute were levied made no such imposition. The allegation of the complaint is "that this plaintiff, as such treasurer and ex officio tax collector, and in his official capacity as such has by reason of the said injunction sustained damages in the following sums, to wit: \$1,463, interest on said taxes, and penalty and costs, from the 9th day of February, 1886, till the 26th day of January, 1889; \$1,560, \* \* \* attorney fees; \* \* \* and \$400 expended in securing the attendance and testimony of witnesses; \* \* \* and these are all the items of damages alleged. On that the court, in its finding, assesses damages \* \* \* in the further sum of \$1,702.89, as damages for and on account of interest on the taxes enjoined." And this in the face of appellee's concession in his brief that "we instantly admit that taxes do not bear interest, and, as the question is so clear that its very simplicity banishes argument, we immediately flee from appellants' offer to discuss it." It is argued by appellee that the damages allowed by the court below, and designated by the court as "interest on the taxes enjoined," were not really so, but was the interest on the indebtedness of the territory and county incurred by reason of their deprivation of the sum due as taxes. It is enough to say that under the pleadings evidence to sustain such a view was not permissible, and the finding of the court below indicates that such was not the theory on which the case was tried. The demurrer on the ground that taxes do not bear interest should have been sustained and that allegation stricken out. 1 Deady, Tax'n, p. 9; Ormsby v. Louisville, 79 Ky. 202; Railroad Co. v. Hopkins Co., (Ky.) 9 S. W. Rep. 497. For the errors in the record we have noted, the case must be reversed, and the district court is directed to sustain the demurrer to the complaint.

(1 Okl. 302)

## QUINTON v. CUTLIP.

(Supreme Court of Oklahoma. Jan. 27, 1893.)

## SALE—WHEN TITLE PASSES—DELIVERY.

The clerk of a provisional city government, under instructions from W., mayor of the city, and N., city attorney, ordered of plaintiff certain books, in the name of the city, the books being intended as payment for services rendered the city by N. Plaintiff shipped the books, consigning them to W., but charging them to the city. When the books reached W., although neither he nor N. was then an officer of the city, W. directed a delivery of them to N., who received them, and sold them for value to defendant. Held, that as the sale was not completed, from the fact that there never was a delivery of them to the city, to whom they were sold, the title did not pass from plaintiff; the receipt of them by N. being a wrongful conversion, by which he acquired no title, and hence could give none. Moody v. Blake, 117 Mass. 23, followed.

Appeal from district court, Kingfisher county; A. J. Seay, Judge.

Replevin by A. B. Quinton, assignee of Crane & Co., against T. G. Cutlip. From a judgment for defendant, plaintiff appeals. Reversed.

W. W. Noffsinger, for appellant. R. C. Palmer, for appellee.

BURFORD, J. Plaintiffs, Crane & Co., brought their action in the district court of Kingfisher county, in replevin, to recover one set of Kansas Supreme Court Reports from volumes 1 to 42, inclusive. Issues were joined, and a trial had by jury; verdict and judgment for the defendant. The facts deducible from the record show that in the year 1889 the inhabitants of Kingfisher, Okl., met and organized what they were pleased to designate a "city government," and elected one W. A. Wilson mayor, W. E. Hamblin clerk, and P. S. Nagle city attorney, and other persons as a common council. These persons proceeded to exercise the powers and duties of a municipal corporation until the 8th day of July, 1890, when a de jure city government was organized, pursuant to the laws of Nebraska then in force in said territory, which de jure government took actual and active control of the affairs of said city, with a complete complement of officers, on the 14th day of July, 1890. The former provisional officers—Wilson, Hamblin, and Nagle—were neither of them officers or agents of the de jure corporation. During the existence of the provisional government, Wilson, Hamblin, and Nagle had a talk in which Nagle claimed the provisional government was indebted to him for legal services, and, if the city would purchase for him a set of Kansas Reports, he would accept the same in payment for his legal services, and release the city. Pursuant to this talk, the following letter was written, and sent the plaintiffs, at Topeka, Kan.: "Kingfisher, O. T., July 8, 1890. George W. Crane, Esq., Topeka, Kansas—Dear Sir: I am instructed by the mayor and council of the city of Kingfisher to order one Compiled Laws of the Statutes of the State, edition of 1889, and the Reports complete of said state. Send the same by express to W. A. Wilson, mayor of the city of Kingfisher. On receipt of books, registered scrip of said city will be forwarded to you, payable three months after date. Respectfully, W. E. Hamblin, City Clerk." In answer, plaintiffs wrote as follows: "July 14th, 1890. W. E. Hamblin, Kingfisher, O. T.—Dear Sir: Your favor of July 8th, ordering a copy of Kansas Statutes and a set of Kansas Reports, received. We are temporarily out of a few volumes of the Reports, but will have them in a few days, when we will forward you the whole lot by freight. We notice you order them shipped by express, but this would be very costly, and the difference in time would not justify it." Again, on July 25, 1890, plaintiffs wrote as follows: "W. E. Hamblin, Kingfisher, O. T.—Dear Sir: We have shipped the books ordered for your city, and have charged the amount as our cash price, but add ten per cent. to cover the discount on the city warrant. If the amount is paid

in cash, this amount, of course, is to be deducted. Please send us the warrant as soon as you can, and oblige." The books were packed, and delivered to the Chicago, Rock Island & Pacific Railway Company on July 23, 1890, consigned to W. A. Wilson, Kingfisher, O. T., and charged on the books of Crane & Co. to the city of Kingfisher. They arrived at Kingfisher during the latter part of July, or first part of August, and were taken by the drayman from the railroad depot to Wilson, who directed him to deliver them to Nagle. They were left at Nagle's office, and the charges paid by one Ferguson, a friend of Nagle's. The books remained in the possession of Nagle about three months, and were sold by him to the defendant, Cutlip, for the sum of \$97.50. After the shipment of the books the plaintiffs continued to send monthly statements of their account to the city clerk, to which they received no response until February 18, 1891, when they received a letter inclosing a warrant for \$3.50 for other goods, and signed by "J. L. Trout, City Clerk," and on the same day they wrote Mr. Trout as follows: "February 18th, 1891. J. L. Trout, Kingfisher, O. T.—Dear Sir: Your esteemed favor of the 14th inst. is received, with \$3.50 in scrip, which we have applied to the credit of the city of Kingfisher. We also have an account against the city, which we presume is filed with you, and that should have been attended to before this, and we inclose herewith a duplicate bill, sworn to, being for a set of Kansas Reports and General Statutes of 1889, \$164.45. It is now seven months since these goods were sent, and are close cash goods, and should have been settled long ago. Will you please look the matter up, and ascertain for us what has been, or what is intended to be, done in regard to the matter. If there is any disposition on the part of the authorities to refuse to pay the bill, we are perfectly willing to take them back, and obliterate the charges, and will do so on receipt of the goods. Will you kindly write us, and let us know what to expect in the matter. Truly, Yours." To which the following reply was sent: "Kingfisher, March 6, 1891. Gentlemen: Yours, with bill for \$164, received. In reply, will say there is no bill on file for the goods mentioned. Please state who ordered the Reports and Statutes, so we may look the matter up. Respectfully, yours, J. L. Trout, City Clerk." Plaintiffs answered as follows: "March 24th, 1891. J. L. Trout, Clerk, Kingfisher, O. T.—Dear Sir: Referring to ours under date of February 18th, 1891, and your postal card replying, under date of March 6th, 1891, we have the pleasure to inclose herewith a copy of original order, covering our voucher for \$164.45, which we hope will be found correct and satisfactory with you." In response, plaintiffs received the following: "Geo. Crane & Co.—Gentlemen: Your bill in the sum of \$164.45 was not allowed. Please instruct us what to do in the matter. Think we can get the books, or collect for same. Awaiting your advice, I am, respectfully, Victor Payne, City Attorney. Per J. L. Trout, Village Clerk." This closed the

correspondence, and constitutes the entire agreement on the subject. The plaintiffs then sent their agent to find the books. They were found in the possession of defendant, Cutlip, and a demand made for their possession, which was refused.

The uncontradicted facts show that, at the time the books were shipped by Crane & Co., they intended to sell them to the city of Kingfisher, and so charged them on their books. The order of the city clerk, Hamblin, stated that the mayor and common council of the city had ordered the purchase, and directed them shipped to Wilson, mayor. This order was mailed the day that the board of commissioners made the appointment of officers for the de jure government, and when the order was filed, and the goods shipped, neither Wilson, Hamblin, nor Nagle had any official relation to or connection with the municipal corporation. Their provisional government had ceased to exist, and their authority to act as officers or agents had expired. Neither of them had any authority to receive the books for the city or village of Kingfisher, and their acts were not binding on the city or on the plaintiffs. It is clear that the sale never was consummated, and there was no delivery of books to the city of Kingfisher. Delivery to a common carrier, on the order of the consignee, is generally a good delivery, and would have been sufficient in this case to have passed the title to the city of Kingfisher under ordinary circumstances; but the facts in the case show that the city never received the books from the common carrier, and that none of her officers or authorized agents received them for her. If no title passed to the city or village of Kingfisher, then what title passed to Nagle? Wilson did not order the books for himself. The clerk did not order the books shipped to Nagle, but to Wilson, who was the mayor of the provisional government. When they arrived at Kingfisher, he did not receive them for the corporation, for his authority to act for the corporation had ceased. If he ever had any. So no sale ever actually took place, for the reason that one of the essential elements was lacking,—that of delivery,—and nothing has ever been done to ratify or confirm the attempted sale. Counsel for appellee cite us to the rule of law that the judgment of the trial court will not be disturbed where there is evidence to sustain the verdict, or when there is a doubt as to the weight of the evidence, and that a new trial will not be granted on ground that the verdict is against the evidence when the evidence is conflicting. We concur in these propositions, and, if applicable to this case, they would control our conclusion; but in this case the verdict is so clearly contrary to the evidence that our duty is clear. When there is no evidence to sustain a verdict upon a given point, the court should not hesitate to set aside such verdict. There is no evidence of a delivery in this case to the village of Kingfisher; but, on the contrary, there is conclusive evidence that no delivery ever took place.

It is contended for appellee that he is an innocent purchaser for value, and hence takes a good title, as against the original

vendor, and a number of authorities are cited in support of the proposition that an innocent purchaser from a fraudulent vendee will take a good title, as against the defrauded vendor. There is a distinction between this class of cases and the case at bar. While it is clear from the evidence that a fraud was perpetrated upon the plaintiffs in this case, and it is conceded that Cutlip is an innocent purchaser for value, the case does not turn upon that question. The case of *Moody v. Blake*, 117 Mass. 23, cited by counsel for the appellee, is clearly in point, and decisive of the case under consideration. In that case it is said: "It is well settled that, where a vendor is induced by fraudulent representations to deliver property to a dishonest or irresponsible purchaser, yet, if the purchaser transfers it for a valuable consideration to a third person, having no notice of the fraud, and acting in good faith, such third person will hold the property in preference to the original settler." And, continuing, the court further says: "But the present case does not fall within this rule. The plaintiff never sold these goods to Porter, and made no contract with him. He supposed himself to be dealing only with Hills & Co. He never delivered the goods to Porter, and never consented to their going into his possession. When Hills & Co. refused to receive them, they remained in the hands of the carrier, but were the property of, and constructively in the possession of, plaintiff. The only mode in which Porter got them into his hands was by the false pretense that he had authority from the owner to dispose of them. This was a wrongful conversion of them to his own use, by which he could acquire no title; and for this reason it was not in his power to give any title to the defendant, although the latter may have acted in entire good faith. The case therefore falls within the rule laid down in *Stanley v. Gaylord*, 1 Cush. 536; *Gilmore v. Newton*, 9 Allen, 171; and *Bearce v. Bowker*, 115 Mass. 129." An examination of the case just quoted from will show that the facts upon which the ruling is based are very similar to the facts in the case before us. In this case the plaintiffs never sold the books to Wilson or Nagle, and made no contract with either of them individually. They supposed they were dealing with the corporation, and that the common council of the city had authorized the purchase. They never delivered the books to Wilson or Nagle, and never consented to them going into the possession of Nagle. When the legally constituted village or city of Kingfisher failed to receive or accept the books, they remained the property of, and constructively in the possession of, Crane & Co. The delivery to and acceptance by Wilson and Nagle of the books, when delivered by the drayman, and taking them into their possession, was a wrongful conversion by them to their own use, by which they, or either of them, could not acquire any title, and for that reason it was not in the power of Nagle to give any title to the defendant, although Cutlip may have acted in entire good faith. In the case of *Baehr v. Clark*, decided by the supreme court of Iowa, and reported in 49 N. W.

Rep. 840, it is said: "It is well settled that when goods are obtained from their owners by fraud, and the facts show a sale to the party guilty of the fraud, an innocent purchaser of the goods from the fraudulent vendee for value, and without notice of the fraud, will take the title. The true inquiry is, did the owner intend to transfer both the property in and possession of the goods to the person guilty of the fraud? If he did, there is a contract of sale, however fraudulent the device, and the property passes, and subsequent innocent purchasers for value will be protected. But this rule has no application unless there is an actual sale of the property by the alleged vendor. If one delivers property to another as a mere bailee, a purchaser from the bailee acquires no title, however innocent he may be. He has no more right to assert title to the property than if it had been stolen, and his purchase had been from the thief. The principle upon which distinction rests is that the vendor in the cases last supposed does not part with the title to the property, nor does he have any such intention; and the fraudulent possessor of property can convey no title to any third person, however innocent, for no property has passed to himself from the true owner." This principle is clearly applicable here. No property passed from Crane & Co. to the village of Kingfisher, or to Nagle, and Nagle, having no title, could convey none.

Under the facts appearing in the record, the provisional city of Kingfisher became and was a de facto municipal corporation from and after the 2d day of May, 1890, and the de facto government was succeeded by the de jure corporation on the 14th day of July, 1890. These books were ordered by the acting officers of the de facto corporation, on the representation that they were for the corporation. If the books had been shipped to and received by the de facto corporation, on the proper order of the common council, the de jure successor possibly might be held liable for the debt; but inasmuch as the power of the plaintiffs to deliver to the corporation, when the books arrived at Kingfisher, was thwarted and defeated by the acts of Nagle and Wilson, who prevented a delivery to the proper officers of the city by receiving and converting the books to their own use, without the consent of either the vendor or the corporation for which they had pretendedly ordered them, they are now in no position to claim that a delivery took place, and Cutlip can take no title from one who unlawfully converts the property of another to his own use. The district court should have granted the motion for a new trial, for the reason that the verdict was contrary to the evidence.

The court gave the jury, among others, the following instructions, which were accepted to by the plaintiffs: "No. 3. The court instructs the jury that if they believe from the evidence that the plaintiffs sold, delivered, and shipped the books in controversy to the city of Kingfisher, or to its acting or recognized mayor, and the defendant afterwards purchased them in good faith, for a valuable consideration, without any notice of fraud in the original purchase,

and paid for them before he had any knowledge of Nagle's right to sell, then the law is for the defendant, whether plaintiffs were ever paid for the books or not. No. 4. Unless you believe from the evidence that the books were delivered to and received by the village of Kingfisher, or its duly-authorized agent, then the title never passed out of the plaintiffs, and it had no right to appropriate the books to the payment of any debt it might have owed to Nagle, and he took no title, and could convey none to defendant company, unless in manner as stated in instruction No. 3." These instructions properly state the law applicable to the case, and are as fair to the plaintiffs as they could reasonably ask, under the law. There was no error in giving said instructions. The judgment of the district court of Kingfisher county is reversed, at the costs of the appellee, with directions to grant a new trial.

(18 Colo. 192)

In re CONTINUING APPROPRIATIONS.

(Supreme Court of Colorado. Feb. 6, 1893.)

STATE LEGISLATURE—POWERS—CONTINUING APPROPRIATIONS.

Const. art. 5, § 33, providing that "no money shall be paid out of the treasury except upon appropriations made by law," does not affect the right of the legislature to grant continuing appropriations,—i. e. those the payment of which is to be continued beyond the next session of the legislature,—but the power of the legislature, except as otherwise restricted by the constitution, is plenary over the entire matter of appropriations, but such power must be exercised subject to the provisions of Const. art. 10, § 16, prohibiting appropriations in excess of the revenue. *People v. Spruance*, 9 Pac. Rep. 628, 8 Colo. 530, disapproved.

Submission by the senate of a resolution inquiring into the legality of "continuing appropriations."

The resolution is as follows: "Senate resolution: Whereas, the constitution, in section 33, article 5, provides that 'no money shall be paid out of the treasury, except upon appropriations made by law;' and whereas, certain acts of the general assembly have provided for continuing appropriations, instead of specific appropriations, from the general or special funds in the hands of the state treasurer, particularly the military law, the insurance law, the supreme court library law, the acts providing for the support of state institutions, etc.; and whereas, doubts have been raised as to the constitutionality of such continuing appropriations, and it is uncertain whether or not specific appropriations should be made by this general assembly for the carrying out of the objects and purposes specified in such laws: Now, therefore, be it resolved by the senate that the supreme court be, and they are hereby, requested to decide the question whether or not it will be necessary for this general assembly to pass specific appropriations for the support of the state institutions, the militia, the insurance department, the purchasing of books for the supreme court library, etc.; or whether or not the con-

tinuing appropriations made in such laws are sufficient for the payment of warrants drawn upon such special funds in the hands of the state treasurer."

HAYT, C. J. The purpose of the clause quoted in the question propounded is to require legislative sanction for the disbursement of the public revenue, where such disbursement is not specifically directed by the constitution. While it is necessary that something more than a duty to pay must be shown, no set form of words is necessary to constitute an appropriation. It is sufficient in this regard if the legislative intention clearly appears from the language employed. In no instance will an appropriation be inferred from doubtful or ambiguous language. As to those appropriations designated in the question as "continuing appropriations,"—that is, those the payment of which is to be continued beyond the next biennial session of the legislature,—we see no constitutional objection thereto. The power of the legislature, except as otherwise restricted by the constitution, is plenary over the entire subject. The power can, however, only be exercised subject to the provisions of section 16 of article 10 of the constitution, by which appropriations in excess of the revenue are inhibited. This court, as at present constituted, is not inclined to follow the views expressed in *People v. Spruance*, 8 Colo. 530, 9 Pac. Rep. 628. Under a similar provision with reference to appropriations to be found in the federal constitution, such continuing appropriations have been made by congress, apparently without question, and it has been resorted to in this state from the time of the inception of the state government. When such appropriations are for the whole or for a definite part of a certain, special fund, we are of the opinion that they furnish sufficient authority for the disbursement of such fund. We are aware that the cases of *Martin v. Francis*, 13 Kan. 220, and *State v. Stover*, 47 Kan. 119, 27 Pac. Rep. 850, are sometimes cited as opposed to the conclusion which we have reached. An examination of the constitution of the state of Kansas in force at the time the first of these decisions was rendered discloses the following provision: "No money shall be drawn from the treasury except in pursuance of specific appropriation made by law; and no appropriation shall be for a longer term than one year." The same provision was also in force at the time of the second decision, except that the term for which an appropriation might be made had then been extended, by a constitutional amendment, from one to two years. Bearing in mind the Kansas provision, the cases will be found not opposed to the conclusion which we have reached. Moreover, the fact that it was deemed necessary in that state to limit the time for which an appropriation might be made furnishes a strong argument in support of the conclusion that without such a restriction the legislature would possess the power to make an appropriation for a longer period. Otherwise, we must believe that the framers of the Kansas constitution were guilty

of doing an idle and useless thing,—a presumption not to be indulged.

The fact that in several of the states of this Union it has been found necessary to inhibit the making of continuing appropriations furnishes an argument against the policy of such laws that will undoubtedly be given due weight by the legislature; but with the policy or expediency the courts have nothing to do, the power of the legislature to make the appropriations being conceded. We think the legislature will be able to apply the general principles herein announced to the several acts mentioned, as occasion for so doing may arise. In at least one case now pending in this court private rights are claimed under some one or more of the acts mentioned, and we do not feel at liberty to anticipate a conclusion whereby the claim of any such litigant might be prejudged. In conclusion, we call attention to the provisions of section 22 of article 5 of the state constitution, requiring all appropriations other than those embraced in the general appropriation bill to be made by separate bills, each embracing but one subject. One object of this is evidently to prevent the placing in one bill of appropriations for several purposes, and thereby combining in favor of all the advocates of each.

(18 Colo. 195)

IN RE LOAN OF SCHOOL FUND.

(Supreme Court of Colorado. Jan. 30, 1893.)

LEGISLATIVE QUESTION—OPINION OF SUPREME COURT—LOAN OF SCHOOL FUND—DEBT FOR CASUAL DEFICIENCIES.

1. When the opinion of the supreme court is requested by the general assembly as to the constitutionality of pending legislation, the particular point of objection or doubt respecting the constitutionality of the bill should be pointed out, and some specific question submitted.

2. A legislative act providing for a loan of \$650,000 of the public school fund of the state to the general revenue funds of 1887, 1888, and 1889, without providing any definite time, means, or security for the repayment thereof, would be unconstitutional.

3. The state cannot contract a debt to provide for casual deficiencies of the revenue in excess of \$100,000, since the valuation of taxable property within the state has reached the limit of \$100,000,000.

(Syllabus by the Court.)

The secretary of the senate sent the following communication to the justices of the supreme court: "I am instructed by the honorable senate to submit senate bill No. 11 to your honors for an opinion as to its constitutionality." The communication was accompanied by the bill, but no specific question or questions were submitted.

PER CURIAM. The bill transmitted contains several sections relating to the loaning of \$650,000 of the public school fund to the general revenue funds of 1887, 1888, and 1889. We would respectfully call the attention of the honorable senate to the fact that it is not in accordance with the practice of this court to give an opinion upon any such general subject as the constitutionality of a bill, unless some

particular point of objection or doubt respecting the constitutionality of the bill is pointed out, and some specific question submitted. See Const. art. 6, § 3; also the following opinions of this court: In re Irrigation, 9 Colo. 620, 622, 21 Pac. Rep. 470; In re House Bill No. 165, 15 Colo. 593, 595, 26 Pac. Rep. 141. The views of the court are so fully expressed in the two opinions above cited that we need not repeat them. We trust the honorable senate will see the propriety of withdrawing its request for our opinion as to the constitutionality of the bill as submitted.

On Further Inquiry.

The foregoing answer being returned to the honorable senate, that body again requested the opinion of the court "as to whether senate bill No. 11 is in conflict with the provisions of section 3 of article 9, or section 3 of article 11, of the constitution." The bill as submitted the second time reads as follows: "Section 1. There shall be loaned from the public school permanent fund to the general revenue fund of 1887, 1888, and 1889, for the use and benefit thereof, the sum of \$650,000.00. Sec. 2. The state treasurer is hereby required to make the transfer on the books of his office made necessary in section 1 of this act, and in such manner that the state of Colorado shall stand charged as a debtor to the public school permanent fund as money loaned from that fund to the state in behalf of the general revenue fund for 1887, 1888, and 1889, and the faith of this state is hereby pledged to repay to the public school permanent fund the full amount so loaned, with interest thereon at the rate of four per cent. per annum from the date of said transfer, payable semiannually, May 31st and November 30th, from the general revenue fund, each year until the return thereof. The state treasurer shall also, in writing, notify the state auditor of such transfer, and he shall make the proper transfer and entry upon the books of his office. Sec. 3. For the purpose of carrying out the provisions of this act, the state treasurer is hereby authorized, with the proceeds of this loan, to redeem and cancel the warrants of 1887, 1888, and 1889 that are now held by him as an investment in the public school permanent fund, the state university fund, and the internal improvement fund, permanent and income. Sec. 4. For the purpose of paying the loan provided for in the foregoing section, all excess revenues for the year 1892 and subsequent years, and not otherwise appropriated, are hereby appropriated to the payment thereof. At the end of each fiscal year it is hereby made the duty of the treasurer to certify to the auditor the amount of money in his hands standing to the credit of the general fund, and not otherwise appropriated, whereupon the auditor shall issue his warrant for the amount so certified, which amount the treasurer shall place to the credit of said loan."

The following provisions of the constitution are considered in the opinion: Article 9, § 3: "The public school fund of the state shall forever remain inviolate and intact. The interest thereon only shall

be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law. No part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided. The state treasurer shall be the custodian of this fund, and the same shall be securely and profitably invested as may be by law directed. The state shall supply all losses thereof that may in any manner occur." Article 10, § 16: "No appropriation shall be made, nor any expenditure authorized, by the general assembly, whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the general assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section eleven of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war." Article 11, § 3: "The state shall not contract any debt by loan in any form except to provide for casual deficiencies of revenue, erect public buildings for use of the state, suppress insurrection, defend the state, or, in time of war, assist in defending the United States; and the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one fourth of a mill on each dollar of valuation of taxable property within the state, and the aggregate amount of such debt shall not at any time exceed three fourths of a mill on each dollar of said valuation, until the valuation shall equal one hundred millions of dollars, and thereafter such debt shall not exceed one hundred thousand dollars; and the debt incurred in any one year for erection of public buildings shall not exceed one half mill on each dollar of said valuation, and the aggregate amount of such debt shall never at any time exceed the sum of fifty thousand dollars, (except as provided in section five of this article;) and in all cases the valuation in this section mentioned shall be that of the assessment last preceding the creation of said debt."

ELLIOTT, J. In view of the stringent provisions of our state constitution, we are of the opinion that senate bill No. 11, as submitted for our consideration, is unconstitutional. Section 3 of article 9 of the constitution is an imperative mandate, binding upon all departments of the government. It provides, among other things, that "the public school fund of the state shall forever remain inviolate and intact;" and, further, that "no part of this fund, principal or interest, shall ever be transferred to any other fund, or used or appropriated except as herein provided." It is true the section provides that the public school fund shall be "invested as may be by law directed;" but a further

requirement is that such fund shall be "securely and profitably invested." The security of the investment is of the first and highest importance. It may in some cases be difficult to determine in advance whether a proposed investment of the school fund will be secure, as well as profitable. In general, legislation respecting such matters must be left to the wisdom and discretion of the general assembly, and of the chief executive of the state; but in this case there would seem to be no room for a difference of opinion. By the terms of the bill submitted, it is proposed to loan \$650,000 of the public school fund to the general revenue funds of 1887, 1888, and 1889. The bill provides for the repayment of such loan out of the "excess revenues for the years 1892 and subsequent years, and not otherwise appropriated." But no certain amount or definite portion of the revenues of 1892, or any subsequent year, is set apart for the payment of such loan; no guaranty or assurance is given that there will be any excess revenue for 1892, or any subsequent year; and no other means of repayment is provided.

Again, the bill proposes to devote the proceeds of the loan—that is, \$650,000 of the public school fund of the state—"to redeem and cancel the warrants of 1887, 1888, and 1889," now held by the state treasurer "as an investment in the public school permanent fund, the state university fund, and the internal improvement fund, permanent and income." What proportion of the warrants so held belongs to each of these several funds does not appear; but presumably, in the aggregate, the warrants are equal to the full amount of the proposed loan. It would seem that if section 16 of article 10 of the constitution was complied with in respect to the revenues and appropriations for the years 1887, 1888, and 1889, respectively, the payment of the warrants for those years has already been provided for, and so the proposed loan is unnecessary. If the payment of the warrants for those years was not provided for by valid appropriations, as the constitution requires, certainly there would be no security in further involving the public school fund in such transactions. As was said in the case of *People v. May*, 9 Colo. 92, 10 Pac. Rep. 641: "The intention would seem to be that the annual state tax should meet the annual state expenditure." If the public school funds of the state, or any part thereof, are to be invested in state warrants, the investment should be in warrants of unquestionable validity; in warrants based upon constitutional appropriations; in warrants the payment of which has been provided for with the greatest certainty. A loan of the public school fund to be repaid out of contingent or doubtful future revenues, as provided in the bill submitted, cannot be considered as "securely invested," and would therefore be without constitutional sanction. According to the several provisions of our constitution, no money can be paid out of the state treasury except upon a valid appropriation; nor can a valid appropriation be made unless the



revenue, within constitutional limits, be provided for its payment. In re Appropriations by General Assembly, 13 Colo. 325, 22 Pac. Rep. 464; In re House Resolution No. 25, 15 Colo. 602, 26 Pac. Rep. 145; Institute v. Henderson, 18 Colo. —, 31 Pac. Rep. 714; In re Continuing Appropriations, 18 Colo. —, 32 Pac. Rep. 272.

Our attention is called to section 8 of article 11 of the constitution. This section affords but little relief. We are advised that the valuation of taxable property within the state has, ever since 1887, more than equaled \$100,000,000; hence the state cannot contract a debt to provide for casual deficiencies of the revenue in excess of \$100,000; and so the loan provided by the bill cannot be upheld under this provision. We must not be understood as expressing any opinion one way or the other as to the validity of the warrants mentioned in section 3 of the bill as submitted. We have not been in any way advised as to their character, and have not had the assistance of, and briefs or arguments of, counsel. Express constitutional authority (section 3, art. 6) constrains us to render an opinion in this manner.

(18 Colo. 217)

LUSTIG et al. v. PEOPLE.

(Supreme Court of Colorado. Jan. 30, 1893.)

UNVERIFIED INFORMATION—VALIDITY.

Though Sess. Laws 1889, p. 101, § 1, gives the county court original jurisdiction of misdemeanors, on information by the district attorney, an unverified information should be quashed, as in violation of Const. art. 2, § 7, which provides that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation, reduced to writing.

Error to El Paso county court.

Joseph Lustig and another were convicted of keeping open a tippling house on the Sabbath day, and appealed. Reversed.

The other facts fully appear in the following statement by HAYT, C. J.:

This prosecution was commenced in the county court, by the filing of an information by the district attorney, charging the plaintiffs in error with keeping open a tippling house on the Sabbath day, contrary to law. The information was not sworn to by the district attorney; neither was it founded upon any preliminary examination previously held, nor upon the oath of any individual. Upon this information a warrant was issued, upon which plaintiffs in error were arrested, and brought into court. A motion to quash the indictment was afterwards interposed, for the following reason, *inter alia*: Because such information was not verified or presented upon the oath of any party. The motion to quash having been overruled, a trial, conviction, and sentence followed.

J. K. Vanatta and W. Harrison, for plaintiffs in error. Joseph H. Maupin, Atty. Gen., for the People.

HAYT, C. J., (after stating the facts.)  
Authority to institute the prosecution by

information is claimed under section 1 of an act entitled "An act to confer original jurisdiction upon county courts in misdemeanors cases." Section 1: "Original jurisdiction is hereby conferred upon the county courts in each of the several counties of this state in cases of misdemeanor, and such courts shall hereafter be empowered to try such cases upon information by the district attorney of the district in which such counties are situated." Sess. Laws, 1889, p. 101. It is claimed that under this provision the information need not necessarily be based upon the oath or affirmation of any person, reduced to writing; that it is sufficient in this respect if signed by the proper prosecuting officer. In support of the position taken by counsel, reference is made to the common law. It is undoubtedly true that, under the ancient common law, the attorney general might inform against any party for a criminal offense, either upon sufficient evidence, or without any evidence at all. But this rule of the common law has been essentially changed in this respect by the seventh section of our bill of rights, which provides that no warrant "to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation, reduced to writing." The language of this section is too plain to admit of misconstruction. An information can serve no practical purpose in the administration of the criminal law unless a legal warrant can be issued thereon; and, to justify a warrant, there must be a charge under oath, reduced to writing. The public prosecutor is no longer authorized to institute a criminal prosecution against any person by reason of his official signature merely. To allow him to do so would be contrary to the express provisions of the bill of rights quoted; and the "probable cause supported by oath or affirmation," prescribed by this section, is the oath or affirmation of those parties who depose to the facts upon which the prosecution is founded. U. S. v. Tureaud, 20 Fed. Rep. 621. This is now the settled law in the federal courts, under the fourth amendment to the constitution of the United States, which is substantially the same as the provisions of our bill of rights. *Id.*; U. S. v. Maxwell, 3 Dill. 275; U. S. v. Polite, 35 Fed. Rep. 58; U. S. v. Smith, 40 Fed. Rep. 755. Section 6 of the bill of rights of Illinois is almost identical with section 7, above quoted. The provisions of the Illinois constitution came before the supreme court of that state in the case of *Myers v. People*, 67 Ill. 503, and it was there held that an affidavit by the public prosecutor is essential to the validity of an information. In that case the information was based upon the oath of a private party, while in this case no oath whatever was required. See, also, *State v. Montgomery*, 8 Kan. 351; *State v. Nulf*, 15 Kan. 404. The act with reference to informations, to be found in the Sessions Laws of 1891, commencing at page 240, seems to have been prepared with special

reference to the provisions of our bill of rights, and the decisions of the courts based thereon. If carefully followed, errors like the one committed in this case will in the future be avoided. As the information in this case is not supported by the oath or affirmation of any person, the prosecution and conviction thereunder were in violation of the seventh section of our bill of rights. The motion to quash should have been sustained.

Judgment reversed.

(18 Colo. 201)

LOVELAND v. FISK et al.

(Supreme Court of Colorado. Jan. 30, 1893.)

OPTION CONTRACT ON LAND—ASSIGNMENT OF INTEREST—DEFAULT IN PAYMENT—RIGHTS OF ASSIGNEE.

1. F., acting for C. and others, entered into an agreement by which L. was to convey to F. certain land upon payment at a stipulated time, the agreement containing a provision that the consideration named in it was merely an option for the purchase, and that it was to be void on default of such payment at such time. Before the time for payment, C. assigned part of his interest to plaintiff, to which assignment F. assented, acknowledging that he held, as trustee for C., an interest in the agreement. Default having been made in payment, L. declared the agreement void, and subsequently a company was formed with L. and F. as officers, which company purchased from L. this same land, and in its sale realized large sums. *Held*, in an action by plaintiff for an accounting, and that the deed to the company be declared in trust for him to the extent of his interest, that the complaint was properly dismissed.

2. A provision in the assignment that C. was to notify plaintiff of any default in the payment did not impose upon F. the duty of giving such notice. F.'s duties being fixed by the agreement, plaintiff, as the assignee of C., can claim no greater rights in the agreement than C.

3. Nor will such a provision impose the duty on L. of giving such notice to plaintiff, for by the express terms of the agreement it was to be void in default of payment.

Error to district court, Arapahoe county.

Action by Frank W. Loveland against Archie C. Fisk and others to have a deed of certain land declared in trust for plaintiff, and for an accounting of the sale of such land. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by GODDARD, J.:

On the 15th day of March, 1887, the defendant Fisk, in consummation of an arrangement between himself and four associates, entered into a written agreement with the defendant Clark, wherein Clark, in consideration of the sum of \$5,000, (in hand paid,) contracted and agreed to sell to Fisk certain real estate near Denver, and execute and deliver good and sufficient deeds therefor upon the payment of \$175,000, as follows: \$5,000 to be paid on or before the 15th day of June, 1887, and a further sum of \$35,000, together with interest on \$170,000 from the 15th day of June, 1887, at the rate of 7 per cent. per annum, on or before the 15th day of September, 1887; the balance of the purchase price to be paid by six promissory notes of equal

amounts in one, two, and three years from date, secured by a trust deed on the land. It was further provided that Fisk should plant not less than 1,000 shade trees upon said premises during the spring of the year 1887, and also cause the extension of the railway known as the "Circle Railway" so as to run through said premises, and cause to be established upon the premises during the year 1887 a depot building. Also that Fisk might plat the premises in lots and blocks, streets and alleys, (at his own expense,) but, if he required such plat to be filed before the first \$40,000 was paid, then he should pay Clark \$2,500, which should apply on the purchase price. This agreement contains the following: "It being the intention hereof on the part of said first party, in consideration of the \$5,000, receipt whereof is hereinabove acknowledged, to convey, grant, and confirm unto the second party, his legal representatives or assigns, the option of purchasing the above-described premises under the terms and considerations before particularly specified; and it is especially agreed and understood that nothing herein contained shall be deemed or taken to require the second party to make the payments or purchase the property under the terms of this agreement. And if the second party shall elect to abandon the purchase of the property, or not make the payments under the terms of this agreement, and shall notify the first party in writing of such election, then this agreement shall be canceled and held for naught, and the second party discharged from all liabilities hereunder; but if the second party shall have made any payments herein provided for he shall not recover the same from the first party, but the same, together with the \$5,000 in cash this day paid, shall be held and deemed as the full consideration of this option." On the 29th day of March, 1887, J. Elliott Condict, one of the associates, and an owner of one fifth interest in the contract so entered into by Fisk, assigned and transferred, for a valuable consideration, an undivided one half of his interest in said contract to the plaintiff, Frank W. Loveland. In this assignment it was provided that Condict was to pay all the consideration for the interest so assigned; and upon the failure of said Condict to pay in full the consideration for said one fifth interest, then Frank W. Loveland, his heirs or assigns, were to have reasonable notice of such failure, and should have the right and privilege to finish said payments, and to have and take all the profits and benefits arising out of or in any wise accruing from the same. That Loveland was to be free from all assessments, charges, or levies of any kind or nature whatsoever on account of the payments for said one tenth interest, or the preservation or improvement of same. This assignment was assented to by defendant Fisk in writing, as follows: "This is to certify that J. Elliott Condict is the owner of a 1-5 interest in and to the contract between Rufus Clark and Archie C. Fisk, dated March 15, 1887, referred to in the above contract; and at present I am trustee to the extent of said interest for said Condict; and he has the

right to transfer 1-5 interest, or any part thereof, and as trustee I will recognize any such transfer or assignment." This instrument was filed for record April 26, 1887, and duly recorded. The \$5,000 due June 15, 1887, was not paid, and on the 23d day of June, 1887, Fisk, acting for himself and associates, entered into a supplemental written agreement with Clark, wherein the payment of the \$5,000 to be made on or before the 15th day of June, 1887, was extended until the 15th day of September, 1887, and the payment of \$32,500 was extended until the 15th day of October, 1887. As consideration for such extension Fisk was to build and put down an artesian well upon the premises. It was further agreed therein that upon the payment of the \$2,500, which Fisk agreed to pay before the filing of a plat, and by 11 o'clock on Saturday, July 2, 1887, a plat or map of the lands should be filed in the recorder's office. The \$2,500 was paid and plat filed. This supplemental agreement plaintiff alleges contained other material modifications of the original that were prejudicial to his interest, and that it was made without his knowledge or consent. It appears from the evidence that neither Fisk nor his associates paid the \$5,000 on September 15, 1887, or any part thereof, and that Clark, on the 16th of September, 1887, demanded payment from all the parties originally interested, except Condict, who was then absent; and, they declining to pay said sum, or anything further under the agreement, he declared the same forfeited, and thereupon placed the property in the hands of real-estate agents for sale. About the 1st of October, upon the request of Clark, Fisk promised to execute a quitclaim deed, but did not do so until November 26, 1887; and in April, 1890, Condict also executed a quitclaim deed for the purpose of clearing the record. On November 26, 1887, the defendant company was organized with Clark as president, Enos Miles, vice president, and Fisk, secretary. On that date a contract was entered into between Clark and the company for the sale of the property specified in the original agreement for the sum of \$180,000, in deferred payments, running six years at 7 per cent. per annum, secured by a trust deed. Fisk was given an option for five years to purchase one third of the capital stock of the company at its par value upon the payment of that proportion of the monthly interest on the notes given for the purchase money. For about two years he paid this interest, amounting to about \$350 per month. That the company has received in money and securities \$122,000 for lots sold up to the time of the trial below, and over one-half of the land was still held by the company. The value of the land has risen, from the fall of 1887 to the time this suit was commenced, from \$300 to \$400 an acre to from \$1,200 to \$2,000 an acre. The plaintiff below (plaintiff in error here) commenced this suit February 14, 1891, prays for an accounting, and that the deed to the company be declared in trust for him to the extent of his interest, and that it execute a deed to him for one tenth of the land remaining unsold. Judgment dismissing complaint.

J. P. Brockway and H. E. Luthe, for appellant. Rogers, Shafroth & Walling and Enos Miles, for appellees.

GODDARD, J., (after stating the facts.) The gravamen of the action is that the defendant Fisk violated his trust, and, with the intent to defraud the plaintiff in error out of his interest in the trust estate, conspired with Clark and Condict to cancel and forfeit the original agreement; that the supplemental agreement and the subsequent transfer to the defendant company were made in consummation of such fraudulent purpose; that by virtue of the assignment and transfer by Condict the plaintiff in error became vested with an undivided one-tenth interest in the original contract that was nonforfeitable, and that the company took title to the real estate with notice, and subject to his equity; that, Fisk's dealings with the company in relation to the property being in violation of his trust, the benefits thereby acquired inured to the plaintiff in error in proportion to his interest. There is no evidence of any conspiracy between Clark, Condict, and Fisk, or either of them, or of bad faith on the part of Fisk in procuring the supplemental agreement. On the other hand, it clearly appears from uncontradicted testimony that he, Fisk, acted in good faith, and, as he believed, for the best interests of himself and associates, in procuring the extension. By this agreement the option to purchase was extended three months after they were in default in making the first payment. This being the only office it performed, by reason of the failure to make the payments as extended, whether its terms in other respects were more or less favorable to the beneficiaries, is immaterial to this controversy. It appears from the evidence that Fisk, McIntosh, Condict, H. R. and E. O. Wolcott agreed among themselves to obtain an option to purchase the real estate in question from defendant Clark; that Fisk, in his and their behalf, made the agreement dated March 15, 1887, in his own name, and thereby became a trustee of their respective interests in that agreement. He assumed no active fiduciary duties, but simply became the repository of those interests, and represented them only in so far as the improvement and management of the property was under his supervision and control. He was under no obligation, contractual or arising from the nature of his trust, to pay any portion of the purchase price other than his own. His declaration, indorsed on the assignment by Condict to the plaintiff in error, was an acknowledgment only that he held in his name a one-fifth interest in the agreement for Condict, and a recognition of Condict's right to assign the same, and did not affect or change the nature or extent of the trust. Plaintiff in error, by the transfer of one half of Condict's interest, acquired no other or greater rights than Condict himself was entitled to under the original agreement. What those rights were is not difficult of ascertainment. The agreement, by its terms, and the testimony of witnesses who were interested in the transaction, show be-

yond question that the money paid and the improvements made were the consideration for an option to purchase only, and were not a part of the purchase price, and that the parties purchased that option and its extension with a full understanding that time was of the essence of the contract to purchase; and that the payment of the first installment of the purchase price, if they elected to purchase, must be made within the life and limit of the option. Moreover, by the form of the contract itself, time of payment was made essential. "Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or of payment must be done within the prescribed time, and time is, from the very form of the contract, essential. If, therefore, a vendor agrees to convey if payment be made at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of the payment is certainly essential; in fact, payment is a condition precedent to the vesting of any right in the vendee." Pom. Cont. § 387. It is unnecessary to notice other conditions that concur in making time the essence of this contract. After the expiration of the time fixed for the payment of the first installment, the option, theretofore irrevocable by reason of the consideration paid therefor, ended by express limitation, and the offer to sell upon the terms specified thenceforth was unilateral, without consideration, and revocable by Clark at any time before payment, which was the act of acceptance contemplated. No payment of any part of the purchase price having been made, Fisk and his associates acquired no equity in the land. Clark was under no obligation, legal or equitable, to demand performance in order to avail himself of the right to revoke the offer; nor did Condict's personal agreement that plaintiff in error should have notice if he, Condict, failed to make any of the specified payments, impose the duty of giving such notice upon Clark or Fisk. Their duties and obligations were fixed by the original agreement, and could not be changed by any private arrangement between Condict and plaintiff in error, to which they were not parties, and in no way interested in the consideration paid therefor. Clark's right to revoke the offer as against Fisk and associates under the facts shown is clear, and the plaintiff in error, by virtue of his right derived through Condict, held no other or greater right than they. While it is true that a trustee cannot, during the continuance of his trust, deal with the trust property for his own benefit, it is equally true that when the trust ceases he occupies the same relation to the trust property as a stranger, and may in good faith acquire an interest therein by purchase or otherwise. As we have seen, the trust held by Fisk was limited to the time of the option, and when the option ended his trust ceased. It ended September 16,

1887. For 60 days thereafter the property was in the hands of agents for sale, and not until some time in the latter part of November did he acquire any interest in the same, at which time he was as free to deal with Clark in relation to the land as any stranger. The interest by him then acquired was in no way in consideration of past investments, but upon a new and valuable consideration, to be by him thereafter paid. The assumption that the quitclaim deed given by him at that time was a part of the consideration for such interest is not sustained by the evidence. He had no interest to convey thereby, and the deed, as its terms express, was for the purpose solely of clearing from the title to the land the cloud cast thereon by the record of the assignment by Condict to plaintiff in error, and for no other purpose. On a careful review of the record, we are convinced that the contention of plaintiff in error is without merit. The judgment of the district court is accordingly affirmed.

(18 Colo. 220)

In re BOARD OF CAPITOL COMMISSIONERS.

(Supreme Court of Colorado. Jan. 31, 1893.)

ERECTION OF STATE CAPITOL — TERM OF OFFICE OF BOARD OF MANAGERS.

By act of legislature approved April 1, 1889, a board of capitol managers was created, and their term of office was fixed "until the entire completion and furnishing of said capitol building, and the full acceptance of the same by the state." Section 9 of the same act, after providing for the regulation by the board of the expenses according to the appropriations, declares that "the entire construction and furnishing of said capitol building shall be completed by the 1st day of January, A. D. 1893;" and in another act, approved April 6, 1889, relating to the construction of the building and appropriations therefor, it is provided that "the time within which said building is to be completed is extended to January 1, A. D. 1893." *Held*, that the specifications of time in regard to the completion of the building did not limit the tenure of office of the board of managers, which will continue until the acceptance of the building by the state, unless the legislature shall otherwise provide.

The opinion is in response to the following communication and interrogatory from the governor:

To the Honorable, the Judges of the Supreme Court. Question submitted.

At a meeting of the board of capitol managers, held at the office of said board on the 16th day of January, 1893, at which there were present Governor Davis H. Waite, chairman, Job A. Cooper, Otto Mears, Perry F. Crowell, and Charles J. Hughes, Jr., members, of said board, on motion of Hon. Job A. Cooper the governor was requested to submit to the supreme court the question as to whether or not the term of office of the said board expired January 1, 1893. This question arises as follows: By act of the legislature approved April 1, 1885, a board of capitol managers was created, consisting of five members, whose term of office was six years, and whose compensation was five dollars per day and traveling expenses

when actually employed. By act of the legislature approved April 1, 1889, the former act was repealed, and a new board of capitol managers created, to consist of the governor of the state as chairman, and four members, with a salary for each member, except the governor, of \$2,500 per annum. The term of office as fixed in said law was, "until the entire completion and furnishing of said capitol building, and the full acceptance of the same by the state of Colorado." In the same act above quoted, commencing on page 360, Laws 1889, § 9, reads as follows: "Sec. 9. Said board of capitol managers shall divide the cost of labor and expenditure for the erection, completion, and furnishing of said capitol building so that there shall not be expended in any one year an amount in excess of the appropriation for that year, and the entire construction and furnishing of said capitol building shall be completed by the first day of January, A. D. 1893." In another act approved April 6, 1889, "relating to the construction of the state capitol building and appropriating funds therefor," section 1, providing for the use of granite instead of sandstone, and hard wood instead of soft wood, closes with the following proviso: "Provided, the board of capitol managers are unable to complete and finish said capitol building as herein provided for less cost, and the time within which said building is to be completed is extended to January 1, A. D. 1893." The words "until the entire completion and furnishing of said capitol building and the full acceptance of the same by the state of Colorado," if they stood by themselves, and were not otherwise alluded to or limited, might well be supposed to establish an indefinite term of office, to be concluded only by the completion of the capitol building at some future time, no matter how distant; but when, in the same act, it is provided that "the entire construction and furnishing of said capitol building shall be completed by the first day of January, A. D. 1893," it would seem that, notwithstanding the language first used in the act might be said to establish an indefinite term, the legislature had in their minds a definite limitation of that term, which they expressed in section 9, above quoted. Again, the same legislative body, only six days later, passed another act in which they again limited the time for the completion of said capitol building to January 1, 1893. The language of the acts of the legislature which has been referred to has created a doubt in the mind of the present executive of the state as to whether or not the term of the present board of capitol managers (of which he is ex officio a member) did not terminate on the 1st day of January, 1893. I certify, therefore, that the question hereinbefore submitted is important, and arises upon a solemn occasion, wherein the executive of this state requires the opinion of the supreme court in order to properly discharge his duties.

Most respectfully submitted,

DAVIS H. WAITE, Governor.

PER CURIAM. Upon a full and careful examination of the statutes to which our

attention is called, touching the duties and office of the board of capitol commissioners, we are clearly of the opinion that the term of office of the present board, as fixed and limited by section 1, Sess. Laws 1889, p. 360, continues not only until the entire completion and furnishing of the capitol building, but until the full acceptance of the same by the state. That the language of section 9 of the same act, specifying the time for the completion and furnishing of said building, was not intended by the legislature to limit such tenure; said act, in so far as it relates to the time of completion, being directory merely. A reference to past legislation in relation to the same subject shows, by the language used in section 1 aforesaid, the manifest intent of the legislature to continue the board in office until the structure is actually completed and accepted. Such construction is consistent with the purpose for which the board was established, and the duties it is to perform. Therefore the term of the present board did not terminate on the 1st day of January, 1893, but will continue until the happening of the event contemplated, to wit, "the full acceptance of the building by the state" unless the legislature shall otherwise provide.

(18 Colo. 209)

KNOWLES v. CLEAR CREEK, PLATTE RIVER & MILL DITCH CO.

(Supreme Court of Colorado. Jan. 30, 1893.)

IRRIGATION COMPANIES — RIGHTS OF STOCKHOLDERS — DIVERSION OF WATER.

Where a stockholder in a company organized for supplying water to landowners has acquired a right to a certain amount of water, he may change the point of diversion of such water from one ranch to another, notwithstanding a long user on the former, unless the rights of others are injuriously affected, or unless his right to so divert it is restricted by some valid by-law of the company, or agreement; and a by-law impairing such a right would have no effect, unless authorized by the charter of the company, or assented to by the stockholder whose right is affected.

Error to district court, Arapahoe county. Application by Joseph C. Knowles for a mandamus to compel the Clear Creek, Platte River & Mill Ditch Company to furnish him water to be used on certain land. Judgment was entered denying the writ, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by GODDARD, J.:

Joseph C. Knowles brought this action to compel the defendant in error to furnish water to be used upon a certain tract of land during the irrigating season of 1888. An alternative writ of mandamus was issued, setting forth that he was the owner of the land described, and owner of one half share of the stock of defendant company, which entitled him to 70 inches of water, which he was entitled to use upon said land. Defendant, in its return thereto, admits that plaintiff is the owner of the land and the one-half share of stock, and entitled to that amount of water, but denies that he has the right to use it upon the land described in the alternative writ. Admits "that petitioner holds and

owns one half share of the stock of the defendant, and under and by the terms of its by-laws, and the understanding and agreement among the stockholders, all holders of stock have the right to have carried through its ditch water to the amount of seventy inches to each one-half share of stock, to be used and appropriated upon one certain piece of land." Alleges that Knowles is the owner of two ranches,—the one described in the writ, and known as the "Lower Ranch;" the other known as the "Upper Ranch;" that the water he is entitled to by virtue of the stock owned by him can be used only on the upper ranch.

Thomas Macon, for appellant. Butler & McKinley, for appellee.

GODDARD, J., (after stating the facts.) The evidence offered on the trial below is not preserved by bill of exceptions, and made a part of the record, and therefore is not before us; and we can look only to the record proper, consisting of the pleadings and judgment, to determine the correctness of the judgment of the court below. The question presented thereby is as to the right of the plaintiff in error to have the water, or any portion of it, to which he is entitled by virtue of his ownership of stock, applied to land other than the upper ranch. It is well settled in this state that "one who acquired the right to divert the waters of a stream may change the point of diversion and place of use without losing his right of priority, where the rights of others are not injuriously affected." *Fuller v. Mining Co.*, 12 Colo. 12, 19 Pac. Rep. 836. That the plaintiff in error would have the right to use the water in question on the lower ranch, notwithstanding its long user only upon the upper ranch, unless such right is restricted by some valid by-law or agreement, we entertain no doubt, and that so valuable a right cannot be impaired or restricted by a by-law having that effect, unless the same was duly authorized by the charter of the company, or assented to by the stockholder whose right is affected thereby. Whether it was shown on the trial below that the by-law in question was authorized by the charter, or assented to by plaintiff in error or his grantor, or that such an agreement was entered into by plaintiff's grantor, we have no means of knowing. But such evidence being admissible under the pleadings, and necessary to sustain the judgment of the court below, it is to be presumed that it was produced, and the judgment of the court below is accordingly affirmed. Writ denied.

(18 Colo. 186)

PEOPLE ex rel. ATTORNEY GENERAL v. MacCABE.

(Supreme Court of Colorado. Jan. 30, 1893.)  
DISBARMENT OF ATTORNEY—ADVERTISING FOR DIVORCES.

1. An advertisement reading: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver."—is against good morals, is a false representation, and a libel on courts of

justice; and repeated publication in a newspaper of such advertisement by an attorney constitutes malconduct in his office, for which the supreme court is empowered by statute to strike his name from the roll of attorneys.

2. Where, in his answer, defendant alleges that he advertised for divorce business in entire ignorance that it was wrong, that he ceased to so advertise on the commencement of this proceeding, and, if the court shall adjudge such advertising wrong or malconduct in office, he will abide by the directions of the court, and when it also appears that this is the first case of the kind brought in this court, the court will not disbar defendant, but will suspend him for six months, and until payment of all the costs of this proceeding.

Original proceedings by the people of the state of Colorado, on the relation of the attorney general, against Isaac J. MacCabe, to procure his disbarment as an attorney and counselor at law.

In this proceeding the petition states that respondent, a duly-licensed attorney, has been guilty of malconduct in his said office as an attorney and counselor at law, in that, for a long time immediately preceding the exhibiting of the petition, he had repeatedly published in a newspaper of large circulation, in the city of Denver, the following advertisement: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver." Respondent, by his answer, admits that he caused the advertisement to be published as alleged in the petition. Cause submitted upon petition and answer.

Joseph H. Manplin, Atty. Gen., for plaintiff. Isaac J. MacCabe, pro se.

ELLIOTT, J. The ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares. An attorney may properly accept a retainer for the prosecution or defense of an action for divorce, when convinced that his client has a good cause; but for any one to invite or encourage such litigation is most reprehensible. The marriage relation is too sacred, it affects too deeply the happiness of the family, it concerns too intimately the welfare of society, it lies too near the foundation of all good government, to be broken up or disturbed for slight or transient causes. In the present case we are not called upon to deal with a matter of ordinary advertising, but with a peculiar kind of advertising. Respondent did not advertise for business openly, giving his name and office address. His advertisement was anonymous, and well-calculated to encourage people to make application for divorces who might otherwise have refrained from so doing. When a lawyer advertises that divorces can be legally obtained very quietly, and that such divorces will be good everywhere, such advertisement is a strong inducement, a powerful temptation, to many persons to apply for divorces who would otherwise be deterred from taking such a step from a wholesome fear of public opinion. The advertisement published by respondent says, in effect: "If you are dissatisfied with your partner in life,—if you desire a divorce,—communicate with me, and your desire shall be gratified. No one will

know it. You see I advertise anonymously. I do not even subject myself to criticism. Everything will be done very quietly, and you will be able to sever the disagreeable marriage tie without public scandal, and hence without reproach." The fear of public opinion is not the highest motive, but it exercises a wholesome influence in many ways. It is undoubtedly potent in preventing many suits for divorce; and in most of such cases, not only the individuals directly concerned, but the circle of society in which they move, as well as society at large, are greatly benefited by the restraining influence of public opinion. The advertisement published by respondent to the effect that divorces could be legally obtained very quietly, which would be good everywhere, was the more mischievous because anonymous. Such an advertisement is against good morals, public and private. It is a false representation, and a libel upon the courts of justice. Divorces cannot be legally obtained very quietly which shall be good anywhere. To say that divorces can be obtained very quietly is equivalent to saying that they can be obtained without publicity. Every lawyer knows that to obtain a legal divorce a public record must be made of the proceeding; the complaint must be filed; the summons must issue, process must be served upon the defendant, either personally or by publication in a public newspaper, proof must also be taken; and a decree must be publicly rendered by the court having jurisdiction of the proceeding. All these public proceedings the statute imperatively requires, and for a lawyer, by an advertisement, to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases, is a libel upon the integrity of the judiciary, that cannot be overlooked when brought to our notice. In the case of *People v. Brown*, 17 Colo. —, 30 Pac. Rep. 338, this court said: "When this court grants a license to a person to practice law, the public, and every individual coming in contact with the licensee in his professional capacity, have a right to expect that he will demean himself with scrupulous propriety, as one commissioned to a high and honorable office. A person enjoying the rights and privileges of an attorney and counselor at law must also respect the duties and obligations of the position." The case of *People v. Goodrich*, 79 Ill. 148, was a disbarment proceeding under statutes from which ours were undoubtedly borrowed. Among other things, the complaint against Goodrich set forth that he had published advertisements without signature, representing that he could procure divorces without publicity, and by such advertisements solicited business of that character by communication through a particular post-office box. The Goodrich Case, though similar to the one before us, was more aggravated in some respects. Mr. Justice Breese, in delivering the opinion of the court, said: "This court, having power, by express law, to grant a license to practice law, has an inherent right to see that the license is not abused or perverted to

a use not contemplated in the grant. In granting the license it was on the implied understanding that the party receiving it should, at all times, demean himself in a proper manner; and if not reflecting honor upon the court appointing him, by his professional conduct, he would at least abstain from such practices as could not fail to bring discredit upon himself and the courts. \* \* \* The morale of defendant's professional conduct deserves special notice. He makes divorce cases a specialty. How many persons in our broad land weary of the chain that binds them? How many are eager to seize upon the slightest twig that may appear to aid them in escaping from a supposed sea of troubles, in which wedded life has immersed them? How many are fretting under imaginary ills, and what better devices than those practiced by this defendant could be contrived to increase these disquietudes, and stimulate to effort, by perjury, if need be, to free themselves from their supposed unhappy condition? Is it desirable that divorce cases should accumulate in our courts? If so, the defendant is justified in the means he has used and is using to that end. An honorable, high-toned lawyer will always aid a deserving party seeking a divorce, as coming strictly within his professional duties. He will render the aid, not solicit the case; and he will, in all things regarding it, act the man, and respect, not only his own professional reputation, but the character of the courts, and discharge the unpleasant duty in all respects as an honorable attorney and counselor should do."

In his answer in this case respondent says, in effect, that in advertising for divorce business he did it in entire ignorance that it was wrong; that he ceased to so advertise, in deference to the court, upon the commencement of this proceeding; that if this court shall adjudge such advertising to be wrong, or to be malconduct in office as an attorney, within the meaning of the statutes, he will cheerfully abide by and obey the directions of the court in the premises. In view of these statements in the answer, this being the first case of the kind brought in this court, we do not feel it incumbent upon us to perpetually deprive respondent from pursuing his business as an attorney. A court intrusted with the power to admit and disbar attorneys should be considerate and careful in exercising its jurisdiction. The interests of the respondent must in every case be weighed in the balance against the rights of the public; and the court should endeavor to guard and protect both with fairness and impartiality. In this connection the words of Chief Justice Marshall, in *Ex parte Burr*, 9 Wheat. 529, are particularly appropriate: "On the one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these



objects, some controlling power—some discretion—ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised, and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself." In view of all the circumstances of this case, the judgment of this court is that respondent (MacCabe) be, and is hereby, suspended from practice as an attorney and counselor at law for the period of six months from this date, and until the payment of all the costs of this proceeding.

(3 Colo. A. 130)

**PIERSON v. WILTON.**

(Court of Appeals of Colorado. Jan. 23, 1893.)

Appeal from Pitkin county court.

Action by Samuel Wilton against H. W. Pierson to recover for services rendered. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. O'Brien, for appellant.

**RICHMOND, P. J.** This is an action to recover for services rendered. It was originally commenced before a justice of the peace of Pitkin county, where judgment was rendered for Samuel Wilton, appellee. Thereafter on appeal the cause was tried in the county court, and judgment rendered for the sum of \$104.41. To reverse this judgment, this appeal was prosecuted to the supreme court, and, by order of that court, transferred to this.

The sole ground relied upon is that the evidence does not sustain the judgment. It is sufficient for us to say that, after reading the abstract, we are of the opinion that there is testimony to support the conclusions reached by the justice of the peace and the county judge, and that under the innumerable decisions of the supreme court, as well as a large number of decisions by this court, we are not warranted in disturbing the judgment.

The judgment will be affirmed.

(13 Mont. 76)

**GOODRICH LUMBER CO. v. DAVIE et al.**

(Supreme Court of Montana. Feb. 6, 1893.)

**MECHANIC'S LIEN—NOTICE—INSUFFICIENT DESCRIPTION—ENFORCEMENT—JUDGMENT.**

1. Under Comp. St. div. 5, § 1371, providing that a notice of a material man's lien shall give a correct description of the property sought to be charged, but that any error or mistake in the description shall not affect the validity of the lien, provided the property may be identified by the description, a notice of a lien particularly describing lot No. 14 on a certain survey as the lot to be charged, is not sufficient to create a lien on lot No. 13 on the same survey.

2. Nor will the fact that the notice referred to the lot as the lot on which there were "certain frame buildings and outhouses" constitute a sufficient identification, as such description might apply to any lot on which such buildings stood, even though it appears that there were no buildings on lot 14, while there were such on lot 13.

3. Where, in an action on an account against the contractor of a building, and to foreclose a material man's lien against the owner, the complaint states a cause of action on the account, a judgment that plaintiff take nothing because no cause of action was stated against the owner will be so modified as to include in its operation defendant owner only.

Appeal from district court, Cascade county; Charles H. Benton, Judge.

Action by the Goodrich Lumber Company against E. R. Davie and others on an account, and to foreclose a material man's lien. From a judgment dismissing the complaint, plaintiff appeals. Modified.

The other facts fully appear in the following statement by DE WITT, J.:

By this action it is sought to obtain a judgment for an account, and to foreclose a lien for lumber and material supplied by the plaintiff for a building. The defendant Gelsthorpe is the owner. The defendant Davie is the contractor with the owner for the construction of the building, and the person to whom the material was sold. The defendant Welch is a mortgagee under an instrument dated March 21, 1891. The material was furnished between January 8 and May 9, and the lien was filed May 12, 1891. The property against which it is sought to enforce the lien, and that which is actually owned by the defendant Gelsthorpe, is described in the complaint as follows: "Lot thirteen, (13,) in block two hundred, (200,) of the city of Great Falls, Cascade county, Montana, as designated on the official plat of the First addition to the town of Great Falls, aforesaid, as the same is filed in the office of the recorder of Cascade county, Montana." The notice of lien is attached to the complaint as an exhibit. It first mentions the premises as "that certain frame building and outhouses erected upon that certain lot, piece, or parcel of land, hereinafter particularly described." The particular description of the lot found thereafter in the notice is as follows: "That certain lot, piece, or parcel of land hereinbefore mentioned, and to which this lien applies and attaches, is situate, lying, and being in the city of Great Falls, county of Cascade, and state of Montana, particularly described as follows, to wit: Lot numbered fourteen, (14,) in block number two hundred, (200,) of the city of Great Falls, Cascade county, Montana, as the same is described on the official plat of the town site of Great Falls, aforesaid, a certified copy of which is on file in the office of the recorder of Cascade county, Montana." The description in the notice of the lien is of lot 14, block 200. The complaint asks foreclosure against lot 13, block 200. To cover the point that the description in the notice of lien was for one lot, and foreclosure is sought against another lot, the complaint has the following paragraph: "Plaintiff further alleges that the description contained in said lien was at the time the only description known to the plaintiff of the premises upon which said building was erected, and that said description was by error and inadvertence placed therein; that block 200 was at said time the only block of that number within the city limits of the said city of Great Falls, and the lot designated within said block, within the description contained in said lien, is adjoining and contiguous to the lot upon which said dwelling house of the said W. H. Gelsthorpe is erected, and is separated therefrom only by an imaginary line; that the said lot fourteen (14) described in said lien has no buildings whatsoever thereon, as plaintiff is informed and believes; that said lot thirteen

(13) is now, and was at all the times heretofore mentioned, the only lot in said block two hundred (200) of the city of Great Falls, aforesaid, owned by said W. H. Gelsthorpe, defendant herein, and that said fact is, and was generally known at the time." A motion was made to strike out these allegations. This motion was sustained. Then a demurrer to the complaint was sustained, and judgment entered for defendants. The plaintiff appeals. The appearance on this motion and demurrer was by Gelsthorpe, owner, and Welch, mortgagee, only. Davie, the contractor and debtor, did not join in the proceeding. The point of the appeal is whether the description, as made in the notice of lien, is such that "the property may be identified by said description." Section 1371, div. 5, Comp. St.

Thos. E. Brady, for appellant. Cooper & Pigott, for respondents.

DE WITT, J., (after stating the facts.) A recent case in Indiana (1890) says: "The principle drawn from the authorities seems to be this: That a description in a notice of lien cannot be supplied by oral evidence, but that an ambiguity may be explained, and the premises identified." *McNamee v. Rauck*, 128 Ind. 59, 27 N. E. Rep. 423. The description in the notice of lien in the case at bar is not defective, or insufficient, or uncertain. It does not come within the class of cases where descriptions of such a nature have been allowed to be helped by averment. The description of the ground is perfectly definite and certain. The only difficulty is that it was a wholly wrong description. The Indiana case remarks that a description in a notice cannot be supplied by oral evidence. That is what is sought to be done in the case at bar,—to substitute in the complaint a lot wholly different from the one particularly described in the notice of lien. Again, it is said in the Indiana case: "But the ambiguity may be explained, and the premises identified." There is no ambiguity here, either latent or patent. The notice of lien clearly and particularly describes lot 14. It is alleged in the complaint that lot 13 was the only one in block 200 upon which the defendant Gelsthorpe had any buildings, and plaintiff contends that the buildings were a sufficient identification of the land; and cases are cited where a description of the buildings was held to sufficiently identify the land. For instance, "the brick city hall to be erected by the city of Hillsboro." *Scholes v. Hughes*, 77 Tex. 482, 14 S. W. Rep. 148. Again, "a mill belonging to the party of the second part, at Marseilles," when the party had but one mill, (*Strawn v. Cogswell*, 28 Ill. 457;) and other cases where the building was some public or well-known structure, and where the description relied upon was the building alone, and there was no attempt to describe the land, either by metes and bounds, or by lot and block. But in the case at bar the description of the building is, "that certain frame buildings and outhouses." That description would apply to hundreds of premises in a large city. It is not like a city hall, (*Scholes v. Hughes*,

supra,) or the works of the La Crosse City Gas Light & Coke Company, (*Brown v. Coke Co.*, 16 Wis. 578.) The lienor herein does not depend upon the building and outhouses for description, but gives force, in his notice, to what he calls a "more particular description" of the premises; that is, by lot and block, on an official plat filed in a public office. It is said in *Northwestern Cement, etc., Co. v. Norwegian, Danish, etc., Seminary*, 43 Minn. 452, 45 N. W. Rep. 868: "In this state the important means of identifying real estate is, in the case of urban property, the description according to the plat." The same system obtains in this state. In the cities and towns, and even small villages, the system is well-nigh universal to describe land by lot and block of the plat of an official survey filed in the proper public office.

Our statute provides: "But any error or mistake in said . . . description shall not affect the validity of said lien, provided the property may be identified by said description." Section 1371, div. 5, Comp. St. In the description under consideration there is no error or mistake. "Lot 14 in block 200" is certain, definite, and unmistakable. By it one would identify that piece of ground as officially platted. By it he would not identify lot 13. A description of lot 14 cannot sustain a lien for materials furnished and used in the erection of a building on lot 13. The judgment of the court was that the plaintiff take nothing by its complaint, and that said defendants Gelsthorpe and Welch recover their costs. But a cause of action is stated in the complaint against Davie, the contractor, on an account for the material furnished to him; therefore the judgment that the plaintiff take nothing by its complaint was not warranted, because all that the court reached was that there was not a cause of action against the owner and a mortgagee. The district court is therefore directed to modify the judgment so that it shall be to the effect that the plaintiff take nothing by its complaint as against Gelsthorpe and Welch only. The judgment as so modified is affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

(13 Mont. 32)

McDONALD v. PINCUS et al.

(Supreme Court of Montana. Feb. 6, 1893.)

SHAM ANSWER—JUDGMENT ON PLEADINGS.

1. Where, in an action on a note by the indorsee against the makers, the answer states as a sole defense that the payee failed to perform services which he agreed to perform as the consideration for the note, but does not allege the terms of the agreement, or the conditions thereof, such answer is properly stricken from the files as sham; Code Civil Proc. § 101, providing that sham and irrelevant answers and irrelevant matter inserted in a pleading may be stricken out, on such terms as the court may, in its discretion, impose.

2. Defendants having failed to amend after the defective condition of their answer was brought to their notice, judgment was properly rendered against them on the pleadings.

Appeal from district court, Silver Bow county; John J. McHatton, Judge.

Action by Frederick G. McDonald against I. Pincus and others to recover on a note made by defendants, and indorsed to plaintiff. From a judgment for plaintiff, defendants appeal. Affirmed.

The other facts fully appear in the following statement by HARWOOD, J.:

This is an action to enforce payment of a promissory note. The complaint alleges that said note was executed by appellants I. Pincus and Joseph Weyerhorst to one Joseph Saunders, for the sum of \$250, principal, to bear interest after maturity, payable 90 days after date, a copy of which note is set forth in the complaint; that said Joseph Saunders transferred said note, by indorsement, to plaintiff; that no part of said sum has been paid; wherefore plaintiff demands judgment for the principal, interest, and costs. The defendants answer the complaint as follows: "First, that the note mentioned and described in the complaint was given by defendants to Joseph Saunders, therein named, without any other consideration than is hereinafter stated; second, that theretofore defendant I. Pincus, in consideration of the promise of said Joseph Saunders, gave said Joseph Saunders said note, as an accommodation, without any other consideration, and solely for the accommodation of said Saunders, and upon his promise to do and perform said labor according to the terms of said agreement;" that "said defendant Weyerhorst joined in the making of said note solely for the accommodation of said Saunders and Pincus; that said Saunders did not perform the labor according to the terms of the agreement entered into by him with said Pincus, and that the said note was made without any consideration whatsoever on the part of defendant Weyerhorst; that plaintiff is not a bona fide holder of said note for a valuable consideration, but received the same with notice of the foregoing facts, and as collateral to secure the payment of an antecedent debt, and without paying any consideration therefor;" that "defendants deny each and every allegation of the complaint inconsistent with the foregoing facts." And on this answer, which is entirely quoted above, except the formal parts, defendants ask judgment for costs. This answer was stricken from the files of said case as sham, on motion, both parties appearing at the hearing thereof. It appears that, on the hearing of said motion, plaintiff offered, and the court received, and considered in support thereof, the separate affidavit of plaintiff and his attorney, William E. Carroll, Esq., and also of said Joseph Saunders, the payee of said note, which affidavits affirm in effect that all the allegations of the answer are false, and specifically state the facts upon which affiants base that declaration. The record shows that defendants' counsel excepted to the ruling of the court sustaining plaintiff's motion to strike out defendants' answer. It does not appear that any attempt was made on the part of defendants to obtain leave to file an amended answer after the original was stricken out, or that defendants otherwise offered any defense thereafter.

Judgment followed, on motion of plaintiff, from which defendants prosecute this appeal.

George Haldorn, for appellants. William E. Carroll, for respondent.

HARWOOD, J., (after stating the facts.) Where the answer tenders an issue by direct and specific denial of the allegations of the complaint, or by alleging substantial facts which would constitute a defense, if true, we think the practice of receiving and considering affidavits contradicting those allegations, and thereon striking the answer out as sham, would not be approved, although there can be found some authorities in support of such practice. See Bliss, Code Pl. § 422; Boone, Code Pl. § 252, and authorities cited and commented on. Such a practice seems to lead towards a dangerous and unwarranted encroachment upon the right of trial, in the ordinary manner provided by the constitution and laws, before judgment can be pronounced. The courts sanctioning such a practice appear to have encountered that difficulty, and it has perhaps been the cause of seeming inconsistency in their decisions on that point of practice. Our Code of Civil Procedure provides upon this subject that "sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose." Section 101. Our view of the contemplation of that provision is that the sham pleading, or portion thereof to be eliminated on motion, is such as appears manifestly and inherently sham by reason of its incompatibility with the law, or the nature and condition of things within the judicial knowledge, or appears to be false by comparison with other declarations of the pleadings; and these conditions should appear upon a consideration of the pleadings alone. In this case, however, the answer is wanting in allegations developing a ground of defense. All that portion of the answer which is not matter of admission or averment in the complaint is mere vague allusion to some agreement for labor, alleged to have constituted the consideration for the note in question; and without alleging the terms of the agreement alluded to, or even the conditions or effect thereof, it is alleged that the payee failed to perform "said agreement," the existence of which is only intimated. This is the only matter of defense attempted to be set up, and that is not set forth so as to enable plaintiff to reply to the same, or so as to allow the agreement hinted at to be proved, and therefore it could not be available as a defense under this answer. When the defective condition of the answer was brought to the notice of the defendants by the proceedings in this action, they appear to have made no effort to cure its incompleteness, under the liberal provisions of the Code allowing amendments. Plaintiff was entitled to judgment on the pleadings, and the court was warranted in granting the judgment, without considering any motion to strike the answer from

the files. Therefore let the judgment stand affirmed, with costs.

PEMBERTON, C. J., and DE WITT, J., concur.

(13 Mont. 87)

BARDWELL et al. v. ANDERSON et al.

(Supreme Court of Montana. Feb. 6, 1893.)

MECHANIC'S LIEN — ENFORCEMENT — EVIDENCE — PLEADING — SUFFICIENCY OF LIEN ACCOUNT.

1. In an action to foreclose a lien for building materials it is not necessary to prove the filing of the lien before introducing proof that the materials were furnished and entered into the construction of the building.

2. A complaint alleging that defendant A., by contract with defendants C. and L., furnished the materials and erected a building on the land of C. and L., herein described, and bought of plaintiffs' assignor windows, frames, stairs, doors, inside furnishing material, lumber, etc., of the agreed value of \$2,085, which went into the construction of said building, is sufficient.

3. A lien account is sufficiently itemized which describes the windows, sash, and all classes of materials sold, with great particularity, except as to price, which appears at the foot of the account, showing the whole amount due at the price agreed upon, since the account contains sufficient information to enable any one to ascertain whether the price of the materials was reasonable, and whether the materials entered into the construction of the building.

4. An objection to the introduction of a lien account, on the ground that the paper purporting to be a lien is not a charge on the property described in the complaint and lien, should be disregarded, since it specifies no ground of error.

5. Evidence of the lien account of a subcontractor is not objectionable because, at the time it is offered, there is no evidence of contractual relation existing between the furnisher of materials and the owner of the land, as required by statute, since such evidence was offered to prove an allegation in the complaint; and, if no such relation was shown after all the evidence was in, the objection could be made in summing up the case.

6. The objection to the introduction of a lien account "because there is nothing therein which operates as a notice to defendants of the materials, and value thereof, which were furnished for said building," raises a question of law as to the sufficiency of the lien and notice, and should have been raised by demurrer.

7. A lien account showing that part of the materials furnished were of the agreed value of \$2,585, and part of the reasonable value of \$110, is not inconsistent with a complaint alleging that the goods were of the agreed and reasonable value of \$2,085.

Appeal from district court, Cascade county; Charles H. Benton, Judge.

Action by Bardwell, Robinson & Company against H. A. Anderson, Timothy E. Collins, and John Lepley to foreclose a lien for building materials. Judgment for defendants. Plaintiffs appeal. Reversed.

Thos. E. Brady, for appellants. John A. Hoffman and Cooper & Pigott, for respondents.

HARWOOD, J. This is an action for judgment on account, and to foreclose a lien for building materials alleged to have been purchased by defendant Anderson from plaintiffs' assignor, one F. M. Morgan, and used in the construction of a three-story brick block by said defendant

Anderson, as contractor and builder, for defendants Collins and Lepley, on a lot in Great Falls, Cascade county, Mont., owned by the two last-named defendants, which building is known as the "Collins & Lepley Block." The complaint in setting forth the allegations constituting plaintiffs' cause of action, tenders as an exhibit, attached to and made a part of the complaint, a copy of the lien account, with description of the property charged therewith, verified, and alleged to be of record in the office of the county clerk and recorder of said county. Defendants Collins and Lepley answered the complaint, and the trial ensued, whereat plaintiffs, to establish their cause of action, called, as witness, Howard Crosby, county clerk and recorder of said county, who, after stating his said official position, identified the original lien account, verification, and description of the property charged therewith, as a document filed in said recorder's office at the time stated in the filing and endorsement thereon. The record recites that this paper "was then offered by plaintiffs to be marked for identification, and was received, and marked 'Exhibit A.'" A second paper was also identified by said witness, as of record in said recorder's office, filed of the date indorsed thereon. This latter paper purports to be an assignment of said lien account, on file in the recorder's office, as aforesaid, by Morgan, to plaintiffs; and the record shows that, after its identification by the recorder as one of the records of his office, said assignment was "offered to be marked for identification, and so received, and marked 'Exhibit B.'" Thereupon said Morgan was called as a witness on behalf of plaintiffs, and, in answer to questions, testified as follows: "My name is F. M. Morgan. I resided in Great Falls during the year 1890. I was in the architect business, and also a dealer in special building materials. I know the building known as the 'Collins & Lepley Block,' in the city of Great Falls, Mont. It is situated on lots 8 and 9, block 366, Great Falls, Mont. To my own knowledge, defendant H. A. Anderson had the contract for the erection of that building, and had said contract from said Collins and Lepley. I bargained, sold, and delivered to said H. A. Anderson material for the construction of that building." Witness was then shown plaintiffs' exhibit marked "A," for identification, and said: "I have examined the schedule which forms part of the paper shown me, and recognize it to be a list of materials I sold Anderson for the building in question,—the Collins & Lepley Block." The witness was then asked the following question: "State whether or not you know whether these materials ever entered into the construction of that building, and, if so, on what dates they were furnished to said building." Thereupon defendants objected to this question, "upon the ground that, before witness can testify that the materials went into the building, he must show that he filed a lien upon this property. Objection sustained by the court, to which ruling defendants duly except." This ruling is assigned by plaintiffs, who are appellants here, as error.

The ground of the objection relates simply to the order of introducing proof, and on that score it does not appear to have any foundation whatever in reason. As a matter of logical and orderly procedure in the proof, it would seem to be as appropriate to first show that the materials were furnished and used in the structure, and then show the filing of the lien, as to reverse the order of showing those facts. The furnishing of material must precede filing of lien, in order to make the lien applicable. The order of introducing proof, condemned by the objection, was the chronological order in which the facts must have arisen, if existing, and was the order in which such facts were alleged in the complaint. The record shows that the original lien account, on file in the recorder's office, had been produced by the recorder, proved as one of the records of said office, and "was then offered by plaintiffs, to be marked for identification, and was received, and marked 'Exhibit A,'" and was in the hands of the witness when the objection under consideration was interposed. The objection appears to be wholly capricious, and ought not to be sustained. The order of admitting proof rests in the sound discretion of the court, and that discretion is usually exercised to allow a deviation from a strictly logical order, if the exigency of the occasion demands it, or the convenience of witnesses or counsel would be subserved thereby, or waste of time avoided, and no disadvantage would result to the adverse party. What difference could there be in effect on the adverse party if the furnishing of the material was first shown, and then the filing of the lien? It should always be recognized that counsel bear an important part in the trial of an action, as advocates of litigants seeking justice at the hands of the court. In the arrangement of the case for trial, in the calling and interrogation of witnesses, the introduction of documentary evidence, the formation of findings and instructions to be asked for, the preparation for argument of the cause, and in the multitude of other cares which press upon counsel in the trial of a case, they have more important responsibilities to absorb their attention than to study whether each item of evidence, as produced, would meet the approval of the most punctilious critic of its logical sequence; and counsel have a right to complain when, in their attempt to present the cause of a suitor, objections are sustained by the court which have no foundation in reason or in fact, and which result only in embarrassment. It is observed that counsel for respondents do not attempt to support the objection under consideration, or the ruling of the court thereon. The above-mentioned objection having been sustained, counsel for plaintiffs offered in evidence the lien account theretofore proved, to which objection was interposed on several grounds, only two of which appear to be relied on to support the ruling of the court sustaining that objection, and refusing to allow the lien account to be admitted in evidence.

The first point relied on to support such ruling, as appears from respondents' brief,

is that "the complaint failed to state facts sufficient to constitute a cause of action against respondents, and they made timely objection to any evidence in the cause, upon that ground. There is no allegation of the complaint, or in the claim of the lien, stating that the material was furnished for the building upon which the pretended lien is claimed." The record shows no such ground stated in the objection to the admission of said lien account in evidence. Moreover, the complaint is not wanting in this respect. The complaint, among other allegations, alleges that "defendant H. A. Anderson entered into a contract with defendants Timothy E. Collins and John Lepley to furnish the materials and erect upon the land herein above described a three-story brick building, known as the 'Collins & Lepley Block,' for them, the said defendants; and plaintiffs allege that in pursuance of said contract, so made and entered into by said Anderson, in the year 1890, and previous to the 27th of June of said year, the said defendant Anderson did proceed to erect and construct said three-story brick block, known as the 'Collins & Lepley Block,' upon the land hereinbefore described; and, while so carrying out said contract, the said defendant Anderson did purchase of one F. M. Morgan, then of the city of Great Falls, Cascade county, Mont., windows, frames, stairs, doors, inside furnishing material, lumber, etc., for the purpose of erecting therewith the said brick block, and which were used in and entered into the construction of said brick building aforesaid, on the land hereinbefore described, of the value in the aggregate, and for the agreed and stipulated sum, of two thousand six hundred and ninety-five and 56/100 dollars, (\$2,695.56.)" Therefore the ruling of the court excluding said lien account could not be sustained, on the ground that the complaint was insufficient in the respect urged, even if that had been made a ground of objection when the lien account was offered.

Respondents also urge that the lien account offered should be rejected as insufficient to constitute a lien, in that the same is not itemized as required by law. The lien account, tendered, by copy, as an exhibit to the complaint, is itemized with great particularity as to the various materials alleged to have been furnished. The account in question is a long one, and a portion will suffice to illustrate the whole of it in the respect mentioned. It commences as follows:

Great Falls, Mont., Dec. 18, 1890.

H. A. Anderson, Contractor for Collins & Lepley Block, lots 8 and 9, block 366, city of Great Falls.

To Frank M. Morgan, Dr.

Sept. 1, 1890.

8 windows,	4 lights	18"x42"x1 1/2",	glazed,	single strength.
2 " "	4 " "	14"x36"x " "	" "	" "
1 " "	4 " "	14"x28"x " "	" "	" "
1 " "	4 " "	20"x24"x " "	" "	" "

Sept. 11, 1890.

8 windows,	4 lights	12"x30"x1 1/2",	glazed,	single strength.
2 sash	2 " "	12"x18"x " "	" "	" "
1 " "	4 " "	14"x18"x " "	" "	" "

—And so continues, describing the several classes of materials, with apparently the same particularity throughout. The part, however, upon which respondents press their objection, is that the account does

not show the price of each particular item. Near the close of the account is a statement as follows: "The foregoing, per price agreed, \$2,585." Then follows a statement of other items of materials and prices, making a total of \$2,695.56, the amount for which this suit is brought. We hold this account sufficiently itemized. It contains ample information to all parties concerned to enable them to investigate as to whether the materials set forth in the account went into the structure, and as to the reasonable value thereof. The items of materials alleged to have been furnished are so particularly set forth in said account that any person informed as to the reasonable value of such wares can readily ascertain whether the aggregate price set down is just and reasonable. Therefore we cannot sustain the ruling of the court excluding said lien account on the ground that it is not sufficiently itemized.

Certain other alleged reasons for rejecting said lien account were stated in the objection thereto, but have not been urged on this appeal in support of the ruling of the court, nor do we deem those reasons pertinent or sufficient; but, inasmuch as it is uncertain upon what particular ground the court sustained the objection, and it being necessary to remand the case for trial, we will briefly notice the other alleged grounds of the objection, in the order set forth in the record.

The first is "that the paper purporting to be a lien is in no wise a charge upon the property described in the complaint and in the lien." This specifies no ground or reason for rejecting the account, and therefore, as an objection to the admission of evidence, it must be disregarded.

The second alleged ground of objection to the admission of the account in evidence is "because the statute of Montana under which said lien is supposed to have been filed does not provide a lien for a subcontractor unless that subcontractor has a contract relation with the owner of the property." This alleged ground is out of place as an objection to the admission of said lien account in evidence. It is asking the court, at this incipient stage of the case, to consider whether the evidence offered by plaintiffs is sufficient in law to sustain a decision in his favor, and not whether the evidence offered is relevant and competent to establish some material allegation of the complaint. If the law does not provide for a lien in favor of a subcontractor unless he occupy the contractual relation mentioned, and on the close of proof no such relation had been shown, it would be time enough to raise that question on the summing up of the case. In offering in evidence the original lien account, tendered by copy attached to the complaint, as part thereof, the plaintiffs were simply attempting to prove the allegations of the complaint by competent evidence. If the complaint was insufficient in stating a case for a lien upon said property, that question of law should have been raised by demurrer.

The third alleged ground is that "the pretended lien is insufficient because the same is not itemized, as required by law."

And the fourth ground is like unto the third, namely: "Because the account attached to the pretended lien, and filed therewith, does not show the value, or reasonable value, of the items therein set forth." These grounds of objection have been already considered.

The fifth ground, as stated, is: "Because there is nothing in said lien, or account therewith filed, which in any manner operates as a notice to the defendants, or to either of them, of the materials, and the value thereof, which are alleged to have been furnished for said building." This ground of objection also raises a question of law as to the sufficiency of the lien tendered in the complaint; and the further question whether the law providing for liens requires such special notice as this ground of objection seems to contemplate. It would have been more appropriate to raise these questions by demurrer, inasmuch as the lien account filed in the office of the county recorder was made part of the complaint; but, not having been raised at that proper time, it is time enough to consider that question after the evidence is in, and the court comes to the consideration whether the law would apply a lien upon the facts shown. Objecting to the introduction of the alleged lien account in evidence on the fifth ground, and on some others stated, is no more than undertaking to say that plaintiffs cannot be allowed to prove the allegations of their complaint after time for demurrer has passed, and those allegations have been answered, and the issue thus raised is being tried.

The sixth alleged ground, as stated, is that plaintiffs "allege upon a contract, and the account filed with the notice of lien claims \$2,585, as per agreement, and another amount, which makes \$2,692, as the reasonable value." Plaintiffs allege in their complaint the price of the goods furnished as being the value thereof, and also as being the agreed price; and the facts pointed out by this ground of objection are not at all inconsistent with the allegations of the complaint. Judgment reversed, and cause remanded for trial.

PEMBERTON, C. J., and DE WITT, J., concur.

(13 Mont. 96)

MARTIN v. FLAHERTY et al.

(Supreme Court of Montana. Feb. 6, 1893.)

DELIVERY OF DEED—ESCROW.

1. Where the owner of real estate executes a deed to her daughters, from whom she takes back a life lease of the premises, and some months later the owner, with one of her daughters, delivers to a third party a package containing the deed and lease, and inscribed with directions to deliver the same to the owner, and in case of her death to one of the daughters, and afterwards speaks of the deed as "the girls' deed," and occupies the premises under the lease till her death, the facts show a present delivery of the deed to the daughters.

2. The leaving of the papers with the depository did not constitute an escrow; there being no condition to be performed before delivery.

Appeal from district court, Gallatin county; Frank K. Armstrong, Judge.

Ejectment by J. P. Martin, administrator, against Martha Flaharty and others. Judgment for defendants. From an order refusing a new trial, plaintiff appeals. Affirmed.

E. P. Cadwell and J. L. Staats, for appellant. Luce & Luce, for respondents.

PEMBERTON, C. J. This is a suit in ejectment instituted in the court below by appellant as administrator of Rebecca Githens, deceased. The complaint is such a one as is ordinarily employed in such actions. The answer contains a denial of all of the material allegations contained in the complaint, and alleges affirmatively that the deceased was not the owner of the demanded premises at the time of her death, but was the tenant of the respondents; that, as she did not die seised of any estate in the premises, her administrator, the appellant, cannot maintain this action. Both parties in the court below having expressly waived a jury, the case was tried by the court. The findings and judgment of the court below were in favor of the respondents. The appellant filed his motion for a new trial, which was overruled, and from the order of the court, overruling his motion for a new trial, this appeal is taken.

The facts of the case are substantially as follows: The deceased, Rebecca Githens, was the mother of the respondents. On the 2d day of January, 1888, the deceased, who was then seised in fee of the premises in dispute, executed a deed to the demanded premises to the respondents. On the same day the respondents executed a lease to the same premises to the deceased for the term of her natural life, and delivered the same to the deceased. The proof is not positive that the deed was actually then delivered by the grantor to the grantees; that is, by manual delivery. Some months after the execution of the said deed and lease, the deceased, in company with Mrs. Flaharty, one of the grantees, took both of said instruments to the Gallatin Valley Bank, and delivered them to the assistant cashier. This inscription was written on the outside of said paper: "To deliver to Mrs. Githens, and, in case of her death, to Mrs. Flaharty." Mrs. Githens died some months after the delivery of these papers to the bank, without even calling for them, and without even attempting or expressing any desire to regain the possession of them. After the death of Mrs. Githens the papers were delivered to Mrs. Flaharty. While these papers were in the bank, Mrs. Githens spoke of them to witnesses, saying the "girls' deed" (meaning the respondents) was in the bank. The evidence also shows that the deceased occupied the demanded premises under said lease from its execution until her death. After the death of Mrs. Githens the respondents took possession of the demanded premises, and have exercised control thereof ever since. The deceased, in her lifetime, while said papers were in the bank, spoke of both the deed and lease being in the bank, and of the deed as belonging to the respondents. Upon this showing of facts appellant con-

tends there was no delivery of said deed, that the deceased never lost control over it during her lifetime, and that the delivery thereof was void. Counsel for the appellant concedes that if the deed was delivered he has no case. Respondents, of course, claim that the deed was delivered. What, then, is a delivery? And how can the delivery be shown?

In the 5 American and English Encyclopedia of Law, (page 447,) we find this doctrine asserted: "The intention always controls the determination of what constitutes a sufficient delivery; and it may be manifested by acts or by words, or by both, in the most informal manner. But either acts or words manifesting the intention must be present, in order to constitute a good delivery. But the deed need not be actually delivered, if the grantor intends the execution to have the effect of a delivery, and the parties act upon this presumption. Delivery will be presumed from the fact that the deed was executed before the witnesses, and declared to be delivered in their presence." And see cases cited in notes.

In Washburn on Real Property (volume 3, 5th Ed., p. 305, par. 28) the author says: "Thus, a deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker; and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the mean time have deceased." See authorities cited in note.

In Devlin on Deeds (volume 1, § 262) the author holds the doctrine of delivery of a deed to be one of intention: "As no particular form of delivery is required, the question whether there was a delivery of a deed or not, so as to pass title, must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. 'The doctrine seems to be settled beyond a reasonable doubt,' remarks Justice Atwater, 'that where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, though the deed remains in the hands of the grantor.' \* \* \* The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee; and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee." A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of



law. A deed was held complete and valid where it had been prepared for execution, read, signed, and acknowledged before a proper officer, notwithstanding the testimony of the witnesses present at its execution that there was no formal delivery, and the fact that the deed, after the grantor's death, was found among his private papers in his desk."

In *Doe dem. Garnons v. Knight*, 11 E. C. L. 632, Bayley, J., holds that "where a party to an instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential;" and cites a great number of cases in support of this doctrine.

In *Wheelwright v. Wheelwright*, 2 Mass. 447, in a case very similar to the one at bar, Parsons, C. J., delivering the opinion of the court, holds that "a deed signed, sealed, delivered, and acknowledged, which is committed to a third person, as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently; and the third person is a trustee of it for the grantee."

In *Woodward v. Camp*, 23 Conn. 459, 460, Waite, J., speaking of what constitutes a valid delivery of a deed, says: "And, in order to constitute a valid delivery, it is not necessary that it should be delivered personally to the grantee. It will be sufficient if delivered to some third person for the use of the grantee, although the latter was not present at the time, had no knowledge of the existence of the deed, and never gave any authority to the person receiving it to act in his behalf. *Merrills v. Swift*, 18 Conn. 257. And if a deed be delivered to a third person, to be by him kept, during the life of the grantor, subject to his order, and at his death, if not previously recalled, to be delivered over to the grantee, and the grantor die without having recalled the deed, such delivery will become effectual, and the title of the grantee consummated, in the death of the grantor. *Belden v. Carter*, 4 Day, 66. According to these authorities, had the deed, in the present case, been delivered to some third person, to have been kept during the life of Mrs. Camp, and then delivered to the grantee, such delivery, upon her death, would have become perfected, and the title would have vested in him."

In *Farrar v. Bridges*, 5 Humph. 411, the court say: "A formal, ceremonious delivery of a deed is not essential to its validity. If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing, and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor or grantor." See authorities cited.

In *Thatcher v. St. Andrew's Church*, 37 Mich. 269, speaking of what constitutes the

delivery of a deed, the court say: "The act of delivery is not, necessarily, a transfer of the possession of the instrument to the grantee, and an acceptance by him; but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument. The deed may be delivered to the grantee, or to a stranger unknown to the person for whose benefit it is made; and it has been held that such was a good delivery, when assented to by the grantee after the death of the grantor." See authorities cited.

In *McLure v. Colclough*, 17 Ala. 96, the court say, speaking of what constitutes delivery: "Then, although there was no delivery by the hand, there was enough to constitute a good delivery in law. This may be accomplished by mere words, or by such words and actions as indicate a clear intention that the deed shall be considered as executed, as when a party to an instrument seals it, and declares in presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and actual delivery to the party who is to take by the deed, or to any person for his use, is not essential. *Doe dem. Garnons v. Knight*, 5 Barn. & C. 671."

In *Belden v. Carter*, 4 Day, 66, a Connecticut case, depending on this statement of facts: "Delivery of deed. When takes effect. A grantor, having signed, sealed, and acknowledged a deed, took it up, in the absence of the grantee, and said to another: 'Take this deed, and keep it. If I never call for it, deliver it to B. after my death. If I call for it, deliver it to me.' The party then took the deed, and the grantor dying soon afterwards, and never having called for it, it was delivered to the grantee." Upon these facts the court say and hold: "The grantor delivered the deed to Wright with a reservation of a power to countermand it, but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummated in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery."

In *Newton v. Bealer*, 41 Iowa, 334, in a case nearly on all fours with the case at

bar, Day, J., delivering the opinion of the court, on page 339, says: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because, during life, he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect because the intention might have been changed. Applying this doctrine to the deed in question, there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make. When within a very few days of his death, and evidently, as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be found, which, as he supposed, had the effect to fix his property so that there would be no 'fussing' about it when he was gone. He thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property; and any construction of the law which ignores this intention, and defeats this purpose, prefers shadow to substance." See cases cited.

In *Hathaway v. Payne*, 34 N. Y. 92, a case wherein the facts are as nearly like the facts in the case at bar as usually happens, the court hold that, "where a deed is to be delivered to the grantee on the death of the grantor, the title, by relation, passes at the time the deed was left for delivery." Potter, J., delivered the opinion in this case, and after viewing at great length the facts, in stating the law and citing the authorities, says: "Looking to the language of the agreement itself, for the purpose and intent of this conveyance, it left no condition to be performed before delivery. It required nothing but the lapse of time, to wit, the death of both grantors, when Herrenden, the agent, trustee, or depository of the deed, (by whatever name he may be called,) by mutual direction of the parties, not alone that of the grantor, who alone could not revoke a mutual agreement, immediately to deliver it, as a good and valid conveyance of all the lands therein contained. If we look at the intent of the parties to the deed, as manifested by their acts, independent of the language of their agreement,—the one granting, the other accepting the grant of, this part of the same premises,—it is equally apparent that the parties intended the first deed as a present conveyance. In *Ruggles v. Lawson*, 13 Johns. 285, A. executed a deed of lands, in consideration of natural love and affection, to his two sons, and delivered it to C., to be delivered to his sons in case A. should die without making a will; and, A. having died without a will, C. delivered the deed to the sons. It was held that this was a valid deed, and took effect from the first delivery; that this was not an escrow. In *Tooley v. Dibble*, 2 Hill,

641, a father signed and sealed a deed purporting to convey to his son a farm, placing the deed in the hands of B., with instructions to deliver it after the father's death, but not before, unless both parties called for it; and after the father died B. delivered the deed accordingly. It was held that the title of the son took effect, by relation, from the time the deed was left with B., and that the son's quitclaim, executed intermediate the leaving the deed with B., and the father's death, though importing a mere conveyance of the son's 'right in expectancy' in the land, would pass his title. The cases of *Goodell v. Pierce*, Id. 659, and *Hunter v. Hunter*, 17 Barb. 25, are but confirmations of this view of the title taking effect from the first delivery of the deed. In the case of *Belden v. Carter*, reported in 4 Day, 66, a deed was delivered to a third person to keep, and, if not called for, to deliver it after the death of the grantor. It was held that by legal operation it became the deed of the grantor presently, and that the depository held it as a trustee for the use of the grantee, and that the title became consummate in the grantee by the death of the grantor, and the deed took effect, by relation, from the time of the first delivery. In the case of *Wheelwright v. Wheelwright*, 2 Mass. 447, a distinction is made which I regard as sound, and which I think has not been questioned since, that applies to this case. It was held that a deed, signed, sealed, delivered, and acknowledged, which is committed to a third person as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently, and the third person is a trustee of it for the grantee. But if it be delivered to the third person as the writing or escrow of the grantor, to be delivered on some future event, it is not the grantor's deed until the second delivery. That is, its being a present deed depends upon the fact whether it was delivered as an escrow. The cases can be multiplied, each varying from every other by some nice shade of difference, upon the question whether, in the present case, the deed was an escrow in the hands of the depository, or whether the depository was made the trustee of the grantor. In the former case a second delivery is generally required before the title passes; in the latter, the title passes at the instant of delivering the deed to the depository. This, I think, is the true distinction. In the case at bar there was no direction by the grantors that the deed was left as an escrow, and it presents no evidence of intent on the part of the grantors to make this deed an escrow. There is no condition mentioned in the agreement, to be performed before delivery, which in law would create it an escrow; and presumptions arising from the language of the agreement, being taken most strongly against the grantor, forbid any implication of its being an escrow. I think, therefore, that if the case depended upon this point, raised by the plaintiff on the assumption that there was no such delivery of the deed of 1839 as to pass the title to the defendant, he must also fail. There is another reason, which exists both

at common law and by the statute, (which adopted the common law in this respect,) which is controlling,—that, in the construction of every instrument creating or conveying any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law.” And, in the case just cited, Denio, C. J., dissents from part of the opinion of the court, but agrees with the court as to the law concerning the delivery of deeds in such cases, and, on page 113 of the opinion cited, says: “They do, [referring to cases cited on the question as to what is a sufficient delivery of a deed,] however, I think, prove that a deed may be delivered to a third person, as this was, with instructions to be finally delivered to the grantee after the death of the grantor. In such a case the weight of authority is that no title passes until the final delivery, and that then and thereafter the title, by relation, deemed to have vested as of the time of the first delivery to the third person. If it were an original question, I should suppose that such a transaction was of a testamentary character, and that it would be inoperative, for want of the attestation required by the statute of wills. But the cases establish the rule as I have stated, and they should not now be disturbed.” See authorities he cites on this point.

Authorities might be cited to any extent in support of the doctrine that a manual delivery of a deed is not an absolutely essential requisite to its validity; that “the question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed.” In this case, the grantor having executed the deed to the grantees, and having received back from them at the same time a lease for the term of her natural life, for the same premises, and she having accepted said lease, depositing it, with the deed to the demanded premises, with the depository, with instructions to deliver the deed to the grantees in the event of her death, and having never recalled the deed, or made any attempt or expressed any desire to regain control thereof, but in the mean time spoke of the deed as being the deed of the grantees, in the hands of the depository, and occupied the premises as the tenants of respondents, and in all respects having treated the deed as belonging to the grantees, and both parties having acted concurrently upon the theory that the deed was complete, as well as the delivery thereof, the opinion seems irresistible that the facts show a valid delivery of the deed in this case. Many of the authorities cited in this opinion have been so cited, not that we deemed it necessary to a determination of the case at bar, but more for the purpose of showing the trend of the authorities, and the extent to which they go in support of the doctrine discussed in this case. Some of these authorities go further than perhaps this court would go under like circumstances;

but they all support the position we take,—that in the case at bar there was a valid delivery of the deed. The acts, words, and conduct of the parties,—especially the giving of the lease to the demanded premises by the grantees of the deed to the grantor contemporaneously with the execution of the deed, and her occupying the premises under said lease until her death,—establish beyond controversy that the parties considered the deed complete, as well as the delivery thereof. This opinion is not to be interpreted as establishing any new rule in relation to the testamentary disposition of property, or as expressing any opinion as to the rights of creditors in cases resting upon like facts and circumstances. We simply decide that in this case there was a delivery of the deed, and complete consummation thereof, before the death of the grantor.

Judgment of the lower court is affirmed.

HARWOOD and DE WITT, JJ., concur.

(13 Mont. 106)

STEVENSON v. MATTESON et al.

(Supreme Court of Montana. Feb. 6, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION TO SET ASIDE—PARTIES—APPEALABLE JUDGMENT.

1. Plaintiff sued to set aside an assignment for the benefit of creditors, alleging fraud by the assignor. The assignee demurred. The court sustained the demurrer, and ordered plaintiff to plead over, which he refused to do, and requested the court to render judgment against him for costs. *Held*, that on the neglect of the court to render such judgment, under Comp. St. 1887, div. 1, § 244, plaintiff might request it to do so, in order to obtain a final judgment, from which he could appeal, and such request did not render the judgment one by consent, from which no appeal lies.

2. In such case the complaint is not demurrable because there is no allegation that the assignee was a party to the fraud. The fact that he is assignee, and has possession of the property, makes him a proper party to the action.

Appeal from district court, Cascade county; Charles H. Benton, Judge.

Action by Robert Stevenson against S. W. Matteson and others to set aside an assignment for the benefit of creditors, for fraud. From a judgment for costs, on dismissal of the complaint as against the assignee, plaintiff appeals. Reversed.

F. C. Park, for appellant. Leslie & Downing, for respondents.

PEMBERTON, C. J. This is a suit brought in the lower court by appellant to set aside, and have declared void, a certain deed of assignment. On the 16th day of January, 1892, George L. Stevenson and Ernest W. Ryder, Jr., who claim to be copartners doing business at Great Falls, in Cascade county, Mont., under and in the firm name and style of Stevenson & Ryder, executed their deed of assignment to one S. W. Matteson, Jr., conveying to him their stock of general hardware, harness, etc., for the benefit of the firm's creditors. The deed was duly executed by Stevenson and Ryder, and accepted by Matteson, assignee, who took charge and pos-

cession of the stock of goods. The deed of assignment names but two preferred creditors, to wit, the First National Bank of Great Falls, in the sum of \$1,900, and one James Bleeker, Jr., of New York, in the sum of \$3,000. The complaint alleges that on the 16th day of January, 1892, the date of the said assignment, and for a long time prior thereto, Stevenson and Ryder, the assignors named in said deed of assignment, and James Bleeker, Jr., the preferred creditor named in said deed of assignment, were, and had been, copartners doing said business as such in the city of Great Falls, in the firm name of Stevenson & Ryder, and also were engaged in business in the city of New York, in the firm name of Stevenson & Co.; that, according to the terms of the articles of copartnership existing between said three copartners, all matters of importance, and all large and important purchases and sales of stock, were to be submitted to all three of the members of said firm, doing business at Great Falls, before being entered into or consummated; that Stevenson and Ryder, two members of said firm, made the assignment without consulting Bleeker, who could have easily been consulted by telegraph, as was often done; that Bleeker did not consent to said assignment, or authorize it, but immediately repudiated it after hearing of it. That said Bleeker was fraudulently made a preferred creditor, in and by said deed of assignment, to the amount of \$3,000, because said firm of Stevenson & Ryder did not owe, nor did either member of said firm owe, Bleeker said sum, or any sum whatever, and, further, because said Bleeker was a member of the assigned firm; that said preferred claim of \$3,000 allowed Bleeker, and the whole of it, was fictitious, false, and fraudulent, and was allowed and preferred for the purpose of hindering, delaying, and defrauding the creditors of said firm; that, if said fraudulent and preferred claim of Bleeker is paid and allowed by the assignee, there will not remain sufficient assets of said assigned estate to pay the claim of appellant. The complaint shows that the assignee received about \$4,000 worth of property. The complaint also shows that on the 20th day of February, 1892, the appellant recovered judgment in the lower court against respondents Stevenson, Ryder, and Bleeker, copartners doing business in Great Falls in the firm name of Stevenson & Ryder, in the sum of \$964, which remains unpaid; and the sheriff of said county, being unable to satisfy an execution issued out of said court on said judgment, has returned the same nulla bona. The appellant asks that said deed of assignment be declared null and void, and be set aside, and for other relief. To the complaint the respondent Matteson filed a general demurrer, as follows: "Now comes the defendant S. W. Matteson, and demurs to the second amended complaint in this action filed by the plaintiff, and for cause of demurrer alleges the said amended complaint does not state facts sufficient to constitute a cause of action, and of this he demands judgment of the court." The court below sustained this demurrer,

and, the appellant declining to plead further, the lower court dismissed the complaint as to respondent Matteson, and rendered judgment against appellant for costs. From this judgment the appellant prosecutes this appeal.

The respondents defend the action of the court in sustaining the demurrer and dismissing the action as to respondent Matteson on the ground that judgment was rendered on the application of appellant. The appellant declined to further plead after said demurrer was sustained, because he believed he had stated a good cause of action in his complaint as to Matteson, as well as to the other respondents, and had perhaps stated all the facts he could state in an amended complaint. It was his right, in that case, to stand on his complaint, and, in the event he did so, it was the duty of the court to render judgment for costs, so as to place the appellant in a position to appeal; and his asking the court to do its duty, or to render such judgment as would allow of an appeal, was not such a consent to the judgment as to debar him of the right to appeal. See section 244, div. 1, Comp. St. 1887.<sup>1</sup> In *Conner v. McPhee*, 1 Mont. 78, Knowles, J., says: "The first question presented in this case is one of practice. Can the plaintiffs in an action move to set aside a nonsuit, when they have consented to it, upon its becoming apparent, from the rulings of the court, that they could not recover, basing their motion upon alleged error in the rulings of the court, which induced them to consent to the nonsuit? Such practice we hold proper." See *Mining Co. v. Clarkin*, 14 Cal. 544. In the case at bar the appellant was so placed, after the sustaining of the demurrer, that he was compelled to ask the court to enter the proper judgment, so he could appeal, basing his appeal upon the alleged error of the court in sustaining the demurrer of respondent Matteson. The judgment sustaining the demurrer and dismissing the case as to respondent Matteson was final as to such respondent in this case.

The respondents further contend that the demurrer of respondent Matteson should have been sustained, because the complaint contained no allegation that he, (Matteson,) the assignee, had knowledge of the matters alleged in the complaint to be fraudulent. Respondent Matteson was a proper party to this suit, because he was the assignee, and had possession of the assigned goods and property which the complaint alleges to have been fraudulently assigned, and was presumably disposing of the property for the purpose of paying off the preferred credits, the principal one of which was alleged to be fictitious and fraudulent. Matteson also had a right to defend the assignment, and for that reason alone was a proper party. Whether there was any allegation

<sup>1</sup>Comp. St. 1887, div. 1, § 244, provides that, "upon the dismissal or other disposition of any action in which the court has jurisdiction of the subject-matter of the action, it shall be the duty of the court to render such judgment for costs as is according to law."

in the complaint implicating him in the alleged frauds is immaterial. It was the right and duty of the court, upon the filing of the complaint, to make such orders in relation to the assigned estate as were necessary to preserve it for the use and benefit of the rightful creditors, so as to render available any judgment that might be rendered in the final determination of this cause. The court could have appointed a receiver to hold and care for the assigned estate until final judgment herein, so that, if the appellant should succeed in this action, there would have been something out of the estate left, out of which he could satisfy his claim. To sustain the demurrer and dismiss this cause as to Matteson would simply be permitting Matteson to carry out the terms of an assignment alleged to be fraudulent, and leave the rightful creditors of the assigned estate remediless, in the event of the assignment being declared void. The judgment of the lower court is reversed, and the cause remanded, with instructions to overrule the demurrer of respondent Matteson, and proceed with the case in accordance with the views herein expressed.

HARWOOD and DE WITT, JJ., concur.

(5 Wash. 458)

McMURRAY v. HOLLIS, County Auditor.  
(Supreme Court of Washington. Jan. 3, 1893.)

COUNTY OFFICERS—COMMENCEMENT OF TERM—  
CONSTITUTIONAL LAW.

Const. art. 6, § 8, provides that the first election of county and district officers, not otherwise provided for therein, shall be on Tuesday following the first Monday in November, 1890, and biennially thereafter. Article 27, § 14, provides that all district, county, and precinct officers in office at the time of the adoption of the constitution shall hold office until the second Monday in January, 1891. Article 27, § 2, provides that all laws in force in the territory, not repugnant to the constitution, shall remain in force until they expire by limitation, or are altered or repealed. Act Feb. 4, 1886, provides that all county officers thereafter elected shall hold office for two years from the first Monday in March following. *Held*, that the act of 1886 was abrogated by the constitution, and that the terms of county officers elected in November, 1892, commenced on the second Monday of January, 1893.

Appeal from superior court, Pierce county; John Beverly, Judge.

Mandamus on the relation of J. L. McMurray against William H. Hollis, county auditor, to compel the issuance of a certificate that relator was elected justice of the peace for a term commencing on January 2, 1893. From an order granting the writ, defendant appeals. Affirmed.

W. H. Snell, Pros. Atty., for appellant.  
O'Brien & O'Brien and F. C. Robertson, for appellee.

HOYT, J. Under the stipulations contained in the record, the only question which this court is called upon to decide is this: Does the term of the county officers elected on the 8th day of November, 1892, begin on the second Monday in Jan-

uary, or upon the first Monday in March, 1893? If upon the former date, it is conceded that the judgment of the lower court must be affirmed, and, if upon the latter, that it should be reversed. It is conceded by the briefs of the respective counsel that the decision of this question depends upon the fact as to whether or not the act of February 4, 1886, entitled "An act to prescribe the tenure of office in the territory of Washington," is still in force. When this state adopted its constitution, and was by the action of the United States admitted to statehood, its existence as a territory was fully terminated. From the fact of such termination of its territorial existence, all its powers and duties as such ceased. All laws enacted for its government were at once abrogated; or it would perhaps be more correct to say that the existence of the political body to be governed by said laws had ended, and that there was nothing left for the laws to operate upon, and for that reason they were utterly without effect. It must follow that to the constitution itself, and the schedule, which may be treated as a part thereof, must the state look for all its authority, until such had been provided by the action of the state legislature under the constitution. Such being the case, it cannot be held that any of the laws of the territory are now in force in the state, excepting such as have been made to be thus of force by the constitution itself, or by the action of the state legislature. It is not claimed that there has been any legislation by the state which affects this question. We can therefore only look to the constitution itself for its determination. The schedule provides, generally, that all the territorial laws shall be continued in force, excepting such as are repugnant to the constitution. This provision was broad enough to continue in force the act in question, and it must be held to be in force, unless it is repugnant to some provision of the constitution or the schedule. It is provided in section 14 of said schedule that "all district, county, and precinct officers, who may be in office at the time of the adoption of this constitution, and the county clerk of each county, elected at the first election, shall hold their respective offices until the second Monday of January, 1891, and until such time as their successors may be elected and qualified in accordance with the provisions of this constitution." This provision, and that continuing the laws of the territory in force, are both found in the schedule, and must, of course, be construed together. Thus construing them, it seems to us clear that there could have been no intention to continue in force the act under consideration. If such had been the intention, there would have been no necessity for the provision contained in said section 14. Such provision, in itself, and without any reference to the act in question, limited the term of the officers then in office, and the limit thus fixed was a different one from that named in said act. When the provision took effect the act in question could no longer stand, as it was repugnant to the terms of the constitution. It follows

that it was not continued in force by the provision above referred to. The fact that there is a further provision in said section 14, that the officers therein named shall continue to hold after the second Monday of January, 1891, until such time as their successors may be elected and qualified, can have no controlling influence. Such a provision is the usual one to prevent an office being left unfilled by reason of the failure to elect a successor, or of such successor to properly qualify and enter upon the duties of the office. It is very clear from such provision of the schedule that it was the intention of the constitution that the officers to be elected at the first election provided for in the constitution should take their office on the second Monday in January, 1891, and not on the first Monday in March, as provided for under said act of the territorial legislature. It would never have been provided that the tenure of those holding under the territory should be continued until the second Monday in January, only, and that the term of the officers to be elected as their successors should not commence until the first Monday in March. Such being the fact, we think that the provisions of section 8 of article 6 of the constitution, furnish additional proof of the intention of the constitution makers to provide fully upon the question of the terms of the officers mentioned in said act of the legislature, and that, such full provisions having been made, the continuance of said act in force was unnecessary. It is provided in said last-named section that such officers shall be elected on the Tuesday after the first Monday in November, 1890, and that thereafter all elections for such officers shall be held biennially on the Tuesday next succeeding the first Monday in November. Such provision for the election of these officers shows a clear intention that their terms of office shall be two years, and, as we have already seen, the term of office of those first elected commenced on the second Monday in January, 1891. It follows, as a reasonable conclusion, that their terms will end on the second Monday in January, 1893, and that that date will be the commencement of the terms of their successors in office. It is not necessary, for the purposes of this case, that we should determine as to the effect of section 5 of article 11 of the constitution. Whether that section, construed with section 8 of article 6, above mentioned, will be held to have authorized the legislature to prescribe such a length of term as it sees fit for such officers, or whether it shall be held that said section 5 simply authorizes the legislature to fix the date when the two years' term shall commence and end, is entirely foreign to the question at bar. It is enough for the purposes of this case that we hold, as we do, that the provisions of the constitution, in effect, have made a two years' term for such officers, and provided that such term should commence on the second Monday of January next succeeding their election; that whether or not the legislature has plenary powers in fixing the length of such terms, and the date of their commence-

ment, such provisions of the constitution must remain in force until action has been taken by the state legislature. The judgment of the superior court must be affirmed.

ANDERS, C. J., and STILES, DUNBAR, and SCOTT, JJ., concur.

(4 Wash. 651)

STATE ex rel. DUSINBERRE et al. v. HUNTER, Judge.

(Supreme Court of Washington. July 20, 1892.)

MANDAMUS TO COURTS.

Mandamus will issue to compel action by an inferior court, where it appears that such court has been asked to take the desired action, and has captiously refused. Per Dunbar, J., dissenting.

Dissenting opinion.

For majority opinion, see 30 Pac. Rep. 642.

DUNBAR, J. I dissent. I think the application shows that the court was asked to enter default against the defendant. The plaintiff was entitled to his default, and it seems to me that it was pure captiousness on the part of the judge to refuse to grant it, and that he should be compelled to do so.

(4 Wash. 170)

MUNHOLLAND v. AULT. BELL v. SAME. MELCHERT v. SAME. WILSON v. SAME. FRANK v. SAME. HEFFNER v. SAME. DUNBAR v. SAME. FELKNER v. SAME.

(Supreme Court of Washington. April 18, 1892.)

CLAIMS AGAINST DECEDENTS—PRESENTATION—LOGGING LIEN—ASSIGNMENT—NOTICE.

1. The holder of a laborer's lien on logs cannot maintain an action to foreclose against the executor of a deceased person, against whom the lien was acquired, where he has failed to present his claim to the executor, under Code 1881, c. 104, providing that no claim holder shall maintain an action against an estate unless the claim shall have been first presented to the executor.

2. But such lien is a primary claim on the property covered by it, and takes precedence thereon, as far as such property goes.

3. While the inchoate right of a laborer's lien before the filing of the notice cannot be assigned, the lien becomes the subject of assignment after such notice is filed.

4. The notice of lien described the logs marked thus © on each end, while the proof described them as marked "Circle T." and without showing the location of the mark. Held, in the absence of any showing that any person had been misled by the description, that the notice and proof were sufficient; the law requiring only that the property be described sufficiently for identification with reasonable certainty.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Munholland, Bell, Melchert, Wilson, Frank, Heffner, Dunbar, and Felkner against John B. Ault, to foreclose laborers' liens on saw logs. Judgment for plaintiffs. Defendant appeals. Reversed.

Andrews & Barnes, for appellant. W. P. Bell, (F. M. Headlee, of counsel,) for respondent.

PER CURIAM. Reversed on authority of *Casey v. Ault*, (Wash.) 29 Pac. Rep. 1048.

(4 Wash. 698)

**MCCORVEY v. POTVIN.**

(Supreme Court of Washington. Aug. 12, 1892.)

**ATTACHMENT—INTERVENTION—BILL OF SALE.**

Appellant put one C. in possession of certain machinery, with an agreement that he would turn the machinery over to C. on his performance of certain conditions. At the same time, and as part of the same transaction, C. executed a bill of sale of said machinery to appellant, which was duly recorded. C. failed to perform the conditions of the contract, and while he was in possession the machinery was attached as his property. *Held*, that the title to the property was in C., and the property was therefore liable under the attachment. Per Dunbar, J., dissenting.

**Dissenting opinion.**

For majority opinion, see 30 Pac. Rep. 1057.

DUNBAR, J., (dissenting.) I do not think the two instruments executed can be explained on any other theory than that it was the understanding of the parties that the title was in the respondent when they were executed. I think contracts should be construed to mean something, and not to mean nothing. The demurrer, in my judgment, was properly sustained.

(4 Wash. 262)

**BURKETT et al. v. ROSENTHAL et al.**

(Supreme Court of Washington. March 29, 1892.)

Appeal from superior court, Thurston county.

E. B. Simmons, for respondents.

PER CURIAM. Motion to dismiss and affirm on short record, under rule 17. 28 Pac. Rep. vi. The motion seems to be well taken, and it is accordingly granted.

(23 Or. 493)

**GIBSON v. OREGON SHORT LINE & U. N. RY. CO.**

(Supreme Court of Oregon. Feb. 20, 1893.)

**INJURY TO TRACK WALKER—NEGLIGENCE OF RAILROAD COMPANY—SUFFICIENCY OF RULES.**

1. Where a track walker of defendant railroad, while crossing its bridge, saw an approaching engine a half a mile away, and, thinking he could get across, started to run, and fell and hurt his leg, and then stepped on one of the bridge caps placed along the bridge for that purpose, where he remained in safety, and he had ample time after sighting the train to retreat or step on a cap, he cannot recover on the ground of the insufficiency of the rules of the company to protect track walkers in not providing for the frequent whistling of engines before approaching bridges, his injury not having been caused by the want of such rules.

2. Where plaintiff was an adult of ordinary intelligence, without any previous experience in track walking, but lived near the railroad, and

had been over the section on which he worked several times, and knew the bridges on it, and the projecting caps were at frequent intervals on such bridges, and furnished conspicuous places of safety against passing trains, defendant had a right to assume that plaintiff would avoid the risk incident to his employment, and was not liable for a failure to specially instruct plaintiff to resort to the caps when caught on the bridge by an approaching train.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by S. B. Gibson against the Oregon Short Line & Utah Northern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. W. Cotton, Zera Snow, and Wallace McCamant, for appellant. Alfred S. Bennett, for respondent.

LORD, C. J. This is an action to recover damages for negligence of the defendant, causing an injury to the plaintiff while at work in the employment of the defendant. The negligence complained of is predicated upon two grounds: First, that the defendant neglected to provide suitable rules or regulations for the protection of its track walkers, and especially for the protection of the plaintiff; and, second, that the defendant failed to instruct the plaintiff of the dangers known to it but unknown to the plaintiff, incident to the employment in which he was about to engage. The principal contention for the appellant is that the trial court erred in denying the defendant's motion for a nonsuit, and in refusing to instruct the jury to find for the defendant. Briefly and substantially, the evidence shows that the rules and regulations adopted by the defendant required the engineers of its trains to whistle at whistling posts in passing over the road; that the plaintiff was employed by a section foreman of the defendant as a track walker on a section of the defendant's road lying between the stations of Viento and Hood River; that previous to such employment the plaintiff was a rancher, residing near Hood River, and in the vicinity of the defendant's road, and had rode over this section of it some two or three times; that there were several high bridges and trestles of considerable length, and some of them curved, on the section over which the plaintiff had engaged to walk as a track walker; and that at frequent intervals the bent caps projected beyond the ties, to which a track walker could repair as a place of safety or means of escape from a passing or unexpected train, when caught on any one of such bridges or trestles. The plaintiff testifies that before starting out to walk the track he told the section foreman that he was inexperienced, and wished to be fully instructed as to his duties, but that the section foreman failed to give him any instructions about getting on the caps when caught on the bridges or trestles by an approaching train; that while he was passing over the road, and when on one of these bridges or trestles, he saw an approaching train, some half mile distant, and, thinking he saw the end of the bridge but a short distance ahead, he started to run towards it



to avoid the train, and that, while so running, he stumped his foot against a spike in the bridge, and fell down, and as the train in the mean time was getting nearer to him he gathered himself up, and hastily got down on a cap, where he remained until the train passed; that his leg was somewhat bruised, but that no bones were broken, or other serious injury suffered by the fall; that after the train passed he got up and retraced his footsteps to Viento, and continued in the service of the defendant two or three days thereafter, when he quit its employment. As to the insufficiency of the rules to protect track walkers from the dangers of an approaching train while in the discharge of their duties, the contention is that they were defective in not providing that the engines should whistle at frequent intervals before approaching bridges or trestles on which trackmen might be walking. But the facts as disclosed by this record do not sustain this contention. The evidence shows that the injury was not caused by a defective system of rules, or the failure to observe them. It was not occasioned, either because the engine did not whistle, as required by the rules, or because the rules were defective in not requiring the engine to whistle at more frequent intervals, for the plaintiff saw the approaching train a half a mile ahead, and had ample time to retreat or step from the bridge to the caps, and there remain in safety until the train passed.

As the argument indicated, it is the other ground of complaint upon which the plaintiff chiefly relies to sustain his action. This is that the foreman of the defendant failed to instruct the plaintiff, who was inexperienced, how to avoid the danger incident to his work in the event he was caught on a bridge or trestle by an approaching train. The solution of this question involves the inquiry whether the danger or risk incident to such employment, in view of the plaintiff's inexperience, required the defendant to give him such instructions as would enable him to comprehend such danger, and do his work safely. The general rule of law governing the liability of the master for personal injuries received by the servant in the course of his employment is that the servant assumes all the risks and hazards incident to such employment when he possesses sufficient intelligence and knowledge to comprehend them; and, if he be an adult person, unless the evidence shows otherwise, the presumption is that he has sufficient intelligence to comprehend the dangers incident to such service or employment. But when the master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, but apparent to persons of capacity and knowledge of the subject, and such servant, from youth or inexperience, or want of capacity, fails to appreciate or comprehend the danger of working at such place, or the dangerous character of the work, it is the duty of the master to point out and explain to such servant the dangers or risks of such employment, so as to enable him to comprehend them, and do his work safely;

and, if the master fails or neglects to do so, and by reason thereof such servant is injured, the master is liable. This principle of the law is well stated by Devens, J., in *Sullivan v. Manufacturing Co.*, 113 Mass. 396, who said: "It may frequently happen that the dangers of a particular position for or mode of doing work are great, and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty upon the part of the master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part." From these considerations it is clear that the servant does not assume the risk incident to such dangerous employment when, from want of age or experience or general capacity, he does not comprehend them, unless the master gives him such instructions and cautions as will enable him to fully understand, and so avoid, them. If, however, the danger is apparent, and the servant is of sufficient discretion to see and avoid it, the master is not liable for an injury resulting to the servant, though he did not warn him. *Wood, Mast. & Serv. § 340.* The servant must exercise ordinary care to avoid injuries. He should seek to inform himself of the dangers likely to confront him in the performance of his duties. As Mr. Beach says: "He must not go blindly and heedlessly to his work when there is danger. He must inform himself. This is the rule everywhere." *Beach, Contrib. Neg. § 134.*

The evidence shows that the plaintiff told the foreman that he knew nothing about the duties of a track walker, and asked for instructions. The foreman gave him some instructions in relation to his employment, and such, perhaps, as the foreman may have considered sufficient to enable him to understand his duties, in view of his age and intelligence. He did not, however, instruct him that he must get out on the caps to avoid injury when caught out on the bridges or trestles by an approaching train; and the failure to so instruct him, unless the danger was obvious, and the plaintiff was of sufficient discretion to see and avoid it, was negligence for which the defendant is liable. The danger from an approaching train when the plaintiff was on the bridges or trestles was practically the only danger which was incident to his employment. The plaintiff was an adult of ordinary intelligence, but without any experience in the employment which he solicited. He lived near the railroad, had been over the section upon which he worked several times, and knew that there were bridges and trestles upon it. The danger was patent. The plaintiff saw the train approaching a half a mile away, and his conduct at that time indicates that he appreciated the danger to which he was exposed by collision, unless he got out of its way. This danger is of that sort which every man of ordinary intelligence

who knows anything about railroads comprehends and understands he must be ready to avoid when he enters upon a railroad track, and especially upon its bridges and trestles, if he would escape injury. The plaintiff knew and understood the danger to which he became subject by the approaching train, but he claims that he should have been instructed how to avoid it; in other words, because of his inexperience, or want of general capacity, he should have been instructed that when, in the course of his employment, he was caught by an approaching train on a bridge or trestle, he must step out on the caps, and remain until the train passed. These caps projected out at short and frequent intervals, some distance from the ties, and furnished a safe place to which a trackman could repair and remain until the train passed. They were visible and conspicuous as places of safety, because there was no other place, except these caps, to which one might resort to avoid collision with a passing train when on the bridges or trestles. The danger was obvious, and the means of escape from it apparent to any one of ordinary intelligence in the exercise of reasonable care. The plaintiff could not have failed to have seen the caps in the exercise of ordinary inspection and carefulness, and, knowing the danger, to understand that he must resort to them to avoid the train, unless he was so near the end of the bridge that he could get off of it before the train came along, as he seems to have thought he could do. In fact, his conduct shows that when the train approached he realized the danger to which he was exposed, and possessed sufficient intelligence and discretion to know how to avoid it, for after his fall he immediately got down on the cap, and sat there in safety until the train passed. The risk incident to the employment was obvious, and such as a man of common intelligence, by the exercise of ordinary inspection and carefulness on his part, would be able to avoid. In the light of the facts, the defendant had a right to assume that the plaintiff would avoid the risk incident to his employment without any special instructions. The judgment must be reversed, and the cause remanded, with direction to the trial court to enter a judgment of nonsuit.

(23 Or. 469)

## McATEE v. McATEE.

(Supreme Court of Oregon. Feb. 13, 1893.)

## ALLOWANCE TO WIDOW.

Under Hill's Code, § 1127, making it the duty of the county court, on filing the inventory of an estate, to make an order setting apart for the widow all the property of the estate exempt from execution, the court may appoint a commissioner, with the consent of the widow, to make a selection, and, on approval of such selection, it becomes the act of the court; and if the widow is satisfied, and the selected property is exempt from execution, the administrator cannot complain.

Appeal from circuit court, Wasco county; James A. Fee, Judge.

Action by Sarah McAtee against Benjamin C. McAtee, as administrator of the

estate of William H. McAtee. From an order of the county court approving the act of a commissioner appointed by the court to set aside for the widow the property of deceased's estate exempt from execution, defendant appeals. Affirmed.

A. S. Bennett and J. L. Story, for appellant. B. S. Huntington, for respondent.

BEAN, J. Upon the filing of the inventory of the estate of William H. McAtee, deceased, his widow filed her petition, asking that all the property of the estate exempt from execution be set apart to her. Upon the hearing of this petition, the county court allowed the same, and made an order setting apart to her all the property exempt from execution,—namely, books, pictures, and musical instruments, to the value of \$75; tools, implements, apparatus, team, not exceeding two horses, vehicles and harness, to the value of \$400; also food sufficient to support such team for 60 days; two cows, five swine, household goods, furniture, and utensils, to the value of \$800, and also food to support such animals for three months,—and appointed one Robert Mays as a commissioner to make a selection of such exempt property from the other property belonging to the estate, and report the same to the court. Upon the coming in of his report, in which the property selected by him was particularly listed and described, the court ratified and confirmed the same, and ordered the property so described to be delivered by the administrator to the widow, as her property, which she accepted, and, so far as this record discloses, is entirely satisfied with the order and action of the county court in the premises. The administrator, however, (who filed objections to the report of the commissioner, which were overruled,) appeals, and claims that the action of the county court in appointing Mr. Mays to make the selection of the property was unauthorized by law, and that all action had therein is void. By section 1127, Hill's Code, it is made the duty of the county court or judge thereof, upon the filing of the inventory of an estate, to make an order setting apart for the widow of the deceased, if any, all the property of the estate by law exempt from execution; and we can conceive of no valid objection to the county court appointing a commissioner, with the consent of the widow, to make selection of such exempt property from the other property belonging to the estate, subject of course to the approval of the court. When such selection is made by the commissioner, and approved by the court, it becomes the act of the court; and, if the widow is satisfied, the administrator has no cause of complaint, provided the property so selected is in fact exempt by law from execution. Under the law the widow is entitled to all the property belonging to the estate exempt from execution, and the method or procedure adopted by the court to ascertain the particular property so exempt is not very material, so long as the provisions of the statute are not disregarded, and the widow is satisfied. In this case it is not

claimed that the property selected by the commissioner, and by the court set apart for the widow, is not in fact exempt by law from execution, but the only objection is as to the procedure adopted by the court to ascertain the description of the property so exempt; and this objection is, we think, not well taken. Counsel for appellant, in their brief, say: "The single question presented is whether the widow of a deceased person can take under the will, and at the same time claim and take the benefit of an allowance of exempt property inconsistent therewith." Although this question was argued at length by appellant's counsel at the hearing, and is the only question noted in their brief, it is not presented in this case, because the record before us does not show even the existence of a will, much less its terms and provisions; and, until a question is properly presented, we must decline to consider or decide it. The decree of the court below is therefore affirmed.

(23 Or. 481)

### HUGHES v. HOLMAN.

(Supreme Court of Oregon. Feb. 13, 1893.)

#### ELECTION CONTEST—APPEAL—EVIDENCE.

1. Though it is provided that a proceeding under the statute to contest an election shall be conducted by the court without the intervention of a jury, this does not make it equitable in its nature, so that there can be a trial *de novo* on appeal.

2. Evidence that the ballots cast at an election were sealed when the canvass was completed, and then delivered to the county clerk, and that they remained in his custody in the vault in his office till he delivered them to the referee in the election contest, when the seals were unbroken, is admissible to identify the ballots given to the referee as those cast at the election, though they might have been tampered with.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Proceedings by Joseph A. Hughes against Edward Holman to contest an election. Judgment for plaintiff, and defendant appeals. Affirmed.

McGinn, Sears & Simon, for appellant. Silverstone, Murphy & Brodie and Killin, Starr & Thomas, for respondent.

MOORE, J. This was a special proceeding under the provisions of sections 2544, 2548, Hill's Code, to contest the right of the defendant to the office of coroner of Multnomah county, to which he was declared elected by the county board of canvassers. The material facts alleged are that at the general election held in June, 1892, plaintiff was the Democratic, and defendant the Republican, candidate for the office of coroner; that the board of canvassers returned defendant as elected by a small plurality; that a certificate of election was issued to him; and that he ever since has been such officer. As a ground for a recount of the votes, the plaintiff alleges, upon information and belief, that small errors occurred in the count of each of the 60 precincts of the county, and such alleged misconduct of the judges and clerks of election of one precinct as to authorize the court to reject

the returns therefrom. The defendant appeared after the service of the summons, and a stipulation was filed in lieu of an answer, whereby it was agreed that all the material allegations of the complaint should be denied, except that each was an elector of the county, and a candidate for the office of coroner. The issues having been completed, the cause was, by stipulation of the parties, referred to take and report the testimony. The recount of the votes resulted in no material change from the official count in any of the precincts except No. 15, North Portland, where the following change occurred: The official count showed 106 votes for defendant, and 75 for plaintiff. The recount showed 107 votes for plaintiff, and 73 for defendant. Some slight changes were discovered, and a few votes cast were rejected, but they do not disturb the result. The determination of the vote in precinct No. 15, North Portland, is decisive of the contest. The testimony was taken before the referee, and reported back, and the defendant, at the proper time, moved the court for a judgment of nonsuit, upon the ground that the evidence showed that the ballots had not been securely kept by the proper officer; that opportunity had been offered for tampering with them; and that there was no evidence offered to show that the ballots recounted were the identical ones cast at the election. The court denied this motion, and prepared and filed findings of fact and conclusions of law, to which the defendant excepted, and judgment was rendered in favor of plaintiff, awarding the office to him, and directing the county clerk to issue and deliver to him a certificate of election, from which judgment the defendant appeals. He contends that there was no evidence before the trial court to sustain a verdict or findings of fact, and that, if the motion for a judgment of nonsuit were made at the proper time, the appellate court should review the testimony.

There is but one question presented by this appeal: Was there any admissible evidence offered in the court below to support the findings of fact therein reached? In the case at bar the testimony was taken before a referee, and upon this evidence the cause was tried by the judge, and because that court had no advantage over this, in that it did not hear the witnesses, nor observe their deportment, the appellant contends that it should now be tried *de novo*. In proceedings of this character the statute contemplates that it shall be tried as an action at law, without the intervention of a jury. *Hartman v. Young*, 17 Or. 155, 20 Pac. Rep. 17; *Fenton v. Scott*, 17 Or. 190, 20 Pac. Rep. 95. The object of the statute probably was to place the trial of an election contest with the court, instead of a jury, for the reason that the former would be less liable to party influences and political motives than the latter. Party spirit, political bias, and local prejudice might influence a jury in passing upon such questions, which would not affect a court; and for this reason, and in order to facilitate a speedy trial, the statute has wisely placed the trial of such causes within the jurisdiction of the circuit courts, without the intervention of juries; but this would

not make the cause equitable in its character, nor change the rules of practice upon appeal. The determination of this cause rests upon the identity of the ballots recounted.

The important findings of fact of the trial court are as follows: "(29) That during the time the ballots were in the room opposite the clerk's office the clerk of the county court paid close attention that no one should have an opportunity of tampering with or handling the ballots during the day, and instructed the night watchman of the courthouse to keep strict watch over said room during the night. (30) That the night watchman of the courthouse kept strict watch over the room in which the ballots were stored during the night. (31) That said room is on what is known as the 'ground floor' of the courthouse. The door to said room is furnished with a spring lock, and during the time said ballots were in the room the door of said room was locked. (32) That said room has two windows, which are not furnished with locks, and are distant from the ground about 12 feet. (33) That the vault used by the clerk of the county court is situate between the county clerk's office and the recorder of conveyances' office, and can be entered by a door either from the recorder's office or from the office of the clerk of the county court. (34) That during the night said vault was locked, and it would be impossible for any one to enter. (35) That during the day the county clerk, or his deputies, never left the county clerk's office. (36) That certain members of the bar were permitted to enter the vault during the day, but no one entered the vault, unless it was members of the bar, or persons of standing with whom the county clerk was acquainted. (37) That, when the recount began by the referee, the respective packages of ballots cast by the electors in the different precincts of Multnomah county, Or., were handed to him by the clerk of the county court. (38) That the two packages of ballots of precinct No. 15, North Portland, were so handed to the referee by the clerk of the county court, and were at that time sealed; that said seals were broken by the referee, and the ballots recounted by the referee, from which count it appeared that Hughes received 107 votes, and Holman received 73 votes. (39) That said packages of ballots so handed by the clerk of the county court to the referee were the actual, identical ballots as cast by the electors for precinct No. 15, North Portland, and were not in any manner altered, erased, changed, or tampered with by any one."

Section 220, Hill's Code, provides that "the order of proceeding on a trial by a court shall be the same as provided in trials by jury. The findings of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner, and for the same reasons, as far as applicable, and a new trial granted." The findings of the trial court must stand as the verdict of a jury, if there be any admissible evidence to support them, unless we can say, as a matter of law, that they are manifestly wrong. In *Fenstermacher v. State*, 19 Or. 508, 25 Pac. Rep. 142, Lord,

J., after reviewing the authorities in support of this legal proposition, says: "The weight of evidence is for that court, and not for us, to determine, however much we might feel disposed to differ from it." The evidence is all set out in the bill of exceptions, and is reviewable on the motion for a nonsuit, not as a trial de novo, but to determine if there were any admissible evidence to support the findings. The election was conducted in pursuance of the requirements of an act of the legislative assembly approved February 13, 1891, and commonly known as the "Australian Ballot Law." This act requires the county clerk to print the ballots upon white paper, and to deliver them to the sheriff, who transmits them to the judges of election. These ballots, when printed, shall state the number and name of the precinct they are intended for, and the date when the election will be held, and shall contain the names of all the candidates for office to be filled at the election. The ballots for each precinct shall be in a package by themselves properly marked, with the number contained in the package, and addressed to the judges of election, whose duty it is to deliver one of them to each elector, to be prepared by him for voting; and, after the polls are closed, the law makes it the duty of the judges of election to destroy the remaining white ballots. The evidence in the bill of exceptions shows that 1,200 white ballots were printed for precinct No. 15, North Portland; that, several days before election, they were sent by the printer to the county clerk, in a package by themselves; that the county clerk, upon receiving this package, placed it, with others, in a vacant room of the courthouse, across the hall from his office; that the door of this room was fastened by a spring lock, for which there were four keys; that the clerk had one, the janitor one, and each of the two watchmen one; that this room had windows about 10 feet from the ground, which were unlocked; that, after these ballots had remained in this room several days, the county clerk sealed the package for precinct No. 15, North Portland, by pasting a certificate over the string which was tied around it, and, on Saturday preceding the election on Monday, he delivered this package to the sheriff; that the sheriff was unable to transmit it to the judges of election till the morning of the election, and that it remained in the courthouse during that time, and, when the package was delivered to the judges, they broke the seal, and 232 ballots were cast; that the judges think they destroyed all of the remaining white ballots as soon as the polls were closed; that the votes cast were canvassed by the judges and clerks of election in the presence of several persons, of all political parties, and the returns thereof were made out and certified to by the proper officers, showing the result as indicated above; that the bystanders who were present at the canvass agreed with the judges and clerks upon the tally of the votes cast and reported; that, when the canvass of the votes polled was completed, the ballots counted were arranged

in two packages, with strings run through each, and tied; that they were then wrapped in paper, sealed, and addressed to the county clerk; that these sealed ballots were then placed in a smaller ballot box, with the certified returns, and this box placed in a larger one, which was then locked, and so returned by one of the judges to the county clerk. The county clerk placed this box, with its contents, together with the ballot boxes of the other precincts, in the vacant room where the white ballots had been kept, and wrote with chalk, on each box, the name and number of the precinct from whence it came; and these boxes remained in this room from Tuesday till Saturday, when the clerk, considering this room unsafe, removed the contents of the boxes, and placed them in a vault in his office, where they remained till they were delivered by him to the referee who took the testimony in this cause. The evidence also showed that the clerk did not have sufficient room in his office to store these ballot boxes, and that he adopted this vacant room as an office for that purpose; that he frequently went into this room while the ballots remained there, for the purpose of receiving the returns, from other precincts, some of which did not arrive till Thursday; that he instructed the janitor and watchman to carefully guard this room, which they did, so far as they were able; that it was possible for a person with a key to have entered the room at night, unobserved by the watchman, while he was on his round of duties in the upper rooms, but he does not think it probable; that, when the ballots were carried to the vault, they were put into boxes, and record books put over them; that persons acquainted with the clerk could have passed through the vault from the clerk's office to the recorder's office; that the vault was locked each night; that during the day some person connected with the clerk's office was on duty all the time; that, when the clerk delivered the ballots to the referee, they did not appear to have been disturbed; and the clerk testified that they had been in his possession from the time he received them till he delivered them to the referee. The evidence further showed that, when the testimony was being taken before the referee, the witnesses reached through a transom, and unlocked the door to this vacant room with a broom. The appellant claims that this state of facts shows that these ballots were not in the custody of the county clerk from Tuesday till Saturday. That, during that time, there was afforded an ample opportunity for abstracting ballots from those returned by the officers, and substituting others therefor. That, while none but official white ballots could have been substituted without detection, there was an opportunity to procure them from three sources—First, from the printing office where printed; second, from the package while it remained in the vacant room, before it was sent out to the judges; and, third, that the ballots remaining after the polls were closed at precinct No. 15, North Portland, might not have been destroyed,

and they might have been obtained from that place. That the recount showing such a material change from the official returns in this precinct conclusively proves that the ballots had been tampered with, and therefore the proof of their identity could not be established.

In the contest of an election under the statute, two presumptions arise—First, that the returns of the judges and clerks are correct; and, second, that the ballots have not been tampered with. The ballots cast constitute the primary evidence in all cases of the expressed will of the electors; while the returns are but secondary, and must always yield to the primary evidence. The certificate of a board of canvassers is merely evidence *prima facie*, showing for whom a majority of the votes appears to have been given; and it is now a well-established doctrine that in a proceeding to test title to a public office the certificate is not conclusive as to the result shown thereby, but the courts will investigate the facts of the election, ascertain the number of votes, and for whom cast. High, Extr. Rem. §§ 61, 638, 639; Cooley, Const. Lim. § 623. When the identity of the ballots has been established, the result of a recount thereof, differing from the official returns, must prevail over the presumption of the correctness of such returns. When the ballots are shown to have been in the custody of the proper officers from the time they were cast until recounted, and kept as prescribed by law, although insecure, they are admissible in evidence in an election contest, and their identity becomes a question of fact for the trial court; but when it is shown that they have not been kept in the custody of the proper officers, and have been left in an exposed and improper place, where opportunity has been given for tampering with them, they should not be received in evidence to overcome the official count made by the election officers. Before any evidence should be received to overcome the *prima facie* correctness of the returns, the identity of the ballots should be established beyond a reasonable doubt. If this can be done, the fact that the ballots have for a moment, an hour, or a day, been in the custody of an unauthorized person, ought not to thwart the expressed will of the electors. It is true that the returns should be guarded with jealous care, and all the forms of law should be observed, but these rules are only directory. O'Gorman v. Richter, 31 Minn. 29, 16 N. W. Rep. 416. If the rule were otherwise, and all the statutory provisions mandatory, the precinct canvassing board might falsify the returns, and by that means perpetuate in office or elect any person whom they chose. The only act necessary upon the part of the judges and clerks of election for this purpose would be to send the ballots cast by some unauthorized person to the county clerk, and it would not matter if it could be shown by the testimony of a multitude of unimpeachable witnesses that such person had exercised the greatest care; that the ballots, when delivered to the county clerk, were in the exact condition as when received. Such evidence could not be admitted to over-

come the *prima facie* correctness of the returns. There could be neither reason nor justice in such a rule.

The identity of the ballots recounted is a question of fact, which the court must find from the evidence. *People v. Livingston*, 79 N. Y. 283. The testimony of the three judges of election in precinct No. 15, North Portland, shows that the ballots were divided into two separate packages when the canvass was completed, and that a strung was run through each package, and then tied; that these packages were separately sealed, and then addressed to the county clerk; that one of the judges delivered them to the clerk, and that he received them in that condition; that they had been in the clerk's possession and custody, as heretofore indicated, from that time till he delivered them to the referee; and that at such delivery the seals upon the packages of ballots had not been broken. This evidence certainly tended to establish the identity of the ballots, and the only question to be considered is whether such evidence was admissible. In *Hartman v. Young*, 17 Or. 150, 20 Pac. Rep. 17, the evidence showed that the ballots had been properly sealed, and placed in the ballot box, which was duly delivered to the county clerk, who kept it in a vault from the 5th day of June to the 12th day of that month, when he took it from the vault, and carried it into the main office, where the vote was being canvassed, and, in the presence of the other members of the board, opened it for the purpose of finding the poll book; that he immediately returned the ballots to the ballot box, relocked it, and returned it to the vault, which stood open during the day; that no one had a key to the ballot box but himself, and that he and his deputy had a key to the vault; that various persons acquainted with the clerk were permitted to enter the vault and to remain there one or two hours; that the box remained in the vault undisturbed till called for in the contest, and had been safely kept, and had not been exposed to the public nor tampered with. From this evidence the trial court found that they had at all times been in the custody of the proper officer, and were the identical ballots cast at the election. Lord, J., conceding that these ballots had at all times been in the custody of the proper officer, and speaking of the admissibility of such evidence to prove their identity while so kept, says: "On the other hand, if it is shown that they had not been kept or protected with that zealous care which the statute contemplates, or so as to preclude opportunity from intermeddling with them, they are the weakest and most unreliable evidence; but this only goes to the credibility of such evidence, and not to its competency. Evidence may be extremely weak, and in fact, as against other evidence, entitled to no credit; yet that does not affect its admissibility. The weight to be given to the evidence, and its admissibility, are diverse matters." Some authorities hold that, where the ballots have been handled by unauthorized persons, or where there has been an opportunity to meddle with them, they can-

not be received in evidence. *McCrary, Elect.* § 278. In *Powell v. Holman*, (Ark.) 6 S. W. Rep. 506, the evidence showed that one of the clerks, on the night of the election, before the canvass was completed, took the ballots in a sack, unsealed, and the poll books and the tally sheets, and put them in a wardrobe of the Odd Fellows' hall, under a combination lock; that other orders held meetings in the same hall; that no one remained with the election returns and ballots; and that, on the next morning, the clerk returned the tally sheets and ballots to the polling place, when the canvass was completed. The returns and ballots were then sent to the county clerk, who put them in a room called the "library," where they remained a week or more, and, while there, the court finds that access could have been had to them through the insecure fastenings of the office, and for that reason held that the ballots were unworthy of credit as evidence. So, in *Kingery v. Berry*, 94 Ill. 518, the evidence showed that, some 20 days after the election, the town clerk, in whose keeping the ballot box was intrusted, with 11 other persons, one of whom was the petitioner, opened the box, and handled the ballots; that they took the ballots out of the box, unstrung them from the thread they were on, and placed them in a pile on the table; that they were then counted, and strung again; and upon this state of facts the court held that there had been an improper handling of the ballots, and that they were not admissible in evidence. Here the direct proof of the unlawful handling of the ballots, and the reasons for rejecting them, were much more apparent than in *Powell v. Holman*, *supra*. In *Dorey v. Lynn*, 31 Kan. 758, 3 Pac. Rep. 557, the court held that the ballots were admissible in evidence when it appeared that they had been opened and canvassed by the city council, and had been kept by the city clerk, when they should have been in the custody of the county clerk. So, in *People v. Livingstone*, *supra*, the evidence showed that the ballots had been kept at the police department, under the general supervision of the police officers, when they should properly have been deposited with the police commissioners, and yet the court admitted them in evidence, upon proof that they had not been disturbed. In the case at bar it would seem that the evidence tended to show that the ballots were sealed when the canvass was completed; that, so sealed, they were delivered to the county clerk; that they remained in the custody of the county clerk, in a room adopted as his office, and in the vault, till he delivered them to the referee; and that when he delivered them to the referee the seals were unbroken, and constituted a chain of facts from which the trial court might reasonably infer that they were the identical ballots cast at the election, though there might possibly have been an opportunity to meddle with them. Such evidence, under the rule in *Hartman v. Young*, *supra*, was admissible, and it was the province of the trial court to find in accordance with the dictates of its judgment, upon the facts presented; and while

this court might, from the same evidence, have reached a different conclusion, it is not in the power of an appellate court to review the findings of the trial court, where there is evidence properly admissible to establish such findings. Haynes, New Trials & App. § 288. The fact that the ballots were sealed when the referee received them does not necessarily nor conclusively prove that the seals had not been disturbed. Any person who could abstract the votes cast, and substitute others therefor, could reseal them in such manner as to avoid detection, and yet it was such a fact as the trial court had a right to consider, and its conclusion should be binding upon this court.

The judgment is therefore affirmed.

(23 Or. 462)

### HERBERT v. DUFUR.

(Supreme Court of Oregon. Feb. 6, 1893.)

APPEAL—ASSIGNMENT OF ERRORS—TRIAL—NON-SUIT.

1. Assignments of error stating merely that the court erred in overruling all of defendant's objections to evidence, and in sustaining all of plaintiff's objections, do not specify with reasonable certainty the grounds of error, as required by Hill's Code, § 537, and are, therefore, not reviewable.

2. In an action by a sheriff to recover fees in attachment proceedings wherein defendant was attorney, plaintiff testified as to an agreement with defendant to pay therefor; that, before any services had been rendered, defendant had told him to go ahead, and he would pay the fees, and that plaintiff had rendered the services accordingly; and that defendant had paid some of the bills, had admitted his liability, and had never made any objection to their reasonableness until a short time before suit. *Held*, that there was no error in refusing a nonsuit.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by George Herbert against E. B. Dufur. Judgment for plaintiff. Defendant appeals. Affirmed.

E. B. Dufur in pro. per. J. L. Story and B. S. Huntington, for respondent.

LORD, C. J. This is an action brought by the plaintiff against the defendant to recover money for services performed and moneys advanced and expended at the instance and request of the defendant in a certain proceeding pending in the circuit court between S. C. Burton, as plaintiff, and John Coldwell, as defendant. The defendant denies the promise to pay for such services or moneys expended, and as a defense alleges that the services were not properly rendered, and that unnecessary expenses were incurred, etc. The new matter alleged is denied. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant appeals to this court.

In the notice of appeal there are several assignments of error, some of which are not reviewable in this court, and require no further notice, while all of the others, with possibly one exception, are met with

the objection that they fail to specify the grounds of error, with reasonable certainty, upon which the defendant intends to rely upon the appeal. As indicating the character of such assignments of error, the following will furnish a sufficient illustration for the purposes of this case: "Upon the ground that the court erred in overruling all of defendant's objections to evidence on the trial offered by the plaintiff, and in not sustaining each and all of such objections." "Upon the ground that the court erred in sustaining each and all of plaintiff's objections to evidence upon the trial, and in not overruling each and all of such objections." The statutory requirement that the notice of appeal "shall specify the grounds of error, with reasonable certainty, upon which the appellant intends to rely upon the appeal," (section 537, Hill's Code,) has been enforced in several cases in this court. *Thompson v. Insurance Co.*, 21 Or. 466, 28 Pac. Rep. 628; *Swift v. Mulkey*, 17 Or. 532, 21 Pac. Rep. 871; *Terminal Co. v. Lowenberg*, 11 Or. 287, 3 Pac. Rep. 683; *State v. McKinnon*, 8 Or. 490. Nor are our decisions under the statute peculiar or exacting in this regard. In other states, wherever a statute has provided for a specific assignment of error on appeal, it has been held necessary to comply with such requirement. *Dale v. Purvis*, 78 Cal. 113, 20 Pac. Rep. 296; *Blizzard v. Riley*, 83 Ind. 300; *Moffatt v. Fisher*, 47 Iowa, 474; *Derby v. Hannin*, 15 How. Pr. 32. "The statutory requirement, it is said, that the assignment of error shall be specific, has been enforced in a great number of cases. The rule, even in the absence of a statutory provision requiring it, is that errors shall be specifically assigned." *Elliott*, App. Proc. § 308. In the common-law sense, an assignment of errors was in the nature of a declaration or complaint. *Tidd*, Pr. 1168. It was considered as a pleading filed by the party complaining of the errors of the judge, and for that reason it was held that each assignment should be single, and not multifarious. *Associates v. Davison*, 29 N. J. Law, 418. Owing to its analogy to a complaint or declaration, it has been thought that logically, upon principle, each specification in an assignment of errors, like each paragraph of a complaint, should be sufficient in itself. *Elliott*, App. Proc. § 309. The assignments of error at common law, and the requirement under our statute to specify the grounds of such errors with reasonable certainty in the notice of appeal, upon which the appellant intends to rely, though differing in modes of procedure, are intended to serve the same purpose. In either case the object is to notify the adverse party, and to present to the appellate court for review the rulings of the trial court which the appellant deems erroneous. It is important, then, that the specification of errors should, be complete in itself, and so framed as to clearly present the question of law upon which a decision is sought. In *Swift v. Mulkey*, supra, *Strahan, J.*, said: "The proper rule of practice is that the appellant must put his finger upon the error complained of; otherwise, he said, 'counsel need never do more than to say, in his assignments of



error, that the court erred in its rulings on particular subjects, without in any measure discriminating or pointing out the specific errors, and then ask this court to go on a voyage of discovery through the record, in search of a particular error upon which counsel may be supposed to have relied." And he further observed that the court could not "sanction such a practice. It is at variance with the requirements of our Code, and with adjudged cases elsewhere." And in *Thompson v. Insurance Co.*, supra, it was said: "Under our statute, it is not enough to state in an assignment of error that the court erred in doing so and so, or in failing to do so and so, but the appellant must point out or specify the ground upon which he intends to rely."

Tested by these principles, the assignments are too indefinite and general to notify the respondent, or apprise the court, of the error upon which the appellant intends to rely upon the appeal. They do not notify the respondent, or specify to the court, the particular issues to be tried upon the appeal, so as to guide him in the preparation of his defense, or aid the court in the examination of the record. All that we can learn from them is that, in the progress of the trial, several objections were made to evidence offered by the plaintiff, which in each instance the court overruled, and also that several objections were made to the evidence offered by the defendant, which the court sustained, each and all of which is assigned as error of the trial court. There is no attempt to specify any error, except generally, or the grounds of any error, upon which the appellant intends to rely on the appeal. No clue to them is furnished us by the assignment, but we must grope our way through the record, in search of them, without chart or pilot. We cannot ignore the requirements of our statute as to such defects in the assignment of errors, when objection is made to them, but we are bound to give them due consideration, and, if ill assigned, adjudge them to be so. Our statute is plain, and imposes no technical hardship. It requires that the notice of appeal shall specify the grounds of error, with reasonable certainty, upon which the appellant intends to rely, so that the appellant, as well as the appellate tribunal, may know the particular ruling which he deems erroneous. In such cases as require a specification of errors, the statute cannot be disregarded, but the errors sought to be reviewed must be pointed out and presented by the assignment. When this is done with reasonable certainty, the purpose of the statute is served, and the parties and court enabled to discharge their respective duties. Beyond this reasonable requirement our decisions have not gone in the enforcement of this provision of the statute. In fact the court has not been, nor does it wish to be, astute in discovering defects in the assignment of errors, nor to be technical or exacting in determining its sufficiency. It is enough if there is a substantial compliance with the statutory requirements. In view of these considerations the assignments of

error already alluded to, in the case at bar, must be disregarded.

The next assignment of error is that the court erred "in not sustaining the defendant's motion for a nonsuit." This motion was made on the ground "that the plaintiff had failed to prove a case sufficient to be submitted to the jury." In his brief counsel says he does not care to discuss any other matters than the court is required to consider under such a motion. As, in his view, this imposes the duty upon the court to examine all the evidence submitted, (1) to ascertain how much and what part of it is admissible, and (2) to then weigh it, and determine its sufficiency to authorize the verdict, he can well afford to ignore the other errors assigned, and adjudged to be ill, and confine his discussion to the limits indicated. It is laid down as a general rule by which courts should be guided in determining whether a nonsuit, when applied for, should be ordered, that if the evidence would not authorize the jury to find a verdict for the plaintiff, or if the court would set it aside if so found, as contrary to evidence, it is the duty of the court to nonsuit the plaintiff. *Stuart v. Simpson*, 1 Wend. 376; *Rudd v. Davis*, 3 Hill, 287; *Stevens v. Railroad Co.*, 18 N. Y. 422. Whenever a motion for nonsuit is made, every intendment and every fair and legitimate inference which can arise from the evidence must be made in favor of the plaintiff. *Fairfax v. Railroad Co.* 40 N. Y. Super. Ct. 128; *Clemence v. City of Auburn*, 66 N. Y. 338. If there is a fair conflict of evidence, arising from contradictory testimony, or if the inferences to be drawn from the testimony are conflicting, or if the witnesses are neither indifferent to the result nor consistent in their statements, so that there is a question as to the credit to be given to them, the case must go to the jury. *Wheaton v. Newcombe*, 48 N. Y. Super. Ct. 215; *Smith v. Coe*, 55 N. Y. 678. In deciding a motion for nonsuit the court should assume those facts as true which a jury could properly find under the evidence; and if in any view of the evidence, taken in its most favorable light, a verdict may be rendered for the plaintiff, or if there are questions of fact which may be determined for the plaintiff, and if determined in his favor will entitle him to recover, the case should not be taken from the jury by a nonsuit. *Clemence v. City of Auburn*, supra; *Carl v. Ayres*, 53 N. Y. 14; *Bickett v. Taylor*, 55 How. Pr. 126. But as the court said in *Mateer v. Brown*, 1 Cal. 222, where the defendant moved for a nonsuit "on the ground that the plaintiff had not proven by competent testimony the 'loss of any property of definite value,'" "the question of the admissibility of the evidence is one with which, in determining the point now under consideration, we have nothing to do;" but, "assuming that the evidence was admissible for the purpose of affecting the defendant, was it of such weight that a jury might legally and properly infer from it that the plaintiff had 'lost any property of definite value?'" The simple question, then, which we have to determine, is whether there is any testimony from which

the jury can reasonably conclude that the facts sought to be proven are established. We shall refer to the facts quite briefly, and merely to show the tendency of the evidence to sustain the allegations. In substance, the evidence for the plaintiff tends to prove that, in the case of *Burton v. Coldwell*, he had an agreement with the defendant in respect to the fees and expenses which would necessarily be incurred in the attachment proceedings in that case. The plaintiff was sheriff, and the defendant an attorney for *Burton*. That before any services were rendered, or expenses incurred, the defendant agreed to pay the fees and expenses of the proceedings. That before the attachment was made, or any services performed or expenses incurred, the defendant said, "Go ahead, and I will pay you myself;" and again, in another conversation, as disclosed by the bill of exceptions, "Go ahead, and serve the papers, and attach everything in sight," and that he (the defendant) would pay him his fees and expenses; and that he (the plaintiff) rendered the services and incurred the expenses in the case for the defendant, and looked to him for the pay. This evidence receives some corroboration from the testimony of the witness *Schultz*. The testimony further tends to show that, in pursuance of this understanding and agreement, the plaintiff proceeded to attach a band of horses, through the direction of the defendant, etc.; when and what was done with them, etc.; that the defendant paid some of the bills, admitted his liability, and never made any objection to their reasonableness until a short time before the commencement of this action. It is not necessary to incumber the record with the statement of matters in detail. Conceding his liability in the premises, the defendant claims and argues that the testimony of the plaintiff is inconsistent; that his conduct in the matter, and his testimony as to the agreement, are irreconcilable; and that a fair consideration of it would lead to the conclusion that the defendant never made the promise, nor that the plaintiff ever so understood it. But these matters are not for us. They are addressed solely to the consideration of the jury. The inferences to be drawn from the evidence, or where it is conflicting, must be settled by the jury. The principle is, in case of a conflict in the evidence, that the court will adopt the view of the contested facts as claimed by the plaintiff. The credibility of a witness, and the weight to be attached to his testimony, are matters to be determined by the jury, and not the court. Before a court is authorized to grant a nonsuit for insufficiency of evidence, it must appear that admitting the testimony of the plaintiff to be true, and giving him the benefit of every inference that is fairly deducible from it, the plaintiff has still failed to support his action. In fact it is enough if the evidence offered tends to show facts sufficient to sustain the action, though remotely. Applying these principles to the case at bar, we are unable to see that there was any error in refusing to grant the nonsuit.

The judgment must be affirmed.

(23 Or. 471)

**PARKHURST v. CITY OF SALEM et al.**  
(Supreme Court of Oregon. Feb. 13, 1893.)  
**STREET RAILWAYS—EXCLUSIVE FRANCHISE—POWER OF CITY.**

A city, under a grant of exclusive power "to permit, allow, and regulate" the laying of tracks for street cars, has not power to grant for a term of years the exclusive right to occupy its streets with street railroads.

Appeal from circuit court, Marion county; R. P. Bolse, Judge.

Suit by E. F. Parkhurst against the city of Salem and the Capital City Railway Company for injunction. Judgment for defendants, and plaintiff appeals. Affirmed.

Tilmon Ford and Wm. M. Kaiser, for appellant. J. J. Shaw, M. W. Hunt, and Paxton & Paddock, for respondents.

**BEAN, J.** This is a suit to enjoin the defendant corporation from constructing, maintaining, or operating an electric street railway, under a franchise granted to it by the city of Salem, on certain of its streets, on the ground that the city had previously granted to plaintiff's assignor an exclusive franchise for 30 years for a similar railway, on the same streets, which plaintiff and his assignors had constructed and had in operation at the time the franchise was granted to defendant. The construction and operation of defendant's road, although on the same streets, does not in any way interfere with or prevent the maintenance and operation of the road belonging to plaintiff, except that it may lessen the amount of traffic thereon, and hence the only question presented at the argument, noted in the briefs, or necessary to be considered, is whether the city of Salem had the power to grant to plaintiff's assignor, for a term of years, or at all, the exclusive right to occupy its streets for the purposes of a street railway. This depends upon the power granted to the city by its charter. By section 6 of the act incorporating the city of Salem it is provided that "the mayor and aldermen shall compose the common council of said city, and at any meeting shall have exclusive power" to exercise certain enumerated granted powers, such as "to provide for lighting the streets, and furnishing the inhabitants with gas or other light, and with pure and wholesome water; to establish hospitals; to license, tax, and regulate auctioneers; and to license, tax, and regulate hacks, cabs, wagons, carts; and to provide for the establishment of market houses and places;" and "to permit, allow, and regulate the laying down of tracks for street cars and other railroads upon such streets as the council may designate, and upon such terms and conditions as the council may prescribe." Laws 1889, p. 523. The precise question, then, is, had the city of Salem, under the grant of an exclusive power "to permit, allow, and regulate the laying down of tracks for street cars," upon such terms and conditions as it may prescribe, the power to grant for a term of years the exclusive right to occupy its streets with street railroads. At the outset it may be conceded that the legislature

has, as the general representative of the public, the power, subject to specific constitutional limitations, to grant exclusive privileges or franchises of the character under consideration, and that it may, subject to similar limitations, authorize the exercise of like powers by a municipal corporation as to all matters of a purely municipal nature. 2 Dill. Mun. Corp. § 701; New Orleans Gaslight Co. v. Louisiana Light, etc., Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252; Water Works Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. Rep. 273; Louisville Gas Co. v. Citizens' Gaslight Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265; Railway Co. v. Jones, 34 Fed. Rep. 579. "But," says Mr. Justice Brewer in *Horse Ry. Co. v. Transit Ry. Co.*, 24 Fed. Rep. 307, "as the possession by one individual of a privilege not open to acquisition by others apparently conflicts with that equality of rights which is the underlying principle of social organization and popular government, he who claims such exclusive privilege must show clear warrant of title, if not probable corresponding benefit to the public." Hence the well-settled rule of construction, applicable alike to both legislative grants and to those made indirectly through the action of municipal corporations, that exclusive franchises or privileges are not favored, and are always construed most strongly in favor of the state and against the grantee. If there is any ambiguity or doubt arising out of the language used as to whether an exclusive franchise has been conferred or authorized to be conferred, it must be resolved against the person or corporation claiming such grant. 1 Dill. Mun. Corp. § 89. "Public grants," says Bradley, J., "are to be strictly construed as to operate as a surrender by them of the sovereignty no further than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the state in imparting to its citizens or corporations powers and privileges of a public character." *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381. The legislature has, as the general representative of the public, plenary powers over the streets and highways within the limits of a municipality, and "has, unless specially restricted by the constitution," says Mr. Dillon, "the power to authorize the building of a railroad on a street or highway, without the consent of the municipal authorities, and may directly exercise this power, or devolve it upon the local or municipal authorities." 2 Dill. Mun. Corp. 701. But a general grant of power to a municipal corporation, which is but a mere local agency, to authorize the use of its streets for such purposes, while it carries with it by implication all such powers as are clearly necessary for the convenient and proper exercise of the authority expressly granted, does not authorize the city to grant an exclusive franchise for that purpose. When an exclusive privilege or franchise to use the streets of the city for the purpose of a street railway is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of

the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. As was said in *State v. Gaslight & Coke Co.*, 18 Ohio St. 293: "It must be found on the statute books, in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it equally clear." Nothing short of express legislative authority will authorize a municipality to grant such a privilege, or enter into such a contract. 15 Amer. & Eng. Enc. Law, 1055; 16 Alb. Law J. 104; 26 Amer. Law Rev. 675.

Now, the charter of the city of Salem does not in express terms confer upon the city the power to grant an exclusive franchise for a street railway, nor can such power be implied, because it is not essential to carry into effect the powers expressly given. *Barnett v. Denison*, 145 U. S. 185, 12 Sup. Ct. Rep. 819; *Com. v. Railway Co.*, 27 Pa. St. 339. The only power given is "to permit, allow, and regulate," and this must be taken as the measure of its powers in the premises; and by all the authorities this is not sufficient to authorize the granting of exclusive franchises or privileges. It is true this power, so far as granted, is by the charter made exclusive; that is, the city alone has the right and power to permit, allow, and regulate the use of its streets for the purpose indicated. To this extent it is endowed with complete legislative sovereignty. That sovereignty has no limit, so long as the city keeps within the powers granted. But the exclusive power "to permit, allow, and regulate" the laying down of car tracks is quite a different thing from the power to grant an exclusive permit for that purpose. The one case presupposes a continuing right and power in the city, to be exercised whenever, in the opinion of the council, the public conveniences or necessity may require, while the other is a right to delegate to some private individual or corporation a portion of the municipal authority over the streets, and vest the exclusive power in its grantee to permit the use of the streets by another railway. If the city has the power to grant an exclusive privilege for a street railway, it has, under the same section of the charter, like powers in reference to water and gas pipes, electric light and telephone wires and poles, and many other enumerated powers. And as Mr. Justice Cooley said in *Gale v. Kalamazoo*, 23 Mich. 344: "If it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might in various directions engage it in permanent contracts, which, while ostensibly for the public benefit, should impose obligations precluding further improvements, and depriving the town prospectively of those advantages and conveniences which the municipality was created

to supply, and without which it is worthless. The charter of the city of Salem only confers upon the municipality the general power to permit or allow the use of its streets for street-railway purposes, and under such a power the adjudged cases are practically unanimous that the city cannot grant exclusive privileges. Thus, when a city having a general power to permit a street-railway company to lay its track in the streets, granted an exclusive right for a certain number of years, the exclusive part of the grant was held void. *Brewer, J.*, delivering the opinion of the court, in speaking of the effect of such a power in a municipality, says "that it furnishes no authority for surrendering its constant supervision and management to any other corporation or individual. It implies that the city to-day, to-morrow, and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may to-day surrender the right of determining a score of years hence what the public may then need. The city may to-day determine that one street railroad will answer all the wants of the public, and so give the privilege of occupying the streets to but a single company. Ten years hence its judgment may be that two railroads are needed. Where is the language in the charter which restricts it from carrying such judgment into effect by giving a like privilege to a second company. \* \* \*

When the legislature deems that public interests require that cities should be invested with power to grant exclusive privileges, it will say so in unmistakable terms, as it already has in some instances. Till then the courts must deny the possession of such powers." So, also, in *Davis v. Mayor*, 14 N. Y. 506, under a like power, the city undertook by resolution to confer upon an association of persons the exclusive right to construct and maintain for a term of years a railway in Broadway, for the transportation of passengers for profit. The court of appeals held the resolution void, and that the city had no power to make such a grant. *Mr. Dillon*, in commenting on this case, says that it "rests upon the sound principle that the powers of a corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered to private parties, either corporate or natural. In this case there was no such authority, and hence the resolution of the council authorizing private persons to construct and operate a railroad upon certain terms, without power of revocation, and without limit as to time, was not a license or act of legislation, but a contract; void, however, because, if valid, it would deprive the corporation of the control and regulation of its streets." 2 Dill. Mun. Corp. § 716. See, also, to the same effect, *Milbau v. Sharp*, 27 N. Y. 611; *Birmingham & P. M. S. Ry. Co. v. Birmingham S. Ry. Co.*, 79 Ala. 465; *New Orleans City R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308; *People's R. Co. v. Memphis R. Co.*, 10 Wall. 52; *Railroad Co. v. Smith*, 29 Ohio St. 291;

*Cooley, Const. Lim.* 207, 208; 2 Dill. Mun. Corp. (4th Ed.) 727, and cases cited; and the recent case of *New Orleans City & L. R. Co. v. City of New Orleans*, (La.) 11 South. Rep. 78.

In harmony with these authorities, and resting upon the same general principles which they announce, are the cases denying to a municipality, under the grant of power to establish and regulate ferries within their limits, the power to confer exclusive privileges or franchises for that purpose. *East Hartford v. Bridge Co.*, 10 How. 511; *Minturn v. Larue*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 796; 1 Dill. Mun. Corp. (4th Ed.) § 114, and cases cited. So, although supplying water and light for city purposes is not recognized to be one of the most important functions of municipal government, in which private persons or corporations would not be likely to engage without some assurance of a return upon their outlay; and hence the apparent reason for permitting a city to grant exclusive privileges for such purposes. Yet by the decided weight of authority a municipality cannot, under a general power on the subject, such as the city of Salem possesses over street railways, grant to a corporation or individual the exclusive right to use its streets for such purposes. *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & F. G. Co.*, 33 Fed. Rep. 659; *Saginaw Gaslight Co. v. Saginaw*, 23 Fed. Rep. 536; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381; *Hamilton Gaslight, etc., Co. v. City of Hamilton*, 37 Fed. Rep. 832; *East St. Louis v. Gas Light Co.*, 10 Reporter, 109; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. Rep. 143; *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Lehigh Water Co.'s Appeal*, 102 Pa. St. 525; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. Rep. 249; *Long v. City of Duluth*, (Minn.) 51 N. W. Rep. 913; 2 Dill. Mun. Corp. (4th Ed.) § 692 et seq., and cases cited. We take it, therefore, to be settled by the decided weight of authority that a municipal corporation cannot create a monopoly by granting the exclusive privilege to any person or corporation to use its streets for laying street-railway tracks, without express legislative authority so to do; and this power must be plainly conferred in express words, or arise from the language used by implication so direct as to amount to the same thing. The mere general power to permit or allow the use of the streets for such purposes is not sufficient to authorize the granting of exclusive privileges. The only cases to which we have been cited or have been able to find apparently holding a contrary doctrine are *City of Newport v. Newport Light Co.*, 84 Ky. 167, and *Des Moines Ry. Co. v. City of Des Moines*, 73 Iowa, 513, 33 N. W. Rep. 610, and 35 N. W. Rep. 602, both of which have been criticised and declared to be contrary to the decided weight of authority, by *Brown, J.*, in *Saginaw Gaslight Co. v. Saginaw*, supra, and *Jackson, J.*, in *Grand Rapids E. L. & P. Co. v. Grand Rapids, etc.*, supra, and are considered by *Mr. McKinley*, author of the article on "Municipal Corporations" in

the American & English Encyclopedia of Law to be out of line with the authorities on the subject. As the charter of the city of Salem does not in express words, or by necessary implication equivalent thereto, confer upon the city the power to grant the exclusive privilege to one person or corporation to occupy its streets with a street railway, but only contains a general grant of a continuing power "to permit, allow, and regulate the laying down of tracks thereon," it seems clear that it did not authorize the city to grant an exclusive franchise to plaintiff's assignor, and thereby disable itself from granting a similar privilege to defendant over the same streets. It is earnestly urged that the construction of street railways necessarily requires the expenditure of a large sum of money, usually without the prospect of an immediate return, and hence private persons would not be likely to engage in such enterprises without an assurance that they would be protected from competition for a sufficient length of time to remunerate them for the outlay. This argument, which is not without force, suggests considerations of policy which might influence the legislature to grant or authorize the granting of exclusive franchises, or induce a municipality to make a franchise practically exclusive by withholding a like privilege from a competing enterprise, but a reference to the cases cited will show that it has often been urged, but without effect, when a court is called upon to construe particular legislation. It follows that the decree of the court below must be affirmed, and the complaint dismissed.

(3 Cal. Unrep. 803)

**TOWNSEND v. BRIGGS.** (No. 14,889.)  
(Supreme Court of California. Feb. 21, 1893.)

**DAMAGES FOR PERSONAL INJURIES — EVIDENCE — INSTRUCTIONS — EXAMINATION OF WITNESS — NEW TRIAL — PREJUDICE OF JURORS.**

1. In an action for personal injuries it appeared that plaintiff entered defendant's shop and was ordered out; that, as plaintiff stepped back to the door, defendant struck him several times on the head with a mallet and with his fist, which caused plaintiff to fall on a cutting machine, and injure his left arm so that it had to be amputated. *Held*, that a verdict for plaintiff was justified by the evidence.

2. In such action, a verdict of \$9,000 was not so excessive as to show bias or prejudice.

3. It was not prejudicial error to allow plaintiff to answer the preliminary question: "You may state whether or not you have ever received any injury caused by . . . defendant," when there follows, without objection, a narration of how the injury was received, and what was said and done by defendant.

4. It was proper to allow plaintiff to testify that he had formerly lost two fingers on his right hand, and to show his hand to the jury, since they should know to what extent the loss of his left arm had deprived him of his earning power.

5. It was proper for plaintiff's physician to testify that he told plaintiff of his condition, and that it was necessary to amputate his arm; since the mental suffering resulting therefrom was attributable to defendant, if he was the cause of the injury.

6. Where a life insurance agent was called to testify that the mortuary tables in an encyclopedia are in general use, and was not asked on his examination in chief to whom the tables

applied, but stated on cross-examination that they applied only to insurable persons, it was not proper cross-examination to ask him "what insurable persons are."

7. Defendant's questions: "Do you know his [plaintiff's] habits as to sobriety?" and "Do you know what his reputation is for sobriety?" were incompetent, as they called for the witnesses' knowledge at the time of the trial, which was two years after the injury was received.

8. In such action it was proper to charge that, "if the jury find from the evidence that defendant, from malicious motives, and a wrongful disregard of" plaintiff's rights, "assaulted him and beat him wrongfully," and plaintiff was injured, "directly or approximately, then plaintiff is entitled to recover all damages he has suffered thereby," and the amount of damages is for the jury alone to determine.

9. Where a new trial was asked for because two of the jurors were prejudiced against defendant, and affidavits are read as to statements made by the jurors showing their prejudice, which statements are denied by the jurors in counter affidavits, the action of the court in denying the new trial will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge.

(Not to be published in California Reports.)

Action by Charles Townsend against J. S. Briggs for personal injuries. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Brousseau & Thomas, (Blackstock & Shepherd, of counsel,) for appellant. Barnes & Selby and H. L. Poplin, for respondent.

**BELCHER, C.** This is an action to recover damages for personal injuries received by the plaintiff. It is alleged in the complaint that on the 18th day of June, 1889, at San Buenaventura, in this state, the defendant wrongfully, wantonly, and maliciously assaulted the plaintiff, struck him several blows on the head with a mallet, and also with his fist, and beat, pushed, and knocked him over upon the kufle of an apricot pitting machine, and thereby cut, bruised, and injured his head and left arm; that by reason of the injuries so received plaintiff lost his left arm, it being necessary to amputate the same above the elbow, and he was caused to suffer great bodily pain and mental agony, and was permanently disabled from doing any work or business, to his damage in the sum of \$20,000, for which he asked judgment. The answer denied all the averments of the complaint, and alleged that the injuries complained of were received by the plaintiff through his own wrongful acts, carelessness, and negligence, while he was willfully and unlawfully trespassing upon the property of defendant, and not by or through any wrongful act of defendant. On the first trial of the case a verdict was returned in favor of the plaintiff for \$500 damages. A motion for new trial was made by the plaintiff and granted by the court, and on appeal to this court the order was affirmed. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. Rep. 108. On the second trial, 11 special interrogatories were submitted to the jury and answered in favor of the plaintiff. A general verdict was also returned awarding the plaintiff

<sup>1</sup> Reversed in banc. See Pac. 116, 99 Cal. 481.

\$9,000 damages, for which sum judgment was entered. From this judgment, and an order denying his motion for new trial, the present appeal is prosecuted by defendant.

It was proved that defendant and one Leach had a shop in San Buenaventura, in which they were manufacturing and testing machines for pitting apricots and peaches; that there were three machines standing on the floor of the shop, two of them finished and one unfinished; that about 6 o'clock in the afternoon of June 18, 1889, the plaintiff entered the shop through an open front door to see one Barnard, an acquaintance of his, who was working there; that on entering plaintiff spoke to Barnard, and immediately stepped to the machine which was nearest the door, and commenced turning the wheel of it rapidly, and then stepped to another machine and turned the wheel of that; that the turning made a rattling, loud noise, which was heard by defendant in an adjoining room, and that he at once went into the shop, and told plaintiff to let the machines alone, and to get out from there, or he would pound his head; that plaintiff stepped back near the door and said, with an oath, "I would like to see you pound me;" that defendant then seized a mallet and went up to plaintiff and struck him on the head with it; that the blow caused plaintiff to fall back against the door, but that he gathered himself up and stepped forward, and as he did so defendant again struck him with the mallet several times, and then struck him with his fist; and that, while plaintiff was moving about, he fell on one of the machines, and his left arm was so badly cut by the knife of the machine that to save his life it became necessary a few days later to amputate it above the elbow. It is claimed by appellant that the verdict was not justified by the evidence, and therefore that the judgment should be reversed. In answer to this claim it is sufficient to say that there was evidence clearly tending to support the verdict and to justify the answers to all of the special interrogatories. It is true that the testimony was in many respects conflicting, but under the well-settled rule in such cases the judgment cannot, in our opinion, be disturbed on this ground.

It is also claimed that the damages allowed were excessive. But the rule is that, where damages are asked for personal injuries committed from wanton or malicious motives, the measure of damages is left largely to the discretion of the jury, and courts will not disturb the verdict on the ground that the amount allowed is excessive, unless it is so disproportionate to the injury received as to make it clear that the jury must have been influenced by passion or prejudice. Here the injury sustained was serious and lasting, and we do not think it can be said that the sum awarded was an excessive compensation for it.

It is further claimed that the court committed several errors in its rulings upon the admission of evidence which were prejudicial to the defendant. The rulings complained of were as follows: After the

plaintiff had taken the stand as a witness in his own behalf, his attorney said to him: "You may state to the jury whether or not you have ever received any injury caused by Mr. Briggs, the defendant in this action." The question was objected to as incompetent, because it called for a conclusion, an ultimate fact, to be determined by the jury, and not by the witness. The objection was overruled, and the witness answered, "I have received it." We see no prejudicial error in this ruling. The question was merely preliminary, and the answer was followed, without objection, by a narration of the facts showing how the injury was received, and what was said and done by the defendant. The attorney also said to the same witness: "You may state to the jury the condition of your other hand prior to and at the time you received this injury." The answer was: "I have only two fingers and a thumb. I lost them in 1869." The attorney then said, "Hold your hand up, and show to the jury." It was objected that the evidence sought was immaterial, irrelevant, and incompetent, and it is argued that the purpose and effect of it was to excite the sympathy and prejudice of the jurors. But the plaintiff was entitled to have the jury informed as to his physical condition, and to what extent the loss of his left arm had deprived him of the means of earning a livelihood. For this purpose, as we understand it, the evidence was introduced, and it seems to have been competent and proper.

Dr. Bard was called as a witness for the plaintiff, and testified that he was a physician and surgeon, and was called upon to dress the plaintiff's wounds; that 10 days after the injuries were received he, with other consulting physicians, decided that it was necessary that the arm should be amputated, and that on the next day he amputated it. He said: "His condition at the time of the amputation was very critical. It was necessary to amputate the arm to save his life. He received proper medical attention and good nursing." He was then asked: "Did you notify Mr. Townsend of his critical condition that you have mentioned?" and the answer was: "I did notify him of his critical condition, and obtained his consent to the amputation." The question was objected to by defendant as incompetent and immaterial, and it is now urged by his counsel that the doctor's expression of his opinion to his patient was incompetent as against the defendant, because, as they say, "It may be that it had a depressing effect on the plaintiff's mind at the time, but such suffering cannot be attributed to the defendant." We see no merit in this objection. It was natural and proper for the doctor to tell the plaintiff of his condition, and that it had become necessary to amputate his arm; and the physical and mental suffering resulting therefrom was clearly attributable to the defendant, if he was the cause of the injury.

John H. Reppy was a witness for plaintiff, and testified that he had been engaged in the life insurance business as agent of the Mutual Life of New York for four years, and that the American Mortuary Tables

were used by the leading life insurance companies; that he had compared the American Mortuary Tables, of which he had a copy, with the American Experience Tables, found in volume 3 of Johnson's New Universal Encyclopedia, so far as they related to the age of 46,—the plaintiff's age at the time he received the injury,—and that they were identically the same. Plaintiff then offered and read in evidence, over the objection of defendant, the page in the encyclopedia showing the probable duration of life at the age of 46 to be 23.81 years. On cross-examination the witness stated that he had been a soliciting agent in the life insurance business, but had made no examinations of applicants for policies; and that the table referred to applied only to insurable persons. He was then asked, "Can you tell us what insurable persons are?" The question was objected to by plaintiff as not proper cross-examination, and the objection sustained. It is argued that this ruling was erroneous, because, if the witness had answered in the affirmative, and had said that plaintiff was not an insurable person, defendant would then have been entitled to demand that all his evidence be stricken out; and, if he had answered in the negative, defendant could properly have made the same motion. But the witness was called to prove simply that the mortuary tables found in the encyclopedia were in general use, and on his direct examination had been asked no questions as to whom the tables applied, or as to who were or were not insurable persons. And the general rule is that a witness cannot be cross-examined except as to facts and circumstances connected with matters testified to by him on his direct examination. There was no error, therefore, in the ruling of the court. The objection that the mortuary tables were not admissible in evidence is not insisted upon, nor could it be successfully. It had already been proved that plaintiff was in good health at the time he received the injury; and the rule seems to be general that, in an action to recover damages for an injury to a healthy person, caused by the negligence or wrongful act of the defendant, where the injury has resulted in the death of the injured party, or in practically destroying his earning capacity, standard mortuary tables are admissible to show what was his probable duration of life, and thus to assist in determining what amount of damages would be reasonable and proper in the case. *Gallagher v. Railway Co.*, 67 Cal. 16, 6 Pac. Rep. 869; 15 Amer. & Eng. Enc. Law, p. 881, note 3, and cases cited.

When defendant was making his own case he asked one of his witnesses, "Do you know his [Townsend's] habits as to sobriety?" and another witness, "Do you know what his reputation is for sobriety?" Both questions were objected to as incompetent, and the objection sustained. The questions called for the knowledge of the witnesses at the time of the trial, which was two years after the injury complained of was received, and they were therefore clearly immaterial and incompetent.

It is next claimed that the court erred in giving to the jury certain instructions asked by the plaintiff. The first instruction complained of reads as follows: "If the jury find from the evidence that the defendant, from malicious motives, and a wrongful disregard of the rights of the plaintiff, assaulted him and beat him wrongfully, and in so beating the plaintiff was injured thereby, directly or approximately, then plaintiff is entitled to recover all damages he has suffered thereby, and the measure of damages and the amount thereof would be for you alone to determine under the evidence and instructions given by the court in this case." It is said that "this instruction assumes the fact that, if the defendant did assault the plaintiff, such assault was from malicious motives, and the wrongful disregard of the rights of the plaintiff." We fail to see any such assumption; on the contrary, the instruction seems properly to leave to the jury the determination, from the evidence, of all the matters referred to. Similar objections are made to other instructions, but we see no merit in them, and therefore pass them without special notice. The instructions asked by the defendant were all given, and when read, as they must be, in connection with those given at the request of the plaintiff, the law applicable to the case seems to have been fully, fairly, and correctly stated.

Finally, it is claimed that a new trial should have been granted, because two of the jurors before whom the case was tried were prejudiced against the defendant, and had made statements showing that they were wholly disqualified to act as jurors in the case. The jurors referred to were E. P. Cook and P. K. Miller, and the defendant, in an affidavit made by himself, stated that he "did not know before said jurors were called and sworn, touching their qualifications to serve as jurors in said case, or before they were so accepted as such, that they were so prejudiced against him. And that he had no means of knowing of such prejudice and ill will." He did not state, and there was no proof, that the prejudice of the jurors, if any existed, was not known to him and his attorneys before the trial was concluded and the case submitted. Such proof, however, should have been made. But, waiving that, we do not think the action of the court in denying the motion for new trial can be disturbed on this ground. It is true that several affidavits were read in support of the motion, in which the affiants stated that in conversations with Cook and Miller, at times and places named, the latter had made statements to them, which, if true, clearly showed that they entertained prejudice and ill feeling against Briggs. But, on the other hand, counter affidavits made by Cook and Miller were read, in which they denied that at the times or places named, or at any time or place, or at all, they had ever made to the affiants, for defendant, or in conversation with them, the statements charged, or any statements of like or similar import, nature, substance, or character. Counsel for appellant suggest that the counter affidavits are insufficient, be-



cause they only deny that the affiants ever made the statements charged to or in conversation with the affiants on the other side. And it is said that the statements may have been made in the hearing of, if not to, or in conversation with, the parties deposing to them. But, in our opinion, there was a real and substantial conflict as to whether the said statements or any like statements were ever made, and, after carefully reading all of the affidavits, we cannot say that the conclusions of the court below, as shown by its action in denying the motion, were not reasonable and proper. We advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 314)

WASHBURN v. LYONS et al. (No. 19,008.)  
(Supreme Court of California. Feb. 16, 1893.)

MUNICIPAL IMPROVEMENTS—NOTICE—SUFFICIENCY OF CONTRACT.

1. St. 1885, p. 147, § 3, as amended by St. 1889, p. 157, provides that before ordering any work done or improvements made on streets, as authorized by section 2 of the act, the city council shall pass a resolution of intention so to do, which shall be published "and" posted for two days in the manner prescribed by section 34 of this act. *Held*, that since such statute refers to section 34, which provides for the "posting" of the notice of the resolution, it must be construed to mean that "publication" of notice alone is sufficient, where there is a paper in which publication may be made; and, if there is no paper, then the notice must be "posted" as provided in section 34.

2. Where the complaint in an action to enforce an assessment for street repairs fails to show that the contract under which the work was done fixed the time for the commencement and completion of the work to be done thereunder, in accordance with the requirements of Act March 18, 1885, § 6, such omission will be fatal to the complaint. *Libbey v. Ellsworth*, (Cal.) 32 Pac. Rep. 228, followed.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Washburn against Lyons and others to enforce payment of an assessment for street repairs. There was a judgment for defendants on a demurrer to the complaint, and plaintiff appeals. Affirmed.

Jones & Carlton, for appellant. Julius Lyons, for respondents.

DE HAVEN, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, and the plaintiff appeals. The complaint does not allege that the resolution of intention was posted, but it does aver that such resolution was published for two days in a daily paper, printed in the city, and designated by the city council for that purpose. The first sentence of section 3 of the act "to provide for work upon streets . . . within municipali-

ties," (St. 1885, p. 147,) as amended by the act of March 14, 1889, (St. 1889, p. 157,) is as follows: "Before ordering any work done or improvements made, which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do, . . . which shall be published and posted for two days in the manner prescribed by section 34 of this act." It is claimed by defendants that, under this provision, the resolution itself should have been posted, as well as published; but we do not think so. The reference to section 34 of the act, and a consideration of the subsequent part of section 3, which provides for the posting of the notice of the passage of the resolution, make it very clear that the word "and," as used in the clause "published and posted," in the sentence above quoted, should be construed to mean "or." Thus construed, the statute requires the resolution of intention to be published the prescribed length of time, if there is a paper printed in the city; and, if there is no such paper printed, that then it shall be posted in the manner prescribed by section 34 of the act. The objection of defendants, therefore, to this part of the complaint, is not well taken.

But in another respect the complaint is defective. It fails to show that the contract, which is the foundation for the assessment sought to be enforced, fixed the time for the commencement and completion of the work to be done thereunder, in accordance with the requirements of section 6 of the act of March 18, 1885, before referred to. In the recent case of *Libbey v. Ellsworth*, 32 Pac. Rep. 228, we held this to be an omission fatal to the complaint in this class of actions; and, upon the authority of that case, the judgment must be affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

(99 Cal. 493)

BURBRIDGE v. LEMMERT. (No. 14,920.)  
(Supreme Court of California. Feb. 20, 1893.)

CONTRACT—INTERPRETATION—ILLEGALITY.

An agreement, with sureties, executed contemporaneously with a mortgage, binding the mortgagor to pay all taxes assessed against the mortgage, evinces a clear intention of the parties that the mortgagor shall pay the taxes; and such intention will govern, though the agreement is thereby rendered unlawful, and though it is seemingly inconsistent with a provision in the mortgage apparently making it the duty of the mortgagee to pay such taxes.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.  
(Not to be published in California Reports.)

Action by Sarah R. Burbridge against P. H. Lemmert to foreclose a mortgage. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

J. A. Donnell, for appellant. A. W. Hutton, for respondent.

VANCLIEF, C. Action to foreclose a mortgage on real property to secure the payment of a promissory note, dated January 29, 1889, for \$12,000, made by defendant, payable to plaintiff, or order, five

years after date, with interest at the rate of 10 per cent. per annum, payable annually; and, if not so paid annually, then the whole principal and interest to become immediately due and payable, at the option of the holder of the note. The defendant failed to pay interest for the first year; and, about six months after it became due, (September 1, 1890,) this action to foreclose for both principal and interest was commenced. The answer of the defendant denied that the principal or any interest thereon had ever become due on said note or mortgage, by reason of facts affirmatively alleged in the answer as follows: "For a second and separate defense the defendant alleges that at the city and county of Los Angeles, Cal., on the 29th day of January, 1889, at the time of the execution of the note and mortgage set forth in the complaint, the plaintiff demanded of the defendant the execution of the agreement hereinafter set forth as a part of the said note and mortgage, and, in accordance with said demand, the defendant, with the said W. C. Furrey, at said city, on said 29th day of January, A. D. 1889, at the time of the execution of said note and mortgage, and as a part thereof, made, executed, and delivered to the plaintiff an agreement in writing, and in the words and figures following, to wit: 'Southern California National Bank, Los Angeles, Cal., Jan. 29, 1889. It is hereby agreed by P. H. Lemmert, as principal, and W. C. Furrey, surety, that, in consideration of Mrs. Sarah R. Burbridge lending P. H. Lemmert twelve thousand (\$12,000) dollars, at 10 per cent. interest, we, the undersigned, agree to and bind ourselves and our assigns and heirs to pay all taxes of whatever nature which may be assessed against said mortgage of twelve thousand (\$12,000) dollars, and that said Mrs. Sarah R. Burbridge, or her assigns, shall be to no costs or expense on account of taxes on said mortgage. P. H. Lemmert, Principal. W. C. Furrey, Surety. Witness: H. M. Russell.'" The court found all these affirmative allegations in the answer to be true, and, as a conclusion of law therefrom, found "that the written agreement set forth in defendant's answer was and is in contravention of section 5 of article 18 of the constitution of this state, and renders null and void all the provisions of the said note and mortgage as to the payment of any interest specified therein;" and, consequently, that no interest ever accrued or became due, so as to give plaintiff the right by election to treat the principal as due prior to the expiration of five years from the date of the note, and thereupon rendered judgment dismissing plaintiff's complaint. The plaintiff appeals from the judgment, and also from an order denying a new trial.

1. It is contended by counsel for appellant that the findings of fact as to the instrument set out in the answer by which the defendant agreed to pay the taxes on the mortgage are not justified by the evidence. It is claimed that this instrument

was not demanded nor authorized by plaintiff, and was not executed at the same time the note and mortgage were executed, nor as a part of the same transaction. Upon these issues the evidence is conflicting, but the preponderance thereof seems to be in favor of the respondent, and amply sufficient to justify the findings of the court. The evidence touching these issues covers 75 pages of the transcript, and cannot fairly be so condensed as not to occupy more than reasonable space in this opinion; and for this reason a statement of it is omitted.

2. The mortgage contains the same provision as the note as to the consequence of a failure to pay the annual interest, and also authorized the mortgagee, if necessary to protect the mortgaged property, to insure it, and to pay the taxes thereon, "other than the taxes of this mortgage or the money hereby secured," and provides that the sums so paid, with interest at the same rate, shall be deemed to be secured by the mortgage. Counsel for appellant contends that the express exception of the taxes on the mortgage from the taxes which the mortgagee may pay and recover from the mortgagor, with conventional interest, is inconsistent with a stipulation in the same mortgage that the mortgagor is, nevertheless, to pay the taxes on the mortgage; that is to say, it is inconsistent for mortgagor and mortgagee to agree that the mortgagee may pay the taxes on the interest of the mortgagor in the land, and recover it back with interest, and at the same time agree that the mortgagor shall pay the taxes on the mortgagee's interest in the land. That the latter part of the agreement is unlawful is clear; but that the two parts of the agreement are necessarily inconsistent with each other I am unable to perceive. But, however this may be, all the provisions of the mortgage, including the concurrent agreement that the mortgagor should pay the taxes on the mortgage, must be read together, and seeming inconsistencies reconciled, if they can be without violence to the language, for the purpose of ascertaining the intention of the parties. If, when thus read and construed, the intention be found to be clear and certain, such intention must prevail, though the agreement be thereby rendered unlawful. The agreement that the mortgagor should pay the taxes on the mortgage was prepared with distinct care and deliberation, and a surety was required to sign it; and its language is so unequivocal and certain as to the intent that the mortgagor should pay the taxes on the mortgage that there is no doubt that such was the intention of the parties. This view of the case renders all other points discussed by counsel immaterial. I think the judgment and order should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

37 Cal. 318)

**FARMERS' & MERCHANTS' BANK OF LOS ANGELES v. BOARD OF EQUALIZATION OF LOS ANGELES.** (No. 14-873.)

(Supreme Court of California. Feb. 17, 1893.)

**TAXATION—EQUALIZATION—NOTICE—WRIT OF REVIEW.**

1. An order of the board of equalization finding that a bank has omitted property from the list of its taxable property, and should be assessed thereon, and directing the assessor to add such property to its assessment, is not an attempt by the board to add property to the list, and exercise assessorial powers, but is a direction that the assessor make such addition, though the order specifies the value of the property to be added, and is authorized by Pol. Code, § 3681, requiring the assessor, at the request of the board, to list and assess property which he has failed to assess.

2. Pol. Code, § 3681, under which the assessor is required, at the request of the board of equalization, to list and assess property which he has failed to assess, which section the city charter of Los Angeles makes applicable to the common council, sitting as a board of equalization, does not conflict with the constitutional provisions which define the powers and duties of state and county boards of equalization, and which do not give the power to cause property to be added to the assessment list, since it merely extends the power and duty of the assessor.

3. A notice to a bank to appear before the board of equalization, and show cause why its "assessment on solvent credits should not be increased from \$2,774 to \$275,000," sufficiently informs it that it is proposed to add property to the assessment.

4. A person appearing before the board of equalization in response to a notice, and submitting to the action of the board, waives any defect in the notice.

5. A finding by the board of equalization that a person has omitted taxable property from his list to a certain amount is conclusive on the courts on writ of review, since Code Civil Proc. § 1074, provides that the review on such writ cannot be extended further than to determine whether the inferior tribunal or board has regularly pursued its authority.

6. Even if the fact that property has been so omitted is necessary to give the board jurisdiction, the court cannot review the evidence to determine whether there was evidence to show such fact, since the fact is one to be determined by the board.

**Commissioners' decision.** Department

1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Petition by the Farmers' & Merchants' Bank of Los Angeles for a writ to review an order of the board of equalization of Los Angeles directing property to be added to petitioner's assessment. From a judgment annulling the order the board appeals. Reversed.

C. McFarland, for appellant. Graves, O'Melveny & Shankland, for respondent.

**TEMPLE, C.** This appeal is from a judgment of the superior court of Los Angeles county annulling an order made by the common council of the city of Los Angeles, sitting as a board of equalization. The judgment was rendered in a proceeding under a writ of review, issued upon a petition and the affidavit of John Milner, the cashier of the plaintiff, a corporation, doing a general banking business at Los

Angeles. No return to the writ was made; but it was stipulated that "the said petition, and the matters stated therein, shall be treated and considered as the certified transcript of the record and proceedings of the city council, sitting as a board of equalization, in the matter of the assessment complained of." This stipulation is not altogether satisfactory. Questions raised upon such a proceeding are to be determined by an inspection of the record, and, in general, not upon pleadings or evidence. It is perfectly manifest that many matters stated in the petition were not, and could not have been, in the records of the board of equalization. The only course open to us would seem to be to regard only those matters as transcripts of the record which are stated to be such or are such orders as were required to be entered in the minutes of the board. For instance, the petition sets forth what petitioner claims was the evidence taken before the board. It is not stated that this evidence is set out in the minutes of the board, and the law did not require it to be done. We are not bound to consider this evidence as something apparent upon the face of the record.

The proceeding before the board was taken for the purpose of ordering the assessor to add certain property to the assessment roll, and an objection is made that the city of Los Angeles has not power to assess, levy, or collect taxes, because the legislature has not granted such authority by a general law, as required by the constitution. This question was decided adversely to respondent in the recent case of *Trust Co. v. Hinton*, (Cal.) 32 Pac. Rep. 3, and need not be again considered.

The petition shows that petitioner duly made and returned to the city assessor a list of all the personal property which was in its possession or under its control on the first Monday of March, 1891. That all its personal property, except mortgages, at that date, subject to assessment for city taxes were: Money, \$21,465.33; vaults and safe, \$4,000. That the city assessor listed and assessed to petitioner: Money on hand, \$21,465.33; solvent credits unsecured, \$2,774; vaults and safe, \$4,000. That the city council, sitting and acting as a board of equalization, August 5, 1891, ordered notice to be given petitioner to show cause August 12, 1891, before the board, why its assessment of solvent credits should not be increased from \$2,774 to \$275,000. The notice given was in writing, as follows: "Los Angeles, Cal., Aug. 5, 1891. To Farmers' and Merchants' Bank—John Milner, Cashier: You are hereby notified to appear before the board of equalization of the city of Los Angeles on Wednesday, the 12th day of August 1891, at 10 o'clock A. M., in the council chamber in the city hall, and show cause why your assessment on solvent credits should not be increased from \$2,774 to \$275,000. By order of the board of equalization. Freeman G. Teed, City Clerk and Clerk of said Board. By Geo. E. Selp, Deputy." That no other notice was given, but petitioner appeared before the board, by the affiant, and submitted

itself to the board, answering such interrogations as were propounded to it or to the affiant touching its property. What is averred to be the testimony is set out in the petition, and it is alleged that no other evidence was taken at such hearing. It is claimed that this testimony does not show, or tend to show, that the petitioner had any solvent credits or any which had escaped assessment. Nevertheless, the board made and entered in its minutes the following order, which, it is claimed, the board had no jurisdiction or power to make: "The Farmers' and Merchants' Bank having been notified to appear on August 12th, to show cause why its assessment for solvent credits should not be increased from \$2,774 to \$275,000, and John Milner, cashier of said bank, having appeared in response to said notice, was sworn and testified in regard to the assets of said bank; and it appearing to the board that said bank has returned a false and incomplete list of its taxable property, and that said bank should be assessed for solvent credits to the amount of \$270,774, and that it had escaped assessment for solvent credits to the amount of \$268,000, on motion of Mr. Tufts, it is ordered that the assessor be directed to add to the assessment of said bank for solvent credits the sum of \$268,000, and assess the bank for solvent credits in the total sum of \$270,774." That the assessor did, in pursuance of the order, enter upon the assessment roll an addition to the assessment of petitioner the sum of \$268,000, solvent credits, making the total of solvent credits assessed to petitioner \$270,774, instead of \$2,774, as listed and returned by the assessor.

1. The first point made upon the record is that it is apparent therefrom that the proceeding was not to equalize the values of property which had been listed and assessed by the assessor, but was an attempt by the board to add other property to the list which had not been listed or valued by the assessor. This it is claimed the board could not do, as it is not vested with assessorial power. But, plainly, the board did not attempt to add property to the assessment roll, or to exercise assessorial powers. It simply directed the assessor to list and assess \$268,000 of solvent credits, which it found had escaped assessment. In this case it is no objection to the order that it states the value of the item to be added, instead of simply directing the assessor to add the property to the list and assess its value. Respondent itself claims that solvent debts, like gold coin, must necessarily be assessed at their face value. To describe the property, therefore, is to fix its value. The board was authorized to make the order by section 3681 of the Political Code, which the city charter expressly makes applicable. It is claimed that this section of the Code is unconstitutional, because the state constitution expressly defines the powers and duties of both the state and county boards of equalization, and the power to cause property to be added to the assessment roll is not there given. The premise is admitted, but I can see no force or logic in the conclusion. It is not claimed that

the power comes from the constitution, but from the act of the legislature. Section 3681, Pol. Code, simply extends the power and duty of the assessor, enabling and requiring him, at the request of the board, to list and assess property which he had failed to assess, notwithstanding the time for assessments had passed, and the roll was no longer in his possession; and the exercise of this power is directly in accord with the policy and express provisions of the constitution, which requires all property not exempt from execution to be taxed. Section 1, art. 13: "If any property subject to taxation should escape assessment in any year, the taxation for that year would not be equal and uniform; nor would all property in this state be taxed in proportion to its value, and the behest of the constitution would not be obeyed." *Biddle v. Oaks*, 59 Cal. 94. The exercise of this power by the board of equalization does not obstruct the performance by the board of any duty enjoined upon it by the constitution, but is in aid of the functions there created; nor does it disturb the division of powers made by the constitution between the state and county boards. The cases of *Wells, Fargo & Co. v. Board of Equalization*, 56 Cal. 194, *People v. Sacramento Co.*, 59 Cal. 320, and *People v. Dunn*, Id. 328, have no bearing upon this subject. In those cases the construction of section 9 of article 13 of the constitution was considered, and the distinct powers and duties of state, and county boards to some extent pointed out. Of course no valid law could be made disturbing this division of power made by the constitution, and perhaps it would follow that functions or powers given to one board are thereby denied to the other. So far the provisions would constitute a limitation upon legislative power, but it constitutes no argument against the power of the legislature to grant other powers, or to impose other duties upon either board so long as these implied limitations are not violated. *People v. Hastings*, 29 Cal. 449, has no application to the new constitution. One of the chief arguments in favor of constitutional revision was the necessity of getting rid of the provision requiring property to be assessed by assessor or elected by the electors of the district in which he exercised his powers. The new constitution contains no such limitation. Besides, as we have seen, the board did not make an assessment, but directed the assessor to do so. The propriety of this course was recognized under the old constitution, when assessorial powers could not be conferred upon any other officer than an elected assessor. *People v. Reynolds*, 28 Cal. 107.

2. It is next contended that the board had no power to act in the matter, because the notice was insufficient. It is said that it gave no information that it was proposed to add other property to the assessment. The position of respondent upon this matter is not quite consistent. Under another point it contends, and quite properly, I think, that to increase the assessment of solvent credits is necessarily to increase the subject of taxation, as was

said in regard to money in *People v. Dunn*, 50 Cal. 328. That being so, the notice in question could only have meant that other solvent credits might be added. The listing of property, however, is part of the process of assessing. The assessment roll includes the list with the values added, and the result is often spoken of as the assessment. The assessment may mean the completed tax list. *Cooley, Tax'n*, 352. Besides, it is averred that the petitioner appeared and submitted itself to the action of the board, and furnished all required evidence as to its property. If the notice was ambiguous or imperfect, the defect was waived by such appearance. *Spring Val. Waterworks v. Schottler*, 62 Cal. 69; *Wade, Notice*, 1358.

3. The next contention is that the order is void, because there was no evidence before the board that any property had escaped assessment. The board had no power to order a new assessment to be made without evidence. *City and County of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. Rep. 264. The order recites that testimony was taken, and, in effect, that the conclusion was reached from the evidence that the bank had returned a false list of its property, and had escaped assessment for solvent credits to the amount of \$268,000. This must be held conclusive. "It is not a proper function of the writ of review to add to or modify the record with reference to jurisdictional facts determined therein, but to test the question of jurisdiction on the facts on the face thereof." *Freem. Judgm.* §§ 263, 619; *In re Grove St.*, 61 Cal. 453; *Ex parte Sternes*, 77 Cal. 156, 19 Pac. Rep. 275; *De Pedorena v. Superior Court*, 80 Cal. 144, 22 Pac. Rep. 71. In *Hagenmeyer v. Board*, 82 Cal. 214, 23 Pac. Rep. 14, it is said: "The record does not show by affirmative proof that the board did not act upon evidence before it. Therefore its order in the premises is conclusive that it did act on such evidence as was necessary." Counsel have cited cases, and no doubt many more could be found from other states in which the writ of review has been used for the correction of errors. Our Code provides: "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer." Section 1074, Code Civil Proc. It has been held that this language is equivalent to the phrase in section 1063 authorizing the court to inquire whether the tribunal, board, or officer has exceeded the jurisdiction of such tribunal, board, or officer. *Central Park R. Co. v. Placer Co.*, 43 Cal. 365. But, where the writ is understood as affording a remedy for mere errors, it has been held that the question must be determined by an inspection of the record, unless the statute has provided for a bill of exceptions. In *Birdsall v. Phillips*, 17 Wend. 464, the common-law rule was elaborately considered by Judge Cowen. After citing numerous cases, he says: "From these authorities and others I collect the following general rule: Wherever, were the suit at common law, the matter alleged for error is of such a nature that a bill of exceptions would be essential to its

review by writ of error, a certiorari will not reach it unless some statute has enlarged the effect of that writ in the particular case." It is true the petition sets out certain evidence alleged to have been submitted to the board, and avers that no other evidence was taken. This can certainly have no greater effect than an offer to impeach the record by evidence de hors. It is not stated that the record of the proceedings of the board discloses the evidence, though, if it did, I cannot see how that would help the matter. The board had jurisdiction to inquire as to whether any property of petitioner had escaped assessment. If I am right on the other points disposed of, it had jurisdiction both as to the subject-matter and the person. This being granted, its procedure within its jurisdiction is no more open to question than it would be were it a court of general jurisdiction. Certainly it was its province to decide as to the effect of the testimony, and that includes the necessity of determining whether it tended to show and did show that property belonging to petitioner had escaped assessment. All its acts after having acquired jurisdiction constituted the exercise of such jurisdiction, none the less that such acts were erroneous. *Central Park R. Co. v. Placer Co.*, supra, is similar to this. It was a proceeding before a board of equalization to have an assessment reduced. It was claimed that the board acted upon illegal testimony. It is said that the board acted within its jurisdiction, and its rulings could not be reviewed. *Barber v. San Francisco*, 42 Cal. 630, is a similar case. It was a writ to review the action of the board of supervisors in regard to a street assessment. It was claimed that the evidence did not justify the conclusion of the board. The court said: "The board, therefore, had jurisdiction to entertain, hear, and determine the appeal upon the proofs introduced; and, if it committed an error in its conclusions as to the facts, the error would not affect their jurisdiction, and could not be reviewed on certiorari. The return of the board to the writ purports to contain the evidence given on the hearing of the appeal, but there is nothing in the record to show what facts the board considered proved; and if there was, and if we should be of opinion that the board found the facts contrary to the evidence, we could not correct the error in this form of proceeding." See, also, *People v. Dwinelle*, 29 Cal. 632. But, if it can be claimed that the fact as to whether the petitioner had property which had escaped assessment was in any sense jurisdictional, it was, nevertheless, a fact as to the existence of which the board was authorized and required to determine in that proceeding. It is said by Wells on Jurisdiction, (section 62:) "Where the jurisdiction of even an inferior court is dependent on a fact which that court is required to ascertain and settle by its decision, such decision is held conclusive." In *Railroad Co. v. Evansville*, 15 Ind. 395, the same doctrine is declared, and numerous authorities cited to the same effect. *Brittain v. Kinnaird*, 1 Brod. & B. 432, was trespass for taking a vessel by magis-

trates. The owner had been convicted under a statute called the "Bum Boat Act." Evidence was offered to show that the conviction was void, as the court had no jurisdiction, as the vessel was not a "boat" within the meaning of the act. Chief Justice Dallas considered the case at great length, and concludes that, conceding that the fact were jurisdictional, still it was a fact the court had jurisdiction to determine, and such determination was conclusive. I do not think, however, the fact was jurisdictional. Jurisdiction was conferred by the statute, the claim that the petitioner had property which had escaped assessment, and the service of the notice. If the board had determined that the evidence did not tend to prove the existence of property which had escaped taxation, it would not be doubted that such determination was an act within its jurisdiction. A contrary conclusion must be equally an act within its power. Jurisdiction to determine an issue involves the power to determine it erroneously. Jurisdiction to determine the effect of evidence involves the power to draw erroneous conclusions from it. I think the judgment should be reversed, and the court below directed to sustain the demurrer.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to sustain the demurrer.

(97 Cal. 208)

RILEY v. NANCE. (No. 19,093.)

(Supreme Court of California. Feb. 17, 1893.)

Concurring opinion. For majority opinion, see 31 Pac. Rep. 1126.

BEATTY, C. J. The result of the decision of the department in this case is to confirm the validity of the title derived under the attachment, and is therefore, in my opinion, correct; but I cannot concur in the reasoning upon which the judgment of reversal is based, and, while I do not dissent from the order denying a rehearing, I desire to state briefly the views which have led me to the same conclusion reached by other members of the court. The question whether an attachment lien merges in the lien of the judgment, or in the lien created by levy of the execution so completely that the filing of a stay bond on appeal will not only release the property from the levy of the execution, and cause the lien of the judgment to "cease," (Code Civil Proc. § 671,) but will also discharge the attachment lien, cannot, in my opinion, be ignored in this case, because the land was conveyed by the attachment debtor before judgment docketed, or execution levied. That circumstance appears to me to be wholly immaterial. A debtor cannot convey land

subject to attachment so as to exempt it from the judgment lien; and the case of *People v. Irwin*, 14 Cal. 434, does not affirm, either in terms or in effect, that he can. If the law is that the attachment lien merges in the judgment lien when the property is conveyed by the debtor after the docketing of judgment against him, and if the filing of a stay bond on appeal in such case extinguishes the judgment lien without reviving the attachment lien, I do not think a conveyance before judgment docketed could prevent the same effect from following; but, in my opinion, the effect of the filing of a stay bond on appeal is to extinguish only the liens resulting from the judgment, and from process thereunder. The sureties on an appeal bond do not undertake to pay any judgment that may be recovered in the action, but only the judgment appealed from in case it is affirmed, or the appeal dismissed. The security of the appeal bond is therefore no security at all for the judgment that may ultimately be recovered by the plaintiff, after a reversal of the first judgment and an order for a new trial. In such a case, on the assumption that the attachment lien is extinguished by the stay bond on appeal, together with the judgment or execution lien, the creditor would lose the security of his lien by the appeal, and the security of the stay bond by the reversal of the judgment, and if, in the mean time, the land had been sold by his debtor, would have no security for a judgment afterwards recovered. This being so, and the declared object of the attachment law being to give the creditor security for any judgment that may be recovered, (Code Civil Proc. § 537,) I do not think it can be held that an attachment lien is discharged by a stay bond on appeal. There is no express provision of the statute to the effect that the filing of such a bond discharges an attachment lien, and it is only by construction that that result is worked out. It has been decided that the attachment lien merges in the judgment lien, and therefore it is argued that when the judgment lien ceases, in consequence of the filing of the stay bond, the attachment lien must also cease. But in the case relied on (*Bagley v. Ward*, 37 Cal. 121) the effect of the decision is merely that the attachment lien is so far merged in the judgment lien that when the latter expires, by lapse of the two-years limitation, the former is also at an end, and this conclusion is based upon the absurdity of supposing that there is no limitation to an attachment lien, and the impossibility of fixing its duration unless it is held to merge in the judgment lien. It is not at all inconsistent with the reasoning to hold that when, instead of expiring by lapse of time, the judgment lien is extinguished by the act of the defendant within the two years, the attachment lien which it superseded is thereby revived; and, in order to give effect to the statute, this conclusion is necessary. Upon these grounds, I concur in the judgment.

(97 Cal. 329)

**LOS ANGELES COUNTY v. ORANGE COUNTY.** (No. 14,917.)

(Supreme Court of California. Feb. 17, 1893.)

**DIVISION OF COUNTY—APPORTIONMENT OF DEBT.**

Const. art. 11, § 3, provides that every county created from territory taken from any other county shall be liable for a just proportion of the existing debts of the last-named county. Act 1889, March 11, creating the county of O. from the territory of L., provides that commissioners shall ascertain the indebtedness of the county of L., "existing at the time this act takes effect," and certify the amount due from the county of O. to the county of L. Held, that the county of O. is not chargeable with moneys expended on its territory by the county of L. between the date of the act and the organization of the county of O.

Department 1. Appeal from superior court, Ventura county; B. F. Williams, Judge.

Action by the county of Los Angeles against the county of Orange to recover the amount of moneys expended on the territory of the county of O. between the date of the act creating it and the time of its organization. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

James McLachlan, Dist. Atty., B. M. Marble, and Waldo M. York, for appellant. F. W. Sanborn, Dist. Atty., and A. W. Hutton, for respondent.

**HARRISON, J.** The county of Orange was created under the provisions of an act of the legislature approved March 11, 1889, and its organization was completed August 2, 1889. By the provisions of section 7 of the act, commissioners were appointed to adjust the respective liabilities of the two counties; and they made their report, fixing the amount of the liability of Orange county to the county of Los Angeles as of the 11th day of March, 1889, and also made a supplemental report, that, in addition to the indebtedness found to exist on that date, "moneys had been advanced after March 11, 1889, by Los Angeles county to Orange county, in the sum of \$11,375.42, and that, as a matter of equity, that amount should be refunded by Orange county to Los Angeles county. These advances consisted of moneys expended in the construction of a bridge, and of certain transfers to different road-district and school-district funds within the boundaries of Orange county. The county of Los Angeles presented its claim for this sum to the board of supervisors of Orange county, and, its payment being refused, brought this action for their recovery, as for moneys paid and advanced by it in behalf of Orange county. A demurrer to the complaint was sustained, and from the judgment rendered thereon the plaintiff has appealed.

Counties are merely local subdivisions of the state, created by the legislature for governmental purposes, and are denominated "public corporations" for the reason that they are but parts of the machinery employed in carrying on the political affairs of the state. The legislature, except as restrained by constitutional limitations, may charge their

boundaries and extent, consolidate two or more into one, or divide and create new counties out of the territory of one or more previously existing ones. It has been established by an unvarying line of decisions that, upon the creation of a new county out of the territory of another, the legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just, and that, in the absence of any provision in reference thereto, the old county will be entitled to retain all public property and assets, except such public buildings and structures as lie within the territory of the new, and will also be liable for all its prior obligations. *Hampshire v. Franklin*, 16 Mass. 86; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Depere v. Bellevue*, 31 Wis. 120; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. Rep. 1067; *Dill. Mun. Corp.* §§ 188, 189. Article 11, § 3, of the constitution of this state, provides that "every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken." The mode of determining the "just proportion" of the debts and liabilities for which the new county shall be liable is not prescribed in the constitution, but is left to the determination of the legislature in each particular case; and by section 7 of the act under consideration the legislature provided that commissioners should be appointed from each of the two counties, who should determine the indebtedness of Los Angeles county, existing at the time the act took effect, in the following manner: "They shall ascertain the total amount of indebtedness of Los Angeles county, existing at the time this act takes effect, and also the total value of all assets of said county, including real estate, buildings, and bridges, erected or in progress of erection, money and solvent credits of whatever nature, and any other property belonging to the said county of Los Angeles. They shall also ascertain the assessed value of all property in Los Angeles county under the assessment made in 1888, and also the assessed value of the property under the same assessment assessed in the territory hereby set apart to form Orange county. They shall then find the balance of the total assets and indebtedness of Los Angeles county, and, if there is a balance of indebtedness against said county, the same shall be divided between the two counties according to the following proportion: As the total assessed value of the property of Los Angeles county at the time of the taking effect of this act is to the total assessed value of the property in Orange county, so is the balance of said indebtedness, so as aforesaid ascertained, to the amount of said indebtedness to be assumed and paid by Orange county to Los Angeles county. Said commissioners shall then certify forthwith to the respective boards of supervisors of said counties of Orange and Los Angeles such amounts of the said indebtedness due from Orange county, to-



gether with the ascertained value of all bridges and other property, reckoned among the assets of Los Angeles county as aforesaid, erected or purchased by county funds, and situated in Orange county, which property shall be charged to the new county; and the amount thereof shall be an indebtedness to Los Angeles county, and shall thereupon become the property of said Orange county. In case said commissioners shall find a balance of assets of Los Angeles county over and above its liabilities, they shall belong to Orange county by the proportion aforesaid, and shall certify the same to the said boards of supervisors, together with the value of the purchases and other property aforesaid; and, if the amount of said balance of assets belonging to Orange county is less than the value of said property, then the difference between the two amounts shall be assumed and paid by Orange county to Los Angeles county. But, if said amount is greater than the value of said property, then said Los Angeles county shall pay the difference between the two amounts to said Orange county."

As the provision of the constitution relates only to the indebtedness of the county, and does not require any division of the assets or property of the old county, the disposition of these matters remains within the scope of legislative provision; and, in the absence of any such provision, the effect of creating a new county would be to give to the old county all the public property, except such as was situated in the territory embraced within the boundaries of the new county. As the legislature could divide the public property and assets of the county in such mode as it might choose, it was competent for it to fix upon any date which it might select as the time for ascertaining their amount and value, as well as for determining, in connection therewith, the "just proportion" of the debts and liabilities to be assumed by the new county. In the present instance the legislature fixed the time when the act took effect as the proper period for ascertaining the amount of these assets and liabilities; and it cannot be held that the constitutional provision was violated in selecting that as the point of time at which to properly determine what would be a "just proportion" of the debts and liabilities to be assumed by the new county. It is not claimed that any of the indebtedness of the county accrued after that date, or that the amount of its debts or liabilities was greater at the organization of the new county than it was at the passage of the act.

The items for which the present action is brought were expenditures made between the date of the passage of the act and the organization of the new county, but during all that time the territory within which these expenditures were made was a portion of Los Angeles county; and we must assume that the expenditures were made in the wise exercise of its control over that territory. It does not appear at what date after March 11, 1889, the moneys were expended; and it must be borne in mind that, until after the elec-

tion upon the question of a division of the county, it could not be known that any new county would be authorized. Until that time it was the duty of Los Angeles county to expend such moneys within the territory that afterwards became Orange county as might be needed. Until after the election upon the question of a division had been had, the moneys which were expended were for the benefit of Los Angeles county, and cannot be said to have been paid or advanced to or for the benefit of the county of Orange. The legislature may have considered that it would be necessary for the county of Los Angeles to expend money for municipal purposes within this territory; and, as it was within its discretion to determine that Los Angeles county should bear the burden of any of the expenditures which it might thus make, the fact that it has made no provision for its reimbursement is indicative that it was not its intention that it should be reimbursed therefor. It would violate all rules of construction to hold that, when the legislature fixed the time when the act took effect as the point of time for ascertaining the amount of indebtedness, it intended those words to apply to the date when the county of Orange was organized. The commissioners are directed, in express language, to determine the indebtedness of said county, "existing at the time this act takes effect;" and the statute itself declares that the act "shall take effect and be in force from and after the date of its passage and approval." There is nothing in the act itself, or in the subjects to which it relates, which requires, or would permit, any different construction to be given to those words from that which they express. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 400)

PEOPLE v. JAMES. (No. 20,950.)

(Supreme Court of California. Feb. 18, 1893.)

CRIMINAL LAW—FORMER JEOPARDY.

On a trial for assault the court instructed the jury to return a verdict of not guilty, but that they were not bound by his instruction. When the jury were brought into court, and asked if they had agreed on a verdict, the foreman said that they disagreed; that they did not wish to render a verdict, but that the court would discharge them; that, if they were discharged without a verdict, it would leave the case for the district attorney and the court to handle; and that they did not wish to be placed in the position of acting as a scapegoat. *Held*, that the failure of the jury to agree, and their consequent discharge, avoided a plea of once in jeopardy; Pen. Code, § 1140, providing that the jury may be discharged if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

Department 2. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Walter James was convicted of an assault with intent to commit rape. From the judgment of conviction, and from an order denying a new trial, he appeals. Affirmed.

J. S. Clark, Rowell Irwin, and R. F. Roth, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The appellant was convicted of an assault with intent to commit rape, and he appeals from the judgment, and from an order denying a new trial. There had been a former trial of the case, at which the jury had been discharged by the court for a failure to agree, and at the second trial the appellant pleaded once in jeopardy. On the issue of jeopardy the jury found in favor of the people, and the main contention of appellant is that the verdict ought to have been in his favor on that issue. At the first trial the record shows, after the statement of the jury that they could not agree, as follows: "Whereupon the court, after an examination of the jury separately, and it appearing that it was impossible for the jury to agree, ordered that they be discharged from further consideration of this case." Section 1140 of the Penal Code provides that such an order may be made, if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree;" and this clause has been held to be not violative of the provision of the constitution as to jeopardy. *Ex parte McLaughlin*, 41 Cal. 211; *People v. Cage*, 48 Cal. 323; *People v. Soto*, 65 Cal. 621, 4 Pac. Rep. 664. But appellant contends that this rule does not apply to the case at bar, on account of certain things which transpired at the time the jury was discharged.

The appellant was charged in the indictment with having committed the alleged crime upon the person of a girl under 14 years old; that being the legal age of consent, under our statute. After the jury had been regularly impaneled at the first trial, the district attorney put the father and mother of the girl, and also the girl herself, upon the witness stand; and, evidently to the surprise of the prosecution, they all testified that the girl was 14 years old several months before the date of the alleged crime. The district attorney then stated to the court that, as the case of the prosecution depended upon proof of the fact that the girl was under 14, it was useless to introduce further evidence, and no further evidence was introduced. The court then instructed the jury to return a verdict of not guilty, but also, pursuant to the provision of section 1118 of the Penal Code, that they were not bound by his advice. The jury then retired, and, after some time, the exact period not being shown, they were brought into court, and asked if they had agreed upon a verdict. The foreman said that they disagreed; and some conversation then took place between the court and the foreman of the jury, upon which the appellant mainly rests on the point of once in jeopardy. The substance of said conversation was in brief this: The foreman said that they did not want to render a verdict in the case, and would ask the court to dis-

charge them; that, if they were discharged without a verdict, it would leave the case for the district attorney and the court to handle; that they did not want to be placed in the position of acting as a scapegoat, etc. Counsel for the appellant insisted that the court should instruct the jury, absolutely, to acquit the appellant. But the court said it had no power to compel the jury to render a verdict, and sent them back to their room with the instruction that no evidence had been introduced tending to prove the guilt of the appellant, and advising and instructing them that it was their duty to acquit him. In the course of a couple of hours more, the jury were again brought into court, and were again asked if they had agreed upon a verdict. The foreman answered: "We have not, and we cannot, and ask the judge to discharge us." Counsel for appellant then moved the court to discharge the defendant, and dismiss the action, on the ground that he had been tried, and there was an absence of any evidence against him; and the motion was denied. The court then polled the jury, and asked each one of them, individually, if there was any probability of their arriving at a verdict, and they all answered, "No." One of the jurors, Mr. Bacon, first answered: "Yes, sir; I could arrive at a verdict in a minute." But when the court said: "What I mean by that, can you get the jury to agree with you?" he answered, "No, sir; I think it is impossible;" saying, further, "nine of us one way, and three the other." Whereupon the court made the order discharging the jury, as hereinabove stated.

No doubt it would have been the duty of the jury to have acquitted the appellant, under these circumstances, at the first trial; and, if they had returned a verdict of guilty, the court would no doubt have granted a new trial. But we do not see that appellant is in a position different, in point of law, from that of any other defendant whom the jury should have acquitted, but failed, through erroneous notions of some of the jurors, to agree upon a verdict, and after a reasonable time were discharged. We do not see that the conversation between the foreman and the court puts any different phase on the matter, or makes any stronger case for appellant, on his plea of jeopardy, than if the jury had merely said they were not able to agree, without assigning any reason. Therefore the present case cannot be taken out of the rule that the failure of the jury to agree, and their consequent discharge, avoids the plea of once in jeopardy.

With respect to the motion for a continuance, without considering the evidence in detail upon the subject, we do not think that the court committed any error in denying it. There are no other points necessary to be specially noted. The judgment and order appealed from are affirmed.

We concur: De HAVEN, J.; FITZGERALD, J.

(97 Cal. 370)

FRAZIER v. LYNCH et al. (No. 19,063.)

(Supreme Court of California. Feb. 20, 1893.)

## ACTION TO RECOVER POSSESSION OF LAND — EVIDENCE.

In an action to recover possession of land, where there is evidence that defendants entered thereon and ordered plaintiff off, and, by threats or force, prevented her from plowing the land, but thereafter exercised no control over the land, and were not in possession, the court erred in instructing the jury that they might infer defendant's possession because of the former trespass, since it is not presumed that a trespass continues from its commission to any subsequent date.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by one Frazier against one Lynch and others to recover possession of certain land, with damages for the withholding thereof. From a judgment for plaintiff, defendants appeal. Reversed.

Z. Montgomery & Son, for appellants. A. E. Nutt and F. W. Ewing, for respondent.

HARRISON, J. Action to recover possession of certain land in San Diego county, with damages for the withholding thereof. The possession of the land by the defendant at the time when the action is commenced is a necessary element of the plaintiff's right to recover in an action of this nature, and must be alleged in the complaint; and, being an issuable fact, must, if denied in the answer, be established at the trial. Under the common-law system, in which the declaration consisted of only a series of fictions, the tenant was not permitted to defend the action, except upon entering into the "consent rule," whereby he consented to plead the general issue, and at the trial to admit his possession, and also the lease, entry, and ouster of the plaintiff, and to insist only on his title, so that the only matter which was tried by the court was an issue not presented by the pleadings or alleged in the declaration, viz. whether the plaintiff's lessor had any title to the land. When these fictions were abolished by the reform in pleading, and the pleader was required to state in ordinary and concise language the facts which constitute his cause of action, inasmuch as the withholding of the possession by the defendant at the time of commencing the action is one of the facts which constitute the plaintiff's right to a recovery, it is essential that it be averred. (*Payne v. Treadwell*, 16 Cal. 244;) and, being an issuable fact, if denied, that it be proved. This action, being only for the recovery of the possession of certain real property, cannot, in a case where the defendant is not in possession, be substituted for an action to determine whether the plaintiff or the defendant has the title to the land. The gravamen of the action is the withholding of the possession from the plaintiff, and the very essence of the plaintiff's cause of action is lacking, if the defendant is not

shown to be in such possession. Accordingly it has been invariably held that, if the plaintiff fails to show that the defendant was in possession of the land sued for at the commencement of the action, he is not entitled to judgment. *Garner v. Marshall*, 9 Cal. 268; *Owen v. Fowler*, 24 Cal. 192; *Hawkins v. Reichert*, 28 Cal. 535; *Pope v. Dalton*, 31 Cal. 218. The jury in the present case were instructed by the court in accordance with the foregoing rule, but the defendants assign as one of the errors committed at the trial that the evidence was insufficient in this respect to sustain the verdict. The evidence presented on the part of the plaintiff of any possession of the land by either of the defendants had reference to certain acts done by them on the land a few days before the action was commenced, and tended more to show a trespass, or a prevention of the plaintiff from going thereon, than an actual possession thereof by the defendants. It was testified on behalf of the defendants that from that time until the commencement of the action neither of them was in possession, or exercised any control of the land, and the record does not contain any evidence of any subsequent act by either of them with reference to the land, nor has the respondent called our attention to any evidence which shows that the defendants were either of them in possession of the land at the commencement of the action, or for several days prior thereto. The court instructed the jury that, "if from all the evidence in this case you should find that a few days before the commencement of this action the defendants, or some or any of them, were upon the premises described in the complaint, or entered thereon and ordered and drove the plaintiff and her agents and employees off from said premises, and prevented them from plowing said premises by threats or force, such acts on the part of such defendant or defendants were acts of possession on the part of such defendants; and, if there is no evidence to the contrary, you have a right to presume and to find that such defendant or defendants so ordering, driving, preventing, or threatening, were in possession of the said real estate at the time of the commencement of this action." In this instruction the court erred. The possession of the land by the defendants was a fact to be shown by the plaintiff, and, while it may be sufficient in some cases to show a constructive, as contradistinguished from an actual, possession, (*Crane v. Ghirardelli*, 45 Cal. 235,) yet the evidence presented in this case did not tend to establish a constructive possession; and it is not a presumption of law that a trespass continues from the time of its commission until any subsequent date, nor should the jury have been instructed that they might infer the possession of the defendants from the fact that they had previously committed a trespass upon the possession of the plaintiff. The judgment and order are reversed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 335)

**JOYCE v. SHAFER et al.** (No. 19,026.)  
(Supreme Court of California. Feb. 17, 1893.)  
**VENDOR AND VENDEE—RECOVERY OF PURCHASE MONEY.**

After default in the last installment of the purchase money due under a land contract, the vendor's conveyance of the land to a third person is not such a breach of the contract as will enable the purchaser to recover the installments already paid, without tendering the last installment due.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Thomas F. Joyce against A. C. Shafer and F. D. Lanterman to recover the first installment paid on a contract for the sale of land. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

W. I. Foley, for appellant. M. W. Conkling, for respondents.

**TEMPLE, C.** This appeal is from a judgment upon demurrer to the complaint. It is an action to recover the first installment paid upon an executory contract for the sale of land. The demurrer is general that the complaint does not state a cause of action. From the complaint it appears that on the 26th of July, 1887, Miss S. A. Popplewell entered into an agreement with defendants, in writing, whereby she agreed to pay them \$1,250 in three installments,—one at the execution of the agreement, one in one year, and the third two years from date,—in consideration of which they sold and agreed to convey to her certain lands. The contract contained the usual covenants, making time of the essence of the contract, and providing for a forfeiture of installments paid, as liquidated damages, in case of failure to make any of the payments as stipulated. The first installment was paid, but no more. December 18, 1889, about five months after the last payment fell due, defendants, without having tendered a deed to Miss Popplewell, or demanded payment from her, without her consent, conveyed the land for a valuable consideration to one J. H. Bryant. July 23, 1891, Miss Popplewell duly assigned said contract, and all rights, legal and equitable, under said agreement, to plaintiff. Neither plaintiff nor his assignor has ever tendered to defendants the amount due on their contract, or offered to perform their agreement, but it is contended that the defendants, by conveying the land which was the subject of the contract, have put it out of their power to comply with their agreement, and that therefore an offer of performance on the part of the purchaser would be unavailing, and plaintiff is therefore at liberty to consider the contract as abandoned, and sue to recover the money paid. Therefore, having made due demand, he brings this action.

Plaintiff bases his claim upon the rule laid down in *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280; *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. Rep. 749; and *Phelps v. Brown*, 95 Cal. 572, 30 Pac. Rep. 774. So far as ap-

plicable to the facts of this case, the rule laid down in those authorities is simply that, when the parties to a contract have abandoned it, or it has been rescinded by mutual consent, either party may recover money paid under it; but it was not intended in those cases to hold that a purchaser may, upon his own default, recover money paid by him, when the vendor has not refused to complete the sale, and the vendee still declines to do so. The conveyance by the vendors was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the mean time the purchaser would not be at liberty to disaffirm the contract, on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title. It may be added that it is at least doubtful whether the assignment of the contract of sale would carry with it the right to maintain this suit, even if it were conceded that plaintiff's assignor could have maintained a suit for money she had paid. The action is based upon the theory that, by abandonment or rescission, the contract of sale became nonexistent, and therefore moneys which have been paid before its cancellation may be recovered as money paid for the use of the person who paid it. This action is not therefore an action arising under the contract of sale. The judgment and order should be affirmed.

We concur: **BELCHER, C.; VAN-CLIEF, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are affirmed.

(97 Cal. 343)

**STERLING v. SMITH.** (No. 14,911.)  
(Supreme Court of California. Feb. 17, 1893.)

**PLEADING AND PROOF—RIGHTS OF PRINCIPAL AGAINST AGENT.**

1. Under Code Civil Proc. § 462, which provides that the statement of new matter in the answer in avoidance, or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party, plaintiff is at liberty to prove fraud at the trial to overcome the new matter set up in the answer, though no allegation of fraud is contained in the complaint.

2. An agent who invests his principal's money in a corporation of which he is a member, and which is largely indebted, without informing her either of his membership or of the debt, is guilty of fraud, though there may be no actual wrongful intent; and the principal may recover such sum from the agent in the absence of a ratification by her of such investment.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Margaret T. Sterling against James Smith for the recovery of money. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Gould & Stanford, for appellant. Anderson, Metcalf & Anderson, for respondent.

MCFARLAND, J. In her complaint the plaintiff averred that during a certain period defendant was her confidential agent in purchasing and selling real estate, and in transacting other business for her; that as such agent, and for such business, he received from her during said period the sum of \$11,920 or thereabouts; that during said period he paid out and expended for her the sum of \$6,225 or thereabouts, leaving a balance of \$5,695, with interest, due her from him; and for this last sum she prays judgment. The defendant answered, admitting the agency as alleged in the complaint, but denied that he had received of plaintiff's money more than \$9,920.70. The court found that defendant had received of plaintiff's money only the said amount of \$9,920.70. But the defendant averred that, in addition to the said sum of \$6,225 paid out by him for plaintiff, as averred in the complaint, he also paid out for her the further sum of \$3,600. He averred that this latter sum of \$3,600 had been paid out by him for her in purchasing certain interests in what is called generally the "Kansas Street Syndicate," which afterwards became a corporation, and was engaged in the purchase and sales of land, principally at Pasadena, Cal. The facts as to this syndicate and the expenditure of money of plaintiff, by defendant in connection with the same, are stated in great detail in the answer. The court found against the defendant as to the said \$3,600 alleged to have been expended with said syndicate, and refused to allow defendant for the same, and entered judgment for plaintiff upon the basis of allowing defendant as against said sum of \$9,920.70 only the sum of \$6,503.75. Defendant appeals from the judgment, and the only point made by him for a reversal of the judgment is the refusal of the court to allow him for said amount paid out in said syndicate. The court found that prior to the time when defendant made the purchase of interests from said syndicate for plaintiff, "he had already become a member of said syndicate, and was one of the joint owners of the property of said syndicate, and of the interests so purchased by him for her; that he did not inform her, and she did not know, at the time she made said purchase, that he was a member of said syndicate, and a part owner of the interests he was about to purchase for her, but led her to believe he was not a member of said syndicate;" and that at the time defendant made said purchase for plaintiff the syndicate was indebted in a large amount, exceeding \$55,500, which defendant had been instrumental in incurring, and that he did not notify her of said debt, but represented to her that she would not have any call to pay if she became a member of the syndicate.

The main contention of appellant is that the findings above referred to are entirely outside of any issues made by the pleadings, for the reason that the complaint does not contain any allegation of facts constituting fraud of any character,

or any allegation that appellant was a member of the syndicate, or that she did not know of his having an interest therein, etc., which allegations appellant contends were absolutely essential in order to admit evidence upon the subject. This position, however, is not tenable. Our system of pleading does not include a replication, and under section 462, Code Civil Proc., "the statement of new matter in the answer in avoidance, or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party." The averments in the answer as to the investments in the syndicate constituted new matter; and, if a replication were allowable, the plaintiff, by such a pleading, could have set up the facts found by the court as aforesaid. But under our system of pleading she is deemed to have set up such facts. No doubt, when a cause of action rests upon fraud, the facts constituting the fraud must be set up in the complaint; but such was not the case here, for the necessity of proving fraud appeared only after the answer of the defendant. And a plaintiff is in that position with respect to all new matters set up in the answer. *Williams v. Dennison*, 84 Cal. 540, 29 Pac. Rep. 946; *Association v. Clark*, 84 Cal. 204, 23 Pac. Rep. 1081; *Colton L. & W. Co. v. Raynor*, 57 Cal. 588; *Curtiss v. Sprague*, 49 Cal. 301; *Canfield v. Tobias*, 21 Cal. 349. In *Colton L. & W. Co. v. Raynor*, supra, the court, in speaking of said section 462, say: "This has always been regarded as allowing a plaintiff, in reply to such new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in a replication, and pleaded with all the precision and fullness which the strictest rules of law ever required." With respect to respondent's criticism of the findings, it is sufficient to say that, in our opinion, they are full and specific enough, and that no further findings were necessary.

As to the merits of the case, it was not necessary for the respondent to prove or for the court to find expressly that the acts done by appellant were done with a fraudulent and wrongful intent, because the acts themselves were of such a character, considering the relationship of the parties, that the law imputes fraud. In *Pom. Eq. Jur.* § 959, the rule, as between principal and agent, is stated as follows: "Equity requires and treats this relation in the same general manner, and with nearly the same strictness, as that of trustee and beneficiary. The underlying thought is that an agent should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal. In dealings without the intervention of his principal, if an agent, for the purpose of selling property of the principal, purchases it himself, or an agent, for the purpose of buying property for the principal, buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable. It will always be

set aside at the option of the principal. The amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial. Nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts." See, also, *Burke v. Bours*, 92 Cal. 108, 28 Pac. Rep. 57.

The objection that the findings are insufficient to support the judgment because they do not contain an express statement that the respondent did not ratify the investment in the syndicate, cannot be maintained. The findings clearly go upon the theory that there was no such ratification; and, moreover, there was no evidence tending to show any ratification after respondent had learned all the facts about the transaction. Appellant was not entitled, upon the evidence, to a finding that there had been such ratification. Neither do we think that the stipulation of counsel referred to in finding 14 can be held as estopping the respondent from attacking the invalidity of the investment in the syndicate, and the trial was not conducted upon any such theory. There are no other points which we deem it necessary to notice in detail. Judgment affirmed.

We concur: DE HAVEN, J.; PATERSON, J.

(97 Cal. 348)

SMITH v. SUPERIOR COURT OF LOS ANGELES. (No. 15,106.)

(Supreme Court of California. Feb. 17, 1893.)

RECEIVER—APPOINTMENT—CERTIORARI.

1. An action on a note by a bank against a railroad company is an action at law, and the court has no power to appoint a receiver for the railroad company, though it consents to such appointment, and though the complaint alleges that it is insolvent, that other creditors are threatening to sue, that defendant has no property out of which to satisfy such judgment, and that the action is brought in behalf of all other creditors willing to come in as plaintiffs.

2. Certiorari will not lie to review a judgment after the expiration of the time limited for appeal, unless circumstances of an extraordinary character intervene.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Petition for a writ of certiorari to review an order made by the superior court of Los Angeles county appointing a receiver for the Los Angeles & Pacific Railroad Company. Petition dismissed.

Thomas L. Winder, for appellant. Wilson & Lamme and Anderson & Anderson, for respondent.

DE HAVEN, J. It appears from the return to the writ of certiorari issued herein that the superior court of Los Angeles on September 30, 1889, made an order appointing one Silver receiver for the Los Angeles & Pacific Railway Company. The order was made in an action then pending in that court, wherein the California Bank, a corporation, was plaintiff, and the Los Angeles & Pacific Railway Company and others were defendants. The petitioner here claims that the order ap-

pointing the receiver was in excess of the jurisdiction of the superior court, and the object of this proceeding is to procure the judgment of this court, annulling such order. It is stated in the complaint in the action in which the receiver was appointed that the plaintiff therein brings the action in behalf of itself and all other unsatisfied creditors of the Los Angeles & Pacific Railway Company who shall come in, and contribute to the expenses of the action. The complaint then proceeds to state a cause of action in favor of the plaintiff therein, and against the defendant railroad company, upon two unsecured promissory notes, and further alleges that the defendant railroad corporation is indebted to various persons in sums amounting in all to \$225,000; that this indebtedness is long past due, and that the numerous holders thereof are "pressing for payment of such indebtedness, and threatening to, and will, commence suits, attachments, and other proceedings" against said corporation; that the road of the defendant corporation is completed, but that the rolling stock is not owned, but only leased, by said defendant; that there is a mortgage upon record which purports to secure a lien of \$240,000 upon the property of said railway company, "and all the rolling stock and motor power of the said company being so leased, as aforesaid, the said defendant corporation has no property, of any kind or character, out of and from which said plaintiff's claim could be met, and a judgment at law and execution would not avail this plaintiff, nor any of the other unsecured creditors; that the said defendant railway company is wholly insolvent, and unable to pay its debts and liabilities, and there is great danger that by reason of attachments and other legal proceedings the property of the said company will be wasted in costs and expenses." There are other averments, not necessary to be here set out, which tended to show that the plaintiff in that action was entitled to an injunction against one Wicks and his wife, who were made defendants in the action. The prayer of the complaint is for an injunction against defendant Wicks and his wife, and "that the court appoint a receiver to take possession of all the property, rights, effects, rents, tolls, issues, and incomes of the said defendant railway corporation, \* \* \* and retain the same, under the direction of this honorable court; that the court issue an order restraining and enjoining the said defendant railway company \* \* \* from claiming any interest in said property, or interfering in the management thereof, except under the orders of this court; that the court ascertain the amount of all the indebtedness of the said railway company, and to whom owing, and adjust and settle the amounts due each,"—and for general relief. The order for the appointment of the receiver was made with the consent of the defendant the Los Angeles & Pacific Railway Company, and directed said receiver "to continue the operation of said roads in accordance with the usual modes and methods of operating railroads."

1. We are unable to distinguish the ac-

tion in which the order under review was made from that of the French Bank Case, 53 Cal. 495. It was there held that the appointment of a receiver in such an action was unauthorized and void, and should be annulled on certiorari. The only relief to which the plaintiff in the case of *The California Bank v. The Los Angeles & Pacific Railway Co.* was entitled to was a judgment against the defendant railroad company for the amount alleged to be due upon the promissory notes of which the plaintiff therein was alleged to be the owner, and in such an action the court was without power to appoint a receiver. The allegations of the complaint to the effect that the corporation was insolvent, and that other creditors were threatening to sue the defendant railroad, and that said defendant had no property out of which the plaintiff would be able to satisfy any judgment it might obtain, and that the action was brought in behalf of the plaintiff, and all other creditors of the defendant railroad who were willing to come in as plaintiffs, did not change the essential character of the action from one at law, to recover upon an unsecured indebtedness, to one in which, according to the usages of courts of equity, a receiver may be appointed; nor would the consent of the defendant railroad to the appointment of the receiver at all affect the right of any creditor aggrieved thereby to have the order appointing such receiver annulled in a proceeding of this character.

2. It appears from the record before us that, more than two years after the date of the order appointing the receiver, the petitioner, on his own application, was permitted to intervene in the action in which that order was made, and to join as a plaintiff therein. In his petition for intervention he demanded a judgment against the Los Angeles & Pacific Railway Company for an alleged indebtedness due him from that corporation, and that its land be sold by the receiver already appointed, and the proceeds thereof applied to the payment of the debts of that defendant. This action upon the part of the petitioner was, in effect, a consent to the order now sought to be overruled; but whether such consent would be of itself sufficient to defeat the present proceeding need not be determined, as we are of opinion that the further contention of respondent, that petitioner has by delay lost the right to the relief now sought, must be sustained. The petition herein was not filed until July 22, 1892, nearly three years after the making of the order sought to be annulled, and no circumstances are shown which in any manner tend to excuse the long delay in making this application. In the case of *Reynolds v. Superior Court*, 64 Cal. 372, 28 Pac. Rep. 121, it was held that delay in commencing proceedings of this character for a period exceeding one year, unless excused by circumstances, was sufficient to defeat the application for such relief. In that case the court said: "By means of certiorari the petitioner seeks to call in question the validity of a judgment, and an order made under it, considerably more than one year before the presentation of his peti-

tion. In *Keys v. Marin Co.*, 42 Cal. 256, it was held that, unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of the same length of time that bars an appeal from a final judgment." We regard the case just cited as conclusive of this, and upon its authority the writ must be discharged, and proceeding dismissed.

We concur: MCFARLAND, J.; HARRISON, J.

(97 Cal. 339)

In re BEDELL'S ESTATE. (No. 15,179.)  
(Supreme Court of California. Feb. 17, 1893.)

ADMINISTRATOR—WHO ENTITLED TO LETTERS.

1. Under Code Civil Proc. § 1365, which fixes the relative order in which persons interested in the estate of an intestate are entitled to administration, and section 1379, which authorizes the appointment of a person not entitled to administration at the written request of the person entitled, the nominee of a person entitled has a preference over one who belongs to a class subsequent in rank to the person making the nomination.

2. Where there has been a waiver of the right to administer an estate by the person entitled, and a written request by him for the appointment of another, the court is not required to pay any attention to his subsequent request for the appointment of the public administrator.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffee, Judge.

Petition for the appointment of an administrator of the estate of Bedell. From an order appointing E. W. Gunther, the public administrator appeals. Affirmed.

J. D. Sullivan and James G. Magulre, for appellant. William F. Herrin and Arthur Rodgers, for respondents.

HARRISON, J. The question presented on this appeal is whether the public administrator, or the nominee of the father and mother of the deceased, is entitled to letters of administration upon her estate. The deceased left a will which was admitted to probate, but, the person named therein as executor having renounced his right to serve, the father and mother of the deceased severally requested that the court appoint E. W. Gunther as administrator with the will annexed, and a petition for such appointment was thereupon filed by him. The public administrator also filed a petition that administration on the estate be granted to him. Both petitions were heard by the court at the same time, and, at the conclusion of the hearing, the court made its order appointing Gunther, and denying the application of the public administrator, from which order the public administrator has appealed. The appellant claims that he is entitled to the administration by virtue of the provisions of section 1365, Code Civil Proc.; while the respondent claims that under the provisions of section 1379, *Id.*, the court was authorized to appoint him in preference to the appellant. Section 1365, *Id.*, is as follows:



"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are respectively entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed; (2) the children; (3) the father or mother; \* \* \* (8) the public administrator; \* \* \* (10) any person legally competent." And it is alleged on behalf of the appellant that the several classes named therein have the respective right to be appointed in the order in which they are named in the section, and that, with the exception of the nominee of the husband or wife, the persons named in the section must be preferred in their respective rank to the nominee of any other prior class; in other words, that in the present case the court could consider only the nominee of a husband of the deceased, and that the public administrator has a preferred right to the administration over that of the nominee of the father. This construction would, however, deprive the provisions of section 1379, *Id.*, of the effect to which its language is entitled. That section provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court." If the relative right of appointment is to be determined by the order in which the parties entitled are enumerated in section 1365, and the nominee of any of the classes therein named, other than that of the husband or wife, is not to be regarded by the court, this provision of section 1379 would lose all effect. The fact that the person entitled is permitted to make a request that administration be granted to a person "not otherwise entitled" must receive some consideration in the construction of the statute, for it is not to be supposed that the legislature has given such permission merely to have the request denied. The evident purpose of the provision is to give to the one entitled to administration the power to select some competent person to discharge the duties of the office; but to hold that his request is not to be considered when resisted by one who belongs to a class subsequent in rank to his own would be to confine his selection to some person falling within the class immediately after his own. The provision in section 1365 giving to the surviving husband or wife the right to nominate some competent person does not restrict the right of requesting an appointment to them, but makes a special provision for the appointment of their nominee, irrespective of whether they are themselves entitled to administration. *Estate of Stevenson*, 72 Cal. 164, 13 Pac. Rep. 404. But the provisions of section 1379 are general, and apply with equal effect to each of the classes named in section 1365, the difference between the two sections being that by section 1365 a non-resident husband or wife, though himself

incompetent to serve, may confer upon any other competent person the right to be appointed in preference to any one of the subsequent classes; while by section 1379 only the nominee of one who is himself competent to serve can be considered by the court. *Estate of Beech*, 63 Cal. 458; *Estate of Hyde*, 64 Cal. 228, 30 Pac. Rep. 804. The provision in this section, being general in its terms, and having no qualifications except the conditions named therein, must be construed as giving to the court the discretionary power to grant administration to any competent person who otherwise would not be entitled thereto, at the written request of a person who would be so entitled. The only conditions necessary for invoking the discretion of the court are that there be a written request from some one who, if applying, would himself be entitled to receive letters of administration, and that the person for whom the request is made be a competent person. In the present case the father was entitled to administration, and the respondent, being a competent person, gave to the court the right to exercise its discretion in making the appointment. This construction finds confirmation in the provision of section 1383, *Code Civil Proc.*, that declares that "when letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him." If the court could, immediately upon having appointed the public administrator, revoke his letters, at the request of a nominee of the father, it is reasonable to suppose that the legislature intended by section 1379 to give to it the same discretion in the original appointment of the administrator. The request of the father for the appointment of the respondent, and the application thereon for administration, was not rendered ineffective by the subsequent request of the father for the appointment of the public administrator. Having once waived and relinquished his right to administration in favor of the respondent, the court was not required to pay any regard to his subsequent request for the appointment of the public administrator. *Estate of Kirtlan*, 16 Cal. 162. The order is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 360)

SCARF v. ALDRICH. (No. 19,070.)

(Supreme Court of California. Feb. 13, 1893.)

SALE OF WARD'S REALTY—JURISDICTION—PETITION—ORDER OF SALE—COLLATERAL ATTACK—GUARDIAN'S DEED.

1. *Code Civil Proc.* § 1782, provides that on petition by a guardian to sell his ward's land the probate court must make an order for

the appearance of "the next of kin of the ward, and all persons interested in the estate," not less than four, nor more than eight, weeks from the time of making such order, to show cause why an order of sale should not be granted." *Held* that, though an order of sale made 23 days after the order to show cause was erroneous, the sale was valid, since the court acquired jurisdiction, when the petition was presented, as the proceeding was not adverse to the ward.

2. Code Civil Proc. § 1783, providing that a copy of the order to show cause must be personally served on all persons interested, or must be published, does not require that the order shall be served on a ward, since he is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court. *Townsend v. Tallant*, 33 Cal. 45, distinguished.

3. A petition for a sale of land by a guardian, and an order to show cause, described the land as "a part of lot number 5, in block number 12, of the town of San Bernardino, Cal." In the order of sale the description was specific, giving a precise starting point, and describing the land by metes and bounds. *Held*, that the defective description in the petition and order to show cause did not affect the jurisdiction of the court, or the validity of a sale by the correct description. *Wilson v. Hastings*, 5 Pac. Rep. 217, 66 Cal. 244, distinguished.

4. Irregularities in a proceeding by a guardian to sell his ward's land, occurring after the court acquires jurisdiction, which would have required a reversal on appeal, do not affect the validity of a sale on collateral attack.

5. A ward's title to land passes by his guardian's deed therefor, and not by the confirmation of the sale by the court.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action to quiet title by Henry S. Scarf, an infant, by W. L. G. Soule, his guardian ad litem, against J. B. Aldrich. From a judgment for plaintiff, defendant appeals. Reversed.

Willis, Cole & Craig, for appellant. C. W. Rowell and E. E. Rowell, for respondent.

HAYNES, C. This action is to quiet title, and involves the validity of a sale of the premises in question, by the guardian of the plaintiff, to the defendant. The complaint is in the usual form, alleging ownership in fee, that plaintiff is entitled to the possession, that defendant claims an interest adversely to the plaintiff, and that such claim is without right. Findings and judgment passed for the plaintiff, and defendant appeals from the judgment upon the judgment roll, and a bill of exceptions setting out the evidence. Elizabeth Wagner, the guardian of the plaintiff, filed a petition in the probate court on November 20, 1879, praying for an order to sell the premises in controversy. This petition set out facts showing the necessity for the sale of the premises, which consisted of a part of a lot in the city of San Bernardino; and no question is made as to its sufficiency, except as to the description of the premises sought to be sold. Upon this petition the court on the same day made an order requiring all persons interested to show cause before the court on the 13th day of December, 1879, why an order of sale should not be granted; and, no objection having been made, an order

of sale was granted on the day last named. The premises were subsequently sold to the defendant under this order, and the sale was confirmed March 5, 1880, and on the next day the guardian executed and delivered to the defendant a deed of conveyance therefor. The respondent's principal contention is that the order to show cause did not conform to the statute; that, therefore, the court did not acquire jurisdiction; and that all subsequent proceedings were void, and did not divest the title of the plaintiff.

Section 1782 of the Code of Civil Procedure then provided, as it does now, that the time fixed in the order for the hearing should not be "less than four, nor more than eight, weeks from the time of making such order to show cause why an order should not be granted for the sale of such estate." Sections 1783 and 1784 of the Code of Civil Procedure, as they then existed, were as follows: "1783. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county, or, if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published. 1784. The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate, who oppose the application." This order was published four times,—the first publication on November 21st, and the last, December 12th. The statute requiring three weeks' publication was therefore complied with. From the date of the order to and including the day of hearing, there were but 23 days, while there should have been not less than 4 weeks, or 28 days; and for that reason respondent contends that the order was void, and that the court acquired no jurisdiction. That the order was erroneous, is evident, but the sole question is whether the court had jurisdiction to order the sale; for whatever errors may have occurred in the proceedings, if the court acquired jurisdiction, the sale of the real estate was not void, and the title passed to the purchaser. It is contended by respondent that proceedings by a guardian for the sale of the ward's estate are adverse to the ward, that the order to show cause is in the nature of a summons, and that a substantial compliance with the statute is a prerequisite for obtaining authority to proceed. Respondent's principal error lies in the first part of his contention, viz. that the proceedings are adverse to the ward; for in fact the proceedings are by the ward, and for his benefit. Our statute does not require that notice shall be given to or served upon the ward, thus emphasizing what is apparent from

the nature and object of the proceeding, and clearly distinguishing it from a proceeding by an administrator to sell the real estate of the intestate to pay debts, which is clearly adverse to the heir; and therefore a valid and sufficient notice to the heir is essential to give the court jurisdiction over him, as a party to the proceeding. But in the case of guardians' sales the minor is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court. An order for the sale of the property is not an order against or adverse to the minor, but is a granting of his request. It is not a judgment in personam, but operates only on the property, and is therefore in rem.

In the case of *Gager v. Henry*, 5 Sawy. 243, the order to show cause was directed to be published "for four successive weeks," while the proof of publication showed that it was only published three weeks. The court said: "This, at least, is a serious irregularity; and if the jurisdiction of the court did not attach upon the filing of the petition, but until due service of the prescribed notice of the time and place of the hearing on the petition, the subsequent proceeding would probably be void. \* \* \* But the better opinion seems to be that the proceeding by a guardian to obtain a license to sell his ward's land is not one between adverse parties, and of which the court does not acquire jurisdiction until due service is made of the notice of application, but rather a proceeding in rem, carried on by and in the interest of the ward through his legal representative,—his guardian." That court, after citing several authorities, and among them *Fitch v. Miller*, 20 Cal. 381, concluded that the county court had acquired jurisdiction by the presentation of the petition, and therefore its judgment could not be questioned collaterally on account of any errors committed in the course of its subsequent proceedings. In *Mohr v. Manierre*, 101 U.S. 418, a case originating in the state of Wisconsin, the guardian of a lunatic petitioned for the sale of his ward's property to pay debts. The order to show cause why the application should not be granted was required to be published at least four successive weeks. The order was not published for the full time. The order of sale was granted, and the property sold. After the recovery of the lunatic, he brought a suit in ejectment to recover the land. The supreme court held: "(1) That the publication of the notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. (2) That, so far as the rights of the lunatic are concerned, the jurisdiction of the court attached upon filing the guardian's petition setting forth the facts required by the statute. (3) That, as against the lunatic, a license to sell is not rendered invalid by reason of an insufficient publication of notice of the hearing." See syllabus. In another case where property of a minor had been sold by guardian, the same court said: "In this form of proceeding the guardian sufficiently and fully represented

the infants, and no notice to them was required by the statute of Maryland, or by any general rule of law." *Thaw v. Ritchie*, 136 U.S. at page 548, 10 Sup. Ct. Rep. at page 1044. See, also, *Fitzgibbon v. Lake*, 29 Ill. 176; *Mulford v. Beveridge*, 78 Ill. 458; *Mohr v. Porter*, 51 Wis. 487, 8 N.W. Rep. 364. Respondent's citations from *Freeman's Void Judicial Sales* all refer to "proceedings in probate to obtain a sale of real estate as an independent adversary proceeding in personam;" but in the latter part of section 15 the author seems to concur in the views we have endeavored to express, and cites *Mohr v. Manierre*, supra, and other cases. *Haws v. Clark*, 37 Iowa, 355, cited by respondent, is not applicable. There the statute required notice to be served upon the minor, and to be returned and heard upon a regular term day. It was clearly in the power of the legislature to limit the exercise of jurisdiction by the court to a day in the regular term; and, as to service of the notice upon the minor, the case can have no application here, as our statute does not require such notice. *Kendall v. Miller*, 9 Cal. 592, and *De la Montagne v. Insurance Co.*, 42 Cal. 292, were cases of the sale of personal property without any order of court. *Halleck v. Moss*, 17 Cal. 340, was a sale by executors upon insufficient notice. *Stilwell v. Swarthout*, 81 N.Y. 109, was an action by creditors of an estate against the administrators and heirs, and involved a question as to the validity of a sale of real estate by the administrators. The inapplicability of the foregoing cases cited by respondent is clear. The case of *Townsend v. Tallant*, 33 Cal. 45, cited by respondent several times, is not in point. That was an action in ejectment by a minor, by his guardian ad litem, to recover real estate. But in that case the land had been sold by the administrator to pay debts. *Schellenberger* was the general guardian of the infant, as well as administrator of the estate. Section 159 of the probate act required a copy of the order to be served on the general guardian. It was contended that as *Schellenberger* was the petitioner, and also the guardian, he, as guardian, had notice. But it was held that *Schellenberger* could not represent both sides; that the minor had no guardian against the petition; and that, therefore, the knowledge of the guardian was not equivalent to the notice required, the proceeding being hostile to the minor, as heir of the estate. The question we are considering was not before the court in that case, and was not decided, but the reasoning of the court is entirely consistent with the view we have taken of the case at bar.

The petition of the guardian for the sale of these premises alleged that the property was unproductive, by reason of being in bad repair; that it was the only property of any character belonging to the minor; that there was no fund out of which the property could be put in repair, or to pay the taxes thereon; that it would be sold for taxes unless sooner converted into money; that the minor was then but seven years of age; and that a sale was necessary to provide him with the common necessities of life. These facts are

nowhere contradicted in the record, and it may therefore be safely asserted that, if the guardian had not sold the property, it would have been lost to the plaintiff by a sale for taxes, and that during his earlier years, at least, he would have been compelled to subsist upon the charity of strangers, or become an inmate of an almshouse. No question is made, either in the complaint or in the evidence, but that the full value of the property was realized, or that fraud of any character intervened, nor that he has not had the full benefit of the proceeds, though, if it were otherwise, it would not affect the question here. While courts of equity are zealous in their efforts to protect the rights and property of infants, and all others who are not sui juris, they are equally unwilling, unless compelled by some strict rule of law, to make their incapacity a shield or ground for doing wrong. Certainly in this case there is nothing to commend the respondent to the sympathies of a court of equity to which he has resorted. It may be that the next of kin, or others interested in the estate of the minor, (if there are such,) are not bound, for want of proper notice, but that does not aid the plaintiff. Nor would the court subvert the best interests of wards by making the titles of purchasers at guardian's sales so uncertain as to prevent the obtaining of a fair price when necessity compels a sale.

Another ground upon which respondent contends that the court had no jurisdiction requires notice, viz. that the petition and order to show cause were void because of an insufficient description of the real estate sought to be sold. The description was as follows: "A part of lot number five, in block number twelve, of the town of San Bernardino, Cal." In the order of sale, however, the description was specific, giving a precise starting point, and describing the premises by metes and bounds. In the complaint in this case the starting point, instead of being "at the northeast corner of the lot owned by L. Caro," as in the order of sale, is fixed, by reference, to a certain corner of lot 5. There is no allegation or evidence that the premises sold under the description given in the order of sale are not identical with those described in the complaint; and hence, if the court had jurisdiction to sell the premises described in the order, there can be no partial recovery by the plaintiff. That the defective description in the petition and order to show cause did not affect the jurisdiction of the court, or the validity of the sale by the correct description, see *Fitch v. Miller*, 20 Cal. 352; *Estate of Boland*, 55 Cal. 312; *Richardson v. Butler*, 82 Cal. 174, 23 Pac. Rep. 9; *Gager v. Henry*, 5 Sawy. 239. The case of *Wilson v. Hastings*, 66 Cal. 244, 5 Pac. Rep. 217, cited by respondent, was one where the sale was by the executor of an estate, and as to the heir was an adverse proceeding; and hence is widely distinguished from this case, where the proceeding was ex parte by the minor, for his own benefit. There was no inconsistency between the general description

in the petition and the definite description in the order of sale. The property mentioned in the petition is the property that was sold.

Other irregularities are pointed out by respondent which would have required a reversal of the proceedings upon appeal; but it is not necessary to notice them, as they occurred after the court acquired jurisdiction, and hence do not affect the validity of the sale upon collateral attack.

Counsel for respondent quotes the concluding part of a stipulation in the case, made to relieve plaintiff of the necessity of proving title to him prior to the guardian's sale, viz.: "And no question is made as to the title of plaintiff and his ownership in all of the premises described in the complaint up to and including March 5, 1880," and contends that this stipulation "lets the defendant out," because, it is said, "if plaintiff was the owner up to and including March 5, 1880, the decree of confirmation cuts no figure whatever." The obvious intention of the stipulation was to concede that prior to the time when title would have vested in the defendant under the sale to him, if the proceedings were valid, the plaintiff was the owner; thus leaving the sole question whether or not his title was divested by these proceedings. This is clearly shown by the body of the stipulation, which admits that the plaintiff was seised in fee "prior to the decree of confirmation, \* \* \* and prior to the execution of the deed of Elizabeth Wagner, then guardian," etc. This deed was made March 6, 1880, and as plaintiff's title was divested by the deed, and not by the confirmation of the sale, the stipulation, even as construed by respondent, cannot aid him. *Doe v. Jackson*, 51 Ala. 514.

All of the proceedings had in the probate court, except the petition, were objected to, as offered by the defendant; and the objections were sustained by the court, as was also the objection to the deed made by the guardian to the defendant. As those objections are fully covered by what has been said, it is not necessary to notice them further. The court erred in sustaining these objections, and the judgment should be reversed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(97 Cal. 232)

In re HAAS' ESTATE. (No. 19,107.)  
(Supreme Court of California. Feb. 18, 1893.)

In bank. On rehearing.

For former report, see 31 Pac. Rep. 893.

PER CURIAM. Rehearing denied, but judgment modified so as to read as follows: Order reversed, except that part thereof disallowing claim of Ella V. Haas. As to that part, affirmed.

(3 Cal. Unrep. 799)

**FLETCHER v. NORTHCROSS.** (No. 19,007.)

(Supreme Court of California. Feb. 17, 1893.)

**MORTGAGE OR CONDITIONAL SALE.**

Foreclosure proceedings were dismissed, and the mortgagor executed a deed to the mortgagee, pursuant to an agreement whereby the mortgagee was to satisfy the mortgage of record, and the mortgagor was to have the privilege of selling the land within six months thereafter, and retain all moneys which he might receive therefor over and above a specified sum, which he was to pay to the mortgagee. *Held* that, in view of the facts that the mortgagor made no promise to pay any sum to the mortgagee, that the sum to be paid the mortgagee in case of a resale was several thousand dollars less than the mortgage debt, that no interest was to be paid by the mortgagor, and that the mortgagee at once took possession of the premises, the transaction must be construed, not as a mortgage, but as a conditional sale, to become absolute on the mortgagor's failure to sell the land within the time specified.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

(Not to be published in California Reports.)

Action by John R. Fletcher against James W. Northcross to recover the possession of real estate. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Anderson & Anderson, F. W. Sanborn, and Julian P. Jones, for appellant. Victor Montgomery and C. C. Hamilton, for respondent.

**TEMPLE, C.** This action was brought to recover the possession of real estate under section 380 of the Code of Civil Procedure. Two defenses are pleaded. The first simply denies plaintiff's title and right of possession. In the second, it is shown that plaintiff claims title under and from defendant, and it is averred that the deed from defendant, under which plaintiff claims, was intended and received as security for a loan, and is therefore a mortgage. Defendant alleges that on the 1st day of August, 1890, he was indebted to plaintiff in divers sums upon certain notes, secured by mortgage upon the premises described in the complaint. That the amount of the indebtedness was \$21,000. The mortgaged premises were then worth \$35,000. That defendant desired to sell, and from the proceeds to pay plaintiff's demand. That he might be able to give a clear title, it was agreed between himself and plaintiff that the mortgages should be nominally satisfied of record, and, in lieu of them, defendant should execute to plaintiff an absolute deed, and plaintiff would then reconvey to defendant by a deed, which should be placed in escrow, to be delivered to defendant upon payment of \$21,000 to Balcom, who was to hold the deed. That this agreement was carried out, and a deed conveying the premises to defendant was executed, and placed in the hands of Balcom, with written directions to deliver the same to defendant on receipt of \$21,000, on or before February 1, 1891. That it was agreed that, upon sale of said premises, plaintiff should have \$21,000 of the

proceeds, and no more, and that the residue, if any, realized from the sale, should belong to defendant. That defendant diligently endeavored to procure a purchaser for said land, but was unable to consummate a sale. That the plaintiff, in violation of his obligation, has at all times since the execution of the deeds endeavored to discourage, and did discourage, many intending purchasers from purchasing said land, and, in consequence of such acts of plaintiff, defendant has been unable to procure a purchaser. In reference to this defense the court finds that on the 1st day of August, 1890, defendant was indebted to plaintiff in divers sums, evidenced by certain promissory notes, and secured by mortgages upon the land in controversy; that there was due upon the mortgages between \$28,000 and \$27,000, that an action brought by plaintiff was then pending to foreclose the mortgages; that defendant, in consideration of having the indebtedness satisfied and the mortgages discharged, conveyed the land to plaintiff, who thereupon canceled, satisfied, and discharged the indebtedness and the mortgages, and dismissed the suit pending for foreclosure, and at the same time agreed that the defendant should have, for the period of six months thereafter, the right and authority to sell said land, and to retain all moneys he might receive therefor, over and above \$21,000, and might, during that period, retain possession of the house and barn on the premises, and, in pursuance of this agreement, executed a deed conveying the land to defendant, and placed the same in escrow in the hands of Balcom, to be delivered to defendant upon receipt of \$21,000, if paid prior to February 1, 1891, and, in case said sum was not paid by that time, the deed to be surrendered to plaintiff; that no sale was made by defendant, and shortly after the 1st day of February, 1891, the deed was surrendered to plaintiff, in pursuance of the understanding; that all the other allegations in the answer were untrue. Judgment was thereupon entered for plaintiff. The defendant appeals from the judgment, and from an order refusing a new trial.

The question presented is whether the transaction must be considered a mortgage, or an actual sale to plaintiff, with an agreement to resell at a certain price. The difficulty of determining whether the transaction is not a mere device to obtain security for a debt, and at the same time to escape the expense and delay of a foreclosure, has often been recognized. If A conveys to B a tract of land, in consideration of a sum of money, due from or then paid to the grantor, and agrees to reconvey at a specified time, if the money is repaid, with interest, the grantor in the meantime remaining in possession, it is difficult to comprehend a motive for the transaction except upon the theory that the conveyance is security for a debt. Yet it is said: "To deny the power of two individuals capable of acting for themselves to make a contract defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a

specified time, would be to transfer to the courts of chancery in a considerable degree the guardianship of adults, as well as infants." *Conway's Ex'rs v. Alexander*, 7 Cranch, 237. In *Henley v. Hotelling*, 41 Cal. 22, the negotiations and the agreement were with the agent of the borrower for a loan; but it was discovered that the warrant of attorney did not authorize the agent to execute a mortgage, but did authorize a sale. So it was arranged that the agent should make an absolute conveyance, defeasible on a day named, by repayment, with interest. This court held that it was not a mortgage, on the ground that there was no agreement, express or implied, to pay. It is said: "If there is no debt, there is no mortgage. We look in vain in this case to find any evidence of a promise on the part of Storms to repay the purchase money, or of the existence of a debt of any kind from him to Hotelling." And it is further said that, in case Hotelling brought suit to foreclose, "the answer that there was no promise, either express or implied, on the part of the alleged mortgagor, would have been a complete bar." To the same effect are *Farmer v. Grose*, 42 Cal. 169; *Page v. Villac*, Id. 75; *Montgomery v. Spect*, 55 Cal. 352; *Manasse v. Dinkelspiel*, 68 Cal. 404, 9 Pac. Rep. 547. The case at bar is not nearly as close a case upon this point as either of the cases above cited. In all of those cases it was plausibly argued that there was an implied promise to pay, which would create a liability at least to the extent of the property conveyed. There may be a mortgage in which the mortgagee is restricted to his lien, and cannot recover a judgment for deficiency. In this case, in addition to the fact that there is no promise to pay, there are many circumstances which rebut the presumption that either party supposed that the deed was held as security. (1) The payee had commenced suit to foreclose, because he believed the security insufficient. Further time would have been given if further security could have been had. (2) The amount to be paid was not the amount of the debt, but more than \$5,000 less. (3) No interest was to be paid. (4) The grantee took immediate possession. True, the defendant continued to occupy the house and barn under the agreement for six months, but the beneficial use passed at once to the grantee. (5) It was supposed that it would cost \$1,500 to cultivate the orange orchards. As defendant was authorized to sell at any time, plaintiff might not be able to gather the crop. In that case he would lose this expense. And (6) all the circumstances show that the arrangement was simply in pursuance of an agreement to give defendant the exclusive privilege of selling as plaintiff's agent for six months, with the right to retain all over \$21,000 as commissions. Such, indeed, are the allegations of defendant's answer, and such is the testimony. Plaintiff thought the land only worth that sum, and was willing to take that for it. Defendant naturally valued it much higher, and was sure he could get more for it. Nothing was more natural, then, than that plaintiff should employ

defendant to sell. The option was for a limited period. If the presumption which it seems to me naturally arises in such transactions can be rebutted, I think it is in this case. There was no error in not finding whether the land was worth \$35,000 or not. If true, this was a mere probative fact. Nor do I think the record shows that there was any evidence that it was worth that sum. I think the judgment and order should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(1 Okl. 228)

### COLCORD et al. v. DREYFUS.

(Supreme Court of Oklahoma. Feb. 18, 1893.)

#### SALE—RESCISSI—RIGHTS OF CREDITORS.

Where goods sold are actually delivered to the purchaser, notice by him, given 15 days later, that he will not accept them, does not reinvest the seller with the title, as against the purchaser's creditors, in the absence of any steps by the seller to reclaim them until after their seizure on attachment as the property of the purchaser.

Appeal from probate court, Oklahoma county; S. A. Steward, Judge.

Replevin by A. H. Dreyfus against C. F. Colcord and others. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

Reddick & Wilkerson, for appellants. Douglass & Galbraith, for appellee.

GREEN, C. J. This was an action of replevin in the probate court of Oklahoma county, brought by appellee against appellants for the recovery of one barrel of whisky, of the alleged value of \$103.52. The complaint is in the usual form of complaints in replevin, and the appellants answered by filing a general denial. A jury was waived, by consent of parties, and the court was asked to state the facts in writing, and the conclusions of law upon them, which was done by the court as follows: "That the plaintiff was a wholesale liquor dealer, doing business in Kansas City, Mo., and that on or about June 15, 1892, he received an order from A. M. Irion & Co. for one barrel of whisky, the property in dispute, and that, on said date, the property in dispute, and which the court finds to be of the value of \$103.52, was shipped to the said firm of A. M. Irion & Co., at Oklahoma City, O. T., and was to be paid for in 60 days from date of shipment, and that the same was received by said A. M. Irion June 22, 1892; that on July 8, 1892, said A. M. Irion refused to accept said property, and so notified the plaintiff by letter, to which letter plaintiff made no reply, the property remaining in Irion's possession; that on or about July 16, 1892, the defendants seized said property under an order of attachment against the property of A. M. Irion; that said property, when seized by defendants, was in the Turf saloon, the place of business of

said A. M. Irion; that the plaintiff notified the defendants that said property was claimed by the plaintiff after the seizure in attachment, and made demand for the same, and, the defendants refusing to deliver said property to the plaintiff, this action was brought; that the plaintiff, at the time of the commencement of this suit, was the owner and entitled to the possession of said property, described in the writ of replevin herein as one barrel of 'Paynt Bros.' Whisky,'—to which conclusion of law the defendants then and there excepted." Upon this statement of facts and conclusion of law the court gave judgment for the plaintiff below, (the appellee,) and against the defendants below, (the appellants;) and the appellants bring the record into this court by appeal, and pray a reversal of said judgment, and assign the following error: "The court erred in its conclusions of law on the findings."

But one question is presented by this record, and that is, did the court reach a correct conclusion of law upon the statement of facts? If the conclusion of law is correct, the judgment is right, and should be affirmed; and, if the court erred in the conclusion of law, the judgment is erroneous, and should be reversed. The facts found show that appellee was a wholesale liquor dealer, doing business in Kansas City, Mo.; and that about the 15th day of June, 1892, he received an order from A. M. Irion & Co. for one barrel of whisky, the property in controversy, which was shipped to said firm, at Oklahoma City, and was to be paid for in 60 days from date of shipment; and that the property was received by the said A. M. Irion on the 22d day of June, 1892. Afterwards, on the 8th day of July, 1892, A. M. Irion notified appellee, by letter, that he refused to accept the property, but for what reason the court did not find, to which letter appellee made no reply. At the time of the seizure of the property, on the writ of attachment, it was in the possession of A. M. Irion. The delivery of the property to the common carrier, to be carried to Oklahoma City, and there delivered to A. M. Irion & Co., in pursuance of the order of A. M. Irion & Co., was a delivery to A. M. Irion & Co., and vested the title of the property in them, subject to appellee's right of stoppage in transitu, as the property was sold on credit. Mr. Tiedeman on Sales states the rule of law as follows: "Delivery to the common carrier, for transportation to the vendee, whether in accordance with his express or implied instructions, is held to be a delivery to the vendee's agent, and equivalent to a delivery to the vendee himself; and a delivery at the carrier's wharf or warehouse to some receiving clerk would ordinarily be a sufficient delivery to the carrier, in order to pass title and risk to the vendee." Section 95, and cases cited in note 5. The property in controversy was not only delivered to the common carrier, to be delivered to Oklahoma City, for A. M. Irion & Co., but was actually carried to that place, and delivered to A. M. Irion, and thereupon became the property of A. M. Irion & Co., and they became liable to pay appellee for the same at the expiration of the

term of credit; and the fact that A. M. Irion, more than 15 days after the property was delivered to him, at Oklahoma City, notified appellee that he would not accept the property, did not reinvest appellee with the title to the property, as appellee did not act upon the notice, and took no steps whatever to reclaim the property until after it was seized on the writ of attachment. What was done by A. M. Irion alone did not amount to a rescission of the sale. There was not even a mutual agreement to rescind; and here we may quote again from the same author: "If the parties to a sale, which has been once completed by delivery, agree to rescind the sale, as much formality will be required to re-vest the title in the vendor, as against the vendee's creditors, as was necessary to transfer the title to the vendee." Tied. Sales, § 108. It follows that appellee was not the owner of the property and entitled to the possession of the same, at the time of the commencement of this suit; and the court below erred in the conclusion of law upon the statement of facts, for which error of law the judgment must be reversed, and the cause remanded.

Counsel for appellee insist that the statement of facts, as made by the court, was not warranted by the evidence introduced on the trial. We have no means of knowing that fact, as the evidence is not before us; but, in order that injustice may not be done, we direct the court below to sustain appellants' motion for a new trial, and to award a venire facias de novo.

Reversed and remanded.

CLARK and BURFORD, JJ., concur.

(1 Okl. 260)

#### CHANDLER v. COLCORD.

(Supreme Court of Oklahoma. Feb. 18, 1903.)

APPELLATE JURISDICTION—CONTINUANCE—JURY—REPLEVIN—FRAUDULENT CONVEYANCES—EXECUTION.

1. Act Dec. 25, 1890, by which the territorial legislature conferred on the probate court concurrent jurisdiction with the district court in certain cases, and regulated the right of appeal, was ratified by congress, (Supp. Rev. St. U. S. p. 929,) in respect to jurisdiction. *Held* that, as such ratification conferred on the probate court concurrent jurisdiction with the district court, the exercise of such jurisdiction must be determined by the Code of Civil Procedure, which provides for the procedure both before and after judgment, including the right of appeal to the supreme court, and the manner of taking and prosecuting such appeal; and hence the supreme court may entertain an appeal from the probate court in a case where it has concurrent jurisdiction with the district court.

2. Where a party opposing a continuance asked for on ground of the absence of a material witness admits that the witness, if present, would testify as stated in the moving affidavit, the trial court, under the express provisions of St. § 4440, commits no error in refusing the continuance.

3. Code Civil Proc. art. 18, §§ 5, 17, which prescribes the method of summoning jurors in the district court when the regular panel is exhausted, apply to the probate court, in a case of which it has concurrent jurisdiction with the district court; and a special jury may be sum-



moned in such a case, tried at a term in which there was no regular panel.

4. A bona fide purchaser of property may, without a prior demand and refusal, maintain replevin against a sheriff for taking it out of his possession on execution against the seller.

5. A claim by a person in possession of property, that he is the owner, made on its seizure under execution as the property of a third person, is not equivalent to a demand for a return of the property, so as to enable him to maintain replevin in a case where demand is necessary.

6. Fraudulent intent on the part of a vendor or mortgagor to hinder, delay, and defraud creditors is not, of itself, sufficient to defeat the sale or mortgage, but it is essential that the vendee or mortgagee should participate in the design.

7. Where a person is in possession of a stock of goods, not only as mortgagee, but as vendee, an instruction as to the fraudulent character of the mortgage, ignoring the sale, is misleading.

8. The clerk of the district court has no power to issue execution on a judgment of the probate court, rendered in a case of which it has concurrent jurisdiction with the district court, but the execution should issue out of the probate court.

9. To enable a creditor to assail the validity of a chattel mortgage executed by his debtor, he must not only obtain a judgment, but also a valid execution against the property of the debtor.

10. In replevin, where the property is delivered to plaintiff, a verdict in defendant's favor which fails to fix the value of defendant's interest in the property, is defective, as it is impossible for the court to render the alternative judgment provided for in St. p. 848, § 9.

Appeal from probate court, Oklahoma county; S. A. Steward, Judge.

Replevin by Robert Y. Chandler against C. F. Colcord. From a judgment in defendant's favor, plaintiff appeals. Reversed.

J. Milton, for appellant. Sweet & Dean, for appellee.

GREEN, C. J. On the 25th day of July, 1892, appellant filed his amended complaint, in an action of replevin, in the probate court of Oklahoma county, against appellee, for the recovery of a stock of liquors, and bar and saloon furniture, of the alleged value of \$875, of which appellant averred he was the owner, and entitled to the immediate possession, and that said goods and chattels had been wrongfully taken, and were unlawfully detained, by appellee, from appellant, to the damage of appellant of \$125. To this amended complaint appellee appeared, and answered by filing a general denial. The property described in the complaint, by virtue of the writ of replevin, was taken from the possession of appellee, as sheriff of Oklahoma county, and who at the time was holding it on an execution in his hands against the goods and chattels of one David M. Chandler, and was delivered to appellant, as appellee refused to give the necessary bond, and retain possession of the property. On the 2d day of August, 1892, it being one of the judicial days of the July term of said court, on demand of appellant, the cause was tried by a jury, which resulted in a verdict in favor of appellee, and against appellant. Motions

for a new trial, and to set aside the verdict of the jury, for irregularities, were filed by appellant, and were overruled by the court; and the court rendered a judgment on the verdict of the jury in favor of appellee, and against appellant, for return of the property, and costs of suit, to all of which appellant excepted, and brings the record into this court by appeal, and assigns numerous errors and grounds for a reversal of the judgment.

Before proceeding to a discussion of the errors assigned, it becomes necessary to dispose of a question affecting the jurisdiction of this court to entertain an appeal from a judgment of the probate court, as appellee has moved a dismissal of the appeal on the ground that no appeal will lie from a judgment of the probate court to the supreme court of the territory.

The legislative assembly, in view of the fact that the probate court, under the provisions of the organic act, could exercise probate jurisdiction only, passed an act entitled "An act extending the jurisdiction of the probate court in civil and criminal cases, and prescribing the procedure therein, and providing for appeals therefrom," which act took effect on the 25th day of December, 1890, and contains eight sections in all, which are as follows: "Section 1. Probate courts, in their respective counties, shall, in addition to the powers conferred upon them by the probate chapter of the territory, have and exercise the ordinary powers and jurisdiction of justices of the peace, and shall in civil cases have concurrent jurisdiction with the district court, in all civil cases, in any sum not exceeding one thousand dollars, exclusive of costs, and in actions of replevin, where the appraised value of the property does not exceed that sum; and the provisions of the chapter on 'Civil Procedure' relative to justices of the peace, and to practice and proceedings in the district court, shall apply to the proceedings in all civil actions prosecuted before said probate court: provided, that probate courts shall not have jurisdiction—First, in any action for malicious prosecution; second, in any action against officers for misconduct in office, except where like proceedings can be had before justices of the peace; third, in actions for slander and libel; fourth, in actions upon contracts for sale of real estate; fifth, in any matter wherein the title or boundaries of land may be in dispute, nor to order or decree the sale or partition of real estate. Sec. 2. In all cases commenced in said probate courts, wherein the sums exceed the jurisdiction of justices of the peace, the pleadings and practice and proceedings in said court, both before and after judgment, shall be governed by the chapter on 'Civil Procedure' of the territory governing pleading and practice and proceedings in the district court. In all cases commenced in said probate courts that are within the jurisdiction of justices' courts, the practice and proceedings and pleadings, both before and after judgment, provided for in the Justices' Procedure of the territory shall be applicable to the practice, pleadings, and proceedings of said

probate courts. Sec. 3. The probate judge shall on the first day of each term prepare a calendar of the cases standing for trial at said term, placing the causes on said calendar in the order in which the same are numbered on the docket, and setting the cases for trial in said order, upon convenient days, during said term; and the provisions of the chapter on 'Civil Procedure' of the territory, relative to the docket in district courts, shall, so far as they are applicable, apply to said calendar. Sec. 4. The probate courts of the territory shall be deemed to be always open for the filing of papers and the issuance of processes in civil actions, and for the purpose of taking and entering judgments by confession, and for the purpose of trying all actions commenced therein that are triable under the Justices' Procedure of the territory, and for all probate business of their respective counties. Sec. 5. Appeals from the final judgment of said probate court shall be allowed and taken to the supreme court of this territory in the same manner as [from] the district, and with like effect, when only questions of law are involved in the appeal. If questions of fact are to be retried in the appellate court, the appeals shall be taken to the district court of the county, in manner and form as appeals are taken from judgments of justices of the peace. Sec. 6. In all cases pending or to be brought in the probate court, the probate judge shall have power and jurisdiction to allow injunctions, mandates, writs of prohibition, and to make all other and further orders as may be necessary in cases pending in said court, and to hear and determine motions made to vacate or modify the same, and generally to do as to actions pending in said courts any and all acts which the judges of the district courts are by law authorized to do. He may also, in case of the absence of the district judge from his county, allow injunctions in matters about to be brought or pending in the district court, but he shall not have power to vacate or modify the same. He shall have power to allow writs of habeas corpus in all cases provided by law, and to hear and determine the same. Sec. 7. All criminal actions prosecuted in the probate court shall be brought in the same manner as similar actions in the justices' courts, or shall be upon information of the county attorney, based upon a sworn complaint, and shall be under his direction and control; and warrants shall issue, the same as in the justices' courts; provided, if the complaint or information be adjudged defective or insufficient, it may be amended to any extent, and sworn to, until it is sufficient; and if the evidence fails to prove the crime charged, but tends to prove any other crime, the information may be amended to charge the crime which the evidence tends to prove; and if that be a felony the trial shall be suspended, and the accused shall be proceeded against by preliminary examination, and bound over or discharged, as the court shall deem just, under the evidence. If the information or complaint be amended, the court shall see that the defendant is not

prejudiced thereby; and, if justice requires, it shall grant to the accused time to prepare his defense to the information or complaint as amended. Sec. 8. The probate judges, for any services performed by, or in any matter within the jurisdiction of, a justice of the peace, shall be allowed the same fees as are allowed by law to justices of the peace for like services; and in all civil actions triable in a probate court, of which a justice of the peace has no jurisdiction, the probate judge shall be entitled to receive the same fees as are allowed to a clerk of the district court for like services, and shall be allowed further fees as follows: For each day's attendance upon trial of a case after the first day, two dollars; taking and approving bail bond, twenty-five cents; for entering voluntary appearance of defendant, twenty-five cents; commission on money collected on judgments without execution, one per cent. on the amount. This act shall be in force and take effect from and after its adoption and legalization by act of congress."

As the legislative assembly had no power to extend the jurisdiction of the probate court, as that jurisdiction was defined and limited by the organic act, it became necessary for congress to ratify the act of the legislative assembly, in order to vitalize it, and give it effect; and congress accordingly enacted the following proviso: "Provided, that in addition to the jurisdiction granted to the probate courts, and the judges thereof, in Oklahoma territory, by legislative enactments, which enactments are hereby ratified, the probate judges of said territory are hereby granted such jurisdiction in town-site matters, and under such regulations, as are provided by the laws of the state of Kansas." Supp. Rev. St. p. 929. It is contended that the act of congress only ratifies so much of the act of the legislative assembly as extends the jurisdiction of the probate court in civil and criminal cases, and that those parts of the act which provide for procedure and appeals are not ratified, and consequently not in force. It is also contended that the provision of the act which gives the right of appeal from a judgment of the probate court to the supreme court extends the jurisdiction of the supreme court, and is not ratified by the act of congress, and is not in force. The act of congress is a remedial statute, and should be liberally construed to effect the purpose intended; and it is the opinion of the writer that congress intended to, and did, ratify the whole act of the legislative assembly, as well as the provisions extending the jurisdiction of the probate court as the provisions which furnish the procedure, and give the appeal. But if the construction of the act of congress contended for be adopted, that it ratifies the act of the legislative assembly only so far as it extends the jurisdiction of the probate court, how does such construction affect the right of appeal from the probate court to this court in a civil action, in which the amount in controversy does not exceed the sum of \$1,000, and does exceed the jurisdiction of a justice of the peace, and in an action of re-

plevin in which the appraised value of the property does not exceed that sum? The jurisdictional clause in section 1 of the act of the legislative assembly, and which, it is conceded, is ratified by the act of congress, provides: "Probate courts, in their respective counties, shall, in addition to the powers conferred upon them by the probate chapters of the territory, have and exercise the ordinary powers and jurisdiction of justices of the peace, and shall, in civil cases, have concurrent jurisdiction with the district court,—in all civil cases, in any sum not exceeding one thousand dollars, exclusive of costs; and, in actions of replevin, where the appraised value of the property does not exceed that sum." The law, then, having conferred upon the probate court concurrent jurisdiction with the district court in actions of replevin, in which the appraised value of the property does not exceed the sum of \$1,000, how is the probate court to proceed in the exercise of the jurisdiction? So far as it has concurrent jurisdiction with the district court, it is of equal dignity with the district court, and is, *pro re nata*, a district court; and no reason is perceived why the provisions of the Code of Civil Procedure should not apply to the probate court, when in the exercise of its concurrent jurisdiction. The Code of Civil Procedure provides for the commencement and prosecution of all civil actions, except such as are commenced and prosecuted before a justice of the peace, and it provides for the procedure both before and after judgment, including the right of appeal to the supreme court, and the manner of taking and prosecuting such appeal; and, the probate court having concurrent jurisdiction with the district court in certain civil actions, the provisions of that Code are as applicable to the probate court, in the exercise of that jurisdiction, as they are to the district court. And it is a general principle of law, in the construction of legislative acts conferring jurisdiction, that where the end is required the appropriate means are given; for it were useless to extend the jurisdiction of the probate court, if no means were provided for the exercise of that jurisdiction. The motion to dismiss the appeal will be overruled.

The first error assigned questions the action of the court in overruling appellant's motion for a postponement of the trial. A subpoena had been issued for Henry Huffman, a resident of Oklahoma county, and placed in the hands of the sheriff for service, but had not been returned at the time the cause was called for trial; and appellant, in support of a motion for a postponement on the ground of the absence of the witness, filed an affidavit setting out, at large, the facts which he believed the absent witness would testify to, and that he believed the facts to be true, and stating all other facts essential to the sufficiency of an affidavit for a postponement. Counsel for appellee, in order to avoid a postponement, consented that the witness would testify to the facts as true which were stated in the affidavit; and thereupon the court overruled the motion, and the affidavit was read on the trial as the evidence of the absent witness.

The statute provides, in substance, (St. Okl. § 4449,) that when an affidavit for a postponement of the trial is filed on the grounds of the absence of a material witness, and such affidavit is held sufficient by the court, the adverse party may consent that the witness, if present, would testify to the facts as true which are stated in the affidavit, and that in such case the trial shall not be postponed on account of the absent witness. In this case such consent was given, and the facts stated in the affidavit were read on the trial as the evidence of the absent witness; and the court committed no error in overruling the motion.

The second error assigned challenges the legality of the selection of the jurors who were impaneled and tried the cause in the court below. The appellant demanded a jury, and that it should be impaneled in the manner provided by law for civil actions in the district court. There being no regular panel of jurors at that term, the court ordered and issued an open venire to the sheriff, who summoned from the body of the county the jurors who sat in the case, and who were impaneled and sworn as a jury over the objections of appellant. Section 5, art. 18, of the Code of Civil Procedure, (general section 4551,) provides: "In any civil action, where the parties are entitled to a trial by jury, and either party shall demand such trial, the sheriff shall call a jury from the regular panel, except as hereinafter provided." And section 7 of the same article (general section 4553) provides: "The court shall have power, when the business thereof requires it, to order the impaneling of a special jury for the trial of any cause." Following the sections quoted supra, the statute provides for the impaneling of a struck jury; and then follows section 17 of the same article, (general section 4563,) which is as follows: "When the regular panel is exhausted, or is insufficient, from any cause, the sheriff shall call the bystanders, or fill the jury in such manner as the court may direct." The record shows that this cause was regularly set for trial on the 2d day of August, 1892, at the hour of 9 o'clock A. M., at which time both parties appeared, and appellant demanded a jury. There being no regular panel, and the business of the court being such as to require a jury, the court was empowered by the provisions of section 7, supra, to impanel a special jury for the trial of the cause. *Wilson v. State*, 42 Ind. 224. The provisions of section 17, supra, are also applicable. The regular panel was insufficient, because there was no regular panel; and when the regular panel is insufficient, from any cause, the sheriff shall call the bystanders, or fill the jury in such manner as the court may direct. In this case it was done by issuing an open venire, and was done in such manner as the court directed; and the court did not err in overruling appellant's objections.

As to all the other errors assigned on the record, they may properly be considered under two of the assignments: First, the court erred in overruling appellant's motion for a new trial; and, second, the

court erred in overruling appellant's motion to set aside the verdict.

The claim of the appellant to the property in controversy was by virtue of a chattel mortgage, executed by David M. Chandler, to secure an alleged indebtedness of \$375, and also by virtue of an alleged absolute sale and delivery of possession on the 7th day of July, 1892, in payment of said mortgage debt, and for the further consideration of \$125, in cash, paid by appellant at that time, making an aggregate consideration of \$1,000. The claim of appellee was by virtue of a writ of execution issued on the 22d day of July, 1892, by Will H. Clark, as clerk of the district court of Oklahoma county, to the sheriff of said county, on a judgment of the probate court of said county in favor of Baldridge Bros., and against the goods and chattels of David M. Chandler, and upon which execution the property in controversy had been seized as the property of David M. Chandler, and was held by appellee as sheriff of said county. And the theory of the defense was that the mortgage and sale from David M. Chandler to appellant were made, if made at all, for the purpose of hindering, delaying, and defrauding the creditors of David M. Chandler, and were void as against the execution upon which the property was seized. At the instance of appellant the court gave the following instructions: "First. The jury are instructed that all transactions are presumed in law to be honest, until the contrary is proven, and that fraud is never to be presumed. Second. That the making of a mortgage by a debtor to secure a creditor is valid, against all existing creditors, from the time it is filed for record until shown to be made to hinder, delay, or defraud creditors. Third. That a debtor has a right to prefer one creditor to another, and mortgage or sell his property to pay the preferred creditor. Fourth. That the taking of possession of mortgaged property by the mortgagee, under his mortgage, has the same effect, as to all creditors and subsequent purchasers, as the filing of the same for record." And the court refused to give the following instructions for appellant, to which appellant at the time excepted: "Fifth. That if the jury believe, from the evidence, that the property seized by the sheriff was, when seized, the property of the plaintiff, then they are instructed that no demand was necessary before bringing the action of replevin. Sixth. That the claim made by the plaintiff, at the time the property was seized by the sheriff, that the plaintiff was the owner of the property, was sufficient, without further demand." And the court, at the instance of appellee, gave the following instructions: "First. The court further instructs the jury that when a transfer of property is made with intent, on the part of the person making it, to hinder, delay, or defraud his creditors, and the party to whom the transfer is made has knowledge of the facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred by an ordinarily cautious person, then such transfer is fraudulent and void, as against

the rights of the creditors. Second. The court further instructs the jury that a chattel mortgage of a stock of goods used in the way of retail trade, and where the mortgagor is allowed to continue in possession of the property, and to sell the goods in the usual course of trade, is in law fraudulent and void, as against the creditors of the mortgagor, no matter whether the parties intended an actual fraud or not. Third. The court further instructs the jury that, in determining the question whether the mortgage in this case was made in good faith, the jury should take into consideration all the facts and circumstances proved on the trial; and if the jury believe, from all the evidence in the case, that the mortgage was not made in good faith, or for a valuable consideration, but was made for the purpose of covering up the property of the mortgagor so as to keep it from his creditors, then these facts would render the mortgage fraudulent and void as to third persons and creditors having claims or liens on the property covered by the mortgage. Fourth. The jury are instructed that, if mortgaged chattels in the possession of the mortgagor are levied on by an execution against him, replevin will not lie, on behalf of the mortgagee against the officer, to recover possession of the property." And to the giving of all which instructions appellant, at the time, excepted.

In order to determine the correctness of the instructions which were given and refused, they must be considered with reference to the facts of the case, as disclosed by the evidence. Appellant relied for a recovery, not only on his mortgage, as a mortgagee in possession, but also on a sale and delivery of possession made to him by David M. Chandler on the 7th day of July, 1892, and claiming that he was in the actual possession of the property at the time the execution was levied, and that the property was taken out of his possession by appellee as sheriff. Upon the theory of the case that appellant was the owner of the property, and in possession of it, and that it was seized on the execution, and taken out of his possession, the fifth instruction which was asked by appellant, and refused by the court, should have been given; and the court erred in refusing it. The rule of law is elementary that when the taking of property is wrongful, and the property is taken from the possession of the owner, he may maintain replevin in the cepit for the recovery of the property, without a demand and refusal. If the property in controversy was the property of appellant, and in his possession, the execution against the goods and chattels of David Chandler created no lien on the property, and the act of the sheriff in seizing the property on that execution was wrongful; and no demand and refusal were necessary before bringing the action.

The court committed no error in refusing appellant's sixth instruction. The fact, if true, that appellant claimed the property at the time it was seized by appellee on the execution, was not such a demand and refusal as the law requires in or-

der to maintain an action of replevin in the detinet. Where a demand is necessary, there must be a distinct demand for possession, and the refusal to deliver possession on the making of such demand.

As to the instructions which appear to have been given at the instance of appellee, the first and third were erroneous, and should not have been given. A fraudulent intent on the part of a vendor or mortgagor to hinder, delay, and defraud his creditors is not, of itself, sufficient to defeat the sale or mortgage. It is essential to that end that the vendee or mortgagee should participate in that design. The fraudulent intent must be mutual. *Meixsell v. Williamson*, 35 Ill. 529; *Herkelrath v. Stookey*, 63 Ill. 486.

The second instruction of appellee's series, which was given by the court, states a correct abstract proposition of law, but should have been modified in order to make it applicable to appellant's theory of the case; and, in the form as given, it was calculated to mislead the jury. If the mortgagor was permitted to remain in the possession of the stock of liquors after the execution of the mortgage, and to sell the same in the usual course of retail trade, and while he was so in possession the execution went into the hands of the sheriff, and became a lien on the stock, then the instruction would have been correct, and applicable, so far as the stock of liquors was concerned. But the mortgage included property other than the stock of liquors, and appellant's claim was based, not only on possession as mortgagee, but on possession as vendee, before the execution was issued. A chattel mortgage on a stock in trade, and on other property, may be void as to the stock in trade, for the reasons stated in the instruction, and valid as to the other property. *Barnet v. Fergus*, 51 Ill. 352.

As to whether appellee's fourth instruction is erroneous or not must depend upon the conditions in the mortgage; and, as the mortgage is not set out in the record, we have no means of determining the question.

But there is still another ground appearing in the record why appellee's first, second, and third instructions should not have been given. Appellee's defense rested entirely upon the execution by virtue of which he seized and held the property; and, unless that execution was valid, he had no right to show or to contend that the mortgage and sale were made with the intent to hinder, delay, and defraud the creditors of David M. Chandler. The execution upon which the property was seized and held by appellee is in the following form: "Territory of Oklahoma, county of Oklahoma—ss.: The territory of Oklahoma to the sheriff of said county, greeting: We command you, C. F. Colcord, sheriff, that you cause to be levied, of the goods and chattels in your bailiwick, of David M. Chandler, the sum of two hundred fifty-four 97-100 dollars, which by the judgment of the probate court of said county, at the July term, 1892, wherein Baldridge Brothers obtained a judgment against the said David M. Chandler, with interest on the sum, from the 22d

day of July, 1892, until paid; and also the further sum of \$2.95, the costs of increase on said judgment, and the accruing costs; and for want of goods and chattels, that you cause the same to be made and levied of the lands and tenements, in your bailiwick, of the said David M. Chandler, and have the money before the district court within 180 days hereof to render unto the said Baldridge Bros.; and have you then and there this writ. Witness my hand and the seal of the district court, at Oklahoma City, this 22d day of July, 1892. Will H. Clark, Clerk of District Court." There is no provision of law which authorizes and empowers the clerk of the district court to issue, attest, and seal a writ of execution on a judgment of the probate court such as the one described in this execution; and an execution so issued is absolutely void, and creates no lien on property in the hands of the sheriff. In all cases where the probate court has concurrent jurisdiction with the district court, it must execute its own judgments by issuing writs of execution out of, and under the seal of, that court. The law is well settled that a creditor who has no lien on the property covered by a chattel mortgage cannot be permitted to assail the validity of the mortgage on the ground that it was made with intent to hinder, delay, and defraud the creditors of the mortgagor. In order to do so, he must not only obtain a judgment, but must have a valid execution against the property of the mortgagor. *Ellingboe v. Braken*, 36 Minn. 156, 30 N. W. Rep. 659; *Thompson v. Van Vechten*, 27 N. Y. 568, 582; *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. Rep. 946; *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. Rep. 679; *Cobbey, Chat. Mortg.* § 774. As appellee was in no position to question the validity of the chattel mortgage, or the alleged sale of the property to appellant, on the ground that they were made with intent to hinder, delay, and defraud the creditors of David M. Chandler, the first, second, and third instructions, which were given at the instance of appellee, were not applicable to any issue properly in the case, and must have had a controlling influence with the jury; and for the errors of law occurring at the trial, and excepted to by appellant, the verdict should have been set aside, and a new trial granted, and the court erred in overruling appellant's motion for a new trial.

The only remaining error assigned, which it is important to notice, is the overruling of appellant's motion to set aside the verdict on the ground that the jury failed to assess and return the value of appellee's interest in the property. Without such finding the verdict was informal and defective, as it was impossible for the court to render the alternative judgment which is provided for by the statute. *St. Okl. p. 848, § 9*. The interest of appellee in the property was the amount due on the execution, and that amount should have been found by the jury as the value of appellee's interest in the property, and the judgment should have been for the return of the property, or the payment of that amount. *Shahan v. Smith*, 38 Kan.

474, 16 Pac. Rep. 749; *Fowler v. Hoffman*, 31 Mich. 221; *Russell v. Butterfield*, 21 Wend. 300. The probate court erred in overruling appellant's motion to set aside the verdict; and the judgment on the verdict, that appellant return the property, or pay the value of the property to appellee,—no value or amount being fixed,—is erroneous, and should be reversed. The judgment of the probate court is reversed, with costs, and the cause remanded, with direction to the court to award a venire facias de novo.

(1 Okl. 204)

**JOHNSON v. MOCABEE.**

(Supreme Court of Oklahoma. Jan. 27, 1893.)

**CONSTITUTIONAL LAW—SPECIAL LAWS—HERD LAW.**

1. St. c. 3, § 3, known as the "Herd Law," which enables the electors, voting by districts, to determine whether or not they will permit stock to run at large, is not in conflict with the organic act, (Act Cong. July 30, 1886, 24 U. S. St. at Large, p. 170,) which prohibits territorial legislatures from passing local or special laws regulating township and county affairs, since the herd law merely permits the districts to regulate their own affairs.

2. The herd law, which prohibits the running at large of stock in all counties except one, but which enables the electors in all counties to determine this matter for themselves, is not in conflict with a provision in the organic act prohibiting special laws where general laws can be made applicable, as the legislature is the judge as to whether or not a general law can be made applicable.

Error from district court, Canadian county; A. J. Seay, Judge.

Replevin by M. T. Johnson against G. A. Mocabee. From a judgment in defendant's favor, plaintiff brings error. Affirmed.

Emera E. Wilson, for plaintiff in error.  
C. H. Carswell, for defendant in error.

CLARK, J. On the 20th day of March, 1891, the plaintiff in error, Johnson, commenced an action of replevin against the defendant, Mocabee, to recover the possession of seven horses and one mule. The defendant answered, setting up as defense that said live stock was distrained while trespassing and doing damage on his premises, and that he held the same for the purpose of securing the payment of the damage done by said stock, and the costs of the keeping of said stock, and of appraising the damages. To the answer the plaintiff demurred on the ground that the answer did not state facts sufficient to constitute a defense to the aforesaid action. The demurrer was overruled by the court, and, the plaintiff failing and refusing to plead further, and standing upon his demurrer, judgment was entered for the defendant for the return of the property, and in default thereof for the aforesaid damages and costs, and the costs of this action, to which the plaintiff excepted, and from which judgment he appealed to this court.

The position assumed is that section 3 of chapter 3 of the statutes of Oklahoma, commonly known as the "Herd Law," contravenes the act of congress of July 30,

1896, found on page 170 of 24 St. at Large, and therefore is not valid and binding. The said act of congress provides "that the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases," omitting those not applicable to this case designated "regulating county and township affairs." And the closing paragraph provides that "in all other cases, where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof." The herd law of Oklahoma is as follows: "Sec. 279. Every owner of swine, sheep, goats, stallions, and jacks shall restrain them from running at large at all seasons of the year; and other stock shall be so restrained unless permitted to run at large as hereinafter provided in this act." And section 280 provides for the districting of the counties, and provides for voting upon the proposition whether stock shall be permitted to run at large. Under this section the question submitted to the voters are: "Shall stock be restrained from running at large? Shall stock be restrained from running at large between sunset and sunrise?" And may also submit questions whether stock shall be restrained from running at large during certain other times and periods therein to be named. "Sec. 282. If at such election a majority of the electors, residents of the districts so formed, shall vote in favor of either one of such regulations, then the same shall take effect and be in force within the district at the end of thirty days after the election so held, and shall continue in force until an election is called for a resubmission of the same question; and if a majority of the electors of the same district, voting thereon, shall vote against said regulation at the resubmission, then the regulation shall cease to be effective at the end of ninety days thereafter." The sections next following provide a mode and manner of distraining stock trespassing and doing damage, and of assessing the damage. Section 309 is as follows: "It is hereby declared that the provisions of this act in regard to restraining stock shall not apply to the county now known as Beaver county, and the same is hereby declared a free range county: provided, however, the people of said county may by petition, as hereinbefore provided for free range, have the privilege of voting on the restraining of stock." According to said section 3, live stock is restrained from running at large in all of the territory of Oklahoma, except Beaver county, provided, however, that the electors in the district to be laid off may permit stock to run at large. By said section 309, Beaver county is made a free-range county, provided, however, that the people of the county may by a vote restrain stock from running at large. The only difference prior to voting on the subject is that in all the territory, except Beaver county, live stock was by statutes restrained from running at large, and in Beaver county live stock was permitted to run at large. Except in that particu-

lar, the statutes and rule of procedure were uniform all over the territory. Does section 3 come within the inhibition of congress, prohibiting the territorial legislatures from passing special or local acts regulating county and township affairs? Regulating county and township affairs is one of the enumerated cases upon which the legislature cannot pass special laws. This is not one of those enumerated cases. The legislature did not attempt to regulate county or township affairs. It merely attempted to let the districts regulate their own affairs. Said section 3 does not come within either the letter or spirit of the nonenumerated cases.

Does said section 3 come within the clause prohibiting the legislature from enacting local laws where general laws can be made applicable? *Suth. St. Const.* par. 75, lays down the rule as follows: "It is now settled that laws, at least of local application, may be imperative or permissive. They may authorize the people of cities, villages, townships, counties, groups of counties, or limited districts, not otherwise defined than for the purpose of said act, to determine for themselves local questions of police, taxation, or any other matter affecting their local welfare, and the law may be conditioned to carry into effect their determination or option." It then cites many cases where the popular vote has decided whether given laws shall be enforced locally or not, and cites contributions to the building of railroads, bonding cities, removing county seats, license or prohibition of the liquor traffic, how paupers shall be kept, whether they shall or shall not have free schools, and whether domestic animals shall be permitted to run at large. This is one of the nonenumerated subjects. Upon this class of cases, when acts have been passed, the courts have generally considered the legislative judgment as conclusive and final. Courts are reluctant to enter upon the inquiry, and usually accept the judgment of the legislature, as exercised within its exclusive legislative domain. *Suth. St. Const.* § 117. The above-quoted act of congress of July 30, 1888, has its counterpart in the constitution of many of the states. It has been generally held that in such cases the legislature has a discretion in nonenumerated cases, and that the court should not attempt to control the discretion of the legislature. *Stocking v. State*, 7 Ind. 328; *State v. Hitchcock*, 1 Kan. 178; *State v. County Court*, 50 Mo. 317.

The whole act, taken together, (the herd law,) leads to the conclusion that the legislature did not intend to apply the law restraining stock from running at large to the whole territory. By striking out section 309, a much broader scope would be given to the act than the legislature ever intended it should have. It was undoubtedly intended that the whole act should take effect. It frequently happens that part of a statute may be constitutional, and a part be void, and the void part not vitiate the other provision; but in such cases the valid part must be complete, and in accord with the legislative intent, and it must not have a broader

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scope, as to subject or territory, when the void part is stricken out. Strike out section 309, and a broader scope is given to the article than the legislature intended. The result must be that the whole act must stand, or it must be held void. The legislature was composed of men of average good sense, who were familiar with the whole of Oklahoma, and the wants, circumstances, and surroundings of the people. What are the facts? Beaver county is a narrow strip of land, extending away to the northwest, 168 miles long, and 34 miles wide. A large portion of it has not yet been brought into market. Its climate and rainfall are quite different to the rest of the territory. It is well and particularly adapted to the raising of live stock, in which industry the people are more largely engaged than in the remainder of Oklahoma. The population is thinly scattered over that great county. Were the settlers required to fence their stock, or restrain it from running at large, the grass on those prairies would not only be of no benefit to humanity, but would be a constant menace to the lives and property of the settlers. The legislature thought it better to let the stock consume the grass, rather than let the burning grass consume the substance of the settlers, and the settlers themselves. In the other six counties organized at the time of the sitting of the legislature there were one or more families on each quarter section who were engaged in farming and in raising stock on a much smaller scale. The situation and surroundings of the people of these two localities, widely separated, were very different. The legislature said to the people of Beaver county, "Your stock may run at large, except in such districts as you may at any time vote to restrain it." To the people in the rest of Oklahoma it said, "You shall restrain your stock, except in such districts as you vote to let it run at large." Experience has taught us that special or local legislation has frequently become necessary in other matters. Why not in this? The act of congress, and the similar constitutional provisions, all recognize that fact. Who, then, must judge whether general or special laws will subserve the interests of the people best in the nonenumerated cases? Unquestionably, the legislature, in the first instance. If so, what right have the courts to control or review the action of that body? Shall this court say that that body did not legislate wisely?

The conclusion arrived at is that the whole act is valid, and that the overruling of the demurrer to the answer was correct.

The judgment of the district court is affirmed.

(1 Okl. 232)

#### CONGOR v. OLDS.

(Supreme Court of Oklahoma. Jan. 27, 1893.)

FORCIBLE DETAINER—EVIDENCE—TENANT HOLDING OVER—NOTICE TO QUIT—REVIEW ON APPEAL.

1. In forcible detainer against a tenant, a deed by defendant's lessor conveying the premises to plaintiff is admissible in evidence, though defectively acknowledged, as showing plaintiff



to be the assignee of the lessor, and entitled to possession.

2. Parol evidence is admissible to show that in a lease executed by an agent a mistake was made as to the principal's name.

3. After the expiration of the lease, a payment of a sum less than the monthly rent reserved does not operate as a renewal; and the tenant is liable to be removed as a tenant holding over, under a statute which declares that a tenant shall be deemed to be holding over his term whenever he has failed or refused to pay the rent, or any part of it, when due.

4. Service of a notice to quit on a tenant a week before bringing forcible detainer is a sufficient compliance with a statute requiring such notice to be served at least three days before bringing suit.

5. In a forcible detainer against a tenant holding over, an objection that a judgment in plaintiff's favor should not have been for the recovery of the whole of the leased premises because plaintiff's agent remained in possession of a small portion thereof cannot be raised for the first time on appeal.

Appeal from district court, Logan county; E. B. Green, Judge.

Forcible detainer by W. B. Congor against H. C. Olds, originally brought in justice's court. There was a judgment in plaintiff's favor, and defendant appealed to the district court. Judgment being again rendered in plaintiff's favor, defendant again appealed. Affirmed.

Fred. M. Elkin, for appellant. Brown & Soward, for appellee.

CLARK, J. This is an action of forcible detainer commenced on the 15th of June, 1890, in a justice's court, in Logan county, in the first district, where judgment was rendered against the defendant, from which he appealed to the district court. In the district court of said county, by agreement of parties, a jury was waived, and the case was tried by the court, and a judgment in words and figures following was rendered: "It is therefore considered, ordered, and adjudged by the court that the plaintiff recover from said defendant the possession of lot sixteen, (16,) in block forty-five, (45,)—the tract of land in controversy,—and, further, that the plaintiff recover from said defendant all plaintiff's costs in his behalf expended." From that judgment the defendant, H. C. Olds, appealed to this court, and assigns 10 causes for reversal, in substance as follows, to wit: (1) The decision of the court is contrary to law. (2) The decision of the court is not sustained by sufficient evidence. (3) The court erred in admitting in evidence a copy of the lease from Hamilton S. Wicks to H. C. Olds. (4) The court erred in admitting in evidence the testimony of John C. Wicks showing that the name of H. S. Wicks was inserted in the lease by mistake. (5) The court erred in admitting in evidence the deed from H. S. Wicks to W. B. Congor. (6) This is the same in substance as the fifth. (7) The court erred in admitting in evidence a copy of the notice to quit, dated January 25, 1890. (8) This is in substance the same as the third. (9) This is the same in substance as the fourth. (10) The court erred in overruling the objection of the defendant to the testimony of John C. Wicks tending to show that

W. B. Congor was the owner of the lot in controversy, and that H. S. Wicks had formerly been the owner.

The plaintiff claimed, and introduced testimony tending to show, that he was the owner of the property in question, and entitled to the possession thereof, and that he leased the same to the defendant for the term of three months for the sum of \$60, and that after the expiration of said lease he paid an additional sum of \$5, and that he subsequently refused to sign another lease, pay any more rent, or recognize the plaintiff as his landlord, or surrender the possession of the property. The defendant admitted in his testimony that he leased the property, and went into possession of the lot in dispute, about the 7th of October, 1889, and that he paid for the rent of said premises until the 7th of January, 1890, the sum of \$60, and that the rent had been paid to John Wicks, and that after the expiration of the lease he had paid \$5 additional rent to Hamilton S. Wicks. He admitted that he went into possession as tenant of Hamilton S. Wicks, but denied that he had been or was a tenant of W. B. Congor. The defendant also claimed that at the time he paid the said sum of five dollars—a day or two after his lease expired—he mentioned the fact that his lease had expired to Hamilton S. Wicks, and that Hamilton S. Wicks replied to him, "My brother and I will be at your place in a few days, and we will make a new lease of the premises;" that he had not heard of W. B. Congor, and never had heard of his being interested in the property, until the second lease was presented a few days afterwards. The payment of the money to Hamilton S. Wicks was denied by John Wicks; he (John Wicks) testifying that the money was paid to himself in person as the attorney of W. B. Congor.

Before considering the sufficiency of the evidence, the admissibility of the evidence should first be determined. To maintain his allegation that he was entitled to the possession of the property in question, the plaintiff, W. B. Congor, introduced in evidence the testimony of John C. Wicks, who swore that he leased the property in question on the 7th day of October, 1889, for the term of three months, to the defendant, H. C. Olds, and one Harry Bulgen; that the property belonged to W. B. Congor; that the lease was in writing, but that in the hurry he used a form of lease prepared for Hamilton S. Wicks, and it appeared therein by mistake that Hamilton S. Wicks was the owner and lessor, whereas, in fact, the property belonged to W. B. Congor at the time the lease was executed, and that Hamilton S. Wicks had sold it to him. The witness further swore that the original lease had been used in evidence before the townsite board, and had been lost, and could not be found. He introduced in evidence what he swore was a copy, with the exception of names and date, which, when filled up, would make it read as follows: "This indenture, made this 7th day of October, 1889, by and between Hamilton S. Wicks, lessor, and H. C. Olds and Harry Bulgen, lessees, all of the town of Guthrie, Indian Territory.

witnesseth, that for and in consideration of the sum of \$20 to be paid monthly in advance, by the said lessees to the said lessor, or to his attorney, the said lessor hereby leases to the said lessees the following described property, to wit: The one-story frame building formerly known as the 'Cozy Restaurant,' and occupied as a restaurant, situated on lot sixteen, (16,) block forty-five, (45,) fronting on Oklahoma avenue. It is hereby further agreed that the terms of this lease are for three months from the 7th day of October, 1889, and the said lessees will vacate the said building and lot on which it stands at the expiration of the term of this lease, unless renewed in writing on the back of this lease. It is further agreed and understood by and between the parties hereto that the lessees claim no title, and will claim no title, to the building or lot on which it stands, and that all improvements made on or to the said building shall belong to the said lessor, and no claim shall be made to them by the said lessees. In witness whereof, we affix our hands and seals. Hamilton S. Wicks. By John C. Wicks, His Attorney. H. C. Olds. Harry Ruigen." To the introduction of the copy in evidence, and the testimony of John C. Wicks that a mistake was made in the contract, and to the introduction of oral testimony, tending to show that the plaintiff was the owner of the property, and entitled to the possession thereof, the defendant objected. These questions cover the 3d, 4th, 8th, and 9th assignments of error. In connection therewith, it would be well to consider the 5th, 6th, and 10th assignments of error, to wit, that the court erred in admitting in evidence the deed from H. S. Wicks to W. B. Congor, and in admitting in evidence the testimony of John C. Wicks tending to show that the plaintiff was the owner of the lot in question. The deed from Hamilton S. Wicks to W. B. Congor of the premises in question bore date on the 15th day of June, 1889, and purported to convey and quitclaim to said Congor, for the consideration of \$1,700, said premises, and to have been executed before James G. Young, a notary public of Jackson county, Mo. Attached to the notary's certificate are the following words: "My commission or term of office expires on the 3d day of June, A. D. 1889." In this class of actions only the right of possession can be tried, and not the title to the premises. Deeds may be received in evidence, not for the purpose of proving title, but to establish the right of possession. *Pettit v. Black*, 13 Neb. 142; *Smith v. Kaiser*, 17 Neb. 187. That was all the purpose for which the deeds in question could be used. It tended to show that the plaintiff was the assignee of Hamilton S. Wicks, and entitled to all the rights of said Wicks. The defendant objected to the admission of evidence of said deed, because the execution had not been properly acknowledged. The defendant does not claim to be the owner of the property. He admits that he went into possession as a tenant, not of the plaintiff, but as a tenant of Hamilton S. Wicks, and admits that his term had expired. A defective acknowledgment did not affect

him or his rights. He was not a purchaser for a valuable consideration. He must have been such to question the validity of the certificate of acknowledgment. As between the parties, the signing, sealing, in the presence of witnesses, and delivering of the deed, conveyed the interest of Hamilton S. Wicks to the plaintiff. At the date of the execution of the deed, June 18, 1889, there was not in force in this territory any law prescribing that there should be an acknowledgment. By the common law, that was not necessary. As between the parties in interest, the acknowledgment might be treated as surplusage, and the deed would be valid. In this action it was admissible in evidence as tending to show that the plaintiff was the assignee of Hamilton S. Wicks, and entitled to the possession of the property. *Gibbs v. Swift*, 12 Cush. 393. Section 6716 of the Statutes reads as follows: "The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this chapter goes into effect, executed, acknowledged, proved, or recorded, is not affected by anything contained in this chapter, but depends for its validity and legality, except as to seals, upon the laws in force when the acts were performed." Section 6717 is: "All conveyances of real property made before this chapter goes into effect, and acknowledged or proved according to the laws in force at the time of making and acknowledgment or proof, have the same force as evidence; and may be recorded in the same manner and with like effect as conveyances executed and acknowledged in pursuance of this chapter." Prior to May 2, 1890, there was no statute in this territory on the subject of the execution and acknowledgment of conveyances. Therefore, if executed in accordance with the common law, which did not require an acknowledgment, they have the same force as evidence as a deed executed and acknowledged under the present statute. That part of the testimony of John C. Wicks wherein he swore that the plaintiff was the owner of the property in question, and to which the defendant objects, could not hurt the defendant in the least, except so far as it tended to show that the plaintiff was rightfully entitled to the possession, and that far it was admissible. This was not an action to try title, but right of possession, and the testimony could not reach further than that. Oral testimony is always admissible when tending to show right of possession.

It was also assigned as error and argued that the admission of a copy of the lease in evidence was error, because the proper ground had not been laid, and because no assignment had been made to the plaintiff; and because it was an attempt to vary the terms of a written instrument by oral testimony. If the original lease was admissible in evidence, the copy was clearly admissible after the witness John C. Wicks testified that the original lease had been used before the townsite board, and lost, and that diligent search had been made for it, and that it could not be found. It is conceded by the defendant that he

leased the property for the term of three months at \$20 per month. That the term expired on the 7th of January, 1890, and that he rented it from John C. Wicks as agent. These matters constitute all the essentials of a lease. Is he in a position to take any exception to or question who, in fact, was his lessor? As a tenant, it was his duty to vacate when his term expired. At that time Hamilton S. Wicks was present in person, and John C. Wicks, acting as the agent for W. B. Congor; and he knew that Hamilton S. Wicks did not claim the property, and that the plaintiff did. He should have then surrendered the possession of the premises to the agent of the plaintiff. He should have lived up to his agreement, wherein he promised not to claim the property, but vacate it at the expiration of his lease. It was not a material question who was his lessor, as he had occupied the premises for the full term of his lease. The deed from Hamilton S. Wicks to the plaintiff would take effect at least from the time of delivery and acceptance. It certainly must be construed as delivered and accepted, when the plaintiff or his agent made demand on the defendant for the vacation of the premises. The defendant swears that he never heard of W. B. Congor as his landlord until the presentation of the second lease to him to sign, after the expiration of the term of the written lease, dated October 7, 1890, and after the payment of the five dollars. The testimony shows that this deed was filed for record in the city of Guthrie on the 21st day of June, A. D. 1889, at 11:47 o'clock A. M., and recorded in Book 5, page 162. This tended to show that the conveyance of Hamilton S. Wicks to the plaintiff was notorious, public, and in good faith, whether the defendant ever heard of the plaintiff or not. The law has been clearly stated on the subject of correction of errors in deeds as follows by an eminent Illinois judge: "Error of expression is unessential when there is no error as to the thing referred to. The name is mutable and immaterial. It is the thing intended alone that is immutable and material, when the operation of a deed or a contract is to be considered. Consequently a designation of an individual can be corrected by parol so as to bring out the person intended in the document, and evidence is admissible to show that a grantor executed a deed by other than his real name. *Nixon v. Cobleigh*, 52 Ill. 387." There was no error in the thing referred to, but the position taken is that the agent of the lessor executed the lease in the wrong name, and that the mistake cannot be corrected by parol. Suppose the defendant had attorned to the plaintiff, and that the heirs of Hamilton S. Wicks had brought suit for the possession of the land in question, could not the defendant have answered that there was a mistake in the lease, and that the plaintiff, Congor, was the real lessor, and proved that fact by parol?

The defendant also argued that, the lease having expired, and that, having paid thereafter as rent an additional sum, the lease was thereby renewed, subject to the terms and conditions of the former

lease, and that he was not liable to be removed as a tenant holding over. Section 1021, on page 983, of the Nebraska Statutes, then in force in this territory, is as follows: "A tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent, or any part thereof, when the same was due." The testimony, undisputed, shows that a day or two after the lease expired the defendant paid as rent the sum of five dollars, and subsequently refused to pay any more rent, or to surrender the premises, and did not pay any more. To place himself in the position he claimed, he should have paid \$20,—another month's rent,—and repeated the same at the beginning of each month as it came around.

The defendant further objected to the admission in evidence of a copy of the notice to quit, dated January 25, 1890. Section 1022, on page 984, of the Statutes of Nebraska, is as follows: "It shall be the duty of the parties desiring to commence an action under this chapter [forcible detainer] to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least three days before commencing the action by leaving a written copy with the defendant, or at his usual place of abode, if he cannot be found." Two notices to vacate the premises were served on the defendant,—one January 25, 1890, and one June 11, 1890; the last at least a week before the action commenced. It does not appear that any attempt was made to account for the absence of the original notice served January 25, 1890, but no exception was taken in the assignment of error to the second notice, served June 11, 1890. The original notice of that date was introduced, and proof of service made. The above quotation from the statutes answers the objection that sufficient notice was not given.

It was also assigned as error that the decision of the court was contrary to law. It was argued that the action was to recover the possession of lot 16, in block 45, in Guthrie, and that the lease and the oral testimony showed that there was leased to the defendant a one-story building, 12 by 16 or 20 feet, and that there was another building on the same lot, the possession of which was not surrendered to the defendant, and that the evidence was not sufficient to sustain a judgment for the possession of said lot 16. The lease was made in writing, with a full knowledge of all the facts. It shows that there was leased to the defendant a one-story frame building on said lot 16. It also shows that the defendant agreed to vacate said building and the lot on which it stands, and also that the defendant claimed no title, and agreed to claim no title, to the building or lot on which it stood. John C. Wicks testified that "there was an adjoining building that stood partly on the lot and partly on the lot adjoining on the east. The building that adjoins on the east I had my desk in, partly as a protection to the property; and I occupied that desk. That is where I kept my real-estate office." The defendant tes-

tified as follows: "Question. You may state when you first went into possession of the lot in controversy. Answer. The first of October, 1889,—about the first of October. Q. You may state under what conditions you went in. A. I went in under a lease of the premises." The testimony is indefinite as to when, where, and how long the agent of the plaintiff held his office in the building on the line east of the lot, and how large a spot was covered, and whether he held or surrendered the control of that spot of ground at the time of the lease. The fact that the defendant admitted under oath that he went into possession of the lot, and that he afterwards in bad faith "jumped" the lot, tends to show that he was, at the time suit was commenced, in possession of the whole. The question whether there was a minute portion of that lot held by the agent of the lessor was raised for the first time in this court. To make it available here it should have been raised in the court below. This court held in the case of *Seeley v. Adamson*, 26 Pac. Rep. 1069, where the plaintiff commenced an action for the possession of the whole of a quarter section, but it appeared that she had in actual possession a small tract in one corner thereof,—the court held "that what is required is substantial, and not technical, accuracy. The law will not regard mistakes which do not mislead the party notified. Mr. Adamson could not be misled by the description in this case. Had he surrendered the possession of what he held, then Maggie Seeley would have had all that the notice called for. The law does not take notice of such small things." Had the defendant called the attention of the district court to even this slight error in the description of the premises of which he was in the actual possession, if there was any such error, the court would have given it due consideration. The evidence in this case clearly shows that the plaintiff was entitled to recover. It shows, and is not contradicted, that the defendant leased the premises, and, at the expiration of his lease, refused to surrender or vacate the premises, but proposed to hold them, and claim them as his own. To enable him to set up a claim to the property, he should first have surrendered to his lessor the actual occupancy and possession of the premises, and then commenced proceedings to recover his interest therein, if any. Any other rule would be illegal, inequitable, and unjust, and would tend to the production of violence and disorder. The judgment of the district court should be affirmed, with costs.

(1 Okl. 244)

RIDER v. BROWN et al., County Commissioners.

(Supreme Court of Oklahoma. Jan. 27, 1893.)

MANDAMUS—RULE TO SHOW CAUSE—ELECTION—CANVASS OF VOTES.

1. St. § 5064, which provides that the writ of mandamus shall be issued on affidavit and motion, and shall be made returnable as the court shall direct, does not prohibit the court

from making a rule to show cause, so as to enable it to determine whether any writ should issue.

2. It is the better practice to issue a writ of mandamus in the name of the territory, on relation of the party interested, though, perhaps, such writ might issue in the name of such party under the code provision requiring the real party in interest to sue.

3. Under St. c. 32, § 2793, constituting the existing board of county commissioners of a specified county a board of canvassers, to determine the result of a special election, a new board of commissioners, elected at such election, have not the power to canvass the vote, and issue certificates of election to other persons claiming under such election.

Error to district court, Canadian county; A. J. Seay, Judge.

Mandamus by Charles Rider against George F. Brown and others, county commissioners, to compel defendants to issue to plaintiff a certificate of election to the office of register of deeds. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

Simpson & Smedly, for plaintiff in error. Kirkpatrick & Blake, for defendants in error.

CLARK, J. On the 11th day of March, 1891, the plaintiff in error filed his complaint in the office of the district court of Canadian county, wherein he represented that he was a candidate for the office of register of deeds of said county at the special election held therein on the 3d day of February, 1891, and that at said election he received the largest number of votes cast for any candidate for said office. He further represented that the then county commissioners of said county, Spencer W. Johnson, George F. Brown, and Thomas Jensen, canvassed the votes cast at said election on the 19th day of February, 1891, with the above result; and that he requested said board of county commissioners to deliver to him a certificate of said election, which request was denied; and that the term of office of said commissioners expired on the 23d day of said month. The plaintiff further alleged that on the 23d day of said month the above-named defendants were qualified as county commissioners of said county, and that on that day he requested said defendants to deliver to him his certificate of election as register of deeds of said county, which request was denied, whereupon he prayed that a writ of mandamus be issued and directed to said defendants, commanding them to issue to him a certificate of election to the office of register of deeds of Canadian county, and to grant to him an early opportunity to file his official bond. Thereupon an order was issued to said defendants, which, after reciting the above facts, commanded them to show cause before the court at El Reno, Canadian county, on the 7th day of April, 1891, why they had not issued the said certificate. The defendants thereupon filed several motions, and, among others, moved the court "to quash the pretended writ herein granted, for the reason that neither the same, nor the petition on which the same was granted, stated a cause of action against the said defendants." The order above stated was

in no sense a writ. It was neither signed nor sealed by the clerk, and was never intended to be a writ, but was a preliminary order to enable the defendants to show why a writ should not be issued. The motion to quash was in the nature of a demurrer to the sufficiency of the affidavit and of the order, and was so treated by the court, and was so treated on the argument of the case, and will be so treated in this opinion.

Section 5064 of the Statutes of the Territory is as follows: "The writ shall be issued upon affidavit and motion, and shall be attested and sealed, and made returnable, as the court shall direct." But this statute does not prohibit the court, in the first instance, from inquiring into the facts, so as to determine whether any writ should be issued. A rule to show cause why a writ should not issue serves all the purposes, and performs all the functions, of an alternative writ, and its sufficiency, and that of the affidavit, may be tested by a demurrer or motions to quash. The demurrer admitted the correctness of the facts stated, but simply denied their sufficiency. Clearly, if no cause of action was stated against the defendants, the proceedings should have been dismissed, unless the plaintiff asked leave to amend; and the record is silent upon that subject. The presumption, then, is that the plaintiff proposed to stand by his affidavit and rule to show cause as containing all the essential elements of a good complaint. At the April term of said court, for the year 1891, the aforesaid matter came up for hearing before said court, and, on the hearing, the following order was entered: "The court, after being fully advised in the premises, finds the issues for the defendants, and refuses to issue the peremptory mandamus, commanding said defendants to do anything prayed for in the plaintiff's petition, and does adjudge that defendants have and recover of the plaintiff their costs in this suit paid out and expended, and have execution therefor,"--to all of which the plaintiff excepted, and from which he appealed to this court.

It does not appear from the record on file, nor from the brief, on what precise point the case turned. Several questions arise, among others this one: Had this plaintiff a right of action in his own name against the defendants? The practice has been long established in mandamus actions that the action should be brought in the name of the sovereign power, on relation or complaint of the party in interest. Maxw. Code Pl. p. 324; High, Extr. Rem. §§ 1, 531. In the United States this writ has lost its prerogative features, but it is still classed as an extraordinary writ; and, in form and name, the proceedings are somewhat in the nature of a criminal action, and are in the name of the sovereign power. *Com. v. Dennison*, 24 How. 66; *Kendall v. U. S.*, 12 Pet. 527. This action was brought to obtain possession of a certificate of election as a preliminary step to the obtaining the possession of an office. By it the right to the office cannot be tried. But quo warranto is a writ by which the right to the office may be tested. In this territory an information is

substituted therefor. That has to be commenced in the name of the territory, on the relation of the party claiming the office. The practice in Indiana (whence our Statutes and Code came) has been to issue the writ of mandamus in the name of the state, on relation of the party interested, which is the safe and better practice. The plaintiff was the real party in interest; and, as the Code provides that the real party in interest shall be the plaintiff, the effect of that provision of the Code on the general and long-established rule that the action shall be commenced in the name of the sovereign power, on the complaint of the party in interest, will not be further noticed, and another, and perhaps a more important, question will be considered.

Even if the plaintiff has a right to bring the action in his own name, had he a right of action against the defendant? Had they, as county commissioners, any power whatever to canvass the votes cast at the election in February, 1891, or to issue, or cause to be issued, certificates of election to candidates who received at that election the largest number of votes, according to the canvass of the votes made by their predecessors? The election in question was a special election, held under chapter 32 of the Laws of Oklahoma, applicable to that election alone. Section 2791 of said chapter is as follows: "It shall be the duty of the county clerk to furnish poll books for the use of the officers holding such election, and the election shall be conducted, notices issued, the votes counted, returns made, and the votes finally canvassed and the final result declared, as provided by the laws of Nebraska, now in force in this territory, which are hereby adopted for the purpose of the special election provided for by this act, and for no other purpose." The Nebraska Statutes on said subject are found in sections 46 and 48, pp. 458, 459, of those Statutes, and are as follows: "Sec. 46. Upon the reception of the returns of each election precinct, township, or ward by the county clerk, directed to him as hereinbefore provided, and within six days after the closing of the polls, he, together with two disinterested electors of the county, to be chosen by himself, shall open the poll books, and from the returns therein, make abstracts of the votes cast, in the following manner: \* \* \* among others, "of votes for county, precinct, and township officers." "Sec. 48. The county clerk shall make out a certificate of election to each of the persons having the highest number of votes for the several county, precinct, and township offices, and the members of the legislature from the county alone." But by section 2793 of the Oklahoma Statutes, in said chapter 32, the then county commissioners were made a canvassing board of the returns. The section is as follows: "The board of county commissioners shall meet on the second Monday of February, 1891, and canvass the returns and declare the result of the election held under the provisions of this act, and cause certificates of election to issue to the party elected. The board of county commissioners shall meet

again on the third Monday of February, 1891, to approve the bonds of the officers elected at such election. The officers so elected shall enter on the duties of their respective offices on the fourth Monday of February, 1891." And section 2795 of said chapter 32 is as follows: "This act shall be held as controlling the special elections herein provided for, and inducing the officers elected thereunder into office, and shall not apply to any other election, or affect any other act relating to that subject passed by this legislative assembly."

The important question to be solved is, what was the legislative intent? Did it intend to invest the power in the new board, as well as the old, to issue certificates to the persons who received the largest number of votes? The old county commissioners went out of office on the fourth Monday of February, 1891, and the new county commissioners came into office on that day. The new county commissioners were sued on the 11th day of March, 1891. The special act (chapter 32) does not define the duties of the new county commissioners, unless they are required to act under section 2795, aforesaid. The duties of county commissioners are generally defined in chapter 24 of the Statutes, (sections 1797-1847,) but they are not thereby made canvassing officers; nor are they made canvassing officers by the general election laws found in sections 2796-2859; but by section 2810 the county clerk, and two persons by him appointed, shall constitute a board of election commissioners, with full powers to prepare ballots, and discharge a great variety of other duties, but do not seem to have the powers of a canvassing board. Nor do we find that the county clerk is made a canvassing officer, or required to issue certificates of election, under article 5 of chapter 24 of the Oklahoma Statutes. It seems that congress, on the 28th day of July last, entertained the idea that the Oklahoma Statutes neither provided a canvassing board nor an officer to certify the result, because on that day it enacted a statute (found on page 300 of the Session Laws of the United States 1892) to govern at the election that was held last November. That statute is as follows: "The board of county commissioners of each county are hereby constituted a county canvassing board, and the governor, secretary, and territorial auditor are hereby constituted a territorial canvassing board; and said county canvassing board shall meet on the Friday next following said election, and canvass the returns and declare the result of said election, and the county clerk shall thereupon immediately issue to all county and township officers elected at said election a certificate of their election." But that law applied only to the election held November last, by its very terms. By the law of Nebraska made applicable to this election only by chapter 32, it became the duty of the county clerk to make out for each of the persons elected a certificate of his election. By this same act it was made the duty of the county commissioners to meet on the second Monday of February, 1891, and canvass the returns, and declare the result,

and cause certificates to issue. By its terms the duty devolved on the board of commissioners then in office. It was evidently the intention of the legislature to make the then county commissioners, or the then clerk, together with two disinterested persons, whom he should select,—and we are not called upon in this action to determine which,—a canvassing board, with power to certify, or to cause to be certified, the result for that particular election, and not to extend that power to the incoming county commissioners, and not to give to the new county commissioners or clerks, or to both, general authority to canvass the returns of that election, and certify the result. It is reasonable to infer that the legislature did not intend to give to the county commissioners elected at that election any power whatever as canvassing officers of the election, or any authority to cause the result to be certified; certainly not so far as they were concerned themselves. If so, why not as to all other officers? The affidavit and order to show cause did not state facts sufficient to constitute a cause of action against defendants, and the judgment of the district court refusing to issue the writ prayed for is affirmed, with costs.

(3 Colo. A. 133)

#### ARTHUR v. GARD.

(Court of Appeals of Colorado. Feb. 13, 1893.)

REVIEW ON APPEAL—AUTHORITY OF AGENT—DUE-BILLS—CONSIDERATION—FRAUD.

1. Error assigned in giving or refusing instructions cannot be considered unless the entire charge is embraced in the record.

2. In an action against the lessee of a mine on a duebill given by the superintendent for services in sinking a shaft, the evidence showed that it was the superintendent's custom to give time checks and bills evidencing the indebtedness of the lessee, and that the one sued on was the only one ever disputed; and a letter from the lessee to the superintendent was put in evidence, in which he spoke of being ready to pay certain bills approved by the superintendent, such bills to be payable on the 15th of the month following that in which the work was done. The bill in suit was executed in accordance with this request. *Held*, that the superintendent was acting within his authority, and the lessee was liable.

3. The duebill was not without consideration when it stated that the payee sank the shaft 4x8 to the depth of 10 feet, and timbered the same complete, for which he was to receive the sum of \$10.50 per foot.

4. Fraud on the part of the superintendent and the payee cannot be shown when not pleaded as a defense.

Appeal from district court, Park county.

Action by R. T. Gard against E. F. Arthur, lessee of the Hill Top mine, to recover on a duebill executed by defendant's superintendent. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. A. Wilkin, for appellant. V. G. Holli-day, for appellee.

RICHMOND, P. J. E. F. Arthur, appellant herein, was working the Hill Top mine as lessee, and in February, 1890, he executed the following paper: "Denver,

Colo., Feb. 24th, 1890. Mr. J. L. Edmunds, Denver, Colo.—Dear Sir: You are hereby appointed superintendent of the Hill Top mine, in full charge of the practical working thereof, getting out the ore, and hauling it to the cars at Fairplay, under the direction of the assignees of the lease. Your salary will be at the rate of two hundred dollars (\$200) per month, commencing March 1st. Yours, truly, E. F. Arthur, Lessee." By virtue of this appointment, Edmunds entered upon the duties as superintendent of the mine, and on May 24, 1890, executed a paper payable to H. E. Box, in words and figures following: "Hill Top Mine, May 24th, 1890. Due to H. E. Box by the lessee of the Hill Top mine, one hundred and five dollars (\$105.00) for sinking the main shaft 4x8 in the clear, and timbering the same complete, to the depth of 10 ft., at \$10.50 per foot. J. L. Edmunds, Sup't." On the back of this was the following indorsement: "Payable June 15, by lessee. J. L. Edmunds. H. E. Box." On the 24th of May, 1890, R. T. Gard, appellee herein, purchased for a valuable consideration this due bill, and instituted action to recover from Arthur. By the complaint we are informed that the answer consisted of general and specific denials. A jury trial was had, and resulted in a verdict for plaintiff, upon which judgment was entered, and to reverse which appellant prosecutes this appeal.

The principal contention of appellant is that Edmunds had no authority to execute this paper, and consequently he is not liable. It is also insisted that the court erred in refusing instructions asked and in instructions given. The instruction complained of is designated as "No. 5," and set forth in the abstract. The other instructions are not embraced in the record. Under the ruling of the court, we would not be warranted in considering this assigned error. In the case of *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. Rep. 463, it is laid down that where the instructions given by the court are not embraced in the transcript or printed abstract, no error can be assigned upon a single instruction. The language of the court in that case is: "It has been determined in construing a charge to a jury the entire charge must be considered, and where the appellant does not embrace within the transcript the entire charge given, the appellate court cannot determine whether or not the jury were misled by the charge to which exception was taken;" and also that the appellate court would be unable to determine whether the court erred in refusing the instructions asked, because of its inability to ascertain whether the entire charge embraced the instruction asked. *McQuown v. Cavanaugh*, 14 Colo. 188, 23 Pac. Rep. 341; *Klink v. People*, 16 Colo. 467, 27 Pac. Rep. 1062.

This brings us to the consideration of the main point relied upon by the appellant. The record and the evidence show that Edmunds was appointed superintendent by Arthur; that he was authorized to employ men in and about the working of the mine; that it was his custom to give time checks and bills evidencing the indebtedness of the lessee; and that, with

the exception of the one sued upon, there appears to have been no controversy during the time Edmunds was acting as superintendent. The superintendent having authority to employ men to prosecute work upon a mine, if no funds be furnished, the principal is liable to the workmen. *Breed v. Bank*, 4 Colo. 487. To establish an agency, in the absence of better evidence, it is the common practice to resort to facts which tend to show recognition by the principal of the alleged agent's authority. Of this nature are communications between the principal and agent, in which the authority of the latter is expressly or impliedly admitted. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 248. Let us apply this last-recited principle to the following letter: "Denver, Colo. 5-9-90. Mr. J. L. Edmunds, Fairplay, Colo.—Dear Sir: I am just in receipt of a letter from Messrs. Bailey & Wilkin, advising that on the 13th of last month Mr. M. McLaughlin, then hauling ore for you, was discharged by you, and that at that time there was due him \$251.76. Mr. McLaughlin has given them his claim for collection, and they state they hold bills formally approved by you, aggregating \$251.76, for which they demand immediate payment. I have replied to them that on receipt of the approved bills I will forward check. I wish you would have it distinctly understood with your teamsters or others doing work for you aside from labor, that no bills are payable before the 15th of the month following that in which the work is done; and, if you know Messrs. Bailey & Wilkin, (which I presume you do, from the fact that they drew up some contracts for you,) I would suggest that you see them, and quietly say to them that letters such as theirs of May 9th are in very poor taste until a demand has been made for payment in the regular way. We propose to pay all bills as fast as they become due, but do not propose to be bulldozed by them or any one else. Yours, very truly, E. F. Arthur." We are inclined to the opinion that the authority to execute the paper declared upon was conferred upon the superintendent, and that he was acting clearly within his authority, and keeping within the express letter of this instruction. It will be observed that the instrument is dated May 24th, payable June 15th. Also that the superintendent had executed bills payable to M. McLaughlin, which Arthur fully recognized. But it is insisted that, even if the authority did exist, the paper in question was without consideration. It occurs to us that the consideration is expressly embraced in each of the instruments. It sets forth what Box did, to wit, sinking the shaft 4x8, and timbering the same complete, to the depth of 10 feet, for which he was to receive the sum of \$10.50 per foot. To this the defendant replied that the shaft was not sunk to the depth of 10 feet, and offered to prove that the depth did not exceed 2½ feet, which proof was rejected. Whether the rejection of this testimony was error or not we are unable to say, because we are not advised by the record what the nature of the defense was. If by this contention defendant sought to attack the



paper on the ground of fraud on the part of the superintendent and Box, it was a matter of defense, and should have been set up. The judgment must be affirmed.

(3 Colo. App. 155)

DENVER & R. G. R. CO. v. MORTON.  
(Court of Appeals of Colorado. Feb. 13, 1893.)  
REVIEW ON APPEAL—FIRES SET BY LOCOMOTIVES  
—EVIDENCE—DAMAGES.

1. Where judgments are entirely without a sufficient basis of proof, an appellate court will not scruple to overturn them.

2. A fire burned over plaintiff's farm, which abutted on defendant railroad company, and plaintiff sued for damages. Railroad companies are by statute made absolutely liable for all fires occasioned by the operation of their roads. When the fire broke out plaintiff was not in the vicinity, and no witness was produced who saw the fire set or discovered it until about 2 o'clock, when it was under considerable headway. How the fire started was undetermined. *Held*, that a verdict fixing liability on defendant could not be sustained, without proof to establish the relation of cause and effect between the operation of the road and breaking out of the fire, and testimony of plaintiff that a freight train usually passed there about 11:30 in the morning was insufficient when he did not attempt to show that a train passed the point daily at 11:30, or that any passed on the day of the fire.

3. After the fire had started, quite a gang of men on a freight train under the charge of a railroad employe went to work to put out the fire, and they materially assisted in so doing. The court charged that this was one of the surrounding circumstances connected with the fire which the jury had a right to consider in determining its origin. *Held*, that this was error; the acts which follow an injury cannot be proven to establish an antecedent negligence.

4. Where the testimony showed that plaintiff was guilty of negligence in leaving a wagon near the fire, so that it was consumed, and the jury so determined by a special finding, it was error for them to apportion the loss making defendant liable for two thirds, for under such circumstances plaintiff was not entitled to any recovery.

Appeal from district court, Gunnison county.

Action by Henry J. Morton against the Denver & Rio Grande Railroad Company to recover damages to plaintiff's farm, caused by a fire alleged to have been set by defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott & Valle and H. F. May, for appellant.

BISSELL, J. In the latter part of the year 1889 the appellee, Morton, owned a ranch in Gunnison county, which abutted on the right of way of the Rio Grande Railroad. About the middle of October a fire broke out on the land, and burned over quite a portion of the farm. This action was brought against the railroad company to recover the resulting damages. The liability of the corporation to respond if the fire was occasioned by its trains was not disputed. Morton recovered judgment for \$150. The railroad company appealed to the supreme court, which transferred the case to this court for determination. A good many questions are raised by the assignments of error,

but there are only two which deserve any substantial consideration. The appellant insists that the judgment ought not to stand, because there was no evidence that the fire was set out by the railroad company. Usually questions of fact which are submitted to the consideration of a jury, and are determined adversely to a party, will not be considered by an appellate tribunal where there is any conflict concerning the disputed matter. With the weight and the sufficiency of testimony we ordinarily have little concern. But where, as in this case, there is an entire want of proof of a fact which must be established to entitle the plaintiff to recover, we feel little hesitation in reversing a case on this ground. This circumstance furnishes an exception to the general rule, and appellate courts do not scruple to overturn judgments which are entirely without a sufficient basis of proof on which to rest. *Keating v. Pedee*, 2 Colo. 526; *Hockaday v. Goodwin*, 1 Colo. App. 90, 27 Pac. Rep. 875. The difficulty experienced in trying causes like the present comes from the fact that under our fire statute a railroad company is made absolutely liable for all fires occasioned by their operation of the road. Whenever a fire breaks out along the line, it is assumed that it was set out by the company, and the injured party has little difficulty in convincing a jury of his right to recover. The record contains no proof of this essential fact. When it broke out Morton was not in the vicinity. There was no witness produced who saw the fire set out, and none who discovered it until it had gotten under very substantial and considerable headway. Morton did not know of it until he returned about 2 o'clock, when some 20 acres of the land had been burned over. By what the fire was kindled, or whether there was any sort of a connection between the running of the road and the breaking out of the fire, was left absolutely undetermined. The jury seemed to proceed on the hypothesis that, since there was a fire, and it burned along the line of the railway, the company must necessarily have set it out. Judgment cannot be permitted to rest on such an unsatisfactory basis. There must be some proof which would at least tend to establish the relation of cause and effect between the operation of the road and the breaking out of the fire. It is true the plaintiff testified that a freight train usually passed along there about half past 11 in the morning. He did not attempt to show that a train passed that point daily at 11:30, nor that any passed that point on the particular day when the fire broke out. There is nothing in the record which furnishes a legitimate basis for the deduction that the fire was occasioned by the running of the company's engines. The plaintiff cannot be relieved of the necessity to support his case by sufficient and competent testimony.

There is another error assigned which is equally fatal to the plaintiff's recovery. It transpired during the trial that, after the fire had started, quite a gang of men on a freight train under the charge of a railroad employe went to work to put out

the fire. According to Morton's testimony, the men came from the direction of Sargent, were in charge of one of the railroad employes, and materially assisted in extinguishing it. This circumstance was made the subject of a special charge by the court. In instructing the jury as to where the burden of proof was, and what the jury had a right to consider in determining the cause of the fire, the court said: "And you have a right also to consider upon this question all the other surrounding circumstances connected with the fire, such as the fact, if such existed, that the employes of the defendant company came upon the ground in question, and put out, or assisted in putting out, the fire." This was substantially telling the jury that they had a right to consider the fact that the employes of the railroad company assisted in putting out the fire in determining its cause or its origin. Under no circumstances, without other proof than was disclosed in this case, can this be the law. It is sometimes true in criminal jurisprudence that the subsequent conduct of the person accused of crime may be shown for the purposes of demonstrating his probable guilt. In civil cases, however, the acts which follow an injury cannot be proven for the purpose of establishing an antecedent negligence. *Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. Rep. 358; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. Rep. 423; *Railroad Co. v. Clem*, 123 Ind. 15, 23 N. E. Rep. 965. If negligence cannot be established by proof of the subsequent acts of the party charged, it is difficult to say why proof that a railroad company aided in putting out a fire should be taken to establish the fact that it was caused by their acts. It does not necessarily follow that the company would not instruct its employes to assist in putting out all fires along the road when by the terms of the statute they are liable for whatever damages result from fires started by their trains. Even proof that the company issued a general order to its employes to put out all fires discovered along the line of the track could hardly be said to establish that the company's trains set the fire out. Such an order would simply be a prudential measure to protect themselves from all pecuniary loss to which they might otherwise be subject. In other words, it would be cheaper, probably, to put out all fires found burning along the line of the road, even though four fifths of them might come from extraneous causes, than to pay for one or two fires for which they ought not to be held responsible. The materiality of this instruction, and its absolute prejudice to the appellant, is apparent when it is remembered that there was no proof whatever that the fire was set out by the railroad company, and none that it sprang up shortly after the passage of the train.

It is alleged as error that the jury erred in awarding damages for the destruction of a wagon. Morton had left a canvas-covered wagon standing in the vicinity for some time, and it was near the fire while it was raging. It was not removed, and remained there until it was subsequently consumed. Morton testified that

when he left the vicinity to go to the house, there was still considerable smoldering fire scattered about the tract. He admitted that it was apparent that in a good many spots the fire was still burning. The wagon was left in dangerous proximity to this unextinguished fire. Sparks were blown on the cover, it took fire, and the wagon was consumed. This loss was part of the subject-matter of the suit, and a portion of its value was included in the recovery. The jury found this damage to be \$75. In answer to a special question submitted, the jury said that Morton was guilty of contributory negligence in leaving the wagon where it stood when it was destroyed. By their finding they apportioned the damages, found the company liable for two thirds of the injury, and left Morton to stand the balance because of this negligence. While this error would not probably suffice to reverse the case, since the judgment could be reduced and still stand, yet, in view of the fact of the reversal on the other grounds stated, it is necessary to determine this matter. Evidently, if Morton was guilty of negligence in leaving his wagon in the vicinity of the fire before it was totally extinguished, he ought not to recover for its loss. That he was negligent is manifest from the testimony, and is indubitably settled by the special finding of the jury. Under these circumstances, he ought not to have had judgment for that item of his damage, and, unless the case shall be varied by the proof upon the subsequent trial, it must be eliminated from his recovery. The case was improperly tried, to the prejudice of the appellant, and for the errors committed the cause must be reversed and remanded for a new trial.

(3 Colo. App. 137)

**BOARD OF COM'RS OF MONTEZUMA COUNTY v. BOARD OF COM'RS OF SAN MIGUEL COUNTY.**

(Court of Appeals of Colorado. Feb. 13, 1893.)

**LIABILITY OF COUNTY — BOARD OF PRISONER AWAITING TRIAL — CHANGE OF VENUE.**

1. In an action by the county of S. against the county of M. to recover for board furnished a prisoner, a complaint alleging that the prisoner was charged with a crime in the county of M., and on a hearing before a justice of said county was held to the grand jury, and, the prisoner giving no bonds, and there being no jail in the county of M., he was committed to the jail of the county of S., whose commissioners presented a bill for the prisoner's board to the county of M., which was disallowed, is sufficient.

2. On proof of the allegations of the complaint the court properly rendered judgment for plaintiff for the amount of the prisoner's board, under Mills' Ann. St. § 2516, providing that where a person is committed for a crime in a county having no jail the justice may issue a mittimus to the sheriff of the county nearest having a jail, who is obliged to keep the prisoner at the expense of the county where the offense was committed.

3. The court properly denied a motion for a change of venue on the ground that the cause of action was not founded on a contract to be performed in the county of S., and that the liability of the county of M. was statutory, and therefore triable in the county of M., since the cause of action accrued in the county of S.; and

Code Civil Proc. c. 2, § 28, allows actions on contracts to be brought in the county where the contract is to be performed.

Error to district court, San Miguel county.

Action by the board of county commissioners of San Miguel county against the board of county commissioners of Montezuma county to recover the amount of board furnished a prisoner committed by a justice of the peace of defendant county. There was judgment for plaintiff, and defendant brings error. Affirmed.

C. W. Blackmer, John Dawson, and Lewis K. Pratt, for plaintiff in error. H. M. Hogg, for defendant in error.

**RICHMOND, P. J.** In June, 1889, George Brown was charged with the crime of being an accessory to the robbery of the San Miguel County Bank of Telluride, Colo. The offense is charged to have been committed in the county of Montezuma. Hearing was had before a justice of the peace in Montezuma county, and Brown was held to await the action of the grand jury of the district court. Failing to give bond, and there being no jail in Montezuma county, the justice of the peace committed Brown to the jail of San Miguel county. December 1, 1889, the commissioners of San Miguel county presented its accounts to the county of Montezuma for the board of Brown and other expenses. The bill was disallowed. Suit was brought to recover the sum of \$819, with interest. Motion to quash the summons was interposed, and overruled. Thereafter motion to change the venue was made, on the ground that the cause of action was not founded on a bill of exchange, promissory note, or book account, or for goods sold and delivered, or a contract to be performed in San Miguel county; that the liability of Montezuma county, if any, was statutory, and therefore the suit should have been commenced in Montezuma county. This motion was overruled. A demurrer to the complaint was then filed and overruled. Defendant elected to stand by the demurrer, and judgment was rendered for the amount claimed. To reverse this judgment this writ of error is prosecuted.

We experience no difficulty in reaching a conclusion in this case, and sustaining the action of the court below. Montezuma county having no jail, the justice of the peace was warranted by the statute in issuing the mittimus, directing the sheriff of the county of San Miguel to receive and keep in custody the prisoner, and the obligation to receive the prisoner is imperatively imposed upon the sheriff and jailer of that county. The burden of the expense of so keeping a party rests upon the county where the offense is alleged to have been committed, and the statute makes it the duty of such county to reimburse the county for expenses incurred in and about the boarding and keeping of a prisoner, in cash. There is no escaping the conclusion that the cause of action accrued in San Miguel county, and, this being so, the right to commence the action in that county cannot be doubted. We

think the complaint sufficiently set forth a cause of action, that the suit was properly instituted in the county of San Miguel, and that the action of the court in overruling the demurrer and refusing to change the venue is amply supported by the provisions of the Code<sup>1</sup> and the General Statutes of the state controlling transactions of this kind. Mills' Ann. St. § 2516;<sup>2</sup> Denver, etc., Construction Co. v. Stout, 8 Colo. 61, 5 Pac. Rep. 627.

The judgment, therefore, will be affirmed.

(3 Colo. A. 139)

### GORDON v. JOHNSON.

(Court of Appeals of Colorado. Feb. 13, 1893.)

ACTION TO QUIET TITLE—JUDGMENT OF DISMISSAL  
—RES JUDICATA.

In an action by the landowner to set aside, as a cloud on title, a contract of sale, a decree dismissing the complaint on the ground that the contract was void, and constituted no cloud, is a complete bar to a subsequent action by defendant in the first action to enforce the contract specifically.

Error to district court, Arapahoe county.

Action by A. M. Gordon against Thomas Johnson to enforce specifically an alleged land contract. Defendant had judgment, and plaintiff brings error. Affirmed.

Keeler & Sales, for plaintiff in error. O. B. Liddell, for defendant in error.

**RICHMOND, P. J.** May 20, 1887, G. W. Clise & Co. executed the following contract: "Denver, Colo., May 20, 1887. Received of A. M. Gordon ten dollars (\$10) as part purchase price of lots numbered 5 and 6, block 33, Hunt's Add. to the city of Denver; full consideration, or purchase price, six hundred and twenty-five dollars; the remainder, six hundred and fifteen dollars, to be paid by said Gordon upon delivery of a good and perfect abstract of title, and a good and sufficient warranty deed; otherwise, this receipt to be void, and the ten dollars to be returned to said Gordon. [Signed] G. W. Clise & Co." A. M. Gordon, plaintiff in error, institutes this action against Thomas Johnson, the owner of the premises described in the contract, to enforce specific performance. Among other defenses, Johnson alleges that during the year 1890, and prior to the institution of this action, he commenced proceedings in the county court of Arapahoe county against the plaintiff, Gordon, for the purpose, among other things, of having the contract set forth in the complaint declared null and void, and for other relief. The entire proceed-

<sup>1</sup>Code Civil Proc. c. 2, § 28, provides that actions on contracts may be tried in the county in which the contract is to be performed.

<sup>2</sup>Mills' Ann. St. § 2516, provides that, when there is no sufficient jail in any county wherein any criminal offense is committed, any justice of the peace of said county may commit the prisoner to the jail of the nearest county having a jail, where the prisoner shall be kept at the expense of the county where the offense was committed, whose commissioners shall audit and pay the bill for the prisoner's board and other expenses.

facts in the county court are set forth in the answer. To the complaint in that case, Gordon answered, alleging that authority for entering into the contract had been vested by Johnson in Clise & Co. The cause was tried to the court, and a final decree entered, from which no review was prosecuted. In the decree of the court it was recited that the identical contract here sued upon was void, and of no effect, and was and is no cloud upon the title to the lots. Thereupon the court dismissed the complaint. To this defense plaintiff, Gordon, filed a demurrer, which was overruled. Plaintiff elected to stand by the demurrer, and judgment was rendered against plaintiff, to reverse which he now prosecutes this writ of error.

The contention of plaintiff is that he is not estopped by the decree in the former case from instituting proceedings for specific performance of the contract; that it is not res adjudicata. The contention of defendant is that as the suit there was between the same parties here, and involved the validity of the identical instrument upon which this action is based, and the finding of the court being that the instrument was null and void, no subsequent action can be predicated upon it. Plaintiff's counsel admit in their argument that the former suit was for the purpose of annulling the contract, and for the cancellation of it, for the purpose of removing the alleged cloud upon the title of Johnson to the premises, but contend that the decree entered is not a bar to the present suit, because it resulted in a dismissal of the plaintiff's complaint in that action.

The contention of plaintiff in error, that in the former action Johnson sought simply to remove the cloud upon his title to the premises, and that, when the court found that the instrument complained of was not a cloud upon his title, it had reached the limit of its jurisdiction, by dismissing the bill, is, in our judgment, without support in reason or by authority. It is true that if the court had found the instrument to be valid, duly and regularly authorized, and on that ground had dismissed the bill, it would have been no bar to the future action for specific performance. But such is not this case, and consequently the reasoning and illustrations in the brief are not applicable. The main purpose of the former proceeding was to secure an adjudication relative to the validity or invalidity of the instrument here sought to be enforced. This issue was presented by the pleading in that case, and was directly adjudicated by the decree of the court, which it had an undoubted right to do. It found that the instrument was void for want of authority; that Johnson was in no way bound by the action of Clise & Co.; that Clise & Co. had received no authority, direct or indirect, from Johnson, to make the contract; that the instrument was absolutely invalid, and consequently was no cloud upon the title of Johnson. Hence it is concluded that the relief sought, so far as it affected the title to the premises, could not be granted. The question there, and the question here, are precisely the same,

to wit, the validity or invalidity of the instrument sought to be enforced. Here the party seeks specific performance of a contract, and must necessarily establish his right to a decree of such performance by proving the validity of the instrument which he seeks to enforce. In the former suit Johnson denied the validity of the instrument, declared it was made without any authority from him, and sought to have it removed and canceled upon the record as being a cloud upon his title. This makes an entirely different case from any relied upon in the brief of counsel, but on the contrary brings the issue here presented directly within the principles contained in the following cases: In *Durant v. Essex Co.*, 7 Wall. 107, Mr. Justice Field, in his opinion, says: "The decree dismissing the bill in the former suit in the circuit court of the United States, being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice." In the case of *Bigelow v. Winsor*, 1 Gray, 299, this language is used: "One valid judgment, by a court of competent jurisdiction, between the same parties, upon considerations as well of justice as of public policy, is held to be conclusive, except where a review, an appeal, or rehearing, in some form, is allowed and regulated by law. No man is to be twice vexed with the same controversy. 'Interest reipublice ut finis sit litium.' To ascertain whether a past judgment is a bar to another suit, we are to consider—First, whether the subject matter of legal controversy which is proposed to be brought before any court for adjudication has been drawn in question, and within the issue of a former judicial proceeding, which has terminated in a regular judgment on the merits, so that the whole question may have been determined by that adjudication; secondly, whether the former litigation was between the same parties, in the same right or capacity, litigating in the subsequent suit, or their privies, respectively claiming through or under them, and bound and estopped by that which would bind and estop those parties; and, thirdly, whether the former adjudication was had before a court of competent jurisdiction to hear and decide on the whole matter of controversy embraced in the subsequent suit. It is no objection that the former suit embraced more subjects of controversy, or

more matter, than the present. If the entire subject of the present controversy was embraced in it, it is sufficient. It is *res judicata*." In *Foot v. Gibbs*, 1 Gray, 412, it was held that "a decree dismissing a bill in equity, after a hearing, is a bar to a subsequent bill between the same parties, for the same subject-matter, unless it appears by the record that the dismissal was 'without prejudice,' or otherwise not upon the merits." In *Foster v. The Richard Busted*, 100 Mass. 409, the rule is announced that "there is no essential difference between the effect of a decree in equity and of a common-law judgment, in this respect. A bill regularly dismissed upon the merits where the matter has been passed upon, and the dismissal is not without prejudice, is a bar to future proceedings, either in equity or at law; and, under similar circumstances, a judgment at law is a bar to future proceedings in equity." This doctrine is followed and affirmed in *Blackinton v. Blackinton*, 113 Mass. 231.

This being so, and recognizing the above principles, we have no alternative left but to say that the action of the court below in overruling the demurrer to the fourth defense was right, and that the former proceedings constituted an absolute bar to the action.

The judgment will be affirmed.

(3 Colo. App. 159)

REDDICKER v. LAVINSKY et al.

(Court of Appeals of Colorado. Feb. 13, 1893.)

NEGOTIABLE INSTRUMENTS—ACTION BY ASSIGNEE—EVIDENCE.

Under Gen. St. c. 9, § 103, providing that all notes or other instruments in writing whereby any person agrees to pay money or other personal property to another shall be taken to be due and payable to the person to whom they are made, one cannot recover as assignee of such instrument without specific proof of an assignment.

Error to Chaffee county court.

Action by Charles Reddicker against S. Lavinsky and others. Defendants had judgment, and plaintiff brings error. Affirmed.

J. B. McCoy, for plaintiff in error. Libby & Martin, for defendants in error.

REED, J. Plaintiff in error was plaintiff below; brought suit against the defendants before a justice of the peace. The case proceeded to trial, and, after the plaintiff had closed his evidence, defendants moved for nonsuit on the ground that it was shown that the plaintiff was the assignee of the claim, and, as such, could not maintain the suit. The motion was overruled, and a judgment entered for \$21 and costs. An appeal was taken to the county court, where the proceedings had before the justice of the peace were duplicated; the same motion made at the same stage of the proceedings, which was sustained; and a judgment entered dismissing the suit at the cost of the plaintiff, from which a writ of error was sued out to this court. The only question presented is whether the court erred in

sustaining the motion. Section 103, Gen. St., cited and relied upon by counsel of plaintiff, occurs in chapter 9, entitled "Bonds, Bills, and Promissory Notes," and is as follows: "All promissory notes, bonds, duebills, and other instruments in writing, made by any person, whereby such person promises or agrees to pay any sum of money, or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom the said note, bond, bill, or other instrument in writing is made." It will be observed that by the wording of the section relied upon, in order to bring the claim within its provisions, it must be an instrument in writing, acknowledging an indebtedness, and promising payment, which may be made either in money or personal property. Two abstracts of the record, one by each of the parties, are filed, in neither of which is there any of the evidence given showing the nature of the claim, or that there was any chose in action that had been assigned; nor is the character of the supposed claim shown by an examination of the record, or disclosed in the argument; consequently we have no means of determining whether or not the claim was one made assignable by the statute. Error will not be presumed. Unless the error is shown, the presumption is against it, and in favor of the regularity of the judgment. It is therefore presumable that the supposed claim was not an acknowledgment in writing of an indebtedness and a promise to pay it, upon which an action could be maintained under the statute relied upon. Under our Code of Civil Procedure almost any surviving right of action may be assigned so as to enable the assignee to maintain a suit in his own name. By section 3 of the Code it is declared: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." With proper proof, perhaps, this action might have been maintained, but there was an absolute want of proof of the existence of any legal right of action, and no proof of any assignment whatever; consequently the judgment must be affirmed.

(50 Kan. 702)

KNAUBER et al. v. WATSON.

(Supreme Court of Kansas. Feb. 11, 1893.)

CONTINUANCE—APPLICATION FOR—DILIGENCE IN MAKING—NEW TRIAL—DISCRETION OF COURT.

Where an application and affidavits for a continuance are received by mail upon the same day a case is assigned for trial, but after a judgment has been rendered, in the absence of the defendants, and it appears that the term of court convened upon the first Monday in September, and the case was assigned for trial on the 24th day of that month, *held*, that while the showing was sufficient to have entitled the defendants to a continuance, if presented in proper time, the defendants did not exercise proper diligence in presenting such application, especially when the cause for such continuance was known at or near the commencement of the term of court; and *held*, fur-

ther, that the district court did not abuse its discretion in refusing to grant the defendants a new trial on the ground of accident and surprise which ordinary prudence could not have guarded against.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Johnson county; J. P. Hindman, Judge.

Action by James Watson against Michael Knauber and another to correct a deed. Plaintiff had judgment, and defendants bring error. Affirmed.

Maloy & Kelley and Parker & Seaton, for plaintiffs in error. McGrew & Watson, for defendant in error.

GREEN, C. This was an action brought by James Watson against Michael and Anna Knauber, in the district court of Johnson county, to correct a mutual mistake in a deed to 40 acres of land. The plaintiff asked that the deed be reformed so as to make it the joint deed of the grantors. To this petition the defendants first interposed a demurrer, which was overruled. The defendants afterwards filed a verified answer denying the general allegations of the petition. The case was docketed for trial on the 24th day of September, 1888. The defendants and their attorneys lived at Council Grove, in Morris county. The case was called for trial between the hours of 11 and 12 o'clock of the day upon which it had been assigned for trial. No one appeared for the defendants, and judgment was rendered against them. It seems that on the 21st day of September, 1888, the defendants prepared an application for a continuance at Council Grove. This application was supported by the affidavit of the family physician, showing the condition of Anna Knauber,—that she had been under his immediate care for four weeks; that it was impossible for her to leave her bed, and that she could not give evidence in court. The husband made an affidavit showing the wife's sickness, and the materiality of her evidence. One of the attorneys for the defendants made an affidavit establishing the fact that, since he had learned of Mrs. Knauber's sickness, he had attempted to get a statement from her as to what her evidence would be, but that she had been too sick to furnish such evidence, and he could not, therefore, take her deposition. The application and affidavits were all prepared on the 21st day of September. By the affidavit of J. W. Parker, an attorney at Olathe, it appears that the application and affidavits addressed to the firm of which he was a member were taken by him out of the post office about 1 o'clock P. M.; that at the same time he received a letter employing him as attorney in this case; that he filed the application and affidavits for a continuance upon the opening of court, at 2 o'clock in the afternoon of the same day the judgment was rendered; that he then first learned that the case had been disposed of. The defendants thereupon filed a motion for a new trial upon the following grounds: First, accident and surprise which ordinary prudence could not have guarded against; second,

that the judgment and decree are not sustained by sufficient evidence. The court overruled the motion, and the plaintiffs in error bring the case here upon the two assignments of error.

It is contended by the plaintiffs in error that the record shows that they were diligent in their preparation of their application for a continuance. We are of the opinion that the showing made was sufficient to entitle them to a continuance. But the real question for us to decide is whether the defendants were diligent in making their application. The case was one of sickness, which would naturally appeal to the judgment of the court. According to the affidavit of the family physician, Mrs. Knauber had been sick at least four weeks. The attorney does not state when he first learned of her sickness. It would seem that her sickness was of such a character that it must have been known to the husband or her attorney that she would not be able to attend court, or to have her deposition taken. Upon such a state of facts it was clearly the duty of her attorney to have made a showing for a continuance in proper time. The September term of court in Johnson county commenced on the first Monday. Applications for continuance should not ordinarily be made so late in the term unless the cause for such continuance arose subsequent to the commencement of the term. There is no showing made as to when the application and affidavits were mailed at Council Grove. If mailed, as stated by counsel for plaintiffs in error in their brief, at once after they were sworn to, on the 21st, they should, by due course of mail, have reached Olathe before noon of the 24th. We are of the opinion that the plaintiffs in error did not show such diligence as to make it an abuse of discretion in the trial court to refuse to grant a new trial on the ground of accident and surprise which ordinary prudence could not guard against.

Upon the second assignment of error, that the judgment is not sustained by the evidence, the record fails to show that the evidence is all here. Hence we cannot determine that question. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 712)

#### STEVENS v. STATE.

(Supreme Court of Kansas. Feb. 11, 1893.)

BASTARDY—SECONDARY EVIDENCE—FOUNDATION FOR—WITNESS—PRIVILEGE OF.

1. In a prosecution for bastardy, where secondary evidence as to the contents of a letter claimed to have been written by the relatrix is sought to be introduced, it must be first established by competent evidence that the letter was written by the relatrix, or signed by her, in addition to satisfactory proof of the loss of the writing, to entitle a party to give secondary evidence as to the contents of such letter.

2. Where, in a prosecution for bastardy, a witness declines to answer the question as to whether he had intercourse with the relatrix, on the ground that his answer might render him

liable to a criminal prosecution, he cannot be required to answer if it reasonably appear that the answer would expose him to such prosecution, or if the fact upon which he is interrogated would lead to his conviction of a crime.

(Syllabus by Green, C.)

Commissioners' decision. Error to district court, Douglas county; A. W. Benson, Judge.

Thaddeus Stevens was convicted of bastardy, and on the judgment entered he brings error. Affirmed.

Geo. J. Barker and J. W. Green, for plaintiff in error. Riggs & Nevison and Fenlon & Fenlon, for the State.

GREEN, C. This was an action brought under the act providing for the maintenance and support of illegitimate children. Sidney Brewer, an unmarried woman, charged Thaddeus Stevens, the plaintiff in error, with being the father of her bastard child. A trial was had in the district court of Douglas county, and he was found to be the father of the child, and adjudged to pay the sum of \$2,000 for securing the maintenance and education of such child. The plaintiff in error brings the case here, and relies upon two assignments of error for a reversal of the judgment.

It is first contended that the district court erred in excluding certain evidence offered by the defendant in the district court. John Heathman was produced as a witness for the defendant, and an effort was made to prove the contents of a letter claimed to have been written by the prosecutrix to Richard Heathman. It is urged that the proper foundation was laid for the introduction of secondary evidence. The prosecutrix stated upon her cross-examination that she had never written a letter to Richard Heathman in her life. Three witnesses, including John and Richard Heathman, swore that they did not know the handwriting of the prosecutrix, and had never seen her write. This evidence, coupled with the further fact that a letter had passed through the post office at Sigel, directed to Richard Heathman, and signed "Sid," was all the court had to authorize the admission of secondary evidence. The evidence did not establish the fact that the letter was in the handwriting of the prosecutrix, or signed by her. It did not even appear that the evidence was competent or material. We are clearly of the opinion that the court committed no error in excluding secondary evidence as to the contents of this letter.

The second assignment of error is that the district court erred in refusing to compel the witness Richard Heathman to give evidence as to his having had sexual intercourse with the prosecutrix. The witness declined to answer the question, for the reason that it might render him liable to a criminal prosecution. The record shows the following: "Question. State whether you ever had sexual intercourse with Sidney Brewer during the year 1886. Answer. No, sir. Q. State whether you had sexual intercourse with her during the year 1887. A. I decline to answer that question. Mr. Riggs: I ask, upon behalf of the prosecuting witness, that the witness be compelled

to answer. I am perfectly willing that he should answer, within proper limits, of course. The Court: They are entirely willing that you should answer. You are at liberty to do so if you choose. The prosecuting witness is willing that you should answer. Q. State whether you had any intercourse with her during 1887. A. I decline to answer. Q. Why do you decline to answer? A. I decline to answer for the reason that it might render me liable to a criminal prosecution. Q. By the Court: Are you a married man? A. No, sir. The Court: It is your privilege to refuse to answer if you see fit to do so. The woman is willing you should answer, but it is for you to say whether you will or not. You are not obliged to do so. Q. I will ask you again to state whether you had sexual intercourse with the prosecuting witness during the month of May, 1887. A. I decline to answer. Mr. Hutchings: If the court please, I insist upon his being required to answer that question. The Court: I shall not require him to answer. I think it would be a violation of his constitutional privilege. I think it would be such error as would reverse the case most certainly. I may be wrong, and if I am I may be set right; but, looking at it as I do now, I will overrule the motion." The right of a witness in such a case as this has been stated: "A witness cannot be compelled to answer any question the answering of which may expose, or tend to expose, him to a criminal charge, or to any kind of punishment. He is exempted by his privilege from answering not only what will criminate him directly, but also what has any tendency to criminate him; and the reason is because otherwise question might be put after question, and, though no single question may be asked which directly criminales, yet enough might be got from him by successive questions whereon to found against him a criminal charge." 2 Phil. Ev. 930; 1 Greenl. Ev. § 451; Whart. Crim. Ev. § 463. The rule, as we understand it, is to require the witness to answer when it is apparent to the court that an answer would not interfere with his legal right and privilege. If, however, the fact upon which he is interrogated forms but a single link in the chain of evidence which would lead to his conviction, he is protected; and this is a matter for the court to determine under the facts and circumstances surrounding each case. The supreme court of Indiana stated the rule in the case of Ford v. State, 20 Ind. 541: "Where a witness, called by the defendant in a prosecution for bastardy, declines to answer whether he has had intercourse with the relatrix, on the ground that his answer would tend to criminate himself, the court cannot compel an answer; nor can the witness be required to answer questions tending to show that the intercourse, if any, was not under such circumstances as would constitute a crime under the statute." The court further holds that, "after the witness claims his privilege, the defendant may show by other witnesses that the circumstances were such that the act of intercourse would not have been criminal; and when it is thus made clear that the



right to be silent does not exist, the witness may be compelled to answer." There was no showing of the kind in this case, and the trial court must have been of the opinion that the answer might have exposed the witness to a criminal prosecution. The relatrix was under 21 years of age, hence the answer might have had a tendency to establish the fact that the witness had violated paragraph 2157 of the General Statutes of 1889, providing for the punishment of persons for obtaining illicit connection under promise of marriage, or paragraph 2369 of the same statute, fixing a penalty for open adultery. We find no error in the record, and therefore recommend an affirmance of the judgment of the district court.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 672)

WICHITA UNIVERSITY OF REFORMED CHURCH IN UNITED STATES v. SCHWEITER et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

GUARANTY—CONDITION OF—COLLATERAL AGREEMENT—EVIDENCE.

1. Where various parties sign and execute a written instrument reciting, among other things, that "whereas, divers persons have undertaken and promised to pay and secure to the Wichita University of the Reformed Church in the United States, as a building fund, the sum of \$25,000, to be paid as follows: 25 per cent. on the completion of the foundation of the proposed university building, 25 per cent. when the walls of the building are completed, 25 per cent. when the building is under roof, and the remaining 25 per cent. on the completion of the building: Now, therefore, we, the undersigned, hereby bind ourselves jointly and severally to the board of trustees of said university that the full sum of \$25,000 shall be paid in the time and manner above mentioned," *held*, that it was competent for the signers thereof, when sued upon the writing, to show by parol that such instrument was a guaranty or collateral agreement to a written subscription of "divers persons" to the Wichita University for \$25,000, signed prior to the execution of the guaranty. When one contract refers to another, the two should be construed together in order to determine the nature of the obligations thereby imposed.

2. Where an action is brought by the plaintiff to recover a balance of money alleged to be due upon a bond or written obligation executed by the defendants, and the defendants in their answer allege that the written instrument sued upon was given as a guaranty of the performance of another written instrument or subscription list, executed by "divers persons" there-in mentioned, and further allege that the persons signing such other written instrument or subscription list had fully paid and complied with all the terms thereof, and thereby that the written guaranty had been fully released and discharged, and where to such an answer the plaintiff files a reply containing a general denial of the allegations therein, *held*, that after the defendants, under their answer, had offered evidence tending to show that the written bond or obligation sued upon referred to another written instrument or subscription list, and that such subscription list had been fully paid and performed according to its terms, it was competent for the plaintiff to show fully that the payments or conveyances made by the parties who had signed the subscription list were made by

them to the plaintiff without any reference to or in connection with the subscription, and were made or donated upon another and wholly different contract.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob M. Balderston, Judge.

Action on contract by the Wichita University of the Reformed Church in the United States against Henry Schweiter and others. Defendants had judgment, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

This action was brought on the 29th day of May, 1888, by the Wichita University of the Reformed Church in the United States against Henry Schweiter, M. C. Hutchings, W. S. Dixon, John F. Stites, and Wilber Stites, under the name of Stites Bros., and C. S. Eichholtz, to recover \$8,405.15, claimed to be due on the following written instrument: "Wichita, Kansas, November 22, '86. Whereas, divers persons have undertaken and promised to pay and secure to the Wichita University of the Reformed Church in the United States, as a building fund, the sum of \$25,000, to be paid as follows, to wit: 25 per cent. of said sum on the completion of the foundation of the proposed university building, 25 per cent. when walls of said building are completed, 25 per cent. when building is under roof, and the remaining 25 per cent. on the completion of the building: Now, therefore, we, the undersigned, hereby bind ourselves jointly and severally to the board of trustees of said university that the full sum of \$25,000 shall be paid in the time and manner above mentioned, and for the payment thereof we hereby bind ourselves and our heirs to the faithful payment of said sum; and in default of such payment the said sum, or the part thereof, on default, may be recovered in an action brought for that purpose. [Signed] Henry Schweiter. C. S. Eichholtz. W. S. Dixon. Stites Brothers. M. C. Hutchings." The defendants answered, and alleged that the writing sued on was executed to guaranty the payment of certain subscriptions made by "divers parties," a copy of which is as follows: "We, the undersigned, promise to pay the sum set opposite our respective names, donated for the purpose of erecting a college building for the Reformed Church, to the treasurer of the board of trustees of said college hereafter elected; said building to be built and maintained on 'College Hill,' on the half section line between the real estate now owned by C. C. Fees and H. L. Hill, in section 26, township 27, range 1 east, in Sedgwick county, Kansas. The said building to be constructed of brick and stone at an estimated cost of \$25,000. The subscriptions hereto are to be paid as follows: 25 per cent. on the completion of the foundation of said building, 25 per cent. when the walls are built to second story, 25 per cent. when the building is under roof, and the remainder on completion of the building. C. C. Fees, 20 acres of land, valued, \$10,000; C. S. Eichholtz, \$1,000; Henry Schweiter, \$3,000;

H. L. Hill, 10 acres of land, valued, \$5,000; Augustus Knight, \$500; M. C. Hutchings, \$500; Moore & Harris, \$500; A. C. Payne, \$500; Mary B. Allman, \$1,000; W. S. Dixon, \$1,000; Geo. H. Blackwelder, \$500; M. L. Henshaw, 2 lots Lincoln St. Add., \$400; C. Teter, 1 acre of land, or \$200; C. S. Eichholts, 'extra,' \$250; Geo. L. Rouse, \$100; G. W. Bartholomew, \$100; F. S. Smith, \$100; Merriam Park & Co., \$300; Chas. H. Hunter, \$100; Geo. W. Knorr, \$100; Wm. Gould, (when I sell enough off either farm,) \$200; Arthur Dishrow, 1 acre of land, or \$200; Hardy Solomon, \$50; I. H. Black, \$100; W. C. Newcomb, \$100; A. E. Shober, \$100; J. C. Richie, \$100; J. F. Sullivan, \$50; John B. Miltner, \$100; J. C. Rutan, \$50; M. R. Mosen, \$50; J. C. Schumacker, \$50." The petition further alleged that the contract of subscription had been fully performed according to the terms thereof, and therefore that the guaranty of the defendants had been fully discharged. Trial before the court with a jury. The instructions given to the jury were as follows: "You are instructed that the written instrument on which this suit is brought is, in legal effect, a guaranty that the persons who had theretofore agreed to contribute certain amounts for the erection of the university building of the plaintiff would perform the terms of such subscription and promises according to the terms of the subscription. The liability of the defendants as signers of the instrument sued upon is to be determined by the terms and provisions of the instrument itself and the subscription referred to in it, taken together. Evidence has been introduced sufficient to show that the subscription introduced in evidence is the subscription referred to in the instrument sued upon. (2) By the terms of that subscription and the bond sued on, construed together, \$15,000 of the amount which the defendants guaranteed should be paid to the plaintiff for the erection of its university building was to be paid in land. (3) If you find that any portion of the land subscribed and referred to in said subscription paper has been conveyed to plaintiff, then such conveyance would operate to extinguish and discharge the liability of the defendants upon the instrument sued on to the extent of the value of the land so conveyed as stated in the subscription. (4) And if you further find that the value of the land so conveyed as stated in the subscription, together with the sums of money paid by the subscribers, equals the amount which was due and payable at the time of the commencement of the action as specified in the instrument sued on, then you should find for the defendants. (5) The defendants claim that some of the subscribers to said fund subscribed certain real estate at the value fixed in the said subscription. If you find such to be the case, and further find that the directors of said university received the said land, and appropriated it to the uses of the said university, then they will be held to account for the same at the value which had been fixed thereon by the terms of said subscription, and the defendants would be entitled to have the same cred-

ited to their account in the settlement of any liability that might accrue under the undertaking above mentioned. And, although you may find that the plaintiff, after having received said land so subscribed, failed to convert the same into money for the purpose of being used as a building fund, but determined to use the same, and did use the same, as a campus for its university, it would nevertheless be held to account to said defendants for the value thereof as fixed in the said subscription. And upon the consideration of the whole case, if you find from the evidence that the land received by the plaintiff under said subscription at the values fixed therein, with the cash received by the plaintiff from said subscription, equaled or exceeded the amount due by the terms of each undertaking at the commencement of this action, then you must find for the defendants. (6) You are instructed that the burden of proof is upon the defendants to establish the fact that plaintiff was to look to said subscription list as the means by which to procure its building fund, and was not to look to the bond sued on except as a security or guaranty that the premises made in said subscription list should be performed. (7) You are further instructed that plaintiff must prove his case by a preponderance of the evidence. If the evidence is equally balanced, you will find for defendants. (8) You are further instructed that you are the judges of the credibility of the witnesses and the weight to be attached to the testimony of each and all of them. You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proven at the trial that said witness is mistaken in what is testified to by him, or if for any reason you consider his testimony is untrue or unreliable." The jury returned a verdict for the defendants, and subsequently judgment was rendered in their favor for costs. The plaintiff excepted, and brings the case here.

Harris & Vermillion and Rohrbaugh & Roach, for plaintiff in error. Stanley & Hume and Dale & Wall, for defendants in error.

HORTON, C. J., (after stating the facts.) It is contended that the trial court committed error in permitting the defendants to introduce testimony to identify the subscription list donating money and land to the Wichita University of the Reformed Church, and thereby tending to show that the written instrument signed by the defendants on November 22, 1886, was given as a guaranty of the performance of the terms of the subscription; and it is further contended that the court erred in construing the written instrument sued on in connection with the subscription as a guaranty or collateral agreement. It was claimed upon the part of the plaintiff that the instrument sued on was an independent agreement. On the part of the defendants it was claimed that the instrument was a guaranty or collateral agreement only, and that the subscribers had fully

performed the conditions of the subscription in the time and manner set forth in both instruments, and therefore that they were not liable. Upon the issues of the case, we think the court committed no error in permitting the defendants to identify the subscription list executed prior to the written instrument of November 22, 1886, as the instrument or paper referred to in the guaranty or collateral agreement. The language of the writing sued on refers to what "divers persons had undertaken and promised," and this instrument guaranties that said sum "shall be paid in the time and manner above mentioned." The evidence is uncontradicted that no other subscription paper was executed or signed than the one referred to in the answer. The court, therefore, committed no material error in stating that the written instrument sued on was, "in legal effect, a guaranty that the persons who had theretofore agreed to contribute certain moneys for the erection of the university building of the Reformed Church would comply with the terms of the subscription." After the defendants had established by the evidence—as we think, conclusively—that the instrument sued on was only a guaranty to the subscription list, they then offered testimony that the parties signing the subscription paper had fully complied with the terms thereof; that C. C. Fees, who subscribed 20 acres of land, and H. L. Hill, who subscribed 10 acres of land, conveyed the lands in full satisfaction of their subscriptions. The plaintiff offered to show that the Fees and Hill lands were donated for a college campus, and not conveyed in payment of the subscription made by them, nor under the terms thereof. As the defendants were permitted to offer testimony tending to show that the parties on the subscription list conveyed all the lands therein stated to the plaintiff in satisfaction of the subscription, it was also competent for the plaintiff to show that the lands so conveyed were not in satisfaction of the subscription, but were transferred under a different agreement between the plaintiff and the parties making the conveyances. It is contended that the plaintiff was not permitted to show fully that such conveyances were made without any reference to or connection with the subscription. In answer to this contention the defendants say that "the plaintiff, having repudiated the whole idea of the subscription being the original undertaking, and having from the first assumed that the subscription had no connection whatever with the instrument sued on, could not pursue the same line of evidence in support of its case that defendants pursued in making their defense. In other words, the theory of the plaintiff and of defendants in relation to the construction of the instrument sued on being wholly different, it would be altogether proper for either party to pursue a line of evidence in support of its theory of the case which the other party, pursuing an altogether different theory, would not be allowed to offer." This is not a correct statement of the law as applicable to this case. Even if the written instrument sued upon was executed as a guaranty

only, the plaintiff was entitled to recover any balance due thereon, unless the terms of the subscription had been fully performed. To defeat the plaintiff it was not only necessary to show that the written instrument was a guaranty or collateral contract, but the defendants had to go further, and prove that the subscription had been discharged by performance. Of course, if the plaintiff accepted any money or any land conveyed in full discharge of the terms of such subscription, it would be immaterial whether such subscriber had paid in full or not; but, in the absence of such acceptance and discharge, it would be incumbent upon the defendants to prove a full compliance by each party on the subscription list. This would include proof that the land conveyed was the same referred to in the subscription list, or that it was of the value therein stated. Therefore the plaintiff had the right to show that the land conveyed had no connection with the subscription alleged in the answer, and was made by the parties to the subscription list upon another or different contract. On account of the refusal of the court to permit the plaintiff to show fully that the conveyances of land referred to in the defendants' testimony were not made on account of the subscription, or with reference thereto, the cause will be remanded for a new trial.

JOHNSTON, J., concurring. ALLEN, J., not sitting.

(50 Kan. 659)

#### HILL v. MILLER et al.

(Supreme Court of Kansas. Feb. 11, 1898.)

ACTION TO SET ASIDE DEED — UNDUE INFLUENCE — SPECIAL FINDINGS — EVIDENCE — INSTRUCTIONS.

1. Evidence examined, and found that the court did not err in refusing to sustain a demurrer to the evidence of the plaintiff below.

2. Receiving evidence in a case after the plaintiffs had rested, and the defendant had introduced his testimony, is a matter largely within the discretion of the trial court; and held, in this case, that the supreme court cannot say that the district court abused its discretion.

3. Instructions considered, and found that the court committed no error in giving the same.

4. Instructions requested by defendant examined, and found that the court properly refused to submit them to the jury.

5. An examination of the record in this case shows sufficient evidence to support the special findings of the jury and judgment of the trial court in canceling a deed from N. H. to T. S. H. upon the ground of undue influence.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Neosho county; L. Stilwell, Judge.

Action to cancel deed by Orvilla Miller and others against Theron S. Hill. Plaintiffs had judgment, and defendant brings error. Affirmed.

Lapham & Brewster, for plaintiff in error. C. A. Cox and J. L. Denison, for defendants in error.

GREEN, C. This was an action to set aside a deed made by Newell Hill to his

brother Theron S. Hill, and dated June 4, 1887, and recorded the November following, to the S. E.  $\frac{1}{4}$  of section 14, in township 27, range 17, in Neosho county, alleged to be worth, at a reasonable valuation, \$4,000. The plaintiffs below, Orvilla Miller and Dora McCowan, were daughters of Newell Hill; Alice Hill was the widow of his son, Cicero Hill; and John was a grandson. Newell Hill, with his wife and children, formerly lived in Richwood, Ohio, where they owned a home, which they sold, and afterwards moved to the state of Illinois, where they purchased an 80-acre tract of land, taking the title in the name of the wife. The family moved upon this land, and improved it. The wife died in March, 1875. The farm was sold, the children joining in the deed with the father. The family came to Kansas, and the land in controversy was purchased, and the title was taken in the name of the father, Newell Hill. The family in Kansas consisted of the father, his son, Cicero, and daughters Dora and Nora. Orvilla had married, and remained in Illinois. A house was built upon the land purchased, and the place was otherwise improved. In January, 1878, the son and daughter were married. The former, to Alice Hill, one of the defendants in error; the latter, to John McCowan. The daughter went with her husband, and the son and wife made their home with the father. The other daughter was married in March, 1882, to a man by the name of North, and went back to Illinois to live, and died there in 1883. The son and wife lived upon the farm with the father until February 14, 1887, when the former died. Of the marriage there was born one son, John, the minor defendant in error in this case. A short time after the son's death Newell Hill went to his neighbor and physician, and requested him to write to his younger brother, the plaintiff in error, who lived near The Dalles, in Oregon, where he was practicing medicine, to come to him and take charge of his property. This letter was dated the 17th day of February, 1887. The brother came in response to the communication. It is claimed by the plaintiff in error that he attempted to reconcile certain contentions which seemed to have arisen between Newell, upon the one part, and Alice and Dora upon the other, so that proper care would be given to his brother, and he could return to his home in Oregon, but that he was unsuccessful; that Newell finally proposed to Theron that he would deed him the land in controversy upon the condition that Theron would take care of him as long as he should live, see him decently buried, and assume a certain mortgage upon the place for \$400, and an indebtedness of about \$400 to another brother. It is claimed that, in compliance with this arrangement, Newell Hill deeded the land to his brother Theron S. Hill on the 4th day of June, 1887. Newell died the December following, and his heirs brought this action to set aside such deed.

Certain questions of fact were submitted to a jury. The court reserved all other issues, to be determined by it. The jury returned the following questions and an-

swers submitted at the request of the defendant below: "(1) Did Newell Hill execute the deed to the premises in controversy with a full understanding of what he was doing at the time of such execution? Answer. No. (2) At the time of the execution of said deed, was Newell Hill in possession of the ordinary mental faculties usual to men of his age? A. No. (3) At the time of the execution of said deed, was said Newell Hill suffering from any disease of the mind? A. He was infirm, and in his dotage. (4) If the jury answer the last question by 'Yes,' state what such disease was, and how long prior to said time he had been suffering from it? A. He suffered a number of years from rheumatism and dyspepsia. (5) Was said Newell Hill forced to execute said deed to T. S. Hill? A. Yes; by the stronger mind over the weak. (6) If the jury answer the last question by 'Yes,' state when and what kind of force was used. A. He was overpersuaded, and undue appliances resorted to, to obtain the same, when executing deed. (7) Did said Newell Hill, after the execution of said deed, speak about it to one or more persons? A. No. (8) At such times was he in possession of his ordinary mental faculties? A. For a man of his age and disease we do not believe he was." The court submitted the following questions to the jury of its own motion: "Question 1. Did Newell Hill, at the time he delivered the deed for the land in controversy to Theron S. Hill, possess sufficient mental capacity to enable him to deliver the deed in question, with an intelligent understanding by him, said Newell Hill, of the nature and effect of the transaction? Answer. No. Q. 2. Did Theron S. Hill obtain the deed for the land in controversy from Newell by the use of any undue influence? A. Yes."

1. The first error of which complaint is made is that the court should have sustained the demurrer of the defendant to the evidence of the plaintiffs. The evidence in this case is very voluminous. The evidence was conflicting. It was properly a court case, but the judge saw fit to submit certain questions of fact to a jury. We have read all of the evidence in the record, and cannot say that the plaintiffs failed to prove the allegations of their petition.

2. The second assignment of error is that the court allowed the plaintiffs, after they had rested their case, and after the defendant had introduced his evidence and excused his witnesses, to recall a witness for the purpose of cross-examination; that one of the attorneys for the plaintiffs made an unwarranted and false statement in regard to the hostility of such witness. As to the order of the trial, the examination of witnesses, and the reception of further evidence, all were within the sound judicial discretion of the court trying the case; and we are not prepared to say, from an examination of the record, that the court abused its discretion. The statement of counsel was to the effect that the plaintiffs had been misled; that the witness was hostile, and at another term of court had gone into the Indian Territory, at the solicitation of other parties.

These remarks were made to the court as reason why the plaintiffs should be permitted to recall the witness. We fail to see wherein the rights of the plaintiff in error were prejudiced by this action of the court.

The plaintiff in error complains that the evidence did not warrant the court in giving instructions 6 and 7, which read as follows: "(6) The evidence shows that Newell Hill, at the time of the alleged delivery of the deed, was a man well advanced in years, being of the age of 72 or 73, or thereabouts. Theron S. Hill was the brother of Newell Hill, and at the time of the transaction in question was probably, as shown by the evidence, about 54 years old. The evidence was also to the effect that Theron was a physician, and that, for some time prior to his obtaining the deed in question, he was living in the same house with his brother; the only other occupants of the house being a young man and his wife, who were tenants on the premises; that he (Theron) was engaged in taking care of his brother, nursing him in his sickness, and administering to his wants. Evidence has been introduced tending to show that Theron acted to some extent in the care of his brother in his professional capacity as a physician, but to what extent, and how much, you will ascertain from the evidence. The evidence further shows that Newell Hill was in poor health. The answer of the defendant, Theron Hill, alleges, and the plaintiffs admit, that at the time of the death of Cicero Hill, which was in February, 1887, the said Newell Hill was aged, infirm, and almost helpless; and there is no evidence that he substantially improved any for the better from that time until his death. (7) On such evidence in the case as is undisputed, and which I indicated in the preceding instruction, the relation existing between the two brothers at the time Theron obtained the deed in question is what, in the law, is called a 'fiduciary' or 'confidential' relation; and the law will require of Theron S. Hill the utmost degree of good faith in the transaction between him and Newell Hill which resulted in Theron S. Hill obtaining the deed. And where the relations existed between the two brothers as I have indicated in this and the preceding instruction, the law presumes, in the first instance, and in the absence of evidence to the contrary, that a brother occupying the relation to another brother that Theron occupied to Newell possessed that superiority and influence over Newell, and Newell reposed that degree of confidence and dependence in and upon Theron, which is the natural result of such relation; and under the circumstances, when such a condition of things is shown, the law shifts the burden of proof upon Theron S. Hill to show affirmatively, as far as practicable, that the obtaining of the deed in question was done without fraud, artifice, or other undue means, and that he gave a just and adequate consideration for the said deed. As to the consideration that was given, the defendant, Theron, alleges, in substance, that it was as follows: that he found his brother in a condition

requiring care and attention, of which he was destitute; that said Theron abandoned his business in Oregon, and promised and agreed with Newell Hill to care for his said brother, and maintain and support him, as long as he lived, and see him decently buried after his death; and to pay certain debts of the said Newell Hill. It was competent, in law, for the parties to make this contract; and if you find that such a contract was made, without fraud or undue means used by T. S. Hill to effect it, and that the consideration received by Newell Hill, under all the surrounding circumstances, was just and adequate, then the deed to Theron Hill is valid, and should stand." The answer of the defendant below alleged that his brother, at the time of the death of his son Cicero, was aged, infirm, and almost helpless; that, when he came to him, he was old and infirm. These admitted facts, taken in connection with the evidence, justified the court in giving these instructions. Complaint is made as to other instructions, but we think they are not subject to the objections urged by the plaintiff in error. The law was properly stated, in our opinion, in the instructions the court gave.

4. It is next contended that the court erred in refusing to give certain instructions requested by the defendant. Complaint is made especially in the refusal of the court to give the following instruction: "To be undue, the influence exerted must be equivalent to moral coercion. It is not enough to show that the grantor, Newell Hill, made a different disposition of his property than he intended. One may yield to the persuasion of affection or attachment, and allow such way to be exerted over his mind, and yet the law does not regard such influence as undue. He must have been constrained to do what was against his will; otherwise, the law will not interfere." We do not think the court erred in refusing this and the other instructions requested. The court submitted certain facts to the jury under proper instructions. The court, as a chancellor, reserved to itself the decision of the case. The rule as to mental weakness has been stated: "It is well settled that there may be a condition of extreme mental weakness and loss of memory, either congenital, or resulting from old age, sickness, or other cause, and not being either idiocy or lunacy, which will, without any other incidents or accompanying circumstances, of itself destroy the person's testamentary capacity, and, a fortiori, be ground for defeating or setting aside his agreements and conveyances. It is equally certain that mere weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. If, as is frequently, if not generally, the case, the mental weakness and failure of memory are accompanied by

other inequitable incidents, and are taken undue advantage of through their means, equity not only may, but will, interpose with defensive or affirmative relief. Finally, in a case of real mental weakness, a presumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness, and the capacity of the other party." Pom. Eq. Jur. § 947. "The doctrine of equity concerning undue influence is very broad, and is based on principles of the highest morality. It reaches every case, and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed. It is especially active and searching in dealing with gifts, but is applied, when necessary, to conveyances, contracts, executory and executed, and wills." Id. § 951. The rule was stated in the case of *Haydock v. Haydock*, 34 N. J. Eq. 574: "I take the rule to be settled that where a person, enfeebled in mind by disease or old age, is so placed as to be likely to be subject to the influence of another, and makes a voluntary disposition of that property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee." See, also, *Paddock v. Pulsifer*, 43 Kan. 718, 23 Pac. Rep. 1049, and authorities there cited.

5. The other errors complained of are that the court should have set aside the special findings of the jury, and granted the plaintiff in error a new trial. Substantially the same questions are raised by these assignments as those already considered. It will be observed that eight questions were submitted at the request of the defendant, and all answered by the jury. If there was no evidence bearing upon these questions, why should the defendant have asked the court to submit them to the jury?

An examination of the entire record in this case satisfies us that the district court stated the law correctly to the jury in submitting the special questions of fact; that there is evidence to support the findings of the jury and the judgment of the court. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 627)

#### CROSS v. THOMPSON et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

ACTION ON NOTE—CONSIDERATION—EVIDENCE—INSTRUCTIONS.

The record examined, and *held*, that no substantial error was committed by the trial court either in its rulings as to the admissibility of evidence, or in its instructions to the jury.

(Syllabus by the Court.)

Error from district court, Wilson county; L. Stilwell, Judge.

Action on a promissory note by Thompson, Blackstock & Co. against Marion Cross. Plaintiffs had judgment, and defendant brings error. Affirmed.

J. W. Sutherland, for plaintiff in error.  
Hudson & Reed, for defendants in error.

ALLEN, J. This action was brought by the defendants in error against Marion Cross on a promissory note for \$100, and interest, dated April 30, 1886. The note was payable to Charles C. Putt & Co., and by them indorsed to plaintiffs. The defendant admitted the execution of the note, and alleged that the only consideration therefor was a certain horse bought by the defendant and others from Charles C. Putt & Co. for \$1,500. He alleges that \$800 of the purchase price had been paid; that the horse was warranted to be sound and healthy, and a safe foal getter and breeder; and claims that the note is still the property of Putt & Co. He claims that the horse was not as warranted, and the \$800 paid is more than the horse is fairly worth. A jury trial was had, resulting in a verdict in favor of the plaintiffs for \$100, on which judgment was entered. No question is raised by the defendants in error as to the jurisdiction of this court, though it will be perceived that the amount for which judgment was rendered, exclusive of costs, is exactly \$100.

We are not asked to decide whether this case falls within the provision of section 1, c. 245, of the Laws of 1889. As the view we take of this case compels an affirmation of the judgment, we do not deem it necessary to consider the jurisdictional question. Many exceptions were preserved to the rulings of the trial court on the admission of evidence before the jury. We have carefully and patiently examined the records, and are unable to perceive any material error in that respect.

It is claimed that the court erred in refusing to permit the defendant to show the meaning of the terms "breeder and foal getter," as set out in the guaranty mentioned in defendant's answer, by showing what was said between the parties at the time the guaranty was written. The meaning of the terms used seems to us clear, and we fail to perceive any materiality in the testimony offered. The question as to the condition and performance of the horse was testified to very fully by numerous witnesses, and the question as to whether he complied with the terms of the guaranty was fairly submitted to the jury.

It is also contended that the court erred in refusing to require one of the plaintiffs, Blackstock, to answer the following question: "What is your usual course with reference to commercial paper, taken in the way this was taken from Putt & Co.?" And also in refusing to require Fred T. Putt to answer the following question: "Did you ever sell them any notes that were not good but what you would make them good?" We perceive no error in the ruling of the court on this testimony.

Counsel for the plaintiff in error also contends that the court erred in its instructions to the jury, because it failed to state that, in order to cut off defenses which the defendant might have had against the payee of the note, it must appear that the holder took the paper in the usual or regular course of business. The

Instructions in the case were full, and we think stated the law correctly. While it is true that the phrase "in the usual or regular course of business" does not occur in so many words in the instructions, we think, taken as a whole, it fairly includes the idea. We have examined the cases cited by the counsel for the plaintiff in error from 37 Conn. 205, (*Roberts v. Hall*), and 48 Ark. 454, 3 S. W. Rep. 805, (*Tabor v. Bank*), and they uphold the doctrine to which we assent,—that, in order to protect the plaintiff against defenses, the paper must have been taken in the usual and regular course of business. We fail to discover anything in this case which shows that the transaction between Putt & Co. and the plaintiffs was unusual. Plaintiffs were bankers. They bought this, with other notes, from Putt & Co., and placed the amount paid for the notes to the credit of Putt & Co. in their general account. The transaction, so far as the evidence discloses, is entirely regular. The cases to which we are cited show an entirely different state of facts. The Connecticut case shows a transfer by the payee to the holder to collect and apply the proceeds to pay certain debts of the payee, and the balance to be paid to the plaintiff's wife. Under these circumstances, the holder of the note could neither claim to be an innocent purchaser for value, nor to have bought the same in the usual course of business. The question as to good faith of the plaintiffs in purchasing the note was fairly submitted to the jury. The jury found a verdict for the plaintiffs for \$100 only. If the plaintiffs were bona fide holders of the notes in such manner as to cut off all defenses existing between the original parties to the instrument, they were entitled to interest, as well as the principal, which plaintiff in error contends amounted to \$22.35. Plaintiff in error contends, therefore, that the jury found in his favor on the question of good faith in the sale of the note by Putt & Co. to Blackstock & Co. If we concede this claim of plaintiff in error to be correct, as there was much conflicting evidence as to quality, value, and performance of the horse, the verdict of the jury seems to be conclusive on the whole matter, and we do not see how he was prejudiced by a failure of the court to instruct the jury that, in order to cut off defenses between the original parties, the note must have been taken in the usual course of business. On the whole record, we find no substantial error prejudicial to the defendant below, and the judgment will be affirmed. All the justices concurring.

(50 Kan. 773)

VAUGHN v. HIXON, Sheriff, et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

VENUE—CHANGE OF—DISCRETION OF COURT—ESTOPPEL.

1. The granting of a change of venue in a civil action is to a great extent within the discretion of the trial court.

2. Where a trial court grants a change of venue on the written application of one of the parties in a civil action, upon the ground that a fair and impartial trial cannot be had in the

county where the action is pending, and subsequently the parties agree in open court for the trial of the action to take place in another county, and the trial takes place according to the agreement, no complaint can be had by either party concerning the place of the trial.

3. Where there is an attempt to apply the doctrine of estoppel, one essential in such a case is that the party in whose favor it is invoked must himself act in good faith.

(Syllabus by the Court.)

Error from district court, Meade county; Francis C. Price, Judge.

Replevin by T. A. Vaughn against John W. Hixon, sheriff, and others. Defendants had judgment, and plaintiff brings error. Affirmed.

W. W. Noffsinger and R. C. Palmer, for plaintiff in error. Rossington, Smith & Dallas, for defendants in error.

HORTON, C. J. This was an action of replevin, brought by T. A. Vaughn, claiming to be the owner of certain goods, wares, and merchandise, of the alleged value of \$1,000, located in Fargo Springs, in this state. The property had previously been attached in an action instituted by Smith, Heddens & Co. against Mills Bros., and, while the property was in the possession of the sheriff, the goods were replevied. The action was originally brought in Seward county, but was afterwards taken on change of venue to Haskell county, and subsequently, by agreement of parties, was transferred to Meade county, where, on the 17th day of September, 1889, the case was tried to the court, a jury being waived, and judgment rendered for the defendants. Plaintiffs below excepted to the rulings and judgment of the trial court, and bring the case here.

It is contended that there were no sufficient reasons presented to the district court of Seward county to grant a change of venue. The change having been granted, this court will not interfere. The granting of a change of venue in a civil action is to a great extent within the discretion of the trial court; and where it does not appear that such discretion was abused, or that any substantial right of the objecting party was materially affected by the change, this court will not reverse an order of the district court granting the change, although it may not appear that the district court was clearly bound to do so. Section 56, Code Civil Proc.; *Waterson v. Kirkwood*, 17 Kan. 9. Further, the record shows that, after the venue was changed to Haskell county, the parties agreed in open court for the trial of the action to take place in Meade county. The trial took place by consent in that county.

It is next contended that the district court erred in overruling the motion for a new trial, because of a want of failure of evidence to sustain the judgment. The trial court made a general finding that the plaintiff was not the owner of the goods, wares, and merchandise in controversy at the commencement of the action, and that he was not entitled to the possession thereof; that his pretended purchase of the stock of goods was without valuable consideration; and that the pre-



tended sale to him by Mills Bros. was fraudulent. The court made the further finding that the defendants were in the lawful possession of the stock of goods at the commencement of the action, under the attachment proceedings commenced in the district court of Seward county, and that the value of the stock of goods at the commencement of the action was \$1,000. The important question of fact for the trial court in this case was whether the sale by Mills Bros. to Vaughn was a bona fide transaction, made in good faith, or made only for the fraudulent purpose of defeating creditors in the collection of their debts. Upon that question, after hearing the testimony, the court found for the defendants, and against the plaintiff. The evidence was conflicting, but the court saw the witnesses, heard what they had to say, and we think that there is sufficient in the record, under the general rule, to prevent this court from interfering. *Railway Co. v. Kunkel*, 17 Kan. 145. In cases brought here on error from a trial upon oral testimony this court is not a trier of questions of fact. Counsel admit this, but claim there was no evidence whatever to sustain the verdict. We cannot agree with this conclusion.

It is further contended, as Vaughn accepted an order from Mills Bros. to Smith, Heddens & Co. to pay their debt or a part thereof from the proceeds of the sale, defendants were estopped from questioning the validity of the sale by Mills Bros. to Vaughn, even though it were originally fraudulent. This, perhaps, would be true if Smith, Heddens & Co. accepted the order with full knowledge of all the facts subsequently claimed by Vaughn and Mills Bros.

At the time the order was obtained, Smith, Heddens & Co. believed from the statement of the parties that the stock would invoice from \$900 to \$1,000, and that \$225 only had been paid. When the delayed inventory was finally produced, it only showed \$473 worth of goods on hand. Therefore, under the circumstances, we do not think Smith, Heddens & Co. were estopped. If Smith, Heddens & Co. were induced by the fraud of the parties to take the order accepted by Vaughn, they ought not to be bound thereby. By commencing their attachment proceedings, they have repudiated that order, and cannot recover thereon. In order to apply the doctrine of estoppel, the party in whose favor it is invoked must himself act in good faith. The case was tried before the district judge, without the intervention of a jury, and we do not find any exceptions taken to the admission of the evidence complained of. A motion was made to strike out some of the evidence after it had been received. The court allowed the motion in part, and refused it as to other matters. If any error occurred in this, we do not think it sufficiently material to reverse the judgment.

Finally, it is contended that there was error in assessing damages. The court rendered judgment for \$1,170.50. On the 9th of March, 1887, Mills Bros. were indebted to Smith, Heddens & Co. for \$1,137.27. The attachment proceedings were for the recovery of that amount. The value of

the goods replevied was \$1,000, and the court found that the return of the goods could not be had, because the plaintiff had sold and disposed of the same. The replevin proceedings were commenced on the 3d of November, 1887. Five per cent. interest was allowed from the 1st of December, 1887, amounting to \$107.50. The court committed no error in the amount of the recovery, if the judgment was otherwise correct.

We have examined all of the other alleged errors, but perceive nothing sufficient therein to require a reversal. The judgment of the district court will be affirmed. All the justices concurring.

(50 Kan. 766)

#### NEIDERLANDER v. STARR.<sup>1</sup>

(Supreme Court of Kansas. Feb. 11, 1893.)

FACTORS AND BROKERS — ACTION FOR COMPENSATION — EVIDENCE.

The testimony examined, and held, that the court did not err in sustaining the demurrer thereto.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Sedgwick county; C. Reed, Judge.

Action on contract by N. F. Neiderlander against Joseph Starr. Defendant had judgment, and plaintiff brings error. Affirmed.

E. W. Moore, for plaintiff in error. Stanley & Hume, for defendant in error.

STRANG, C. Action on contract for \$400 alleged by the plaintiff to be due and owing to him from the defendant as a commission on the sale of real estate. The plaintiff introduced his evidence, and rested. The defendant demurred to the evidence, and the demurrer was sustained by the court. The plaintiff brings the case to this court, and alleges that the trial court erred in sustaining the demurrer to his evidence, and that is the only question before this court.

The plaintiff's evidence showed that he had the farm of the defendant on his books for sale. That Jacob Dold wanted to buy a farm, and Neiderlander and one of his men showed Dold several farms for sale, and among others they took him to see the Starr farm. Starr and wife were not at home, but their sons showed the farm, and, as Neiderlander and Dold were returning to Wichita, they met Starr and wife. Neiderlander informed them he had been showing Dold their farm, and Starr said he would call at Neiderlander's office next day, and see them. When he called next day, they talked the matter over. Starr at first wanted \$16,000 for the farm, but finally agreed to take \$15,000, and also agreed to pay Neiderlander \$400 commission for selling the land at \$15,000. A few days after a contract was drawn up and signed by Dold, and also by Starr and wife, which embodied the terms and conditions of the agreement between the parties when they had talked the matter over. This contract provided for the payment of \$2,000 cash, the assumption of

<sup>1</sup> Rehearing pending.

an incumbrance of the land, and the giving of two notes, for \$3,000 each, to be secured by mortgage on the land. After Starr and wife had signed the contract, they learned that the notes and mortgages and the \$2,000 in cash had not yet been received by Neiderlander. Dold lived in Buffalo, N. Y., and the notes and mortgages had been sent there for execution, and had not yet returned. The \$2,000 was to be turned over to Neiderlander by Dold's son, who lived in Wichita, and was doing business there in connection with his father, whenever Neiderlander requested it. Dold had directed his son to pay it over when called on for it. When Starr and wife found the notes and mortgages and the \$2,000 were not in Neiderlander's hands, they asked to have their names stricken off of the contract, and that was done. But they said they would carry out the contract, as agreed upon, as soon as the notes and mortgages and money came. When the notes and mortgages reached Neiderlander, he notified Starr through the mail, but heard nothing from him. He then saw Starr, and told him the papers had come, and they were ready to close up the contract. Starr then said he did not think he wanted to do so. Neiderlander never had the money in his hands. To prove that the money was ready he put young Dold on the stand. This young man's evidence was very badly confused, and quite indefinite, and the court undoubtedly sustained the demurrer to the evidence on the ground that the plaintiff failed to show that Dold was at any time ready to comply with the terms and conditions of the contract.

There is but one question in this case. Did the trial court err in sustaining the demurrer to the evidence? We have examined the evidence very carefully, because somewhat in doubt as to the correctness of the ruling of the court below. We have finally reached the conclusion that we are not required, by the record in this case, to reverse the action of the trial court. By the terms of any agreement shown by the record for the sale of the land, upon which the plaintiff bases his claim for commission, \$2,000 of the purchase money was to be cash in hand. The contract of sale for said land, prepared by the plaintiff, not only provided that \$2,000 of the purchase price should be cash in hand, but the receipt of said \$2,000 was acknowledged in the contract. But, when the contract was signed by the Starrs, it was learned that the plaintiff did not have the \$2,000 in cash to pay them, because of which, and the fact that the notes for the deferred payments and mortgages were not ready to be put in escrow, their names were scratched off of the contract; and though the plaintiff afterwards received the notes and mortgages, and then notified the defendant that the papers had come, and he was ready to complete the business of the sale, yet the evidence shows that he did not at that time have the \$2,000 in cash ready to pay over to Starr, and that in fact he never did have said money in his possession, ready to pay over to Starr. The plaintiff's notice to the defendant that he was

ready to conclude the deal was unavailing so far as binding Starr is concerned; for the reason that the evidence shows that the plaintiff was not ready to close the trade, because he was not in possession of the money to make the cash payment. The plaintiff put the young man, Dold, on the stand, to show ability on the part of his father, the vendee in the contract with the Starrs, to pay the purchase money. It might be said that such evidence was not very material; for though Dold, Sr., was able to pay for the land as per contract, he was never exactly ready to pay, because his money was never turned over to the plaintiff for the purpose of making the payment. But, if it were material, the young man's evidence was so confused, indefinite, and contradictory, that we would not feel like reversing the judgment of the court below on account of it. We therefore recommend that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 644)

FRICK CO. v. FALK et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

SALE—WARRANTY—BREACH OF—NOTICE OF DEFECT—EVIDENCE.

1. Where a machine is purchased which does not meet the conditions of the contract, and the defect is one that can be easily repaired, it is the duty of the injured party to take reasonable steps to have the repair made, and to make the liability of the other as light as possible. Damages cannot be awarded upon the assumption that the defect is to continue indefinitely.

2. The evidence in the case examined, and found to be insufficient to sustain the findings of the jury.

(Syllabus by the Court.)

Error from district court, Edwards county; J. C. Strang, Judge.

Action on a promissory note by the Frick Company against Charles H. Falk and another. Defendants had judgment, and plaintiff brings error. Reversed.

W. H. Robb, for plaintiff in error. W. H. French, for defendants in error.

JOHNSTON, J. On January 5, 1885, Falk Bros. purchased from Frick Company an Eclipse steam engine for \$1,320, for the price of which they executed three promissory notes, in the sum of \$440 each, payable, respectively, December 1, 1885, December 1, 1886, and December 1, 1887. It was sold subject to a warranty, in which it was agreed that it was manufactured of good material, of good workmanship, and, by proper management, would perform well, if the rules and directions furnished by the manufacturers were intelligently followed. If it failed to operate according to the contract, written notice was to be given by the purchasers within 10 days, and reasonable time allowed for the seller to remedy the defects. If any defects were found, the sellers were required to remedy them; and, if the fault was in the engine, it was to be taken back, and any payments made were to be re-

funded. The engine was operated by the purchasers during the years 1885, 1886, and 1887, and the notes due December 1, 1885, and December 1, 1886, were paid by the purchasers. Default was made in the payment of the note due December 1, 1887, and on June 14, 1888, action was brought to recover upon that note. The defendants then alleged that the engine was not manufactured of good material and workmanship, and that it was unfit for the purposes for which it was purchased. They alleged that they had sustained damages in the amount of \$720, for which they asked judgment. At the trial the defendants claimed that the engine was defective in two particulars,—one, that the mud cleats furnished could not be properly fitted on the drive wheels; and another, that the spur pinion did not mesh deep enough in the gear of the machine. For these defects the jury, by their general verdict, allowed the defendants \$603.25 as damages. In answer to special questions, they stated that they allowed \$444.50 for the defect in the spur pinion, and \$158.75 on account of the defects in the mud cleats. The testimony is wholly insufficient to sustain these findings. The first two payments were made upon the engine without complaint, or the claim of any credits on account of defects in the engine. No notice was given that the pinion was insufficient within the time required by the contract, nor until 1887. It appears that the defect was not discovered until the engine had been used through two threshing seasons. In respect to the mud cleats, it seems that this defect was discovered soon after the purchase of the engine, and an attempt was made to have it repaired. It appears that the holes in the wheels through which the mud cleats were to be fastened to the wheels were too wide apart. A chisel was obtained from the plaintiffs, with which some of the holes were widened, and about one half of the cleats were fastened on. Altogether there were 32 holes necessary for fastening the cleats upon the wheels, and the testimony is that these could be drilled for 25 cents each. The limit of expense in remedying this defect would not exceed \$20, and one of the defendants, in estimating the cost of fitting them on the wheels, placed it at \$2.50; and yet the jury, upon this testimony, awarded the defendants \$158.75. It is true these cleats were necessary to the successful operation of the engine, and without them it would not perform as well as it should; but the defendants could not, by neglecting to have the repairs made for several years, enhance the damages which they might recover. Damages cannot be awarded on the assumption that the defect is to continue indefinitely. "It is the duty of a party who has suffered an injury for the nonperformance of a contract to take reasonable measures to make the injury or damages for which he intends to hold the other party liable as light as possible." *Lumber Co. v. Sutton*, 46 Kan. 192, 26 Pac. Rep. 444; *Town Co. v. Leonard*, 46 Kan. 354, 26 Pac. Rep. 717. It was shown that the repair could have been made at the neighboring shop for a trifling expense; and it

was the duty of the defendants to have had the repair made at once, and the expense of the repair, and any actual loss resulting from having it done, such as the loss of time, was the measure of their recovery. The actual loss shown by any of the testimony, however, is out of all proportion with that allowed by the jury. The testimony in respect to the liability of plaintiffs for the alleged defect in the pinion is not so clear, but, if any liability was shown, it was only a fraction of that allowed by the jury. It is very clear that the findings are not sustained by the testimony, and therefore the judgment will be reversed, and the cause remanded for another trial. All the justices concurring.

(50 Kan. 635)

### MILLS v. BOARD OF COM'RS OF NEOSHOCOUNTY.

(Supreme Court of Kansas. Feb. 11, 1893.)

#### HIGHWAYS—ESTABLISHMENT—VACATION.

1. A petition is necessary to confer jurisdiction upon the board of county commissioners in opening, altering, or vacating public roads.

2. Where the board of county commissioners have confirmed the report of viewers in favor of a public road, and have ordered it opened, they cannot, at a subsequent session of that body, without any petition therefor, or any notice thereof, reconsider their action ordering the road opened, and vacate said road.

3. The record examined, and *held*, that the court erred in dismissing the plaintiff's appeal over his objection.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Neoshocounty; L. Stillwell, Judge.

Henry Mills appealed from the action of the Neosho board of county commissioners in disallowing his claim for damages in establishing a highway over his land. After such appeal the board filed a disclaimer to said road, and the court dismissed the appeal, from which dismissal appellant brings error. Reversed.

Lapham & Brewster, for plaintiff in error. J. L. Denison and H. P. Farrelly, for defendant in error.

STRANG, C. On the 4th of April, 1888, a petition was presented to the board of county commissioners of Neosho county, praying for the opening of a certain highway across the land of the plaintiff in error and other lands. Viewers were appointed to view and lay out said road. When they met to assess the damages to the different landowners the plaintiff in error duly presented his claim for damages, which was entirely disallowed by said viewers. July 5, 1888, said board being in session, the road was ordered opened, and, the plaintiff's claim for damages was disallowed. The plaintiff then appealed to the district court. At the April meeting of the board in 1889 the commissioners reconsidered their action of July 5, 1888, in ordering said road opened, and then filed a disclaimer in the district court to said road, and asked the said court to dismiss the

case at their costs, which was done over the objection of the plaintiff. The plaintiff is here alleging that the court erred in dismissing the case over his objection. We think the contention of the plaintiff in error is just. The board of county commissioners, on July 5, 1888, confirmed the report of the viewers in respect to the road complained of by the plaintiff, and ordered it opened. It also disallowed the plaintiff's claim for damages. The plaintiff then had a right to appeal to the district court, and there have his claims for damages heard. There is nothing in the record that authorizes the court below to dismiss plaintiff's appeal against his wishes and over his objection. Paragraph 5474, Gen. St. 1889, provides for laying out highways, and also for vacating the same; and from this and subsequent paragraphs of the same chapter it will be seen that a petition and notice are necessary jurisdictional factors in the process of either securing or vacating a public road, and these jurisdictional steps are as necessary in order to vacate a road as to lay one out. *Troy v. Commissioners*, 32 Kan. 507, 4 Pac. Rep. 1009. In this case the board reconsidered its action in ordering a public road opened, and vacated the same, at a session subsequent to the one at which the road was ordered opened, and after one full session had intervened, without any petition asking the vacation of the road having been filed, and without any notice to the public, or any person interested. This action of the commissioners was unauthorized and void. "The order of the county board declaring a section line to be a public highway, or establishing a line of road thereon, and ordering it to be opened by survey of the county surveyor, is an establishment of a public highway on such line, which can only be vacated by pursuing the course designated in said chapter. Therefore, an order of a county board, afterwards made, declaring such highways 'no road,' without any proceedings by petition or otherwise by which they could obtain jurisdiction, held void." *McNair v. State*, (Neb.) 41 N. W. Rep. 1099. "Where the road records show that the board had reconsidered its action in establishing such road, but no authority therefor was shown, and no notice thereof given, and a regular meeting had intervened since the one at which such road had been established, such action was, in the nature of a new and independent proceeding to vacate a road, which, being without notice, was unauthorized and ineffectual." *Miller v. Schenck*, (Iowa,) 43 N. W. Rep. 225. The action of the board in reconsidering the establishment of the road at a subsequent session of that body, without any petition praying such action, and without any notice thereof, being ineffectual, was unavailing in the form of a disclaimer or otherwise on the part of the board to authorize the court to dismiss the appeal of the plaintiff. We therefore think the court erred in dismissing said appeal, and recommend that the order of the court so doing be reversed.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 787)

# UNION STOVE & MACH. WORKS v. CASWELL et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

SHERIFFS—AMERCEMENT—SATISFACTION OF JUDGMENT.

On a motion to amerce a sheriff for failure to serve an execution, where it appears that the judgment on which the execution is based had been in fact satisfied, and where it further appears that at the time of the hearing of the motion to amerce a judgment had been duly entered canceling the judgment on which the execution issued, *held*, that the trial court did not err in overruling the motion to amerce the sheriff.

(Syllabus by the Court.)

Error to district court, Pratt county; S. W. Leslie, Judge.

Proceedings by the Union Stove & Machine Works against James Ryan, sheriff, and John D. Caswell, to amerce defendant Ryan for failure of official duty. On the judgment entered the Union Stove & Machine Works bring error. Affirmed.

R. F. McGrew, for plaintiff in error. Bowman & Bucher and Charles H. Apt, for defendants in error.

ALLEN, J. This was a proceeding instituted in the district court of Pratt county, Kan., to amerce James Ryan, sheriff of Harvey county, for failure to properly serve and return two certain executions. On the 8th day of December, 1886, the plaintiff in error recovered a judgment in the district court of Pratt county, Kan., against J. D. Caswell for the sum of \$963.98 and costs. On December 20, 1886, a transcript of the journal entry of said judgment was filed in the office of the clerk of the district court of Harvey county. On the 12th day of March, 1887, the plaintiff caused an execution to be issued thereon to the sheriff of Harvey county. This execution the plaintiff alleges was never returned. Afterwards, on the 23d day of July, 1887, the plaintiff caused another execution to be issued, also to the sheriff of Harvey county, and directed said sheriff to levy on certain real estate situated in the city of Newton. The sheriff returned this execution "No property found," March 28, 1888. On March 27, 1888, Smedley Darlington commenced an action in the district court of Harvey county, against John D. Caswell and wife, the Union Stove & Machine Works et al., defendants, to foreclose a mortgage executed by Caswell and wife on certain property in Harvey county. No issue was joined by any of the defendants with the plaintiff. Judgment of foreclosure was entered in his favor. The Union Stove & Machine Works filed its answer, setting up its judgment before mentioned against the Caswells, alleging the filing of the same in the office of the clerk of the district court of Harvey county, claiming a lien by reason thereof on the property described in the plaintiff's mortgage, and asking a foreclosure of its lien, subject only to the claim of the plaintiff. To this answer the defendants, Caswell and wife, filed a reply, admitting the rendition of said judgment, and alleging, among other things, that

since the rendition of said judgment, and on December 12, 1886, one William Fisher, being then and there indebted to said Caswell in a sum greater than the amount of said judgment, assumed payment of the same. That the Union Stove & Machine Works took and accepted said William Fisher in full payment and satisfaction of said judgment, taking from the said William Fisher a note for the same, secured by both real and chattel mortgages. That said Union Stove & Machine Works had since foreclosed said mortgage in the district court of Pratt county, Kan. That said indebtedness of the said William Fisher to the said J. D. Caswell arose in this manner: "That on or about November 27, 1886, the said J. D. Caswell sold and conveyed his stock of merchandise, business house and lot, to one William Eastman, who, as part consideration therefor, assumed and promised to pay the note of said J. D. Caswell to the Union Stove & Machine Works, which note was secured by mortgage on the business house and lot aforesaid, and also by chattel mortgage on heating stoves and stock of merchandise aforesaid. That afterwards, on or about December 12, 1886, the said William Eastman sold and conveyed said stock of merchandise to said William Fisher, and said business house and lot to Bertha Fisher, subject, however, to the incumbrances placed on the same by said J. D. Caswell to the Union Stove & Machine Works, as aforesaid, and as part of the consideration for the transfer of said stock of merchandise and business house and lot said William Fisher assumed the obligation of said William Eastman, as aforesaid, and agreed to pay said indebtedness of the said J. D. Caswell to said Union Stove & Machine Works. That by reason of these transactions said judgment has been fully satisfied, and said Caswell relieved from payment of the same; and praying cancellation of the said judgment. By agreement of the parties the issues joined between the plaintiff and the defendant herein were transferred to Reno county for trial. Afterwards, on the 13th day of November, 1888, said cause came on for trial in the district court of Reno county, before the court and jury, and the jury rendered a general verdict in favor of the defendant Caswell, and also special findings on certain questions of fact. Upon this verdict said district court rendered a judgment in favor of the Caswells against the plaintiff herein, ordering that said judgment of said Union Stove & Machine Works against said Caswell and wife, rendered in the district court of Pratt county, be released, satisfied, canceled, and held for nothing, and against the plaintiff herein for costs. Proceedings in error were prosecuted by the plaintiff herein from that judgment, and the judgment of the district court of Reno county was affirmed by this court. 48 Kan. 689, 29 Pac. Rep. 1072. The date of the filing of the notice to amerce in this action does not appear from the record, but notice of the motion was served in March, 1888. The hearing of the motion was on the 17th day of May, 1889, about six months after judgment had been rendered by the district court of Re-

no county, canceling the plaintiff's judgment against the Caswells.

Section 472 of the Code provides: "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which shall come to his hands, or shall neglect or refuse to sell any goods and chattels, lands and tenements, \* \* \* such sheriff or other officer shall, on motion in court, and two days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per cent. thereon, to and for the use of said plaintiff or defendant, as the case may be." While it appears from the record that the judgment of the plaintiff against the Caswells still appeared of record uncanceled at the time these executions were placed in the hands of the defendant, the judgment which was afterwards rendered by the district court of Reno county determined that on the 12th day of December, 1886, Fisher assumed the payment of the indebtedness which was evidenced by this judgment, and that at the time said executions were in the hands of the defendant the judgment against the Caswells did not evidence an indebtedness from the Caswells to plaintiff, and at the time the motion to amerce the sheriff was heard and decided by the court in this case this judgment had been duly canceled by the judgment rendered in the district court of Reno county. The statute imposes no liability on the sheriff under a proceeding to amerce beyond the amount of the debt, damages, and costs, with 10 per cent. thereon. No debt existing at the time the motion to amerce was heard, no order of amercement could have been made.

The plaintiff in error complains of the ruling of the court in excluding an agreement between the parties with reference to the value of certain property in Harvey county. Unless the plaintiff had a substantial judgment, the value of this property could make no difference in the case, and no material error was committed by excluding it. An objection was also made to the admission of certified copies of the record, pleadings, and proceedings in the case of Smedley Darlington against J. D. Caswell et al. We think this objection was properly overruled, and that the copies, being duly authenticated, were admissible. Other errors are alleged with reference to the admission of evidence, but we are unable to perceive that the court committed any substantial error in this respect. The order of the district court will be affirmed. All the justices concurring.

(50 Kan. 602)

BEAVERS et al. v. MCKINLEY et al.<sup>1</sup>  
(Supreme Court of Kansas. Feb. 11, 1893.)  
IMPLIED TRUST—EVIDENCE TO ESTABLISH.

B. conveyed 160 acres of land, which had been taken under the homestead law, to his minor son, at a time when he was not in debt, by a warranty deed in the usual form, with an habendum clause, for the expressed consideration of \$1,000; and the son afterwards reconveyed the same land to his father, taking from the latter a note for \$1,500, and the father afterwards mortgaged the land for a like sum to go

<sup>1</sup> Rehearing pending.

into business. *Held*, that the conveyance from the father to the son was not in trust for the benefit of the former, and that the reconveyance from the son to the father was not made in pursuance of any trust. No implied trust can result in favor of the grantor in a deed from a father to a son, where such deed expresses a valuable consideration, and contains an habendum clause, and the usual covenant of warranty.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Rooks county; Clark A. Smith, Judge pro tem.

Action in attachment by Albert E. McKinley and others against E. S. Beavers. Marion E. Beavers replevied the goods, and moved to dissolve the attachment. The two actions and the motion to dissolve were heard together, and on the judgment entered the Beaverses bring error. Reversed.

S. T. Fenn and C. Angevine, for plaintiffs in error. A. H. Ellis, for defendants in error.

GREEN, C. E. S. Beavers was engaged in keeping a general store in Palco, Rooks county, on the 24th day of December, 1888. He was then, and for some time had been, a widower. His elder son, Marion E. Beavers, was a married man, and had reached his majority on the 9th day of July, 1888. There was one other son, Bruce W. Beavers, who became of age on the 28th day of September, 1891. The father, with his two sons, and the wife of the elder son, lived together, as members of the same family. On December 24, 1888, E. S. Beavers sold and conveyed to his son Marion E. Beavers the real estate he then owned, and the stock of goods, in Palco. The consideration of the sale was a note the son held against the father for the amount of a mortgage that the father had put upon a tract of land which the son claimed to own, amounting to \$1,756.53; second, the amount the father owed the son, which, it is claimed, the son received from his grandparents, of \$1,151.25; and, third, the amount that the father owed the younger son, who was at the time a minor, and which it was claimed came from the estate of his grandparents, and Marion E. Beavers assumed to pay, \$1,151.25,—making a total of \$4,059.03. The land for which the note was given was taken by the father under the homestead law, and occupied by Marion E. Beavers, who was then a minor about 15 years of age, and his younger brother, Bruce, who was then about 12 years old. The older boy managed the farm, and took care of his younger brother, under an agreement, as it is claimed, that, when the father proved up on the land, it should belong to him. The father, it seems, was a commercial traveler, and away from home a great deal of the time, and the two sons made their home on the land. The father conveyed the land to the older son on the 1st day of October, 1886, after final proof had been made. The consideration expressed in the deed was \$1,000. The son reconveyed the land to the father on the 23rd day of May, 1887; the consideration expressed in the deed being \$1,500. On the 30th day of May of

the same year the father executed a note to his son, M. E. Beavers, for the sum of \$1,500, due on the 9th day of July, 1888, with interest at the rate of 10 per cent. per annum. This note, the son testified, was given in consideration of the purchase price of the land. The father swore that the note was given in consideration of the incumbrance of \$1,500 he had placed upon the land after it had been reconveyed to him. This loan, it seems, was to enable the father to go into business. On the 27th day of December, 1888, the plaintiffs attached the stock of goods and merchandise, as well as the land. Marion E. Beavers replevied the goods. Motions were also made to dissolve the attachments. The replevin action and the motions to discharge the attachments were, by agreement, all heard together, and tried upon their merits. Upon the hearing of the several cases, judgment was rendered in favor of the attaching creditors in each case, and against Marion E. Beavers. It seems from the evidence that E. S. Beavers owed at the time of the transfer, to the different attaching creditors, for merchandise, the sum of \$3,000; that his assets consisted of a stock of goods worth about \$1,800, accounts valued at \$123, a store building valued at \$800, 20 town lots valued at \$300, a small residence worth \$100, and other lots valued at \$225. Upon the question of the intent to defraud the creditors of E. S. Beavers, the court found "that the conveyance of the homestead from E. S. Beavers to M. E. Beavers was in trust for the use and benefit of E. S. Beavers, and that the reconveyance was in execution of that trust, and that the \$1,500 note does not represent an actual indebtedness from E. S. Beavers to M. E. Beavers." A motion was made to set aside the above finding of fact upon the ground that it was unsupported by the evidence. This motion was overruled. The plaintiffs in error also moved the court for a new trial, which was refused.

The point is made by the plaintiffs in error that there was no evidence to support the finding of the court that the conveyance of the homestead from E. S. Beavers to his son was in trust for the use and benefit of the former, and that the reconveyance was in execution of that trust. There is no evidence to establish the fact that, at the time the father deeded the land to the son, he was indebted to any one. It was some months before he engaged in business for himself; in fact, the reconveyance of the land was for the purpose of enabling the father to mortgage the land to obtain money to go into business. Could a trust be created under the facts surrounding this case? Did not the father have a perfect right to deed the land to his son, if he was not in debt when he made the conveyance? The land was expressly exempt from the payment of any debts contracted prior to the issuance of the patent. Rev. St. U. S. § 2296. The deed from the father to the son expressed a consideration of \$1,000. It was in the usual form, with an habendum clause to the grantee. A trust does not result to the grantor from such a deed. *Gould v. Lynde*, 114 Mass. 366. In speak-

ing of trusts arising by operation of law, Mr. Pomeroy, in his book on Equity Jurisprudence, (volume 2, § 1035,) says: "If the doctrine has any existence under the conveyancing system of this country, so that a trust should result to the grantor from the absence of a consideration, it can only be where the deed simply contains words of grant or transfer, and does not recite nor imply a consideration, and does not, in the habendum clause or elsewhere, declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift." A deed from the father to a son is presumed to be an advancement, and no trust results. Where a father purchased land in his children's name, and had a deed made to them, the law presumed it to be an advancement, and not a trust resulting in his favor. 2 Washb. Real Prop. 506; 4 Lawson, Rights, Rem. & Pr. § 2010; Moore v. Jordan, 65 Miss. 229, 3 South. Rep. 737. "If a good consideration is stated in a deed, there is no resulting trust for the benefit of the grantor, even though the deed be in fact without consideration." Farrington v. Barr, 36 N. H. 86. The rule of resulting trusts does not apply to modern conveyances, and no trust is now held to result to a grantor, although he conveys his estate without consideration. 1 Perry, Trusts, § 162. We think the court erred in making the finding it did, and the same is unsupported by the evidence.

It is urged by the defendants in error that there was no motion for judgment upon the special findings in favor of the party now complaining; that, if the plaintiff in error had called the attention of the district court to this assignment of error, the findings could have been amended in that particular; that under the circumstances the plaintiffs in error cannot now complain of the special findings. The record shows that the plaintiffs in error filed a motion to set aside this particular finding of the court, and that the court overruled the same, and an exception was taken to such ruling. We think the record is sufficient to show the assignments of error. It is recommended that the judgment of the district court be reversed, and that a new trial be granted.

**PER CURIAM.** It is so ordered; all the justices concurring.

(50 Kan. 739)

**KANSAS CITY, W. & N. W. R. CO. v. WALKER et al.**

(Supreme Court of Kansas. Feb. 11, 1893.)

**PRACTICE—ABSENCE OF PLAINTIFF AT TRIAL—NONSUIT.**

Where the plaintiff fails in a civil action to appear on the trial, and there is no counterclaim or set-off filed or presented by the defendant, the district court should dismiss the case without prejudice to a future action.

(Syllabus by the Court.)

Error from district court, Jackson county; Robert Crozier, Judge.

Action by the Kansas City, Wyandotte & Northwestern Railroad Company

against A. D. Walker and another for specific performance of a land contract. On the judgment and orders entered plaintiff brings error. Reversed.

William C. Hook and Pratt, Ferry & Hagerman, for plaintiff in error. Hayden & Hayden, for defendants in error.

**HORTON, C. J.** The Kansas City, Wyandotte & Northwestern Railroad Company commenced an action against A. D. Walker and H. Tucker for the specific performance of a contract to convey land for a right of way and for the payment of certain sums of money. The answer contained a general denial, and also set up counterclaims and set-offs for the unlawful taking of land owned by the defendants. The cause was regularly assigned for hearing on November 13, 1889. Owing to a mistake of plaintiff's attorney as to the time of the trial, the plaintiff failed to appear. The cause was reached in its regular order for trial on November 13th, and the defendants, in the absence of plaintiff and its attorneys, asked leave to withdraw and dismiss without prejudice to a future action the counterclaims and set-offs in their answer. The court granted the motion without prejudice, and thereupon the defendants announced to the court that they would waive a jury, and desired a trial of the cause upon its merits. The defendants then submitted the pleadings, and without evidence of any kind excepting two certain deeds of conveyance for the premises in controversy, executed to one of the defendants, which were not read, but the substance thereof stated to the court by the defendants' counsel, the court found the issues for the defendants, and entered judgment accordingly, with costs. On November 16, 1889, the plaintiff filed its motion for a new trial, alleging "irregularity in the proceedings of the court, by which the plaintiff was prevented from having a fair trial," and the other statutory grounds. On November 21, 1889, during the term of the court, the plaintiff also filed a motion to modify and correct the judgment so as to make the same appear as a dismissal without prejudice, at plaintiff's costs. The first motion was overruled, and the second motion was also overruled, excepting that the court ordered that the judgment rendered against the plaintiff and for the defendants be corrected to show the actual facts. Section 397 of the Civil Code reads: "An action may be dismissed without prejudice to a future action \* \* \* by the court where the plaintiff fails to appear on the trial." Statutes are construed in reference to the principles of the common law, if possible. Under the common law, the plaintiff took a nonsuit by absenting himself from court when his case was called for trial. 16 Amer. & Eng. Enc. Law, 721-723; 2 Tidd, Pr. (4th Amer. Ed.) 761; Case v. Hannahs, 2 Kan. 490; Moore v. Toennisson, 28 Kan. 608, 610; Herring v. Poritz, 6 Ill. App. 208, 211, 212; Nordmanser v. Hitchcock, 40 Mo. 179. In 2 Thompson on Trials (section 2229) it is said: "The failure of the plaintiff to appear when his case is called for trial is equivalent to the expression of an election



on his part to become nonsuit. In such a case no judgment can be taken against him, but his action should be dismissed, or judgment of nonsuit entered." There was, in fact, in this case, no trial, either of the law or of the facts. The plaintiff, upon whom rested the burden of the issues, was not present to offer any evidence, and the defendants were not called upon to offer any evidence to sustain the general denial. The general rule is that a permission to a court is a command, if it relates to the rights of suitors. Bish. St. Crimes, (2d Ed.) § 112. "May be dismissed," in section 397 of the Code, should be construed to read "shall be dismissed." As the plaintiff did not appear on the trial, the cause, when called, should have been dismissed at the costs of the plaintiff, without prejudice to a future action, as the defendants withdrew their counterclaims and set-offs. There was such error in the proceedings, on account of the judgment being rendered in the absence of the plaintiff, that the district court should have sustained the motion for the new trial, or should have so corrected the judgment as to have shown a dismissal without prejudice. The judgment of the district court will be reversed. All the justices concurring.

**FIRST NAT. BANK OF KINGMAN v. GERSON.** (No. 6,538.)

(Supreme Court of Kansas. Feb. 11, 1893.)

**ATTACHMENT—PROPERTY IN CUSTODIA LEGIS NOT SUBJECT TO**

Where property has been attached, and subsequently taken from the officer on an order of replevin, it is in custodia legis, pending the result of the replevin suit, and not subject to levy under further orders of attachment against the original attachment debtor.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Kingman county; S. W. Leslie, Judge.

Action in attachment by the First National Bank of Kingman against George Gerson & Co. Joseph Gerson moved to discharge the attachment on the ground that the property attached had been replevied by him from other attaching creditors, and was therefore in custodia legis, and not subject to attachment. The motion was sustained, and plaintiff brings error. Affirmed.

Hay & Hay, for plaintiff in error. John E. Lydecker, for defendant in error.

**STRANG, C.** On the 26th of November, 1889, and long prior to that time, George Gerson and Isaac Levy, partners under the firm name of George Gerson & Co. were engaged in the drug business in the city of Kingman, in this state, and had been indebted to plaintiff and other parties, on account of goods, wares, and merchandise sold and delivered to them. On the 26th day of November, George Gerson & Co. executed two promissory notes to Joseph Gerson for the sum of \$1,000 each, due and payable in three and six months, which notes, it is claimed, were partly, if not wholly, without consideration. At

the same time Gerson & Co. executed and delivered to Joseph Gerson a chattel mortgage upon their stock of drugs, liquors, etc. This was not then filed, and no information thereof was given to the creditors or other parties. Joseph Gerson, the mortgagee, had a friend living in Newton by the name of George W. Rodgers. He had become the owner of two notes against Gerson & Co.,—one for the sum of \$200; the other for the sum of \$500. These notes were both dated in July, 1889, the \$200 note maturing in October; the other, not due, matured November 26, 1889. Each of these notes was signed by George Gerson & Co., and payable to Joseph Gerson. The \$200 note Joseph Gerson had sold and indorsed to the Citizens' Bank of Newton, of which Rodgers was cashier. On November 26, 1889, and at the time the chattel mortgage was given to Joseph Gerson, George Gerson & Co. made a deed to all their real estate to A. Cole, of Newton, a brother-in-law of George Gerson, and the son-in-law of Joseph Gerson. A. Cole, being at Kingman with Joseph Gerson, on November 26th carried his deed to Newton without recording it. This deed, it is claimed, was wholly without consideration, and in fraud of creditors. Joseph Gerson, having returned to Newton, on November 27th had an interview with George W. Rodgers, regarding the notes which Rodgers and the Citizens' Bank held against George Gerson & Co. Thereafter, on November 27th, George W. Rodgers took up from the Citizens' Bank, as he claims, the \$500 note against George Gerson & Co., and which had matured the day before, and thereby became, as he claims, the owner of both notes. On December 17, 1889, Joseph Gerson and George W. Rodgers took the early morning train at Newton for Kingman, Gerson carrying with him his chattel mortgage, and also the deed to A. Cole, and Rodgers carrying with him the two notes, one for \$200 and the other for \$500, against George Gerson & Co. The train was a little late, and they arrived in Kingman about half past 11 A. M. Upon arriving at Kingman they separated; Rodgers going to the drug store of Gerson & Co., and, seeing George Gerson, told him he wanted his money; that he must have it right away, and could not wait any longer. With this brief interview he departed for the hotel, where he registered, and got his dinner. As soon as Rodgers was out of the store, Joseph Gerson went in, took possession under his chattel mortgage, and locked it up, put a notice on the door that it had been closed by Joseph Gerson under a chattel mortgage, and went to the hotel for his dinner, arriving at the hotel at 1 o'clock, entering the dining room just as George W. Rodgers came out. George W. went to the store, and found it locked, with a notice on the door that it had been closed by Joseph Gerson under a chattel mortgage. He procured an attachment, which was levied upon the entire stock of George Gerson & Co., worth about \$6,500. Joseph Gerson at once began a replevin suit against the sheriff of Kingman county for the possession of the goods, claiming title under his chattel mortgage. No redeliv-

ery bond was given, and the goods were turned over to him. Plaintiff and other creditors of George Gerson & Co. then began actions against Gerson & Co., and procured orders of attachment, and caused the same to be levied upon a portion of the stock of goods of George Gerson & Co. These are the goods in controversy in this action. Plaintiff also commenced garnishment proceedings against Joseph Gerson, to which he filed his answer on December 30, 1889, admitting possession of all the goods and accounts formerly owned and held by Gerson & Co. As soon as the attachments were levied, Joseph Gerson filed motions in the district court of Kingman county, in cases brought by the plaintiff and other creditors against George Gerson & Co. to discharge the goods from the attachment on the ground that the goods had been attached by Rodgers and replevied by Gerson, and were therefore in custodia legis, and not subject to attachment.

The first question discussed by counsel for plaintiff in error is stated by them as follows: "Did the district judge commit error in sustaining the motion to discharge said property from attachment, under the law in the case?" The defendant in error answers this question in the negative, and asserts that the property attached in this case was, when attached, in the custody of the law, and not liable to attachment. He shows by the record that the property had been attached by one George W. Rodgers, and that he had replevied the same from the officer, and held them under bond for the return of the property; and that, pending the trial of this replevin case, the goods were in custodia legis, and exempt from process. We think this contention is correct, and that the attachment should have been discharged in this case, because the goods were, when attached, in custodia legis, and therefore freed from attachment for the time being; that is, pending the result of the replevin suit of the defendant in error against the sheriff, who held the goods under the order of attachment of George W. Rodgers vs. George Gerson & Co. "Even if goods are taken from the officer under a writ of replevin, and delivered over to a third person, they still remain in custodia legis, to the extent that they cannot be levied upon under process of the original defendant." 1 Freem. Ex'ns, § 155. "Chattels in the custody of the law are not subject to levy. A. brought replevin against the sheriff for goods levied on by virtue of an execution against B., and under the writ the goods were delivered to A. While the action was pending, the sheriff seized the goods by virtue of another execution against B. Held, that the second levy was unlawful." Pipher v. Fordyce, 88 Ind. 436. "Property levied upon and seized by virtue of an execution, and then delivered upon a writ of replevin to the third person, cannot subsequently be levied upon by virtue of another execution against the defendant in the first execution, although the property be permitted by the plaintiff in replevin to continue in his possession and occupation. Until the claim under the first execution be disposed of, a second levy cannot be made." Acker v. White, 25 Wend. 614. See, also, Bank v.

Owen, 79 Mo. 429; Ward v. Whitney, 13 Phila. 7; and Selleck v. Phelps, 11 Wis. 380. In McKinney v. Purcell, 28 Kan. 446, this court held as follows: "Where property is held by an individual under a bond given in judicial proceedings for the redelivery of the specific property, it is to be deemed in custodia legis, the same as if it had continued in the possession of the officer." It is recommended that the judgment of the trial court discharging the attachment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.

#### FIRST NAT. BANK OF KINGMAN v. GERSON. (No. 6,527.)

(Supreme Court of Kansas. Feb. 11, 1893.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Hay & Hay, for plaintiff in error. John E. Lydecker, for defendant in error.

PER CURIAM. The facts in this case are the same as the facts in the case of Bank v. Gerson, 32 Pac. Rep. 366, and it is agreed that this case shall follow that case. The order of the court discharging the attachment in this case is affirmed for the reason given in that case.

(5 Wash. 558)

#### STATE v. McARTHUR.

(Supreme Court of Washington. Jan. 20, 1893.)

**LIBEL—WHAT CONSTITUTES—ORAL DEFAMATION—CONSTRUCTION OF STATUTE.**

2 Hill's Code, p. 648, § 17, provides that a libel is the defamation of a person, made public, by any words, etc., and that every person who publishes or willfully circulates such libel shall be punished. Held, that the expression "words" means written or printed words, and that oral defamation does not constitute libel.

Appeal from superior court, Spokane county; R. B. Blake, Judge.

John McArthur was indicted for libel. From a judgment sustaining a demurrer to the indictment, the state appeals. Affirmed.

The indictment charged defendant with circulating a report that people doing business with a certain bank had better draw their money out, as the bank was insolvent. It was not charged that this report was written or printed by defendant.

Samuel G. Allen, Pros. Atty., Jones, Voorhees & Stephens, and Feighan, Wells & Herman, for the State. Jesse Arthur, Franklin W. Knight, John A. Peacock, and W. S. Dawson, for respondents.

DUNBAR, C. J. This case involves the construction of section 17 of the Penal Code. We think there can be no difference of opinion between the appellant, the respondent, and the court as to the rules of construction applicable to this case; but, adopting and applying the rules of construction contended for by the appellant, we are unable to conclude that the statute intended to break down the distinction that has always existed between libel and slander. It is true that the use of the expression "words," if construed without reference to the rest of the section, would probably lead us to that conclusion. But while the rule is undoubted that, in construing statutes,

words must be given their ordinarily accepted meaning, yet that must be taken in consideration with, and made subservient to, another imperative and absolutely necessary rule, that "the whole section must be construed together;" and, considering the descriptive part of this section in connection with the latter part, which provides that every person who makes, composes, or dictates a libel, or who publishes or willfully circulates such libel, etc., shall be punished, etc., plainly indicates that the expression "words," used in the section, has reference to written or printed words. This view is strengthened by the provisions of section 18, which define what publication of a libel is. There is no provision in said section for the publication of a libel by oral language, as there certainly would have been if it had been the intention of the legislature to incorporate spoken words into the definition of libel.

The judgment is affirmed.

HOYT, SCOTT, STILES, and ANDERS, JJ., concur.

(50 Kan. 727)

**UNION SCHOOL FURNITURE CO. v. SCHOOL DIST. CO. NO. 60, ELK COUNTY.**

(Supreme Court of Kansas. Feb. 11, 1893.)

**PURCHASES BY SCHOOL BOARD—RATIFICATION BY DISTRICT.**

A school district which has received, retained, and used for a long period of time school furniture bought for it by the members of the school district board, acting separately, without any board meeting, must be deemed to have ratified the purchase, and must pay for the property so obtained for its use.

(Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

Action by the Union School Furniture Company against school district No. 60, Elk county, to recover the value of school furniture sold to defendant. There was judgment for defendant, and plaintiff brings error. Reversed.

Douthitt & Ayers, for plaintiff in error.  
J. A. McHenry, for defendant in error.

ALLEN, J. Various amendments were made to the pleadings in this action before trial. The petition, as finally amended, and on which the action was tried, contains two counts. The first is on a school-district order purporting to have been executed by the director and clerk of the defendant district, dated August 20, 1884, for \$80. The second count alleges that the plaintiff sold and delivered to the defendant school furniture, of the value of \$80, on or about August 20, 1884, under a written contract, signed by the officers of said defendant and the said plaintiff's agent. The cause was tried before the court, without a jury. Special findings were made. The court finds that the director, clerk, and treasurer of the defendant signed a written contract for the purchase of certain school desks and seats for the total price of \$80, but that no meeting of the school-district board was ever held at which said contract was authorized or ratified, and that such purchase was never

authorized by the electors of the district. The court further finds that a school-district order, in blank, was signed by William Liebeau, as a matter of convenience to L. Weeden, as clerk of the district, for the purpose of enabling said Weeden to pay some small bills against the defendant; and, after being thus signed in blank, was by said Weeden filled up, executed, and assigned to the plaintiff, without any authority from said Liebeau. The court also finds that said school furniture was delivered to the defendant; that the defendant took possession of the same, and has had the use and benefit thereof ever since about the 20th day of August, 1884; and that such school furniture was at such time reasonably worth \$80. The court finds as a conclusion of law that the defendant was entitled to recover costs. From this judgment the plaintiff appeals to this court.

No oral argument has been made in the case, and the only explanation of the grounds on which the defendant in error claims that the judgment of the court can be maintained must be gathered from his brief, the whole of which we quote, as follows: "The only question in the case under the pleadings is, was the warrant sued on void? The plaintiff elected to rely on and sue on the warrant, and hence the question of quantum meruit cannot apply, and any finding of the trial court as to the value of the goods sold was entirely outside of the case. The court found that there was no authority of the school board or the district ever given for the issuing of the order or making the purchase of the goods. *Alkman v. School Dist.*, 27 Kan. 129, and cases therein cited, fully sustain the judgment of the court below." We think the second cause of action stated in the petition is amply sufficient to authorize a judgment to be entered for the value of the furniture, if the evidence warrants it. It states that the plaintiff sold and delivered to the defendant school furniture, for which the defendant agreed to pay \$80; that the defendant received the furniture, and has used the same. It is found by the court, and all the evidence in the case shows, that the defendant school district received the school furniture in August, 1884, and has held and used the same ever since the 20th of that month. We are utterly at a loss to understand how the defendant, having kept and used this furniture during all the time from that date to the time of the trial of this action, on the 8th day of February, 1890,—a period of nearly 5½ years,—can claim to be excused from making any payment therefor. It would seem from the pleadings and the record in the case that the court took the view that the written order set up in the petition, and also the written contract made by the board of directors with the agent of the plaintiff for the furniture, were void because unauthorized. It may be conceded for the purposes of this case that both these written instruments were void, and that no action could be maintained on either or both of them, yet the defendant district, having received and retained the property which the court finds to have been fairly worth the price stated in the written contract, is bound in com-

mon honesty to pay for it. During all the time this furniture has been in the possession of the defendant district it is fair to presume that the schoolhouse which was furnished with the seats and desks purchased from the plaintiff was used in the same manner as schoolhouses are ordinarily used. It is fair to presume that school-district meetings were therein held annually, at the time appointed by law. It is fair to presume that the school-district board met there, and caused the seats to be placed in the building, and to be used by the district. The board and the residents of the school district must all have known of the use of this property; and their continued retention and use of it shows a perfect and complete ratification of the purchase made by the district officers. In the case of *Sullivan v. School Dist.*, 39 Kan. 347, 18 Pac. Rep. 287, it was held that a contract for the construction of a schoolhouse made by one member of the school-district board alone, on behalf of the district, might be ratified and made binding on the whole school district. This case came again before this court, and is reported in 48 Kan. 624, and 29 Pac. Rep. 1141; and the court then held that "a contract for building a schoolhouse, void because made only by one member of the school board, may be ratified and made binding by the action of the school district in completing the building, left unfinished by an absconding contractor; by furnishing the same with seats, desks, and other necessary schoolhouse furniture; by occupying the same for school purposes; and by insuring the same." This case but enunciates the broad doctrine supported by very numerous authorities, which we do not deem it necessary to cite, and is founded in reason and justice. The judgment will be reversed, with an order to the district court of Elk county to enter judgment on the findings of fact in favor of the plaintiff against the defendant for \$80, with 7 per cent. interest per annum from the 20th day of August, 1884, to the date of judgment. All the justices concurring.

(50 Kan. 631)

## TENNISON v. PLATT.

(Supreme Court of Kansas. Feb. 11, 1893.)

ADMINISTRATION — ASSIGNMENT OF INTEREST BY HEIR — BONA FIDES — QUESTION FOR JURY.

Where, in an action by an assignee against W. H. T., as administrator, to recover a certain sum alleged to be due one of the heirs of an estate, and such administrator alleges payment to the heir before assignment, and the evidence tends to show that the administrator delivered a check to the claimant for the amount and took her receipt for the sum claimed to be due, and she immediately indorsed such check to W. H. T. individually, *held*, that the court should have submitted the question of payment to the jury under proper instruction.

(Syllabus by Green, C.)

Commissioners' decision. Error to district court, Johnson county; J. P. Hindman, Judge.

Action by Elizabeth A. Platt against W. H. Tennison, administrator, to recover her share of an estate administered by de-

fendant. There was a judgment for plaintiff, and defendant brings error. Reversed.

H. L. Burgess and John T. Little, for plaintiff in error. I. O. Pickering and R. O. Boggess, for defendant in error.

GREEN, C. This was an action brought by Elizabeth A. Platt to recover from W. H. Tennison the sum of \$1,750. The petition contained two counts. The first charged the indebtedness against the defendant, as administrator of the estate of J. D. Tennison, deceased, to Lucy Tennison, widow and heir at law of the decedent, being part of her distributive share of the estate which had been ordered paid to her by the probate court of Johnson county, which indebtedness was alleged to have been assigned to the plaintiff. The second count charged the same indebtedness against the defendant personally. The answer was a general denial, and the plea of full payment to the widow before the assignment. At the close of the evidence the court required the plaintiff to elect upon which count she would rely for a recovery, and the plaintiff asked for judgment upon the first count of the petition, charging the indebtedness against the defendant as administrator. The defendant then asked the court to give the following instruction: "If you find from the evidence that W. H. Tennison, administrator, paid Lucy Tennison the \$1,750, and afterwards she repaid said sum to W. H. Tennison, to be returned to her when she was acquitted of the crime with which she was charged, then I charge you W. H. Tennison, and not W. H. Tennison as administrator, would be liable, and you must find for the defendant." The court refused the instruction. This is claimed as error. The record of the probate court of Johnson county established the fact that an order of distribution was made on the 23d day of September, 1887, by which the administrator was directed to pay Lucy Tennison the sum of \$1,750. W. H. Tennison testified that he gave to Lucy Tennison a check for that amount, and took her receipt for the same, on the 30th day of September following; that she immediately indorsed and delivered the check to him individually, and he deposited it to his own credit in the bank the same day. Upon the question of the execution of the receipt and the delivery and indorsement of the check, the court instructed the jury as follows: "The fact that, after the execution of the receipt that has been offered in evidence, and the transfer of the check for \$1,750 from Lucy Tennison to the defendant, he transferred moneys which he before had held as administrator, and had credited to his account as administrator,—the fact that he transferred those funds to his individual account,—wouldn't avoid his liability as administrator. That is, any moneys that were in his hands, and were properly due Lucy Tennison as her part of this estate, would be due her from the administrator, and she would have a right to recover against him as administrator; and the plaintiff here, under this assignment, would have a right to recover against him

as administrator for all those moneys, wherever he might have deposited them in his own name, or have them put in his individual account. The only question for you to pass on is whether or not he held moneys as administrator at the time of the commencement of this suit in which Lucy Tennison would have been entitled if she hadn't made this assignment under which the plaintiff was entitled, as the assignee of Lucy Tennison, in this written article set out in the petition, and which has been read in evidence." The pleadings in this case fairly raised the question of payment to Lucy Tennison of said sum of \$1,750. The evidence tended to show that she had had delivered to her a check for that amount which she indorsed and delivered to the defendant below at the same time that she receipted for the amount named. We are of the opinion that this or a similar instruction should have been given to the jury. The defendant in error contends that the making and delivery of a check and the taking a receipt for the sum of \$1,750, unexplained, only amounted to prima facie evidence of payment. Suppose we admit the correctness of this proposition; still the defendant below would have the right to have the question of payment submitted to the jury. The court did not do this. The instruction the court did give virtually took that question from the jury. The question of payment by the defendant as administrator and repayment by Lucy Tennison to him individually of the amount in controversy was a question of fact for the jury, and should have been submitted to them under proper instructions. *Stadel v. Stadel*, 40 Kan. 646, 20 Pac. Rep. 475. The refusal to give the instruction is such error as requires a reversal of the judgment. It is recommended that the judgment be reversed, and that a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 630)

#### YADON v. MACKKEY.

(Supreme Court of Kansas. Feb. 11, 1893.)

LEVY OF EXECUTION—CLAIMS BY THIRD PARTIES.

Evidence examined, and found that the verdict of the jury is supported by the testimony.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Geary county; M. B. Nicholson, Judge.

Action by Daniel J. Yadon against William H. Mackey, Jr., to recover the value of two horses seized by defendant as sheriff. There was a verdict for defendant, and plaintiff brings error. Affirmed.

Thomas Dever, for plaintiff in error. Humphrey & Laundry, for defendant in error.

GREEN, C. This was an action brought by Daniel J. Yadon against W. H. Mackey, Jr., to recover the value of two horses which the latter, as sheriff, had levied upon and sold under an execution

issued against Thomas H. Yadon. The jury returned a verdict in favor of the defendant. The plaintiff in error brings the case to this court, upon the one assignment of error that the verdict is not supported by the evidence. We are asked to read the entire record concerning the evidence, which we have done. The claimant of the property was the son of the judgment debtor. The father and son testified as to the son's ownership of the property. One appeared personally in court, and the other gave his evidence in the form of a deposition. It was shown that the father mortgaged the property without disclosing the title of the son. We cannot tell just what testimony influenced the jury to return a verdict in favor of the defendant; neither can we say that the verdict has no evidence to support it. The jury may have concluded that the continued acts of ownership over the property by the father had greater weight than the statements of the witnesses as to the title. The verdict received the approval of the trial court, and we cannot say that the same is unsupported. We recommend an affirmance of the judgment of the district court.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 680)

#### DODSON v. COOPER.

(Supreme Court of Kansas. Feb. 11, 1893.)

FRAUDULENT CONVEYANCES—CONSIDERATION—SUFFICIENCY.

1. In an action to determine whether a sale made by a debtor to another of all his property was honest or for the purpose of defrauding creditors, the insolvency of the debtor is an important element of proof, which should be considered by the jury in determining the question.

2. Where the sale is made for considerably less than the actual value it is such evidence of fraud as requires explanation, and may, when coupled with other facts, be controlling proof of dishonesty and fraud.

3. Whether or not there is such a disparity between the real value of the property and the consideration paid as to justify an inference of fraud is for the jury to determine.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Trover by R. H. Cooper against H. T. Dodson. There was judgment for plaintiff, and defendant brings error. Reversed.

Redden & Schumacher and Mills, Smith & Hobbs, for plaintiff in error. Leland & Harris, for defendant in error.

JOHNSTON, J. In this action R. H. Cooper seeks to recover \$10,000 as damages from H. T. Dodson for the alleged wrongful conversion of a stock of goods. Cooper claims to have purchased the goods from Horace Blakely on the night of December 25, 1884, and they were seized by Dodson, as sheriff, on December 27, 1884, upon attachments at the instance of Blakely's creditors, and as Blakely's property. This is the second time the case has been here, and the nature of the

transaction and the facts of the case were quite fully disclosed in the first consideration of the case. 37 Kan. 346, 15 Pac. Rep. 200. It is claimed by Dodson that the sale was made in bad faith, and for the purpose of defrauding the creditors of Blakely. To sustain this claim, testimony was offered tending to show that Blakely was insolvent; that the sale was made in the nighttime, without an inventory, to a person who was unacquainted with the business or the value of the stock of goods; that Blakely accepted land as a part consideration, which he had not seen, and that one tract offered by Cooper in payment was shown to Blakely in the nighttime. Dodson further attempted to show that the consideration claimed to have been paid was very inadequate, and that even the cash payment claimed to have been paid on the sale was turned over to the relatives of Blakely, instead of to his creditors. Cooper offered testimony tending to show that the sale was made in good faith, and without any intention to defraud any one, or to delay the creditors of Blakely in the collection of their debts. The honesty of the sale was the main question in the case for decision, and, while the jury sustained the bona fides of the transaction, it is contended by Dodson that the result was reached through the misdirection of the jury. He asserts that the insolvency of Blakely, and the inadequacy of the consideration claimed to have been paid for the goods, both of which were calculated to throw suspicion on the transaction, and were elements for the consideration of the jury, were taken out of the case by the instruction of the court. The following instructions were embraced in the charge of the court: "A person, though insolvent or in failing circumstances, had a right to sell the whole of his property or any portion thereof if done in good faith, and without any purpose or intention to thereby cheat or defraud his creditors, or hinder or delay them in the collection of their debts; and in order to make a valid sale as against his creditors it is not necessary that such sale should be for money only, or for all cash down, but it may be made in exchange for other property or partly for money and partly in exchange for other property, or partly on credit, and still be valid. It may be unwise as a business transaction, and still be a valid transfer as to creditors. Nor does the fact of insolvency of the seller, or that he is in failing circumstances, raise any presumption of an intention on the part of such seller to cheat or defraud or hinder or delay his creditors in the collection of their debts. Every person, whether he has experience as a merchant or not, has the lawful right to buy or trade for a stock of goods, and may buy or trade for such stock from a person whom he knows to be insolvent or in failing circumstances; and in so doing he may make the best bargain he can for his own interests, provided he does so in good faith, without intent to aid the seller to cheat or defraud his creditors, or hinder or delay them in the collection of their debts, and without knowledge of any in-

tent to defraud creditors by means of the sale on the part of the seller, or if such intent existed on the part of the seller then without knowledge of facts or circumstances which would lead a reasonably prudent man to make inquiry into the purpose and intention of the seller in making such sale; and the fact that the value of the consideration paid or exchanged is considerably less than the value of the goods purchased or traded for is not, of itself, sufficient to raise the presumption that the seller thereby intended to cheat or defraud his creditors, or hinder or delay them in the collection of their demands, or that the purchaser intended to aid him to do so, or had knowledge of such intent." The correctness of these instructions was challenged by an objection made at the time the charge was given. It was overruled, however, and the giving of these is the principal error complained of. There is good reason for the complaint made against these instructions in respect to insolvency and the inadequacy of the consideration paid. Whatever may be the actual fact as to the honesty of the sale, it was charged to be fraudulent, and evidence tending to sustain the charge was offered. It is not often that fraud can be shown by direct evidence, and hence the suspicious circumstances developed by the testimony which tend to show a fraudulent purpose should be properly submitted to and considered by the jury. The law recognizes certain circumstances and conduct as marks of fraud, and whether those relied on in this case were of much or little consequence was a question for the jury themselves. Insolvency is an element of proof entitled to consideration in canvassing the badges of fraud in order to determine the honesty of the transaction. Proof of insolvency does not necessarily establish fraud, but a sale of all his property by one insolvent is a circumstance which, in connection with others, may be sufficient to awaken suspicion, and create a presumption of a fraudulent design. So, too, in respect to the inadequacy of consideration. It cannot always be held to be a fraud as a matter of law, but where a sale is made for much less than the actual value it is such an indication of fraudulent intention as requires explanation. If the inadequacy was slight, it would only be weak evidence, but, if it was considerable, it might, when coupled with other facts, be controlling proof of dishonesty and fraud. Whether or not there is such a disparity between the real value and the consideration paid as to justify an inference of fraud is for the jury to determine. But the ruling of the court in practically eliminating this element from the case, as well as the insolvency of the debtor, cannot be upheld. *Lewis v. Hughes*, 49 Kan. 23, 30 Pac. Rep. 177; *Davidson v. Little*, 22 Pa. St. 245; *Shelton v. Church*, 38 Conn. 416; *Bartles v. Gibson*, 17 Fed. Rep. 293; *Auction & C. Co. v. Mason*, 16 Mo. App. 473; *Brown v. Hedge Co.*, 64 Tex. 396; *Rhoads v. Blatt*, 84 Pa. St. 31; *Fisher v. Shelver*, 53 Wis. 498, 10 N. W. Rep. 681; *Wilson v. Jordan*, 3 Woods, 642; *In re Alexander*, 4 N. B. R. 181; *Wait*,

Fraud. Conv. §§ 231, 239, and cases there cited. By the charge of the court the fact that the consideration was considerably less than the actual value was treated by the court as of little or no consequence, and that insolvency was a matter of no importance in determining the fairness and good faith of the parties to the transaction. The defendant in error does not contend that the instructions are correct, but he argues that other portions of the charge are such as to eliminate the error from these. We find nothing, however, which cures the vice in the instructions quoted, nor which would justify us in holding the error harmless. There are some facts and circumstances calculated to excite suspicion as to the fairness and honesty of the sale. Other facts in the case may be sufficient, however, to show that they are not inconsistent with honesty and fair dealing; but all important elements of proof should be fairly submitted to the jury, and given proper weight. We are unable to say that the error in the instructions did not mislead the jury, and hence there must be a reversal of the judgment, and a new trial of the cause. All the justices concurring.

(50 Kan. 743)

**CALLOWAY et al. v. COOLEY et al.**

(Supreme Court of Kansas. Feb. 11, 1893.)

CONSTITUTIONAL LAW—TITLE OF ACT—PROOFS OF FOREIGN WILLS.

1. Chapter 102 of the Laws of 1879, "An act to authorize foreign executors and administrators with the will annexed to convey real estate in pursuance of power contained in the will," is held to be constitutional and valid.

2. Such act is applicable to all wills which were executed and proved in another state or territory prior to its passage, as well as to those executed and proved after its passage.

3. Where a will executed, proved, and admitted to probate in another state is presented for record to the probate court of a county in this state, in which land belonging to the estate is situate, and such court, upon the evidence submitted, finds and adjudges that the authentication of the copy presented for record is sufficient, its adjudication thereon cannot be collaterally attacked.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Ejectment by Annie P. Calloway and others against W. S. Cooley and others. Defendants had judgment, and plaintiffs bring error. Affirmed.

The other facts fully appear in the following statement by JOHNSTON, J.:

This was an action of ejectment brought by Annie P. Calloway and the other surviving heirs of James Calloway, deceased, to recover 80 acres of land situated in Lyon county. The cause was tried by the court without a jury, and the following findings of fact and conclusions of law were made:

"First. On the 25th day of December, 1878, James Calloway died, seised of the property in controversy. The plaintiffs are the only surviving heirs of the said James Calloway, deceased, and they are related to him as follows: Annie P. Cal-

loway is his widow. Mary O. Adams, Hattie H. Lowe, Elizabeth C. Gillespie, Annie Y. Hubbard and Ruth P. Calloway are his children. James C. Bowle, Annie C. Bowle, Mary Bowle, Anna Bowle, Mary Virginia Bowle, Matilda Bowle, Thomas C. Bowle, and John Ruth Bowle are the children of a daughter of said James Calloway, now deceased, who died the widow of John Bowle. The name of said deceased daughter was Frances C. Calloway.

"Second. At the time of his death, and for many years prior thereto, the said James Calloway was and had been a resident of Wilkes county, in the state of North Carolina, and the said plaintiffs at the time of his death, and ever since have been, and now are, residents of said state.

"Third. The said James Calloway left a will which was duly probated in the said county and state on December 30, 1878, in accordance with the laws of said state. The George H. Brown named in said will as executor qualified as such in said county and state, and he is the same person who executed the executor's deed to the land in controversy.

"Fourth. A paper purporting to be a copy of said will is hereto attached, marked 'Exhibit A,' and made a part hereof. Annie P. Calloway, as the widow of said James Calloway, knew the contents of said will, and knew of the probate thereof, at the time it was probated as aforesaid; but she has never in any manner dissented from the provisions of said will, as required by chapter 117 of Battle's Revisal of the Laws of North Carolina, by which law every widow is deemed to have assented to her husband's will unless within six months after the probate thereof she dissents therefrom."

The will above mentioned was duly executed in legal form, and made certain specific bequests to his wife, children, and grandchildren, and gave to his wife all of the personal property which belonged to him at his death, excepting money and evidences of debt, and directed the executor to collect all debts, and to proceed to sell all his lands upon such time and terms as he might, in his discretion, think best, "whether said lands may be situated in the states of Kansas, Missouri, or North Carolina," and that all the proceeds realized after making the disbursements and payments specially directed, and paying the expenses of administration, should be distributed in equal proportions among his wife and daughters. George H. Brown, of Statesville, N. C., was appointed his executor, with authority to carry out the terms of the will, and to make title to the real estate which he might convey, and granting him all the necessary rights and powers of execution. Attached to the will were the proceedings probating the same, on December 30, 1878, together with the qualification of the executor. The following authentication is attached to the will, which appears in the record:

"State of North Carolina, Wilkes county—ss.: I, A. H. Horton, judge of probate in and for the county aforesaid, do certify that the foregoing is a full and true copy as taken from the original papers and records on file in my office in the matter of



the will of James Calloway, deceased. I further certify that the clerks of the superior courts of North Carolina are judges of probate, and that the seal of the superior court is used as the seal of the probate court in the respective counties. In testimony whereof, I have hereunto set my hand, and affixed the seal of my office, at office in Wilkesboro, December 30th, 1878. A. H. Horton, Clerk Superior Court and Judge of Probate. [Seal of Wilkes Superior Court of Law, North Carolina.]

"State of North Carolina. I, Jesse F. Graves, judge of the superior court of North Carolina, elected for and residing in the seventh judicial district, do certify that clerks of the superior courts are, by virtue of their office, judges of probate, for their respective counties, having jurisdiction over the probate of wills, and of the recording thereof; that Wilkes county is in the seventh judicial district; that A. H. Horton is to me personally known; is, and was at the time of signing the foregoing certificate, the clerk of the superior court of the said county; that his signature to the foregoing certificate is genuine. The seal attached is the seal of said court, and the certificate is in due form of law. Done at chambers, at Mt. Amy, N. C., Jan. 13, 1879. J. F. Graves, Judge Seventh District."

Here follows certificate of the governor, of the election and qualification of Judge Graves, and that his signature and acts are entitled to full faith and credit.

"Fifth On February 19, 1879, the paper hereto attached as Exhibit A was presented to the probate judge of Lyon county, Kan., with the authentication appearing to it as such exhibit, and none other, and the said probate judge, upon such presentation of said paper by George H. Brown, the person named therein as executor, and without other proof than said paper and said authentication, ordered said paper to be admitted to record in said court as the duly-authenticated copy of the will of said James Calloway. A copy of said order is hereto attached, marked 'Exhibit B,' and made a part hereof. Again, on November 1st, 1888, a paper purporting to be a duly-authenticated copy of the said will of the said James Calloway was presented to the probate court of Lyon county, Kan., a copy of which, with its authentication, is hereto attached, marked 'Exhibit C,' and made a part hereof. Upon the presentation of said paper so authenticated, the said probate court ordered said paper to be admitted to record as the duly-authenticated copy of said will of said James Calloway, without other proof than said paper and said authentication. A copy of said order is hereto attached, marked 'Exhibit D,' and made a part hereof. No other or further step was ever taken in any probate court in the state of Kansas to authorize or legalize the sale of the lands belonging to the estate of the said James Calloway, deceased. No letters testamentary or of administration were issued in the state of Kansas on said estate. The plaintiff Annie P. Calloway, was never called upon to, and she never did, elect to take under the will of her deceased husband in the state of Kansas."

The following is Exhibit B, above referred to: "Thursday, February 19, 1879. In the matter of the estate of James Calloway, late of Wilkes Co., N. C., dec'd. Comes now George H. Brown, executor of the last will of said deceased, and presents to the court a paper in writing purporting to be an authenticated copy of the last will and testament of said James Calloway, late of Wilkes county, state of North Carolina, executed, proved, and admitted to probate according to the laws of the state of North Carolina, relative to property in this county and elsewhere in this state, and makes application to have the same admitted to record in this court. Upon the hearing of this application, the court finds that said paper is a duly-authenticated copy of the will of said James Calloway, deceased; that it has been executed, proved, and admitted to probate according to the laws of the state of North Carolina, and that the authentication thereof is in due form of law, and entitled to full faith and credit; and that said will relates to property in this county and state. It is therefore ordered that said authenticated copy of said will of said deceased be, and it is hereby, admitted to record in this court, and duly recorded, and that said will, so recorded, shall have the same validity as wills made in this state, in conformity with the laws thereof. L. B. Kellogg, Probate Judge."

The following is Exhibit C, referred to in the fifth finding of fact:

"State of North Carolina, county of Wilkes—ss.: I, Milton McNeill, clerk of the superior court of Wilkes county, state of North Carolina, do hereby certify that the above and foregoing is a full, true, and correct copy and transcript of the last will and testament of James Calloway, deceased, and of the probate thereof, and of all the proceedings had in relation to the probate thereof, in the probate court of Wilkes county, North Carolina, before A. H. Horton, clerk of the superior court of Wilkes county, state of North Carolina, at that time, by virtue of his office as clerk of aforesaid court, judge of probate in said county and state, as the same appears upon the original files and records in my office as clerk of said court, and which are now, by virtue of my office, in my sole and exclusive possession and control. In testimony whereof, I have hereunto set my official hand, and affixed the seal of said court, this 25th day of September, 1888. Milton McNeill, Clerk Superior Court of Wilkes County, State of North Carolina. [Seal of Wilkes superior court of law, North Carolina.]

"State of North Carolina, county of Wilkes—ss.: I, Milton McNeill, clerk superior court of Wilkes county, North Carolina, do hereby certify that under the laws of North Carolina, as they existed in the year 1878, and as they still exist, do not require the seal affixed to the signature or certificate of the probate judge or clerk of the superior court, except to the letters testamentary. Given under my hand, at office in Wilkesboro, N. C. Milton McNeill, Clerk Superior Court, Wilkes County, N. C.

"State of North Carolina, county of

— I, Jesse F. Graves, judge of the superior court of North Carolina, elected for and residing in the ninth judicial district, aforesaid state, and being the presiding justice of the aforesaid district, which includes within its boundaries the county of Wilkes, in said state, do certify that clerks of the superior courts are, by virtue of their office, custodians of all files, and records of, in matters of the administration of the estates of deceased persons, and of the probate of wills, and of the record thereof; that Milton McNeil, to me personally known, is, and was at the time of signing the foregoing certificate, the clerk of the superior court of Wilkes county, state of North Carolina; that his signature to the foregoing certificate is genuine; and that the seal attached to said certificate is the seal of said court; and that the certificate is in due form of law. J. F. Graves, Judge of the Superior Court, Ninth Judicial District."

Here follows certificate of governor, of the election and qualification of Judge Graves, and that his signature and acts are entitled to full faith and credit.

The following is Exhibit D, referred to in the fifth finding of fact:

"November 1st, A. D. 1888. In the matter of the estate of James Calloway, late of Wilkes county, state of North Carolina, deceased. [Authenticated copy of will.] Came, this 1st day of November, A. D. 1888, George H. Brown, executor of the last will and testament of said deceased, by C. N. Sterry, his attorney, also S. B. Warren, the owner of certain real estate sold under the provisions of said will by Kellogg & Sedgwick, his attorneys, and presented to the court a paper in writing purporting to be an authenticated copy of the last will and testament of said James Calloway, late of Wilkes county, state of North Carolina, deceased, executed, proved, and admitted to probate according to the laws of the state of North Carolina, in relation to property in this state, and made application to have the same filed and admitted to record in this court. Upon the hearing of said application the court finds that said paper is a duly-authenticated copy of the will of said James Calloway, deceased; that said will has been duly executed, proved, and admitted to probate in accordance with the laws of the state of North Carolina; and that the authentication thereof is in due form of law, and entitled to full faith and credit; that said will relates to property in this county and state. It is therefore ordered that said authenticated copy of said will so presented be, and it is hereby, filed and admitted to record in this court, and be duly recorded, and that said will so recorded have the same validity as wills made and probated in this state in conformity with the laws thereof. J. W. Parrington, Probate Judge."

"Sixth. The executor, George H. Brown, after the making of the order hereto attached as Exhibit B, and prior to June 16, 1883, sold all the lands in Kansas belonging to the said estate, including the land in controversy, receiving therefor the aggregate sum of \$21,695. On July 21, 1885, said executor filed a statement of ac-

counts in the court of probate in Wilkes county, state of North Carolina, in which it appeared that he had received property belonging to said estate, from all sources, of the aggregate value of \$32,546, including the receipts from the Kansas lands, which account contained a description of each tract of land in Kansas, including the land in controversy, together with the amount of money received for each. In July, 1881, said executor paid to the special legatees of said will the aggregate sum of \$5,500, and in April, 1883, the further sum of \$9,000, as a distribution under said will, and in April, 1884, a further distribution of \$1,400. July 21, 1885, there remained in the hands of said executor, after the payment of debts, expenses, and legacies, and distributions aforesaid, the sum of \$78.86.

"Seventh. On April 13, 1881, said executor filed in the court of probate in Wilkes county, N. C., a complete inventory of the estate of the said James Calloway, real and personal, including the Kansas lands, with their estimated value.

"Eighth. On October 18, 1887, said executor made final settlement in the court of probate in said Wilkes county, N. C., and was discharged from his trust as such by order of said court. The plaintiffs had due notice of said settlement and discharge, the settlement and notice thereof both being in full compliance with the laws of North Carolina.

"Ninth. The land in controversy was sold by said executor to H. E. Kelley on June 15, 1883, for the sum of \$450, which sum was the reasonable value thereof. By successive conveyances it was transferred from Kelley to three other parties, and finally to the defendant.

"Tenth. Neither of the plaintiffs have ever tendered in any way to the defendant the executor, or any one, any of the moneys received by them from the proceeds of the Kansas lands, or of the land in controversy, or any part thereof.

"Eleventh. The plaintiffs Annie P. Calloway and Hattie H. Lowe lived in Wilkes county, N. C., and near to the courthouse where said will was probated, and where said final settlement was made. The widow and children of said James Calloway knew of said Kansas lands, and knew that they formed a material part of said estate, and the said widow knew that said executor was making an effort to sell the same. Further than this, the plaintiffs had very little actual knowledge as to the condition of said estate, or as to the executor in relation thereto. They did not actually examine the inventory filed April 13, 1881, nor did they know the contents thereof. They did not know that any of the money paid to them by the executor was the proceeds of the Kansas lands. They did not know that the executor had sold the Kansas lands until after his final settlement and discharge. They supposed that the estate situated in the state of North Carolina alone was worth the sum of \$40,000. The plaintiff Annie P. Calloway accepted and received what was due under the provisions of the will, knowingly and intentionally, but in so doing she did not know whether such tak-

ing would affect her rights as to the property in Kansas or not. She made no inquiry upon this subject, and was not informed by any one. The other plaintiffs accepted what they received under the will without knowing, thinking, or inquiring as to the effect thereof as to their rights as to the lands in Kansas. After the final settlement by the executor as aforesaid, and long before the commencement of this suit, the plaintiffs were all informed fully as to all the facts herein stated."

"Thirteenth. The defendant W. S. Cooley, at the time he purchased the land in controversy, made no examination whatever of the public records concerning the title to said land, but relied solely upon representations made to him concerning the same, and from such representations he believed, in good faith, that he was obtaining a good title to said land.

"Fourteenth. The executor acted in good faith in the sale of the Kansas lands, and he honestly believed that all his acts in relation thereto were proper, legal, and for the best interest of the estate and heirs of said James Calloway.

"Fifteenth. Upon the trial of this case the parties introduced, as a part of the evidence, Battle's Revision, two volumes of the Code, and the Session Laws for the years 1873 and 1874, of the state of North Carolina, and also all the Reports of the supreme court of said state, all of which laws and Reports are here referred to, and made a part hereof."

"Conclusions of law: The defendant is entitled to recover upon all the issues in said cause, and for costs."

The court thereupon awarded judgment in favor of the defendants, to which rulings and judgment the plaintiffs excepted, and they bring the case here for review.

J. Jay Buck and J. G. Hutchinson, for plaintiffs in error. L. B. Kellogg and C. N. Sterry, for defendants in error.

JOHNSTON, J., (after stating the facts.) The validity of the judgment is to be determined from the findings, as none of the testimony has been preserved. From them it appears that the title of the land in controversy was in James Calloway, who died in North Carolina, and the executor of his will, who was vested with full power, sold the land in good faith, and for a reasonable price, and accounted for the proceeds of the sale to the estate and heirs of the deceased. The Calloway heirs, without tendering or offering to restore the purchase price of the land, or any part of it, have brought this action to recover the land, contending that the sale was irregular and unauthorized. The will was executed and proved in North Carolina, and the executor, in pursuance of the authority conferred by chapter 102 of the Laws of 1879, brought a copy of it to Kansas, and presented it for record in the probate court of Lyon county, where the land was situate. That court determined that it was a duly-authenticated copy of the will, which had been executed, proved, and admitted to probate, according to the laws of North Carolina; that the au-

thentication was in due form of law, and entitled to full faith and credit,—and, having found these facts, admitted it to record. The plaintiffs contest both the applicability and the validity of the statute mentioned, under which the foreign executor derived authority to sell the land. Gen. St. 1889, par. 2932. It is claimed to be inapplicable because it was enacted after the will had been executed and proved. It provides: "Whenever, in any will which heretofore has been or hereafter shall be executed and proved in any state or territory of the United States, power is given to the executor or administrator with the will annexed to sell or convey real estate of the testator, any executor of such will, or administrator with the will annexed of the estate of the testator, duly appointed and qualified in any state or territory of the United States in which such will shall have been executed and proved, may sell," etc. Counsel for plaintiffs in error contend that "the obvious intent of the legislature was to make the statute operative as to wills already executed, but which had not yet taken effect through the demise of the testator, and the proving of the will, but not to wills where the testator was already dead, and his will had taken effect by being proved according to law, and all property rights thereunder, or that had passed by descent, had vested. The statute is to be read, 'which heretofore has been or hereafter shall be executed and proved,' and not, 'executed and proved.'" The language of the statute appears to us to be so plain, and the intention of the legislature so obvious, that there is little room left for interpretation. It is clear that it was intended to apply to all wills which had been executed and proved prior to its enactment, as well as to those which were executed and proved afterwards, and fairly covers the will in controversy.

It is contended that the statute is obnoxious to section 16 of article 2 of the constitution, because the subject of the act is not clearly expressed in its title. The title is, "An act to authorize foreign executors and administrators with the will annexed to convey real estate in pursuance of power contained in the will." It is said that the act relates to executors and administrators in other of the states and territories of the United States, while the title indicates executors and administrators of other nations. The word "foreign" is frequently used as the opposite of "domestic." In the statutes and decisions the judgments and wills of other states are generally spoken of as foreign judgments and wills. This was the sense in which it was used by the legislature, and as it will admit of a meaning such as was given to it by the legislature, and broad enough to include the provisions of the act, it cannot be held invalid. In re Pinkney, 47 Kan. 89, 27 Pac. Rep. 179.

It is argued that it is obnoxious to section 17 of article 2 of the constitution, but we find nothing substantial in the claim, nor in any of the other objections made to the validity of the statute.

It is next contended that the authentication of the will was insufficient, and

that, therefore, the plaintiffs' motion for judgment on the findings should have been allowed. The authentication appears to be substantially correct, but, its sufficiency having already been adjudged by a competent tribunal, it is not before us for decision. It appears from the findings that an application was made in the probate court of Lyon county, by the executor, to have a copy of the will admitted to record in that court, and, upon a hearing duly had, it was found that the will presented was a duly-authenticated copy of the will of James Calloway, deceased; that it had been executed, proved, and admitted to probate according to the laws of North Carolina; and that the authentication thereof is in due form of law. It was further found that the will related to property in Lyon county, Kan., and upon these findings an order was made that the authenticated copy of the will be admitted to record in that court, and duly recorded. The probate court is vested with full power to inquire into the sufficiency of the authentication, and to ascertain whether, under the proof offered, the will should be admitted to record. Being vested with jurisdiction, its finding and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack. The statutes provide that the existence of certain facts are necessary before a will executed and proved in another state can be admitted to record in this state. One of the requisite facts is that the copy of such will, presented for record, shall be duly authenticated. This fact is to be determined upon proof, and the authority to determine it is conferred upon the probate court. Gen. St. 1889, para. 2932, 7228. Anything indicating a contrary view in *Gemmell v. Wilson*, 40 Kan. 764, 20 Pac. Rep. 453, is not controlling, as in that case the existence of the requisite facts to admission to the record were conceded. Under the statutes these requisite facts must be determined by the probate court; and, it having exercised the jurisdiction, its determination, although it may have been erroneous, is conclusive upon all interested parties, and all courts, until it is reversed or reviewed in some appropriate proceeding. *Stanley v. Morse*, 26 Iowa, 454, *Roberts v. Flanagan*, (Neb.) 32 N.W. Rep. 563, *Loring v. Arnold*, (R. I.) 8 Atl. Rep. 335; *In re Shoenberger's Estate*, (Pa. Sup.) 20 Atl. Rep. 1050; *Goldtree v. McAllister*, (Cal.) 23 Pac. Rep. 208; *Dickey v. Vann*, (Ala.) 8 South. Rep. 195; *Holmes v. Railroad Co.*, 9 Fed. Rep. 229. See, also, *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. Rep. 116; *Higgins v. Reed*, 48 Kan. 272, 29 Pac. Rep. 389. A duly-authenticated copy of the will having been properly admitted to record, the executor was authorized to sell the property in controversy, and to confer a good title upon the purchaser. We are clearly of opinion that the purchaser from the executor acquired a good title, and that the plaintiffs in error suffered no injustice by reason of the conveyance. The judgment of the district court will be affirmed.

HORTON, C. J., concurring. ALLEN, J., not sitting.

(50 Kan. 655)

KANSAS CITY, F. S. & M. R. CO. v. GRIMES.

(Supreme Court of Kansas, Feb. 11, 1893.)

REVIEW ON APPEAL—STOCK KILLED ON TRACK.

1. Where there is some evidence to support the verdict of the jury, which has received the approval of the trial court, the same will not be disturbed by the supreme court, although the evidence may be conflicting, and the preponderance of the evidence may seem to be against such verdict.

2. Evidence examined, and found that there was testimony showing the defective condition of the cattle guard, and that the employees of the railroad company knew of such defect before the killing of the animals for which suit was brought.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Bourbon county; E. F. Ware, Judge pro tem.

Action by Charles M. Grimes against the Kansas City, Ft. Scott & Memphis Railroad Company for killing two colts of plaintiff. There was judgment for plaintiff, and defendant brings error. Affirmed.

Wallace Pratt and C. W. Blair, for plaintiff in error. E. C. Gates and J. M. Humphrey, for defendant in error.

GREEN, C. This was an action against a railroad company for killing two colts, valued at \$150. It was alleged in the bill of particulars that at the place "where the colts came upon said railroad, and where they were so run over and killed, said railroad was not then inclosed with a good and lawful fence, to prevent animals from being on said road, said places being in Osage township, in said Bourbon county, the fence on each side of said places not then being a lawful and sufficient fence, and the alleged cattle guards nearest said places then being wholly insufficient to keep said colts or other animals from being on said road; that, by said killing of said colts, plaintiff was and is damaged in the sum of \$150; that, more than 30 days prior to bringing this suit, plaintiff made demand upon defendant for the payment of the full value of said colts and the damages so sustained, which payment the defendant has ever since failed and refused to make." The case was first tried before a justice of the peace, and appealed to the district court, where it was again tried, and a verdict rendered in favor of the plaintiff for \$203.50. The railroad company brings the case here. No question is raised but that the animals were killed about the time and near the place alleged.

The point is made that the decision of this case must turn upon the question of fact as to where the animals were struck and killed. If upon the highway, the judgment of the district court should be reversed; if upon the railroad right of way, outside of the crossing, and the animals got on the right of way by reason of not being properly inclosed, the judgment should be affirmed. The defect, if any, in the inclosure of the right of way, was in the cattle guard. There was a highway 40 feet wide over the railroad. One of the colts was found 65 feet north of the cattle

guard, on the right of way, and the head and shoulders of the other were located 160 feet north of the crossing. The remaining portion of the animal was found 690 feet north of the cattle guard, on the right of way. It seems the slats which formed a part of the cattle guard were from 3½ to 8 inches apart; that the pit underneath was only from 10 to 12 inches deep. The plaintiff testified that he saw tracks of colts down in the cattle guard; that there were marks on the north side; but he could not tell just what they were. Another witness testified that he saw some tracks in the cattle guard going north; that on the other side he saw what appeared to be a track coming up on the north side, and inside the right of way. A third witness swore that he saw one track made by a colt or small horse's foot in the cattle guard the morning the colts were found killed. The engineer testified that he was going north with a heavy freight train, and reached the crossing about 8 o'clock in the evening, the train running at the rate of 15 miles an hour; that it was dark, and just before he reached the crossing in question two horses ran across from east to west in front of the engine; that he saw one horse down in the cattle guard, under the pilot; that, when the engine reached the crossing, he saw a horse ahead of the engine, just before the engine knocked it down; he saw only one horse; that he first saw the horses 40 feet from the crossing. The fireman did not see the animals. This accident occurred about the 26th day of November, 1888. We are free to say that the evidence in this case is not clear as to where the animals were struck and killed. There were no special findings. The court instructed the jury that, if the animals killed were struck by the engine and cars anywhere upon the highway, they should find for the defendant. The testimony was all submitted to the jury, under proper instructions from the court. There was some evidence to support the verdict returned by the jury. This court cannot weigh and determine the preponderance of evidence as it is presented here upon paper. This court has often said that where there is some evidence to sustain the verdict of the jury, and the verdict has been approved by the trial court, the findings of the jury will be held conclusive in the supreme court, although there may be a conflict of evidence, and the preponderance thereof may seem to be against the verdict. *Jones v. Inness*, 32 Kan. 181, 4 Pac. Rep. 95.

The point is made by the plaintiff in error that there is no evidence to fix the liability of the railroad company for the alleged defect in the cattle guard; that while there is evidence tending to show that, on the morning after the colts were killed, there was only a depth of from 10 to 12 inches below the surface, there is nothing to show how long it had been in that condition, or that it was in that condition when the colts were killed. The accident occurred about 8 o'clock the night before; so it was so near the time that we would be safe in assuming that there had been no change. It seems from

the evidence of one witness that there had been some trouble about this cattle guard before the accident in question, and he went to the section boss, and called his attention to the condition of the guards; that they were so close together that the plaintiff's horses walked over it. He also went to the station agent about it. The section boss afterwards, and before the accident, fixed the cattle guard by taking out some of the rails, and separated those that remained, so that the feet of the animals attempting to pass over it would go down to the ground. We think there was some evidence to establish the fact that the cattle guard was defective, and that employees of the railroad company had had their attention called to such defects. The law imposes the duty upon a railroad to see that proper cattle guards exist wherever they are required to be constructed. *Railway Co. v. Morrow*, 32 Kan. 217, 4 Pac. Rep. 87. There was sufficient evidence, we think, to show that the railroad company had some notice as to the defective condition of the cattle guard. It is recommended that the judgment of the district court be affirmed.

PER CURIAM. It is so ordered. All the justices concurring.

(50 Kan. 648)

**BABCOCK HARDWARE CO. v. FARMERS' & DROVERS' BANK.**

(Supreme Court of Kansas. Feb. 11, 1893.)

**VACATING JUDGMENT—NOTICE OF MOTION.**

Where a motion is filed to vacate a judgment because of its rendition before the action regularly stood for trial, during the term at which said judgment was rendered, and is continued by order of the court to the next term, *held* error for the court to refuse to hear such motion because notice thereof was not served within the first three days of such succeeding term.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action by the Farmers' & Drovers' Bank against the Babcock Hardware Company on promissory notes. There was judgment for plaintiff, and defendant's motion to set aside the judgment was overruled, and it brings error. Reversed.

L. M. Conkling & Son, for plaintiff in error. John E. Lydecker, for defendant in error.

ALLEN, J. The facts in this case are as follows: The Farmers' & Drovers' Bank presented a claim to C. H. Alexander, as assignee of the Babcock Hardware Company, for allowance on two promissory notes, amounting to \$8,000. The bank admitted having received, through the collection of collateral notes, \$3,800. The hardware company, as assignor, filed its answer to the claim of the plaintiff below, alleging that the bank had received a large amount of property belonging to the hardware company, which was fully described in the answer, amounting in all to \$14,495, and asking that it be set off against the claim of the plaintiff, and for an allowance

of the balance against the bank. The matter was heard before the assignee, who found from the evidence that the Farmers' & Drovers' Bank was indebted to said Babcock Hardware Company in the sum of \$345.73, for which sum the assignee rendered judgment against the bank. From that judgment the bank appealed to the district court of Kingman county. The case was regularly set for trial in the Kingman county district court on the 22d day of December, 1888. The case, however, was called up by the plaintiff on the 6th day of December, 1888, 16 days before the time it was set for trial as shown by the case, although the journal entry reads the 8th of December. The journal entry shows that the plaintiff was present by its attorneys, Lydecker & Cooper, and the defendant, by its attorney, L. M. Conkling, and that judgment was rendered by consent in favor of the plaintiff against the hardware company for \$4,180.86. Afterwards, on the 25th day of February, 1889, during the same term of court at which said judgment was rendered, and while the court was still in session, the defendant filed a motion to set aside said judgment, on the ground that said judgment was improperly and irregularly rendered, the case having been set for the 22d of December, 1888, and judgment rendered on the 6th, and that the judgment was rendered without the knowledge or consent of the defendant, and without a trial of the issues therein. This motion is supported by a number of affidavits, which seem to show that the only authority for entering such judgment came from C. S. Babcock, who was a director of the hardware company. The affidavits state that he had no authority to bind the company, or to act for it in the suit pending. The assignee testifies by affidavit that the judgment was rendered without his knowledge or consent, and that Babcock had no authority to adjust or settle, or to consent to a judgment being rendered. Conkling, the attorney, admits having been present at the time the judgment was rendered, but says that on the morning of the 6th day of December, while he was on his way to the court room, he was met by Babcock, and that Babcock informed him the case was adjusted between the plaintiff and defendant, but did not tell him how much of a judgment was to be rendered; that Babcock told him that it was all understood by all concerned; that in the court room the plaintiff's attorney called the case up, and announced that the case had been settled, and Babcock, being present, assented to such statement, and judgment was entered after the cashier of the plaintiff stated to the court the amount agreed upon, and that Babcock requested Conkling not to oppose the matter, as it was understood by all the parties interested. The motion was filed and placed on the motion docket of the district court on the 25th day of February, 1889. On the 4th of March—being still at the December term of court—the motion was called up for hearing by the defendant's counsel. The court declined to hear it, and the motion was continued to the next term by general order. On the 2d day of April, 1889, the

spring term of court commenced, and the motion was again called up by the defendant's counsel, and was put over until Saturday, the regular motion day. On Saturday it was again called up, and the plaintiff's attorneys objected to the hearing of the motion on the ground that no notice had been served on them. This objection was sustained, and notice was required to be given for at least three days before the hearing. On the 6th day of April the defendant served a written notice of motion on plaintiff's attorneys, notifying them that the motion would be heard on the 9th day of April, 1889, or as soon as might be thereafter. Afterwards, on the 25th of April, the motion came on for hearing, whereupon the plaintiff objected to the hearing of the motion, on the ground that notice of the hearing of said motion had not been given and served within the first three days of the succeeding term of said court after the rendition of said judgment, and the defendant had lost the right to make said motion; and, after the argument of said objection by the respective counsel, the court ordered that said objection of the plaintiff be sustained, and the defendant excepted. Afterwards, on the 25th day of April, 1889, the defendant filed a motion for a new hearing and a new trial, which motion the court overruled, and the defendant excepted.

The defense set up in the hardware company's answer, if true, is an ample defense against the plaintiff's claim. Section 568 of the Code provides that "the district court shall have power to vacate or modify its own judgments or orders at or after the term at which said judgment or order was made. \* \* \* (3) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." Section 569 provides: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term." Section 575 provides: "Proceedings for the causes mentioned in subdivisions three and six of section 568 shall be within three years." In the case of *Leavenworth v. Hicks, McCahon*, 160, this court decided that the provisions of section 547 of the Code, that a motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only on the first three days of the next succeeding term, merely prescribes the time within which a party may come into court to vacate a judgment in an action which had not been properly entered on the trial docket. The party may make his motion at the same term at which the judgment is rendered; and when said motion is made, and the party appears, at the same term, for the purpose of the motion, it is not error for the court to hear and determine it.

Counsel for the defendant in error, in their brief, challenge the truthfulness of the record brought to this court, and assert

that "it is padded with misstatements." We, however, feel constrained to consider the facts presented by the court, rather than the counsel's statements of them. Counsel for the plaintiff in error contend that the only question to be considered by this court is as to whether the court erred in refusing to hear their motion to set aside the judgment. Counsel for the defendant in error, however, contend "that the question now is, did the court commit material error in sustaining the objection of the defendant to the hearing of said motion at the time and as the same was presented?" And they also say, "We think the all-important question before this court is as to the merits of their motion," and contend that this court should inspect the entire record, and determine the merits of the application of the plaintiff in error to set aside the judgment. We think that the defendant's motion was filed in time, and that it was not necessary in this case for the defendant to have served notice of the motion at any time earlier than it was served. Counsel for the defendant in error say in their brief that by agreement of parties the motion was continued from the term at which the judgment was rendered to the April term. If that statement be correct, no notice was necessary. The only purpose of a notice is to bring the party into court, and, where a voluntary appearance to a proceeding is made, no notice is required. We think counsel for the plaintiff in error is correct in his contention as to the question presented to this court, and that this court can only decide as to the right of the plaintiff in error to a hearing on his motion to set aside the judgment rendered against the hardware company. This court cannot pass on the merits of that motion until it has been decided by the district court. While it may be that, if it were apparent on the record that this motion was groundless, the court might feel called upon to decline to require a hearing by the court below on the motion, yet we are not able to say from this record that the motion was groundless. On the other hand, while we do not attempt to decide the question, it appears to us that sufficient facts were presented to the trial court to merit judicial examination and decision. The motion was filed in time, was properly before the court for consideration, and should have been considered and decided by it. The order of the district court refusing to hear the motion to set aside the judgment will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

(50 Kan. 621)

# FRANKHOUSER et al. v. CANNON.

(Supreme Court of Kansas. Feb. 11, 1893.)

## ILLEGAL LEVY BY DEPUTY—LIABILITY OF SHERIFF—REPLEVIN—DAMAGES.

1. Where a deputy sheriff makes a levy upon property not authorized by the writ of execution, the sheriff is also responsible with him for damages.

2. Where a plaintiff in a replevin action demands \$50 damages for the detention of the

property claimed, and, without any amendment to the petition or pleadings before or after the trial, a judgment is rendered for \$75 for the detention, \$25 is excessive and erroneous, and the supreme court may order the district court to modify the same in accordance with the prayer of the petition.

(Syllabus by the Court.)

Error from district court, Osage county; William Thomson, Judge.

Replevin by W. B. Cannon against N. Frankhouser and another. There was judgment for plaintiff, and defendants bring error. Modified.

Pleasant & Pleasant, for plaintiffs in error. J. H. Staveley, for defendant in error.

HORTON, C. J. This was an action brought by W. B. Cannon against N. Frankhouser and J. G. Ellis to recover the possession of two mares alleged to have been taken on execution as the property of his son, John P. Cannon. The mares were valued at \$150, and \$50 damages were claimed for the detention thereof. Trial before the court, with a jury. A verdict was returned for the plaintiff below for the possession of the property, and \$75 were allowed as damages for the detention of the same. Subsequently judgment was rendered thereon, and the defendants below bring the action here for review.

Various errors are alleged concerning the admission, the rejection of evidence, and the giving of instructions. We have examined all of the questions presented and discussed in the briefs, but most of the alleged errors are trivial and wholly unimportant. W. B. Cannon claimed the property under a purchase on the 19th of December, 1888. A written bill of sale of 12 horses and colts from John P. Cannon to W. B. Cannon was introduced in evidence of that date. The amount paid for all this property by W. B. Cannon to John P., as testified to by them, was \$800. Seventy-five dollars was paid in cash on the 19th of December, 1888. One hundred and eighty-eight dollars was acknowledged received on account of the payment of a security debt. Two hundred and seventy dollars was paid in labor, and \$100 for the keeping of two children one year. On the 31st of December, 1888, \$167, the balance due on the bill of sale, was settled with property. It is contended that judgment should have been rendered in favor of Frankhouser, upon the ground that there is no evidence connecting him with the wrongful possession of the goods, or with the transaction in any way. The petition alleged that the property in controversy was seized on the 5th day of February, 1889, by N. Frankhouser, sheriff of Osage county, by virtue of an execution issued out of the district court of that county. Upon the trial it was admitted by the parties that the property was levied upon by John G. Ellis, acting as deputy sheriff of Osage county. In view of the provisions of section 108 of the Civil Code, taking all allegations of authority as true, unless denied upon oath, and the unverified answer filed in this case, and the admission of the parties, we think it may be fairly said that



N. Frankhouser was the sheriff, and that J. G. Ellis made the levy as his deputy sheriff. The sheriff is the real party in interest, as the acts of the deputy sheriff levying an execution bind him. *McCracken v. Todd*, 1 Kan. 148; *Holsington v. Brakey*, 31 Kan. 560, 3 Pac. Rep. 353. In this case Frankhouser would not be benefited if he were released from the judgment, as Ellis was deputy sheriff only, and Frankhouser would be responsible for any orders to him.

The bill of sale from John P. Cannon to W. B. Cannon, of December 19, 1888, was witnessed by Samuel Snow. Snow testified that after it had "just been written down, and John Cannon was going away, it was read over to him, and he made his mark; that the mark upon the bill of sale presented was his mark, and that he could read a little; that he knew his own name when he saw it written." His evidence may not have been of much weight or value, but it was competent. It was sought by defendants below to show by John P. Cannon what he did with the \$75 after receiving it. He stated "that he received the money, never returned it to his father, and that he kept it and used it for himself." It is immaterial what he did with the money after receiving it, if it was received in good faith, and not in any way used for the benefit of his father. If any action had been commenced against John P. Cannon for the recovery of money before the purchase of the horses and colts by W. B. Cannon, the date of the commencement of such action ought to have been shown by the records of the justice of the peace, or the court where the action was commenced.

One or two of the instructions given by the court are entitled to criticism, but there is so little evidence in the case impeaching the purchase of the property by W. B. Cannon that we do not think the errors in the instructions sufficiently erroneous or misleading to cause any reversal.

The amount of damages allowed in the judgment for the detention of the property was \$75. The petition asked \$50 only. Therefore \$25 of the judgment is excessive, and without authority, under the pleadings or issues. *Loper v. State*, 48 Kan. 540, 29 Pac. Rep. 687. The judgment must be modified. The case will be remanded to the court below, with direction to deduct \$25 from the judgment heretofore rendered. The balance of the judgment is affirmed. The costs in this court will be divided. All the justices concurring.

(50 Kan. 624)

#### GREEN v. CORSON.

(Supreme Court of Kansas. Feb. 11, 1893.)

#### FORECLOSURE SALE -- DEFECTIVE NOTICE--FRAUD OF MORTGAGOR.

In pursuance of a judgment of foreclosure, certain real estate was ordered to be sold. A notice was published by the sheriff in a daily paper that the sale would occur on March 9, 1889, and the notice was published in every issue of the paper from February 6, 1889, to March 8, 1889, inclusive, except in the issues of March 6 and 7, 1889. In each of those issues

the figure 9 in the notice had been taken out and turned upside down, so as to somewhat resemble the figure 6. It was found that the alteration in the notice was caused or procured to be made by the defendant, whose property was advertised to be sold, for the purpose of avoiding the sale. *Held*, on a motion of the defendant to set aside the sale by reason of the defective notice, that a party guilty of such misconduct is not in a position to appeal to the court for assistance in consummating the wrong, and that the court will not aid him in reaping the anticipated fruits of his wrongful conduct.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Joseph B. Corson against A. H. Green to foreclose a mortgage of real estate. Defendant's motion to set aside the sale was overruled, and he brings error.

Sam D. Pryor, for plaintiff in error. Peckham & Peckham and McDermott & Johnson, for defendant in error.

JOHNSTON, J. This is a proceeding to review the rulings of the district court of Cowley county refusing to set aside a judicial sale of real property, and confirming such sale. On May 4, 1888, Joseph B. Corson obtained a judgment against A. H. Green and others for the sum of \$6,097.61, and also a decree foreclosing a mortgage given to secure the debt, on three lots in the city of Winfield. The decree directed the sale of the property without appraisal to satisfy the judgment. On February 6th an order of sale was issued to the sheriff, and that officer gave notice of a sale to be had on March 9, 1889, which was published in the Winfield Courier. The return made by the sheriff shows that a sale was made on that day of each of the lots separately, for the total sum of \$6,000. A motion was made by the plaintiff, who was the purchaser at the sale, for a confirmation; and at the same time the defendant, A. H. Green, moved the court to set aside the sale, because of the insufficiency of the notice published by the sheriff. In his affidavit, Green states that the notice of sale, as published in the Winfield Daily Courier on the 6th and 7th days of March, stated that the sale would occur on March 6, 1889, instead of March 9, 1889, as it had appeared in the other issues of the paper. Testimony was taken before the court which showed that the notice was published correctly in every issue of the Winfield Daily Courier from and including February 6 to March 8, 1889, in all of which it was recited that the sale would occur on March 9, 1889, except the issues of March 6 and 7, 1889. In each of those issues the figure 9 had been taken out and turned upside down, so as to somewhat resemble the figure 6. Proof was offered tending to show that this change in the notice was caused or procured to be done by the plaintiff in error, and the district court appears to have found from the testimony that he was responsible for this wrong. Treating this alteration as one made at the instance of the defendant, for the purpose of avoiding the sale, as we must under the general finding, should the court aid him in reaping the anticipated fruits of his wrongful

conduct? A party guilty of such a wrong is hardly in a position to appeal to the court for assistance in consummating that wrong; and, when such an appeal is made, it should be disregarded. There is no intimation that the property sold for anything less than a fair and reasonable price, nor that any bidders were misled or prevented from attendance upon the sale by the discrepancy in the published notice. The proper figure was in the notice, but inverted, so as to somewhat resemble a 6. When so inverted, it was out of line, however, so that it did not fairly represent a figure 6, and the difference between it and a figure 6 could be readily seen. In any event, the plaintiff in error will not be heard to complain of a defect or alteration of the notice of his own creation, nor should a court aid him in taking advantage of his own wrong.

The objection that no appraisal of the property sold was made and returned by the officer prior to the sale is without force, since the judgment shows that the sale was to be made without appraisal. The order of the court confirming the sale will be affirmed. All the justices concurring.

(30 Kan. 639)

NEENAN et al. v. WHITE.

SAME v. BLACK.

(Supreme Court of Kansas. Feb. 11, 1893.)

TAX DEED—VALIDITY.

After five years have expired from the time of recording the tax deed, and the claimant under such tax deed has been in the actual possession of the property all of the time, making improvements thereon, and no person claiming to have any interest in the property at any time during the period that elapsed from the time when the first taxes were levied upon the property till after more than five years have elapsed from the time of the recording of the tax deed has ever made any claim to the property as against the claimant or his grantors under the tax deed, such deed should be liberally construed, for the purpose of upholding and enforcing it, and protecting the equities of the claimant. *Sanger v. Rice*, 23 Pac. Rep. 633, 43 Kan. 580.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Elizabeth Neenan and others against John A. White. Same against Samuel D. Black. The actions, which were brought to recover land, were tried together, and, defendants having judgment, plaintiff appeals. Affirmed.

C. D. Walker, for plaintiffs in error. W. W. & W. F. Guthrie, for defendants in error.

HORTON, C. J. These cases were tried together, and the facts in each are substantially the same. The plaintiffs below (plaintiffs in error) were the heirs at law of Michael Neenan. Martin Walter was the original patentee from the United States of the N. E.  $\frac{1}{4}$  of section 6, township 5, range 19, in Atchison county. On the 25th day of September, 1858, he deeded it to Michael Neenan. The latter lived at St. Joseph, Mo., until his death, on the 29th of March, 1885, with the exception of

one year of residence in Colorado. St. Joseph is about 22 miles from Atchison. Neenan was a contractor, and a man of property. White claims possession and ownership of the east half, and Black the west half, of the land deeded to Neenan, under two several tax deeds,—one dated May 16, 1865, and filed for record in the office of the register of deeds of Atchison county on May 18, 1865. This deed recited a consideration of \$39.70, for the taxes, interest, and costs of 1859, 1860, 1861, 1862, 1863, and 1864. It showed a tax sale made on May 11, 1863. The other tax deed was dated August 8, 1873, and filed for record on that date. It recited a tax sale on the first Tuesday of May, 1869, and a consideration of \$89.79, for the taxes, interest, and costs of 1868, 1869, 1870, and 1871. It appears from the findings of the trial court that Neenan, after obtaining his deed, never paid any attention to the land, or paid any taxes thereon. His heirs commenced this action in the court below on August 25, 1888, to recover possession of the land deeded to him. The defendants and their grantors have paid the taxes to the commencement of the action. The first tax deed was of record over 23 years before the action was commenced, and the last tax deed of record over 15 years. Jacob Frommer, one of the holders under the tax deeds, took possession of the land in the spring of 1874, and made arrangements to have the grass upon the land cut, and the timber thereon properly taken care of. On the 20th day of May, 1878, Frommer conveyed the land to Elling O. Twidt. He at once occupied the same, building a house, and fencing and breaking about 52 acres of the east 80 acres. On the 11th of October, 1880, Elling O. Twidt and wife, by warranty deed, conveyed to White the east half of the land; and White went into possession thereunder, and has continued in actual possession thereof ever since. On the 10th of December, 1880, Elling O. Twidt conveyed the west 80 acres to Franklin, and he conveyed to Black. They each took possession under their respective conveyances, and, after Black obtained his title, he continued to occupy the west half.

A great many objections are presented to the tax deed of 1865; but, with our view of the case, it is unnecessary to refer to them.

The principal objection to the tax deed of 1873 is that it does not show an assignment of the tax-sale certificate from Samuel Gard, the holder and owner thereof, to P. L. Hubbard, the party to whom the deed was issued. Further, that it fails to show that Samuel Gard was dead, or any order of the probate court permitting an assignment of the certificate to be made. The tax deed recites as follows: "And whereas, the said J. I. Locker did on the 10th day of June, A. D. 1869, duly assign the certificate of the sale of the property as aforesaid, and all his right, title, and interest to said property, to Saml. Gard, of the county of Atchison, and state of Kansas; and whereas, Hugh D. Fisher, administrator, did on the 17th day of December, A. D. 1869, duly assign the certificate of the sale of the property as afore-

said, and all his right, title, and interest to said property, to P. L. Hubbard, of the county of Atchison, and state of Kansas." The defendants upon the trial showed, by the records of the probate court of Atchison county, the death of Gard prior to the 17th of December, 1869, and the appointment and qualification of Fisher as his administrator. No heir or personal representative of Gard, deceased, objected to the transfer of the tax certificate to Hubbard, which was obtained by Gard, in his lifetime, from Locker. It was decided in *Sanger v. Rice*, 43 Kan. 580, 23 Pac. Rep. 633, that "ordinarily a tax deed should be strictly construed; but where a tax deed has been of record for more than five years, and the claimant under it has been in the actual possession of the property conveyed by it during all that time, making improvements thereon, and no person claiming to have any interest in the property, at any time during the period that elapsed from the time when the taxes were first levied upon the property till after more than five years had elapsed from the time of the recording of the tax deed, has ever made any claim to the property, as against the claimant under the tax deed, \* \* \* and where such tax deed, if it were so construed as to make the facts therein stated correspond precisely with the actual facts, would necessarily be held to be valid, such tax deed should be liberally construed, for the purpose of upholding and enforcing it."

Applying the law thus stated to this case, we think that the tax deed of 1873 cannot be held invalid or void, as it was of record for more than 15 years, and the defendants or their grantors have been in possession for over 14 years. The equities of the case are all with the defendants, and if, in any case after the tax deed is upon record for more than five years, a liberal construction should prevail, the one of 1873 should certainly be entitled to such a construction. The judgments in both cases will be affirmed. All the justices concurring.

(50 Kan. 697)

CHICAGO, K. & W. R. CO. v. HOFFMAN.

(Supreme Court of Kansas. Feb. 11, 1893.)

EMINENT DOMAIN—DAMAGES ON APPEAL FROM AWARD.

On an appeal from an award in proceedings to condemn a right of way for a railroad over a highway, it was error for the court to permit evidence as to damages to the farm of the plaintiff by reason of the location of another railroad, other than that of the defendant, along the same highway. Upon an appeal from an award in condemnation proceedings by a railroad company the inquiry is limited to the damages sustained by reason of the location of the railroad of the defendant.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Saline county; R. F. Thompson, Judge.

Action by W. H. Hoffman against the Chicago, Kansas & Western Railroad Company to recover damages for land taken by defendant for right of way. There was

judgment for defendant, and plaintiff brings error. Reversed.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Joseph Moore, for defendant in error.

GREEN, C. Commissioners duly appointed to condemn a right of way over a public highway made the following report as to the land of the defendant in error: "Probable name of owner, W. H. Hoffman; description of land over which the road is located, west half of northeast quarter section 5, township 14, range 2 west; amount of land taken, 1.02 acres; value of land taken, \$1.00; total, \$1.00; all of the land lying within 40 feet of the right of way of the Union Pacific Railroad Company, on the south side of Union Pacific Railroad, and used as a public road." Hoffman appealed from this award to the district court of Saline county. It was admitted upon the trial that 1.02 acres were taken by the railroad company. In the examination of one of the witnesses the following questions were asked, and answers given: "Question. Do you know the value of the 1.02 acres of land occupied by the public highway prior to the condemnation of the right of way for this railroad,—what it was worth,—taken in connection with the farm, and considering that it was burdened with an easement or right of the public to use it as a public or county highway? (Objection as incompetent, irrelevant, and immaterial. Objection overruled, defendant excepting.) Q. And taking into consideration, also, the purpose for which that farm was used? (Same objection, ruling, and exception.) Answer. Yes, sir. Q. You may state what it was worth. (Same objection, ruling, and exception.) A. It was worth \$30 per acre. Q. You may state, if you know, what that same acre and two hundredths was worth immediately after the railroad condemned it for its right of way, taking into consideration that the railroad was constructed at that time as it is at the present time. (Same objection, ruling, and exception.) A. It was worth nothing."

We are of the opinion that the questions complained of are subject to criticism, but are not prepared to say that they come within the rule laid down in the case of *Railroad Co. v. Woodward*, 48 Kan. 599, 29 Pac. Rep. 1146. The inquiry, ordinarily, should be made as to the market value of the property before and after the condemnation proceedings were had. In this case the damage was the additional burden imposed by the construction and operation of a railroad over the highway. If this was a damage to the farm, the measure of such damage would be the difference in the value of the farm before and after the construction of the road. Where the fee of the highway is in the owner, as in this case, the measure of damage is the same as in other cases of partial taking; that is, the value of the land taken, subject to the easement for the highway, and damages to the remainder of the land by reason of taking a part for railroad pur-

poses. The inquiry should have been made as to the value of the land actually occupied by the railroad, taking into consideration the fact that the public had a right thereon for a highway. This was not embraced in the last question. We do not, however, regard this as sufficient error to reverse this case.

The following evidence was given by the plaintiff over the objection of the defendant: "Question. After the location, about the 16th of September, taking into consideration that the railroads were built at that time as they are now, with that fence along the south side, and the gate, and no crossing there over the Santa Fe, what, in your judgment, was the market value of the place at that time? (Objection as incompetent, irrelevant, and immaterial, and for the reason that it includes any damage that may be occasioned by the location, construction, and operation of the Chicago, Kansas & Nebraska Railroad. Objection overruled; to which ruling and decision of the court the defendant excepted.) A. I do not think it would be worth more than \$72 or \$73 per acre,—say \$73 per acre." Upon this feature of the case the court instructed the jury as follows: "If you find from the evidence that the Chicago, Kansas & Nebraska Railway Company built its railroad upon defendant's right of way, through the plaintiff's farm, without the plaintiff's consent, or by any right acquired by condemnation proceedings, and if you further find that said railroad was built upon such right of way with the defendant's consent, then the defendant is liable to the plaintiff in damages, the same as though the defendant had built and operated said railroad itself." The court refused the following instruction requested by the defendant: "The plaintiff is not entitled to recover in this case for any damage to his land resulting from the location and operation of the Chicago, Kansas & Nebraska or the Union-Pacific Railways through his land." The admission of the evidence, the giving of the instruction, and the refusal to give the instruction requested, were, in our opinion, error. The plaintiff below introduced in evidence a certified copy of the condemnation proceedings in the case of the Chicago, Kansas & Nebraska Railroad Company, doubtless for the purpose of showing that this company had not condemned a right of way over the highway through the plaintiff's land; but this was not evidence that the plaintiff in error was in any way responsible for this, or was to respond in damages for the other company. The question to be determined was the damages the plaintiff had sustained by reason of the construction of a railroad by the plaintiff in error. It was the only issue to be tried. Hoffman appealed from the award of the commissioners, and the inquiry was thereby limited to the mere matter of damages he had sustained by reason of the location of the railroad of the plaintiff in error; and the inquiry should have been confined to the damages naturally resulting from the construction of the Chicago, Kansas & Western Railroad. We recommend a reversal

of the judgment of the district court, and that a new trial be granted.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 701)

#### CHICAGO, K. & W. R. CO. v. ALLEY.

(Supreme Court of Kansas. Feb. 11, 1893.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by Thomas Alley against the Chicago, Kansas & Western Railroad Company to recover damages for land taken by defendant for right of way. There was judgment for defendant, and plaintiff brings error. Reversed.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Joseph Moore, for defendant in error.

PER CURIAM. The questions involved in this case are substantially the same as those in the case of Railroad Co. v. Hoffman, 32 Pac. Rep. 382, (just decided.) Upon the authority of that case the judgment in this case will be reversed, and remanded to the district court, with instructions to grant a new trial.

(50 Kan. 776)

#### FRICK & CO. v. LARNED et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

AGENTS—COMMISSIONS—ACCOUNTING—LIMITATIONS—LIABILITIES TO PRINCIPAL.

1. Where it was agreed that agents should receive a stated commission for the sale of machinery, and it was provided that commissions should be paid on cash payments only, and that no commission was to be paid or retained on sales made to irresponsible parties, nor where the debts for which the machinery was sold were uncollectible, and where it appeared that the agents under this contract sold machinery which was to be paid for at a future time, and represented that the notes taken were good, and would be paid at maturity, and the principal, relying upon these statements, paid the commission in full, and afterwards it was found that the purchasers who gave the notes were insolvent, and only a small part of the purchase price was paid, *held*, in an action brought for that purpose, that the principal was entitled to recover the difference between the commission which was paid and the amount actually earned by the agents under the terms of the contract; and further, *held*, that the action arises on contract, and is not barred by the two-years statute of limitations.

2. Where an agent is required to exercise care and diligence in ascertaining the financial standing and ability of proposed purchasers, and the principal, relying upon the exercise of due care by the agent, and that he has made full inquiry as to the truth of the representations made by the purchaser concerning his property and financial ability, is induced to sell machinery to an irresponsible party on credit, who was actually insolvent, and where it appears that the agent exercised no care and made no inquiry, he is liable to the principal for the loss sustained because of such neglect.

(Syllabus by the Court.)

Error from district court, Sumner county; J. T. Herrick, Judge.

Action by Frick & Co. against C. G. Larned & Co. on a contract. There was judgment on demurrer to the petition, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by JOHNSTON, J.:

Frick & Co. brought an action against C. G. Larned & Co. to recover the sum of \$1,741.59. The grounds for recovery, as stated in their petition, are as follows:

"First. That the plaintiff is a corporation created and existing under and by virtue of the laws of the state of Pennsylvania, and doing business in the state of Kansas, as well as other states, in the manufacture and sale of threshing machines, engines, and separators. That on the 6th day of November, A. D. 1884, the plaintiff herein appointed the defendants herein as its agents to sell its threshing machines, engines, and separators through the counties of Sumner and Harper under a contract then and there entered into by plaintiff and defendants, whereby the defendants accepted the agency and appointments under certain agreements and terms in a written contract, a copy of which said contract is hereto attached, marked 'Exhibit A,' and made a part of this petition. That it is by said contract mutually agreed by and between the plaintiff and defendants under the fourth clause of said contract that the commission to be allowed to said defendants for the sale of said portable engines and traction engines for farm and other purposes and for separators and horse powers should be 17 per cent. of the amount of such sales, provided no commission should be allowed said agents on any articles taken back, or any sale to irresponsible parties, or any portion of such sales as will be uncollectible. That on June 27, A. D. 1884, the said defendants, as agents of the plaintiff, sold to Jonathan Anderson, William M. Riley, and Preston Douglass one Frick & Company's (Eclipse) traction self-guide engine number 3,361, and one Frick & Company's vibrating threshing machine number 1,104 for the sum of \$1,765. That said Jonathan Anderson, William M. Riley, and Preston Douglass on the 27th day of June, A. D. 1884, made and executed and delivered to C. G. Larned & Co., as agents for said plaintiff, three promissory notes,—one for \$588, due on the 1st day of October, A. D. 1884, with interest at the rate of 8 per cent. per annum from date; another, due on the 1st day of October, A. D. 1885, for the sum of \$589, with interest at the rate of 8 per cent. per annum from date; and another, for the sum of \$588, due on October 1, A. D. 1886, with interest at the rate of 8 per cent. per annum from date,—copies of which notes are hereto attached, marked respectively Exhibits 'B,' 'C,' and 'D,' and made a part of this petition, and for better securing the said notes the said Jonathan Anderson, William M. Riley, and Preston Douglass made and executed at the same time a chattel mortgage on live stock and on the engine and separator so purchased by them, and delivered it to said C. G. Larned & Co. for said Frick & Company, a copy of which said chattel mortgage is hereto attached, marked 'Exhibit E,' and made a part of this petition. That said Jonathan Anderson, William M. Riley, and Preston Douglass, or any of them, have never paid the said notes, or any part thereof, except \$250, paid December 5, 1884; and said plaintiff was com-

pelled to foreclose said chattel mortgage, after giving due notice of the time and place appointed for said sale; and the proceeds of said sale, after expenses of selling under said chattel mortgage, amounted to two hundred and seventy-seven and fifty-nine one hundredths dollars. That the plaintiff has never received a dollar of the remainder due from said parties that made said notes, and are unable to collect anything thereon, for the reason that they were and are insolvent. That the defendants at the time of the sale represented to the plaintiff that the said notes were good, and would be paid at maturity, and that said plaintiff, relying upon the statement so made by the defendants, paid the said defendants the sum of \$300.05 as commission on such sale. That all plaintiff has ever collected of said notes and chattel mortgage was the sum of five hundred and twenty-seven and fifty-nine one hundredths dollars. Wherefore the defendants were entitled to receive only \$89.09 as commission on such sale. Wherefore the plaintiff demands judgment against defendants for the difference between \$300.05 and \$89.09, amounting to \$210.96, and costs of suit, and such other and further relief as may be deemed by the court just and equitable.

"Second cause of action: And plaintiff herein for a further and second cause of action against the said defendants says it was by said plaintiff and defendants, in the ninth clause of said contract, to which reference is heretofore made, mutually entered into and agreed that said defendants should take written orders or blanks furnished by the plaintiff for all such contracts, and send plaintiff original and keep a copy of the same, and that the defendants would take a blank statement of the ability of the person to make payments, and that it should be invariably filled out; and that the defendants then and there agreed that they would not send any order to the plaintiff for approval until the defendants had thoroughly convinced themselves that the statements made by the purchaser or purchasers were based on a fair value of the property at the time such statements were made by an examination of the records, or by making full inquiries of the residents in the locality of the purchaser, and every means which would assure them of the correctness of the statements made by the purchaser. That at the time of said purchase to which reference is heretofore made the said Jonathan Anderson made and signed a property statement for the purpose of obtaining credit at the time from said Frick & Company, a copy of which is hereto attached, marked 'Exhibit F,' and made a part of this petition, and in which said statement the said Anderson claimed to own in his own name 160 acres of land in section 36, in township —, in range 5, worth \$2,000, which was free of incumbrance except \$500, and personal property worth \$2,000 over and above his indebtedness and exemptions, and that said property was not incumbered. That the said plaintiff sold the said engine and separator to said Jonathan Anderson, William M. Riley, and Preston

Douglass solely on the basis and representation in the property statement of said Jonathan Anderson, furnished by him for the plaintiff through the defendants, being true, and on belief that said defendants had investigated the statement of the ability of said parties, and especially said Jonathan Anderson, to pay to the plaintiff as represented. That upon the belief that the said C. G. Larned & Co. had investigated said statement, and had convinced themselves that said statement was true, and upon such representation being made by the said defendants to the plaintiff, the plaintiff furnished said engine and separator to said Anderson, Riley, and Douglass. That said statement of Anderson was wholly untrue, and that he had no land at the time of his purchase, and was not worth anything over and above his exemptions and liabilities, and his statement of his ability to pay, as furnished by the said Anderson, through the defendants, to the plaintiff, was wholly untrue. That said defendants never investigated the truth of the statement so made, and never made an inquiry or examination of the records, as they were bound to do under said contract. That said plaintiff has been unable to collect any part of said notes so given, except \$250, and has been unable to collect by foreclosure of the chattel mortgage given at the time for certain live stock over the sum of \$277.59. That said balance due on said notes cannot be collected from said Anderson, Riley, and Douglass by reason of their insolvency, they having no property out of which anything can be made, and they have at all times, and do now, refuse to pay anything further upon said notes. Wherefore, by reason of the failure of said defendants to investigate the statement of said Anderson as heretofore stated, and as they were bound under said contract so to do, an action has accrued to the plaintiff to recover from said defendants the amount not collected on the notes, amounting to \$1,237.41, together with interest on said uncollected amount, amounting to \$293.82; and also the sum of \$210.36, as set forth in the first cause of action in this petition, amounting in all to the sum of \$1,741.59,—for which said sum the plaintiff demands judgment against said defendants, together with interest at the rate of 7 per cent. per annum from the 1st day of January, A. D. 1887, and the costs of this suit, and for such other and further relief as may be deemed by the court just and equitable."

The contract referred to provided that the agent should receive 17 per cent. as commission upon all sales made, but it provided "that no commission shall be allowed or paid said agents on any article taken back, or any sale to irresponsible parties, or on any portion of such sales as shall be uncollectible." In the fifth paragraph the defendants agreed "to attend to the collection of notes taken for machinery without extra charge; that the signatures of all notes, orders, and property statements shall be genuine, and that the makers of all notes which may be sent to the parties of the first part in pursuance of this agreement shall at the time

such notes are signed be parties of well-known responsibility and good reputation for veracity and the prompt payment of their debts in the localities where they reside, and that the notes so sent shall be accompanied by the order containing the property statements of the makers and chattel mortgages or deeds of trust." In the ninth paragraph it was provided that the defendants should take and forward written orders for all machinery contracted for, and that they should also take statements of the ability of the persons to whom sales were made to make payments; and it further provided that the agent "will not forward such orders to the factory for approval until he has thoroughly convinced himself that the statements made are based upon a fair valuation of the property at the time such statement is made, either by examination of the records or by making full inquiry of the residents in the locality of the intended purchaser, or by any other means that will assure him of the correctness of the statement made." It further provided that the defendants should receive commission out of cash payments only; and where the sale was made partly on time they should retain commission only on such portion as was paid in cash, and the remaining commission was to be paid as the notes were paid. Another provision of the contract was that the defendants agreed to be accountable to, and to reimburse, the plaintiff for any losses or expenses resulting from any deviation from the agreement. Each of two of the defendants filed general demurrers, alleging that the foregoing petition did not state facts sufficient to constitute a cause of action against them. The court sustained the demurrers, and awarded judgment in their favor. The plaintiff excepted to the ruling, and brings the case here for review.

Elliott & Woods, for plaintiff in error.  
W. W. Schwinn and A. E. Parker, for defendants in error.

JOHNSTON, J., (after stating the facts.) By the first count of the petition the plaintiff seeks to recover the unearned portion of the commission paid by it to its agents, and no reason is seen why the facts alleged do not warrant a recovery. The amount of the commission which the agents should receive was fixed by the contract, and no commission was to be paid on any sales made by the agents to irresponsible parties, nor where the debts for which machinery was sold were uncollectible. The plaintiff alleges that certain machinery was sold to certain parties on credit, for \$1,765, and that the total amount which the plaintiff had been able to collect from the parties and upon the security which had been given by them was \$527.59. The commission on the amount for which the machinery was sold was \$300.05, while the commission upon the amount collected was only \$89.69. It is alleged that the plaintiff was unable to collect any more than \$527.59, for the reason that the debtors were and are insolvent. Under the contract no commissions were due or payable for that

part of the selling price which could not be collected, and, as \$1,237.41 of the selling price of the machinery in question was uncollectible, no commission was earned thereon, and the defendants had no right to retain the commission on that amount. It is true that another provision of the contract provided that the defendants should receive commissions out of cash payments only, but that is coupled with the further provision that the agents should retain commissions only on such payments as should be made. It is contended by the defendants that, as the plaintiff had advanced the commission before the payments were made, it departed from the contract, and cannot now recover such commission back. This is met by the allegation that the defendants represented to the plaintiff that the notes were good, and would be paid at maturity, and, relying upon their statements, the plaintiff paid the commission in full. From the petition it does not appear that any new contract was made between the parties, but that the commissions were advanced upon the schedule of rates fixed by the written contract, and upon the representation and assumption that the sales had been made to responsible parties, and that the paper would be paid at maturity. The fact that the commissions were advanced to or retained by the defendants before it was developed that their representations were untrue, or that a portion of the debt could not be collected, gives them no right to retain the unearned portion of the commission. According to the averments of the petition, it was agreed that they should not receive or retain a greater sum as commission than 17 per cent. of the amount which was or could be collected on the sales made; and it was further provided that they would reimburse the plaintiff for any losses resulting from any deviation from their agreement. As the commissions were advanced upon the representation of the defendants that the notes taken by them were good and collectible, the advance of commission can hardly be treated as a voluntary payment. The allegations of the petition are not as full and definite as they should be, but, assuming that the facts alleged are true, as we must, we think they are sufficient to show that the plaintiff is entitled to recover the difference between the commission which was paid and the amount actually earned by the defendants.

It is contended that the action sounds in tort, and is therefore barred by the two-years statute of limitations. From what has been stated it is clear that the action arises on contract, and does not fall within that limitation.

The allegations of the second count are set out at length in the statement, and from it and the exhibits it appears that the defendants agreed to take orders for machinery and forward the same to the plaintiff for approval. Blanks were to be furnished for that purpose, and, in connection with each order, they were to take and forward a statement of the financial ability of the purchasers to meet their obligations. These statements were to be

invariably filled out where sales were made on credit, and no orders were to be forwarded to the plaintiff for approval until the agents had thoroughly convinced themselves that the statements of property were based on a fair valuation; and they were required, either by examination of the records, or by making full inquiry of residents in the locality of the intended purchaser, or by other means, to ascertain and assure themselves as to the correctness of the statement made. It was further provided that the notes taken should be from parties of well-known responsibility and good reputation for veracity and prompt payment of debts. Now, it is alleged that the parties to whom the sale was made in this instance were insolvent. One of them, Jonathan Anderson, made a property statement that he owned a certain quarter section of land, worth \$2,000, free from all incumbrances except \$500, and that he owned \$2,000 worth of personal property over and above his indebtedness. It is averred that at that time Anderson had no land, and that his statement of his property and his ability to pay, taken by the defendants and forwarded to the plaintiff, was wholly untrue. It is then averred that the defendants never made inquiry as to the truth of the statement which they had taken and forwarded, and never made any examination of the record, as the contract required. These averments, fairly interpreted, show a liability of defendants for the losses occasioned by their noncompliance with the contract and their neglect. The law requires fidelity and reasonable care and diligence on the part of agents in the transaction of business for their principals. In the absence of any specific provisions as to the care of agents in ascertaining the responsibility of persons to whom sales were made on credit, they would be held to a careful examination of the credit of a proposed purchaser, and to the exercise of reasonable care in ascertaining from the usual sources of information as to his ability to meet payments when they were to be made. In this case care and diligence were especially enjoined upon the agents, and, while they did not become guarantors of the responsibility of the persons to whom sales were made, they bound themselves to a high degree of care and diligence in ascertaining the financial standing and ability of the persons from whom orders were taken. The property statement made by the proposed purchaser was treated as an important feature of a proposal to purchase machinery. It was to be invariably filled out and forwarded with the order. The agents were required to thoroughly convince themselves that the valuation put upon the property by the proposed purchaser was fair, and either by examination of the record, or full inquiry of residents in the locality of the intended purchaser, or by other means, they were to assure themselves of the correctness of the statement made. The statement thus made and attested and sanctioned by the agents was made the basis upon which the principal determined whether a sale should be made. It is averred that the



plaintiff relied upon the performance of these duties by the agents, and, if they failed to exercise the care and diligence required of them, they are liable to the plaintiff for the loss sustained by reason of their neglect. It is said by the defendants that ample security was taken, upon which the plaintiff relied, and that the loss was occasioned by its own neglect. These are matters to be set up in an answer, and which do not appear from the allegations of the petition. Taking the facts alleged in the petition to be true, we think it stated a cause of action against the defendants, and that the general demurrer should have been overruled. The judgment of the district court will be reversed, and the cause remanded for another trial. All the justices concurring.

(7 Kan. 755)

### INGELS et al. v. INGELS.

(Supreme Court of Kansas. Feb. 11, 1893.)

#### HOMESTEAD—NECESSITY OF OCCUPANCY.

1. Where city lots are purchased for a homestead, in order to preserve a debtor's right to the homestead exemption he must actually occupy the same as a residence within a reasonable time after the purchase; and where a debtor fails to so occupy, and fails to make any preparation for occupancy for a period of two years and five months after such purchase, he cannot defeat the judgment lien of a creditor merely by showing that he has always intended to occupy said lots as a homestead. The constitution and the statute require actual occupancy in order to preserve a homestead right.

2. Occupancy after levy of execution does not change the right of the parties.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Lemuel Ingels against Millard F. Ingels and Eliza Ingels. There was judgment for plaintiff, and defendants bring error. Affirmed.

W. D. Gilbert, for plaintiffs in error. B. F. Hudson, for defendant in error.

ALLEN, J. On the 22d day of June, 1889, defendant in error obtained a judgment in the district court of Atchison county, Kan., against T. J. Ingels and M. F. Ingels for the sum of \$906.90 and costs of suit. On the 9th day of August, 1889, execution was issued on said judgment to the sheriff of Atchison county. On the 19th of August, 1889, said sheriff levied the same on lot 11, and the west 40 feet of lot 12, block 11, in that part of the city of Atchison commonly known as "West Atchison." The sheriff duly advertised this property for sale, and on the 26th day of September, 1889, sold the same to the plaintiff below for the sum of \$157. Motions were thereafter filed both to confirm and set aside said sale. These motions were heard at the same time. The motion to set aside the sale was overruled, and the motion to confirm was sustained. The defendants below excepted to the ruling of the court on these motions, and bring the case here for review.

Two points are urged by counsel for the plaintiffs in error. One is that the ap-

praisement is defective, because the appraisal fails to state that the appraisers made an estimate of the real value of the property. The appraisal does state that the appraisers, being first duly sworn impartially to appraise the said property upon actual view, had truly and impartially appraised said property, and that the particular property in controversy was appraised at \$150. We think this a substantial compliance with the statute. It is not necessary that the precise language of the statute be used in the report of the appraisers. We think that the appraisal in this case fairly shows that the property was appraised at what the appraisers deemed its real value. This is a substantial compliance with the requirement of the statute.

The principal question presented for our consideration is whether or not this property was a homestead, and therefore exempt from levy and sale. The facts with reference to the matter, as appears from the record, are as follows: The plaintiffs in error formerly owned and occupied a homestead in West Atchison, which they sold in the year 1887, expecting and intending at the time to reinvest the proceeds in another homestead. Soon thereafter they invested a part of the proceeds of this sale in the property in controversy, for the purpose and with the intention of making it their permanent homestead. At the time of the purchase there was no house or other building thereon, and the same was not inclosed. They inclosed the lots with a fence, and, as fast as they were able, proceeded to and had hauled on said lots materials, stone, lumber, etc., with which to build a dwelling house and building to occupy as a homestead. Millard F. Ingels then took a contract at Valley Falls to bore for coal, and temporarily moved to Valley Falls, to be near his work, and intending to return to his homestead, complete his dwelling house, and occupy the same as his permanent homestead. While he was still engaged on his contract at Valley Falls, and before he had completed the same, on the 19th day of August, 1889, the sheriff levied said execution on said property, and sold the same as before stated. The plaintiffs in error have no other homestead, and no other real estate of which to make a homestead. After the levy the defendants below built a house on said lots, which they occupied at the time of the sale. The defendants never occupied the premises in question from the time they were purchased by the defendants, in March, 1887, till after the making of the levy thereon; and at the time said judgment was rendered and at the time the levy was made, the said premises were vacant and unoccupied, excepting that they were inclosed by an old fence. The facts in this case are to be gathered from the affidavit made by both plaintiffs in error, and also from an agreed statement of the facts made by both parties, and included in the record. The statements with reference to the placing of building materials on the lots are contained in the affidavit. From the agreed statement it appears that the defendants never occupied the premises in

question from the time they purchased them to the time of the levy, and that at the time the judgment was rendered and at the time of the levy the premises were vacant and unoccupied, except that they were inclosed by an old fence. We can only harmonize the facts gathered from the affidavit with those contained in the agreed statement of facts by concluding that whatever building materials had been placed on the lots were removed therefrom before the levy was made. It clearly appears from the whole record that the premises were never in fact occupied by the defendants as a homestead, and also that at the time the judgment was rendered and the levy made the lots were vacant and unoccupied. The question is now presented for our consideration as to whether the purchase of this property for a homestead, and the intention in the minds of these parties to make it a homestead in the future, is sufficient to supply the requirement of occupancy contained in the constitution. Section 9, art. 15, of the constitution reads as follows: "Sec. 9. A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." This section of the constitution has been considered and construed by this court in numerous cases. In the case of *Edwards v. Fry*, 9 Kan. 417, Mr. Justice Brewer, speaking for the court, used the following language: "We know the spirit which animates the people of Kansas, the makers of our constitution and laws, on this homestead question. We note the care with which they have sought to preserve the homestead inviolate to the family. We have no disposition to weaken or whittle away any of the beneficent constitutional or statutory provisions on the subject. We know that the purchase of a homestead, and the removal onto it cannot be made momentarily contemporaneous. It takes time for a party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now, the law does not wait till all this has been done, and the purchaser actually settled in his new home before attaching to it the inviolability of a homestead. A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure at once a homestead inviolability. Yet occupation is nevertheless an essential element to secure this inviolability." Again, in the case of *Monroe v. May*, Id. 466, it was held: "A purchase of a home-

stead with a view to occupancy, followed by occupancy within a reasonable time, receives from the time of purchase a homestead exemption from seizure upon execution or attachment." The facts in that case with reference to the occupancy are briefly these: Monroe, the judgment debtor, owned a farm, which he sold in November, 1870, receiving in exchange a house and lot in Atchison and \$1,600 in notes. Possession, by agreement, was to be exchanged on the 1st of March following. The exchange was so made, and this city property was occupied and claimed by Monroe and wife as their homestead. The court in that case came to the conclusion that the Monroes became actual occupants of this property within a reasonable time after its purchase, and that it was exempt to them as a homestead. The time intervening between the purchase and taking possession was four months or less. Again, in the case of *Gilworth v. Cody*, 21 Kan. 702, it appeared that Cody, on December 1, 1877, purchased 80 acres of land for the purpose of present use as a residence. The land was vacant at the date of the purchase. Cody commenced at once to dig a cellar, and haul stone for a dwelling house. On December 5th, he started to a neighboring town to purchase materials out of which to erect a dwelling house. He made such purchase, and returned with the materials on December 7th. He unloaded the materials adjoining the premises on the same day the premises were levied on under the order of attachment. Cody continued the construction of his dwelling house, and completed the same December 28, 1877, and moved at once with his family into the dwelling, and occupied it as the residence of himself and family. Chief Justice Horton, in delivering the opinion of the court, used the following language, after having reviewed the authorities on the subject: "These decisions clearly establish the doctrine that our homestead laws, beneficial in their operation, and founded in a wise policy, should be liberally construed, so as to carry out their spirit. Considered in this light, in this case there was such an actual purpose and intention of present occupancy, accompanied with such acts on the part of the defendant in error in the commencement and completion of his dwelling, together with his residence therein with his family, that this might reasonably be held to amount in substance to actual occupancy at the date of the levy. While, therefore, we hold, within the terms of the law, that occupancy is an essential element to secure a homestead inviolability, under the exceptional circumstances which appear from the findings of the court, the intentions and acts of the purchaser of the land in controversy may be construed into a legal equivalent of actual occupancy of such premises. Law is entitled to and can command respect only when it is reasonable, and adapted to the ordinary conduct of human affairs; and the construction we have given above to the provisions securing homestead exemptions is certainly within their spirit, and more in consonance with a reasonable inter-

pretation thereof, than if we adopted the opposite conclusion."

Counsel for the plaintiffs in error calls our attention to the case of *Reske v. Reske*, 51 Mich. 541, 16 N. W. Rep. 895. The opinion in that case was delivered by Justice Cooley, and carries the doctrine of constructive occupancy for a homestead to the furthest limit yet reached by any court, so far as we have been able to review the authorities. It appeared in that case that the defendant purchased the lot in controversy in Detroit in January, 1880. He was a single man at the time of the purchase, but soon thereafter married. He then fenced the lot, and commenced making use of it. He built a barn and shed, dug a well, kept his horses, his hogs, and his poultry, and also piled wood, which he kept for sale, on the lot. At first he lived at some considerable distance, but afterwards took board across the way, and remained there while building. In the spring of 1881 he obtained figures from a builder on the cost of a house, but, not being able to go on, he did not then build. It was towards the end of 1882 before they were able to put up a house, and they were not living in it till 1883. In November, 1882, judgment was taken against the defendant, and execution levied on the lot. The court in that case comments on the fact that the defendant was all the time in the actual occupancy of the lot, and was, from time to time, doing various acts tending towards the construction of such buildings and conveniences as were required in order to make it a home. The period of time intervening between the purchase of the lot and the levy of the execution was a few months longer than in this case. It will be noted, however, that in this case it is expressly admitted that there was not at any time actual occupancy of the premises by the defendants from the time of the purchase till the date of the levy. In that case the defendant testified, and the court quotes from his testimony the following language, "I built every day as soon as I got a little money ahead." The court evidently took the view of the case that the defendant's delay in the construction of his dwelling house was due solely to his poverty, and that he was all the time making a determined effort to actually fit the premises for occupation by himself and family. He not merely had the purpose in his mind to make the lot his homestead, but was actually at work, from time to time, on the lot, preparing it for a home. In the case of *Swenson v. Klehl*, 21 Kan. 533, the syllabus of the case is as follows: "(1) Homestead occupation. Occupation, actual or constructive, is essential to give the character of homestead to premises. (2) \* \* \* Intent when purchased. While occupation need not always be instantaneously contemporaneous with purchase to create a homestead, yet the purchase must always be with the intent of present, and not simply of future, occupancy." In that case the land was purchased by the execution debtor on November 13, 1876. The judgment on which the execution was issued was rendered in 1873. One execution was issued

February 5, 1877, and another February 23, 1877. The sale was made under the latter execution. There was a house on the land, but the defendant failed to occupy it as a residence for more than a year after the purchase, and in that case Mr. Justice Brewer, in the opinion, says: "Occupied as a residence by the family of the owner," is the language of the constitution defining a homestead exemption. We are aware that occupancy is not always possible at the instant of purchase, and that, as we have heretofore said, a reasonable time is allowable in which to prepare for and to complete the removal and occupation of the intended homestead, but the purchase must be for the purpose and with the intent of present, and not simply of future, use as a residence." In the case of *Farlin v. Sook*, 26 Kan. 398, it was held: "Under the homestead exemption laws no person can hold property exempt from execution or forced sale unless the property is 'occupied as a residence by the family of the owner.' Therefore, where the owner of the property resides upon the same, but his family, consisting of a wife and children, have never been in Kansas, but reside in Illinois, and it is not, and never has been, the intention of the owner to bring them to Kansas, or to have them reside upon the property, held, that the owner cannot hold the property exempt from execution and forced sale under the homestead exemption laws." In the case of *Koons v. Rittenhouse*, 28 Kan. 359, it appeared that a husband and wife resided in New York in 1871. The husband, desiring to change his place of residence, came to Kansas, and purchased real estate, and resided thereon for about four years, then sold the same, and executed a deed therefor, representing himself to be a single man. About a year afterwards the wife came to Kansas, and thereafter resided upon the land with her husband, and it had been at all times the intention of the husband and wife that she should at some time come to Kansas, and reside upon the land with him. It was held that the land had never been occupied as a residence by the family of the owner in accordance with the exemption law, and that the deed from the husband alone was therefore not void. Again, in the case of *Bradford v. Trust Co.*, 47 Kan. 587, 28 Pac. Rep. 702, in concluding the opinion, Chief Justice Horton says: "Under the constitution, there must be occupancy as a residence by some one of the family of the owner to constitute a homestead."

We do not think there is any real conflict in the authorities cited, nor do we think that the Michigan case goes to the limit which the plaintiff in error asks us to reach in this case. Whatever our views might be as to the propriety of allowing a debtor to hold a tract of land for a homestead, whether occupied or not, we are bound to declare the law as we find it, and, while this court in the cases cited has given the constitutional provision a liberal construction for the purpose of fully securing to needy debtors the beneficial exemption secured to them by the constitution, yet we may not wholly dis-

pense with the requirement of occupancy. Can it be said that these lots, though vacant and wholly unoccupied for a period of more than two years, were in the constructive occupancy of the defendants, because they were purchased with the proceeds of a former homestead, and the defendants intended, as soon as they should be able to build thereon, to occupy them? If we hold these lots to have been a homestead during all this time, by what course of reasoning can we ever fix a limit within which actual occupancy must take place? The admission contained in the record that the defendants never occupied the lots or premises in question herein from the time they were purchased by the defendants, in March, 1887, up to the time subsequent to the making of the levy herein, (which was on August 19, 1889,) and that at the time of the levy the premises were vacant and unoccupied, seems to us to be decisive of this case; and that the defendants have admitted that occupancy by the family of the defendants did not exist, and therefore the defendants cannot claim the premises exempt to them as a homestead. The fact that the defendants took possession of the lots and constructed a house thereon after the levy of the execution cannot of itself defeat the lien of the judgment. *Bulene v. Hiatt*, 12 Kan. 98. The rights of the parties were fixed at the time of the levy, and no subsequent act of the debtor could change them. We find no error in the rulings of the district court, and its orders will be affirmed. All the justices concurring.

(50 Kan. 725)

PHOENIX INS. CO. OF HARTFORD v.  
DOLAN.

(Supreme Court of Kansas. Feb. 11, 1893.)

MORTGAGES—FORECLOSURE—LOSS BY FIRE—CREDIT OF AMOUNT OF POLICY—EVIDENCE.

A dwelling house and lot were mortgaged by the owners to secure a note, and the house was insured against loss by fire. It was agreed that the loss, if any, was payable to the mortgagee or his assigns. The note and mortgage were assigned to the company which had insured the house. The mortgagors conveyed the property to D., who assumed the payment of the mortgage debt. The insurance company brought an action to recover upon the note, and to foreclose the mortgage assigned to it. D. answered that the house had been destroyed by fire, and the loss had accrued to him, and should be credited upon the mortgage debt. It was ruled that the burden of proof was upon D., who offered in evidence the insurance policy, and also a paper purporting to be a receipt of payment by the insurance company to the original mortgagee, and rested. The execution, identity, or genuineness of the paper was not shown. *Held*, that the testimony was insufficient to show that a loss had occurred, or that D. was entitled to a credit upon the mortgage debt for any loss. (Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

Action by the Phoenix Insurance Company of Hartford, Conn., against William Dolan to foreclose a mortgage. There was a judgment for plaintiff for an amount less than he claimed, and he brings error. Reversed.

Douthitt & Ayers, for plaintiff in error.  
Scott & White, for defendant in error.

JOHNSTON, J. The Phoenix Insurance Company of Hartford, Conn., brought this action to recover on a promissory note executed by Thomas D. Kerns and wife in favor of James H. Tallman for \$250, and the interest thereon, and also to foreclose a mortgage given by them to secure the same on a house and lot in Howard. The note and mortgage were assigned to the insurance company, and, default having been made in the payment, this action was brought against the makers, and also against William Dolan, who had purchased the mortgaged property, and assumed the payment of the mortgage debt. Dolan answered that when he purchased the real estate it had upon it a frame house, which was insured by the plaintiff against loss by fire to the amount of \$250. He stated that after the house had been insured, and after he became the owner thereof, it was destroyed by fire; and he also alleged that the company had refused to pay for the loss as they had agreed to do, and had refused to give the defendant any credit on account of the loss. The cause was tried with a jury, and, as no question was raised upon the validity of the note and mortgage, it was ruled that the burden of proof was upon the defendant. He offered in evidence the insurance policy, which showed the insurance of the house in favor of Thomas D. Kerns for \$250. It contained a provision that the "loss, if any, under this policy, payable to James H. Tallman, mortgagee, or his assigns, as interest may appear." There was pasted on the back of the policy what purported to be a receipt from the insurance company, signed by James H. Tallman, the mortgagee, of the payment of \$250 for a loss under the policy. No other testimony was offered by the defendant, nor were any admissions made, except that the title of the mortgaged property had passed to William Dolan, and that he had assumed the payment of the mortgage debt. The court instructed the jury to give Dolan a credit upon the mortgage debt of \$250, and by their verdict this was done. The evidence was wholly insufficient to warrant the ruling of the court or the verdict that the jury were instructed to return. If a liability had arisen against the company on the policy, and it had passed to Dolan, he is entitled to a credit of the amount of the loss on the mortgage debt which he assumed. The burden, however, was upon him to show that a loss had occurred, and a liability had arisen of which he might avail himself in this action, before any credit could be given. He fails to show that the property had been destroyed, and, if there was any loss, that proofs had been made, and steps taken by him to entitle him to any amount of the insurance contracted for. The policy introduced was sufficient to show the original contract of insurance, but the receipt was not identified nor its authenticity shown by any one. There is nothing to show where it was found, or by whom it was written or signed. It falls to establish that any loss had occurred,

or any liability had accrued in favor of Dolan. If there was an actual loss during the lifetime of the policy, the right to which accrued in favor of the plaintiff, the insurance company cannot avoid the liability for the loss by the purchase of the note and mortgage. *Insurance Co. v. Marshall*, 48 Kan. 235, 29 Pac. Rep. 161. If the liability is shown by competent proof, and the facts are such as to bring it within the cited case, the amount due upon the policy should be applied as a payment upon the debt secured by the mortgage. Because of the insufficiency of the proof the ruling of the court in directing a verdict in favor of the defendant was erroneous. Its judgment will therefore be reversed, and the cause remanded for a new trial. All the justices concurring.

(23 Or. 507)

NELSON v. BLAISDELL et al.

(Supreme Court of Oregon. Feb. 27, 1893.)

FORECLOSURE OF CORPORATE MORTGAGE—ATTORNEYS' FEES—REVIEW ON APPEAL.

1. A judgment by default was obtained against a corporation, after service of process on the manager. He, on being served, notified the president, and also consulted an able attorney, who advised him that there was no defense to be made. *Held*, that the facts failed to show that the judgment was obtained by collusion with the manager.

2. A judgment recovered by an attorney against a corporation for professional services will not be disturbed, where the evidence shows that the charge was reasonable, and there was no agreement as to the amount of fees to be charged.

Appeal from circuit court, Baker county; James A. Fee, Judge.

Action by L. W. Nelson against S. W. Blaisdell, J. W. Bailey, I. L. Given, B. F. Baker, and L. A. Booth, the Nelson Mining Company, Samuel Howe, Montgomery Howe, William Nelle, David McClure, Jr., Alfred Abbey, E. Dubois, George Roeth, and F. V. Drake. From a judgment sustaining a judgment recovered by F. V. Drake against the Nelson Mining Company for professional services as an attorney, the Nelson Mining Company, Samuel Howe, Montgomery Howe, William Nelle, David McClure, Jr., Alfred Abbey, E. Dubois, and George Roeth appeal. *Affirmed*.

The other facts fully appear in the following statement by BEAN, J.:

This suit was brought by L. W. Nelson against S. W. Blaisdell, F. V. Drake, the Nelson Mining Company, and certain of its stockholders, to enforce the specific performance of a contract made between Nelson and the defendant corporation in May, 1889. The facts are that on November 12, 1887, the plaintiff sold to the defendant corporation a certain hydraulic placer mine in Baker county known as the "Nelson Mine," for the sum of \$300,000, of which \$25,000 was paid in cash, \$50,000 secured by mortgage on certain property belonging to the corporation, known as the "Auburn Ditch Property;" and, of the remainder of the purchase price, \$115,000 was to be paid November 12, 1888, and \$100,000 on November 12, 1889. By the terms of the contract of sale the deeds for

the property were to be held in escrow by the Merchants' National Bank of Portland until the entire purchase price should be paid, and then delivered to the defendant corporation. This sale was made through the agency of defendant Blaisdell, who had previously obtained an option on the mine, and who was one of the promoters and organizers of the Nelson Mining Company, which was organized and incorporated for the purpose of buying this mining property. Under his agreement with Nelson, Blaisdell was to receive as a compensation for making the sale 25 per cent. of the purchase price, when the same should be paid; and this agreement was unknown to his associates in the Nelson Mining Company, who understood and believed, and Blaisdell so represented to them, that the mine could not be purchased for less than \$300,000, and that he was to receive from Nelson no commission on the sale. Immediately after the purchase of the mine by the Nelson Mining Company, it entered into possession thereof, and commenced to operate it, with Blaisdell as superintendent, but soon became involved in litigation with the farmers owning land along the sources of water supply for the mine, concerning water rights, when, for the purpose of placing all the title to the property in the defendant corporation, the better to enable it to conduct such litigation, by mutual agreement the deeds held in escrow by the Merchants' National Bank were delivered, and the balance of the purchase price secured by a mortgage to Nelson on the property. About this time Nelson indorsed and delivered to Blaisdell the \$50,000 note and mortgage on the Auburn ditch property, to be held by him until November 12, 1888, the date when the payment of \$115,000 would be due Nelson from the company, as security to that amount for his commissions in case the purchase price should be paid in accordance with the terms of the contract, and with the understanding that, if the payments were not so made, the note and mortgage should be returned to Nelson. The company entirely failed and neglected to make the payments as agreed; and in May, 1889, Nelson, at the urgent request of Blaisdell, went to Oakland, Cal., the home office of the company, and effected a compromise and settlement with it, which is known in this case as the "May Agreement," and which is, in effect, an agreement for the rescission of the contract of sale from Nelson to the company. By this agreement Nelson was to surrender up the notes of the company, and cause its mortgages given to secure their payment to be canceled, and ultimately to receive back the property, after the company had been reimbursed for certain moneys advanced and expended by it in operating the mine, and paying off certain liens. Although Nelson canceled of record the mortgages held by him, he was unable to comply with the agreement, because Blaisdell refused to surrender up for cancellation the \$50,000 note and mortgage on the Auburn ditch property, held as security for his commissions, and in November, 1889, one Bailey, to whom he had assigned the note with

out consideration, began a suit in the circuit court for Baker county to foreclose the mortgage, making service upon Blaisdell as manager of the defendant company, who suffered a default, and a decree of foreclosure was entered in December of the same year. On September 25, 1889, the defendant Drake, who was the attorney for the Nelson Mining Company in the water-right litigation and other legal matters, recovered a judgment by default against the company for \$11,963.30, being the balance of a \$15,000 fee charged by him for services as attorney. Executions were issued on the Bailey and Drake judgments, and levied upon the property of the company, whereupon this suit was begun by Nelson to enforce the May agreement, or foreclose his mortgages, as the court might, under the facts, decree. In his complaint he alleges that the Bailey decree and Drake judgment are each fraudulent and void, and the result of a collusion between Blaisdell and Drake to obtain title to the mining property, and deprive him of his rights in the premises. The Nelson Mining Company, Blaisdell, Drake, and the individual stockholders of the Nelson Mining Company, who are defendants, have each answered separately; the individual stockholders joining with plaintiff in alleging and claiming by their answer that the Bailey decree and Drake judgment are both the result of fraud and collusion between Blaisdell and Drake, and an attempt to obtain title to the mine, and defraud them out of their interest in the company property. A decree was rendered in the court below setting aside the Bailey decree, and canceling the \$50,000 note and mortgage upon which it was based; enforcing the terms and conditions of the May agreement; holding the Drake judgment valid, but subordinate and subject to the rights of the plaintiff. From so much of the decree as sustains the validity of the Drake judgment, the individual stockholders of the Nelson Mining Company have appealed.

C. B. Bellinger and Snow & McCamant, for appellants. J. B. Cleland and Frank V. Drake, for respondent.

BEAN, J., (after stating the facts.) A motion was filed in this court to dismiss the appeal on the ground that the answer of the individual stockholders, containing affirmative allegations against Drake, and the charge contained therein, are not germane to the original suit brought by Nelson to enforce the May contract, and cannot be litigated therein. But, as the appealing defendants have failed to sustain the averments of their answer by the evidence, it is unnecessary to consider the motion to dismiss; and we shall put this decision on the merits, assuming that in a suit to foreclose a mortgage, or to enforce the specific performance of a written contract, against a corporation, the individual stockholders of the corporation, on being made parties, may litigate in the same suit the validity of a judgment against the corporation.

Defendant Drake, who is an attorney of this court, residing in Portland, was in

May, 1888, employed by the then manager of the company, B. F. Baker, with the knowledge and consent of the directors, as attorney for the company in the water litigation, and other matters requiring legal advice, with no agreement as to the amount of his fees. By the terms of his employment he was to subordinate all his other business to that of the company, and hold himself in readiness at all times to attend to the business of the company. These water cases were originally commenced in Baker county, but on the application of the defendant company were transferred to the federal court, where a long, protracted, and sharply-contested litigation ensued, involving substantially the entire value of the mine; for, without the water rights, the mine was practically valueless. That the defendant Drake rendered the services for the company according to agreement is not questioned; but the claim is that the amount charged by him is unreasonable, and largely in excess of the value of the services rendered, and that his judgment was obtained by fraud and collusion with Blaisdell, the manager of the company. A critical examination of the evidence has, in our opinion, failed to disclose any foundation for either of these claims. There is no evidence, so far as we can find, showing or tending to show any collusion between Blaisdell and Drake concerning the amount of attorney's fees, or the recovery of his judgment; but, when process in the Drake action was served on Blaisdell, he not only immediately notified the president of the company in California, but consulted an able attorney in Portland, and was advised by him that Drake's charges were reasonable, and it would be useless to attempt to defend the action. Not only this, but the directors, and several, if not all, of the appealing stockholders, were informed of this action and judgment in November, 1889, but took no steps to open up the default, or defend the action. So far as this record discloses, the corporation never has at any time questioned the validity of the judgment, or the reasonableness of the attorney's charges, notwithstanding the appealing stockholders obtained control of the corporation before this case was submitted to the court below, and the company appeared at the hearing, by its attorney, who was content to try the case on the answer filed, which neither contests nor denies the validity of the Drake judgment. It is true this answer was prepared by Drake while he was attorney for the company; but after the change in the management, and the substitution of another attorney, no attempt was made to amend the answer, or put in issue the validity of the Drake judgment, but the case was tried, and is now before this court for hearing, on the answer as originally filed. And besides, from the great preponderance of the testimony, the amount charged by Drake was not an unreasonable fee for his services. Judges Williams, Whalley, and Olmsted, United States District Attorney Mays, T. A. Stephens, W. M. Gregory, and others, all reputable attorneys of long standing in this court, agree in testifying that the

services rendered by Drake were reasonably worth the amount charged therefor. Judge Williams says: "Some considerable time ago,—a year ago, perhaps,—I had a conversation with Col. Drake about this case, in which he stated quite a number of the facts, and described, to some extent, his services. Subsequently to that I was engaged in a suit in which Sheppard was a party, and, I think, Mr. Nelson and the Nelson Mining Company was another party, in which I obtained some insight—not very extensive—into the case; and I have heard the evidence given by Col. Drake, read on this occasion. My judgment is that it would be somewhere between \$10,000 and \$15,000; that that would be a reasonable compensation for the services in that case." Judge Whalley, who was consulted professionally by Blaisdell when the action was commenced, and at that time looked into the merits of Drake's fees, also testified: "I was once spoken to in reference to this matter, for the purpose of estimating the value of Mr. Drake's services. At that time the explanation given to me was not as full as it has been in the question just addressed to me, but I had an opportunity at that time of examining the brief that is referred to in the question. After looking over the whole thing, considering the amount of property involved, I then stated, as I now state, that I think that \$10,000 would have been an exceedingly low fee; and I do not think that \$15,000, under the circumstances, would be a high one." Judge Olmsted, who was attorney for the plaintiffs in the water-right litigation, and in two other cases against the company, and is therefore especially qualified to testify on that subject, says: "I was present during most of the time the testimony was being taken in those cases, except about ten days. I know of the services rendered by Col. Drake; know the character of the cases, and the property involved. An ordinary and reasonable charge for a like service, in my experience of sixteen years' practice in Oregon, would be about \$12,000. I wouldn't put it less than that. I know it took a good deal of time. Then, there was an extensive lot of records to look up. There was an endless amount of work." To the same effect is the testimony of the other witnesses mentioned. From these considerations, we conclude, therefore, that the decree of the court below should be affirmed, and it is so ordered.

(23 Or. 58)

**FIRST NAT. BANK OF ARLINGTON v. CECIL.**

(Supreme Court of Oregon. Feb. 13, 1893.)

**PROMISSORY NOTE—CONSIDERATION—AGREEMENT TO FORBEAR.**

1. Where a signer of a joint and several note assigned his property to defendant, and thereupon plaintiff, the payee of the note, to induce defendant to sign, said, "Unless you sign the note, we will contest the conveyance," whereupon defendant signed, a mere forbearance by plaintiff to attack the conveyance without any agreement on his part to forbear was not a sufficient consideration to support defendant's promise to pay.

2. In such case, whether there was an agreement by plaintiff to forbear, either express or implied, was a question for the jury.

3. The fact that the note itself imported a consideration was not sufficient to support defendant's promise, he not becoming a party to it at its inception, and not having partaken of the original consideration; and the words "value received" therein gain no additional meaning by defendant's signature, and import no other consideration than that signified when the note was originally given.

On rehearing. Reversed.

For prior report, see 31 Pac. Rep. 61.

BEAN, J. This cause was originally submitted on briefs, without an oral argument, and, as the brief of appellant was confined largely to a discussion of the points passed upon in the opinion filed, the alleged error of the trial court in giving and refusing certain instructions, although assigned as error, and noted in the brief, escaped our attention, and was not considered. The contention for appellant is that, although an agreement by plaintiff to forbear instituting proceedings to set aside the conveyance from F. Cecil to defendant, and an actual forbearance by it, would be a good and sufficient consideration for the execution of the note by defendant, and that there was evidence from which the jury might find such an agreement, yet that question was not submitted to the jury, but the court instructed them, in effect, that mere forbearance by plaintiff, without an agreement to forbear, would be a sufficient consideration for defendant's promise. The defendant requested the court to charge the jury that "the mere forbearance of plaintiff, if you should find that there was such forbearance, to attack a conveyance of property from F. Cecil to the defendant, without any agreement to forbear on the part of the plaintiff, would not be a sufficient consideration to sustain the contract in question, even though the plaintiff did forbear to attack such conveyance on account of the defendant having signed the note in question. This was refused, and the following given: "If you believe from the evidence that when the defendant signed the note sued upon he did so to induce the plaintiff not to attack the conveyance of property theretofore made by Frank Cecil to himself, then I charge you that there was a good and sufficient consideration for his so signing." From the instruction refused and the one given it is apparent the theory of the trial court was that an agreement on the part of plaintiff to forbear to attack the conveyance from Frank Cecil to defendant was not necessary to support the defendant's promise, but, if the note was signed by defendant to induce plaintiff to so forbear, it was a sufficient consideration. This was manifest error. An agreement by a creditor to forbear prosecuting his claim, and an actual forbearance by him, is a good consideration to sustain a promise of a third person to pay the claim, (*Robinson v. Gould*, 11 Cush. 55, and *Biah. Cout. § 63*;) but a mere forbearance, without such a promise, is not. "A mere forbearance to sue," says *Rigelow, J.*, "without any promise or agreement to that ef-



fect, by the holder of a note, forms no sufficient consideration for a guaranty. It is a mere omission on the part of the creditor to exercise his legal right, to which he is not bound by any promise, and which he may at any moment, and at his own pleasure, enforce." *Mecorney v. Stanley*, 8 Cush. 87. And this is so although the act of forbearance was induced by the defendant's promise. *Manter v. Churchill*, 127 Mass. 31. An agreement to forbear may be inferred by the jury from the fact of forbearance and the circumstances under which it was exercised, and, as we have already held, there was sufficient evidence in this case to go to the jury on that question; but whether there was such an agreement on the part of the plaintiff, either express or implied, ought to have been submitted to the jury. It was argued for the plaintiff that the note itself imports a consideration, and, in the absence of any evidence on the part of the defendant showing a want of consideration, the plaintiff was entitled to a verdict, and the error of the court in instructing the jury did not prejudice the defendant. But, as the defendant did not partake in the original consideration of the note by becoming a party to it at its inception, the plaintiff, in order to recover against him, was bound to show a valid consideration for his promise; otherwise it was nudum pactum, and void. Without a new and independent consideration, the legal effect of his signing the note was that he became a party to an old note, which had long been made and delivered to the payee as a completed contract on a consideration wholly past and executed, and moving solely between the original makers and the plaintiff, and not to a new contract on a new and additional consideration as between the payee and himself. The words "for value received" gain no new or additional meaning by the defendant's signature, and import no other or further consideration than that which they signified when the note was given; and, without some proof of a new consideration, plaintiff cannot recover, because the complaint avers that the note was not signed by defendant until long after it was delivered to the plaintiff by the original promisors. *Green v. Shepherd*, 5 Allen, 589. It follows, therefore, that the judgment must be reversed, and a new trial ordered.

(23 Or. 448)

MITCHELL & LEWIS CO. v. DOWNING  
et al.

(Supreme Court of Oregon. Jan. 30, 1893.)

NONSUIT — PAYMENT OF SHERIFF'S CHARGES — VACATING JUDGMENT.

1. Under Hill's Code, § 246, providing that a judgment of nonsuit may be given against plaintiff on his motion "at any time before trial, unless a counterclaim has been pleaded," the court, on granting the motion, should see that the costs of its officers are paid; and it is proper, on a nonsuit, to render judgment against plaintiff in favor of a sheriff for his expense of keeping property held under attachment, to be taxed as costs and disbursements, and the sheriff will not be required to bring a separate action.

2. An affidavit to support a motion to set aside the judgment showed that when plaintiff and defendant were making a settlement the sheriff informed them that the costs were \$94, which sum plaintiff agreed to pay; that afterwards the sheriff claimed there was due him \$217; that the sheriff's petition for judgment had not been answered because of the failure of the junior counsel to receive directions from the senior counsel. *Held*, that the judgment should be set aside, since the affidavit shows an excusable neglect on the part of the junior counsel, and an equitable estoppel against the sheriff, in regard to the amount claimed, that should have been tried by the court.

Appeal from circuit court, Jackson county, Lionel R. Webster, Judge.

Attachment by the Mitchell & Lewis Company against F. T. Downing and another. From an order denying a motion to set aside a judgment for costs in favor of James G. Birdsey, as sheriff, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by MOORE, J.:

This is an appeal from an order of the court refusing to set aside a judgment, and grows out of the following facts: Plaintiff commenced an action against the defendants, Downing et al., and caused a writ of attachment to be issued, which was placed in the hands of James G. Birdsey, sheriff of Jackson county, for service, who, in pursuance thereof, attached and took into his possession some live stock and other personal property of the defendants. Before the issues were joined a settlement was had between the parties, and plaintiff agreed to pay the costs, which the sheriff reported to be \$94.30, and on February 7, 1891, moved the court for an order dismissing the action. A controversy then arose between the plaintiff and the sheriff, in which he claimed that there was due him on account of feed furnished for the stock attached, for maintaining a keeper of the property, and for his disbursements, the sum of \$217.15, instead of \$94.30, as had been reported. On April 1, 1891, the sheriff filed an itemized account of his claim, and petitioned the court for its allowance and approval, and prayed for a judgment against the plaintiff for the amount, to be taxed as costs and disbursements. On April 13, 1891, the court made an order that a certified copy of the petition be served upon R. A. Miller, plaintiff's attorney, giving him 10 days after such service within which to answer or object thereto. On April 18, 1891, Mr. Miller demurred to the petition, on the ground that the court had no jurisdiction of the person of the plaintiff nor of the subject of the action. This demurrer was on September 4, 1891, overruled by the court, and plaintiff given till the 9th of that month to answer. On September 11, 1891, the court, upon the failure of the plaintiff to further plead, approved and allowed the claim of the sheriff, rendered judgment against the plaintiff for the amount, which was taxed and entered as costs and disbursements in favor of the sheriff, and dismissed the action of the plaintiff against the defendants. On October 8, 1891, plaintiff's attorney filed his affidavit, and those of others, in which he showed that he was acting as the jun-

for counsel for plaintiff, and that, in consequence of the failure to receive directions from the senior counsel, he had failed to file objections to the petition within the time allowed, and moved the court to set aside the judgment, and allow him to plead to the merits of the petition. The court took this motion under advisement, and on April 13, 1892, denied the same, from which order and judgment the plaintiff appeals.

C. M. Idleman and R. A. Miller, for appellant. Wm. M. Colvig, for respondents.

MOORE, J., (after stating the facts.) There are two questions presented by this appeal. First, the right of the court to enter judgment against plaintiff in favor of the sheriff, to be taxed as costs and disbursements; and, second, whether there had been an abuse of discretion in refusing to set aside the judgment.

Section 246 of Hill's Code provides that a judgment of nonsuit may be given against the plaintiff on his motion at any time before trial, unless a counterclaim has been filed as a defense. The right to dismiss an action is not an absolute one, which the plaintiff can exercise without leave of the court. It is addressed to the discretion of the court, and may, in some instances, such as infancy, misjoinder, and a few others, be granted without the payment of costs. In all other cases, as a general rule, a nonsuit must be granted by the court only when the plaintiff has paid the costs. It is the duty of the court, in dismissing an action upon plaintiff's motion, to see that the costs of its officers are paid, or to render judgment against him for the amount. It has been uniformly held that a plaintiff cannot dismiss his action without the payment of costs. *Young v. Bush*, 36 How. Pr. 241. At common law, there were no costs by that name, but when the plaintiff failed he was amerced for presenting his false claim; and, when judgment was rendered against the defendant, he was fined for resisting the just claim of the plaintiff. Hence costs by statute grew out of these fines at common law. By the statute of this state costs are the amounts awarded the prevailing party as attorneys' fees, and take the place of the common-law fines. Disbursements are the fees of officers, and all other expenses necessarily incurred in the preparation for and trial of causes, for which the statute has prescribed the amount to be paid; and it is made the duty of the clerk to tax the same when judgment is rendered, and any person aggrieved thereby may appeal to the court or judge and have the taxation reviewed. The expense of keeping property held under attachment is neither costs nor a disbursement, under the statute, since the reasonableness of such charges is not and cannot be fixed by law; and hence the clerk, who is only a ministerial officer, cannot determine the amount due, nor tax the same, and the only person authorized to determine the reasonableness of such charges is the court or judge. "The court will see that its officers do their whole duty, and will

hold them to a strict performance of every requirement of the law; and, while this is true, it will also see that the just and reasonable charges of its officers are fully paid. \* \* \* When, therefore, a sheriff, at the instance of the plaintiff, levies upon the property of the defendant and incurs expenses in securing it, he will not be driven to an action to recover his costs and fees in case the proceedings are dismissed by the order of the plaintiff. In such case judgment will be entered in his favor against the plaintiff, and execution will be issued therefor." *Murfree, Sher.* § 1079. In *Bank v. Tucker*, (Colo. Sup.) 3 Pac. Rep. 217, a sheriff had attached property, and appointed a keeper thereof. The action was subsequently dismissed, and the clerk taxed, as a part of the costs, the expense of the keeper, and judgment was rendered against the plaintiff for this amount. The court, in passing upon this question, said: "To require the institution of a separate suit in every case where the sheriff fails to collect fees in advance would be disastrous to litigants as well as himself. There is no necessity for such rule. If these expenses are allowed as costs, and taxed by the clerk, the party dissatisfied can, by a motion to retax, as fully and fairly inquire into and try the legality, justice, and reasonableness of the same as he could in another action." In *Schneider v. Sears*, 13 Or. 76, 8 Pac. Rep. 841, Thayer, J., says: "In all such cases the officers should be repaid the amount of money reasonably expended in that behalf. But in all cases where it is possible to apply to the court for directions in regard to such matters the application should be made. The court has a right to control the sheriff in such affairs, and its attention should be called to the matter whenever it reasonably can be; and I believe the court should audit and allow the expenses in all such cases." The law requires the sheriff to act promptly in the service of a writ of attachment, and the court holds him to a strict performance of every duty connected therewith. Often writs of attachment reach him by mail, and, if he delayed their execution till the plaintiff could send him the necessary means to pay his costs and to defray the incidental expenses of removing and guarding attached property, which can never be fully determined in advance, the claim sought to be secured might become wholly lost. The sheriff is the plaintiff's agent, and must do all in his power to enforce the writ and secure the claim. What encouragement would there be for a sheriff to make extra endeavors to secure a claim if, when he had made a levy, and been obliged to incur expense in maintaining a keeper, in storing the attached goods, or in making any other necessary outlay of money, the plaintiff could, upon his own motion, and without consulting the officer, dismiss the action, and thus compel the sheriff to commence proceedings against him to enforce the payment of his just claim—a claim in which the sheriff had no personal or pecuniary interest; one in which the money must be paid to others, who had done the work, or fur-

nished the supplies, and for which the sheriff was primarily liable? There would be neither justice nor reason in such a rule. The sheriff should, in such cases, be paid promptly for his service, and reimbursed for such reasonable sums of money as he had been obliged to incur in the care of the attached property. The reasonableness of these charges should be determined by the court or judge upon the presentation of the sheriff's claim and proof of the justice thereof. The plaintiff should have notice of the claim, and be allowed to object thereto; and, when the court or judge determined what was just and reasonably due the sheriff, that sum should be taxed and entered as costs and disbursements against the plaintiff and in favor of the officer. It is only by such means that prompt and efficient service can reasonably be expected from a sheriff.

The affidavits filed in support of the motion to set the judgment aside showed that when plaintiff and defendants were negotiating a settlement application was made to the officer for a statement of the costs and other expenses of the action, who informed them that they were \$94.30, and that upon this basis the settlement was effected, which sum plaintiff agreed to pay. That thereafter the sheriff set up a claim of \$217.15 as the amount due. The affidavits also showed that R. A. Miller was the junior counsel in the case, and that, when the demurrer was overruled by the court, he at once asked the advice of the senior counsel, but that the letter from them containing their instructions did not reach him until after the judgment had been entered. The record shows that the judgment was entered September 11, 1891; the motion to set the same aside was made on the 8th of the next month; the court took the same under advisement until April 13, 1892; and the notice of appeal was filed and served July 1, 1892. The respondents moved to dismiss the appeal for the reason that the same had not been taken within six months from the entry of the judgment. While the motion for a new trial was pending there was no final judgment from which an appeal could be taken. The appellant had a right to rely upon that motion, and till it was disposed of there was no final judgment. In *Railroad Co. v. Doane*, 105 Ind. 92, 4 N. E. Rep. 419, the court, in a similar case, says: "It is quite clear that, if the appellant had brought up this case before a ruling on the motion, the appeal would have been dismissed, on the ground that it was prematurely taken." Every motion to set a judgment aside is addressed to the sound discretion of the court, and will not be reviewed unless there appears to have been an abuse of such discretion. It appears to us that the affidavits and answer presented show that there was an excusable neglect on the part of R. A. Miller, as junior counsel, and that there was an equitable estoppel against the sheriff, that should have been tried by the court or judge, in relation to the amount claimed by the sheriff. For these reasons the judgment will be reversed, and inquiry had up on the issues entered.

(22 Or. 514)

## JOHNSON v. FANNO.

(Supreme Court of Oregon. Feb. 27, 1893.)

## APPEAL—ASSIGNMENT OF ERRORS.

Assignments of errors, stating merely that the court erred in admitting testimony offered by plaintiff and objected to by defendant; in excluding testimony offered by defendant and objected to by plaintiff; "in giving instructions to the jury, and which were excepted to by defendant, and the exception allowed;" and "other errors apparent on the face of the record,"—are insufficient, and not reviewable by the appellate court. *Herbert v. Dufur*, 32 Pac. Rep. 302, followed.

Appeal from circuit court, Washington county; F. J. Taylor, Judge.

Action by A. H. Johnson against A. R. Fanno to recover possession of real property. From a judgment for plaintiff, defendant appeals. Affirmed.

T. H. Tongue and R. Stott, for appellant. W. W. Thayer, R. Williams and L. A. McNary, for respondent.

PER CURIAM. This is an appeal from a judgment rendered in favor of the plaintiff, and against the defendant, in an action to recover possession of real property. The assignments of error in the notice of appeal are as follows: "(1) Error of the court, committed at the trial of this cause, in admitting testimony offered by the plaintiff, and objected to by the defendant. (2) Error of the court, committed at the trial of this cause, in excluding testimony offered on behalf of the defendant, and objected to by the plaintiff. (3) Error of the court, committed at the trial of this cause, in giving instructions to the jury, and which were excepted to by defendant, and the exception allowed. (4) Other errors apparent upon the face of the record." Under the rule announced by this court in the recent case of *Herbert v. Dufur*, 32 Pac. Rep. 302, each of these assignments of error are manifestly insufficient, and do not present any question for review in this court, and the judgment of the court below must be affirmed.

(22 Or. 526)

## GOODNOUGH v. POWELL, Clerk, et al.

(Supreme Court of Oregon. Feb. 27, 1893.)

## TAXES—INJUNCTION.

The spreading on the assessment rolls of a certain increase, made by the board of equalization, in the assessment on mortgages, will not be restrained, but relief must be sought after attempted collection of the tax, and on payment of the amount conceded to be due.

Appeal from circuit court, Multnomah county; T. A. McBride, Judge.

Suit by Ira Goodnough against T. C. Powell and others for injunction. Judgment for defendants. Plaintiff appeals. Affirmed.

Geo. H. Williams and Raleigh Stott, for appellant. W. T. Hume, Dist. Atty., George E. Chamberlain, Atty. Gen., and John H. Hall, for respondents.

LORD, C. J., (orally.) The importance of this case requires us to promptly decide

it, and we have only been able to examine the authorities cited by counsel, and reach our conclusion upon the facts, but have been unable to prepare a written opinion. The suit was brought by appellant to restrain respondent T. C. Powell, as clerk of the county court of Multnomah county, from extending upon the assessment roll of said county any greater sum than 30 per cent. increase upon the assessed valuation thereon, as fixed by the county assessor of said county, and furnished to the secretary of state and state board of equalization by said county clerk, the said board of equalization having raised the assessment of mortgages on said roll from an assessed valuation of 50 per cent. of their cash value to 100 per cent., or to their actual cash value; and also to restrain the governor, secretary of state, and state treasurer from apportioning to Multnomah county its proportion of state taxes to be levied and collected for the year 1893 at any sum greater than it would be if the mortgages on said roll were assessed at 65 per cent. of their face value, appellant claiming that real property is only assessed on said roll at 65 per cent. of its cash value, and that the assessment of mortgages at their face value is in violation of section 32, art. 1, of the state constitution, requiring that "all taxation shall be equal and uniform;" and that "said assessment was made arbitrarily, and with the intent to discriminate against mortgages and in favor of other real estate, the said board of equalization well knowing that the assessment upon said mortgages was 35 per cent. higher than the assessment on lots and agricultural lands." The general doctrine is well established that courts of equity will restrain by injunction the collection of taxes that are fraudulent, or that would lead to a multiplicity of suits, or produce irreparable injury, or, if the property is real estate, that would cast a cloud upon the title of the complainant; but it is equally well established that courts of equity will not interfere with the collection of taxes unless they are void, or levied without authority, and not then unless the taxpayer has paid or tendered such taxes as are legal; nor will equity restrain an extension of a tax on the tax books unless wholly unauthorized, and void in all its parts. In *Glass Co. v. McCaleb*, 81 Ill. 562, Walker, J., says: "If any portion of the tax is valid, then the court will never interpose until the taxes have been extended on the collector's books, and not then until the taxpayer has paid or tendered such taxes as are legal. The court will not stay a tax which is legal because some portion of it may be illegal and void. The legal portion must be paid without hindrance or obstruction." In *State Railroad Tax Cases*, 92 U. S. 617, Mr. Justice Miller says: "It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest by lumping it with that which

is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed to a receipt in full for all the taxes assessed." See, also, *Bank v. Kimball*, 103 U. S. 732, and *Investment Co. v. Parrish*, 24 Fed. Rep. 198. This practice is not observed in the present suit, for the reason that the tax is not yet extended on the assessment rolls by the officer, nor its collection sought to be enforced against the claimant. If the assessment upon mortgages is fraudulent, and made with the intent to discriminate against him in that particular, and for the part or amount alleged, it will be time enough to hear complainant after the taxes are extended, and their collection sought to be enforced against him upon his payment of the amount of tax conceded to be due. The judgment is affirmed, and the bill dismissed.

(23 Or. 499)

## CONLON v. OREGON S. L. &amp; U. N. RY. CO.

(Supreme Court of Oregon. Feb. 27, 1893.)

ACCIDENT TO RAILROAD EMPLOYE — DEFECTIVE BRIDGE — ASSUMPTION OF RISK — NEGLIGENCE — QUESTION FOR JURY.

1. A shoveler to clear an obstruction from a railroad track does not assume the risk of accident from defects in a bridge over which he rides in going to his work, where proper care on the part of the company would have detected the defects and prevented the accident.

2. Whether it was negligence for a railroad company to send out a train loaded with workmen without making any investigations as to the conditions of a bridge over which it must pass is a question for the jury, there having been an unusually severe storm since it was inspected.

Appeal from circuit court, Washington county; Frank J. Taylor, Judge.

Action by Francis Conlon against the Oregon Short Line & Utah Northern Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

W. W. Cotton and Zera Snow, for appellant. A. S. Bennett and S. B. Huston, for respondent.

LORD, C. J. This is an action to recover damages for personal injuries received by the plaintiff while in the service of the defendant. The injury was caused by the wreck of a work train from the falling of a bridge over which the plaintiff was being carried on the line of the defendant's road. For a day or so prior to the accident there had been unusual storms, causing dirt and rock from the adjacent mountains to slide down upon the track and obstruct it at different places, so as to impede and finally to stop the passage of trains for several days. On the night before the accident the storm was accompanied by a heavy fall of warm rain, which, together with the melting snow, swelled the stream spanned by the bridge in question into a freshet. The officers in charge of the passenger train, which had come down the night before the accident, found a slide below the bridge, and, with the laborers accompanying that train, had undertaken to clear the slide, so that they might run the train

through to Bonneville, but, finding that they would be unable to clear the track of the slide that night, they backed the train up to Cascade Locks, and side tracked it, and during the night the heavy fall of warm rain occurred which closed the road for traffic. The next morning the plaintiff was engaged by the defendant as a shoveler, to aid in removing the dirt and other obstructions from the track, and in pursuance of orders went on the work train, with other shovelers, for the immediate purpose of being carried down to this slide below the bridge, which had been discovered the night previous, to help remove it from the track; and while being so carried over the bridge it gave way and precipitated the train, with the plaintiff and other laborers, some 20 feet into the creek below. As to the cause of the bridge giving way the evidence for the plaintiff tended to show that the foundation of the center bents had been gradually undermined by the action of the water in the creek for some time prior to the accident; that the bridge had settled, and at different times had been wedged up so that the bolts by which the stringers were fastened to the bents were drawn out of the bents, leaving nothing to hold them in place but the weight of the bents themselves. It also appears from the evidence that the defendant had but one track walker on the eight-mile section of its road upon which this bridge stood, and that he had not been over this bridge for two days prior to the accident; that the defendant had sent out the train which was carrying the plaintiff over its road to the place where the slide below the bridge obstructed it, without having previously sent any one over its road, or made any investigation to ascertain its condition, or the condition of its bridges. Substantially the state of facts involved in the case at bar has been before this court in the case of *Knabla v. Railway Co.*, 21 Or. 136, 27 Pac. Rep. 91, and *Carlson v. Railroad Co.*, 21 Or. 450, 28 Pac. Rep. 497, and in this same case upon an appeal from a judgment rendered upon a verdict in favor of the plaintiff in *Conlon v. Railroad Co.*, 21 Or. 462, 28 Pac. Rep. 501, so that any further statement of the facts in detail is unnecessary.

The defendant claims that under the facts, as disclosed by the evidence, it was not liable for the injury which the plaintiff sustained, because "the risk arising from the plaintiff's employment in assisting to remove the obstructions from the track was not increased by any act or omission or commission of the defendant." But the correctness of this proposition depends upon the fact whether the defendant was negligent in not using proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm; for, if the injury which the plaintiff sustained was the result of an omission of the defendant to take proper precautionary measures, either before or after the storm, to lessen or avoid the liability to accident, it did not arise out of any risk which the plaintiff assumed as incident to his employment. For in-

juries occurring to other parties by the same accident, this court, in applying the law to a like state of facts in *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. Rep. 497, by Bean, J., said that, if "the danger were increased by the negligence of the master to use proper care before the storm to keep the bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take due and proper precautionary measures to prevent accidents, as the exigency of the situation might require, he did not assume such risks. The fact that the track was known to be in a dilapidated condition and out of repair did not relieve the master of the discharge of his duty in the premises. The deceased could still expect from it the exercise of such care and vigilance, and require it to take such precautionary measures to prevent accidents, as the exigencies of the case, having due regard to the safety of its employees, would suggest to prudent and cautious men experienced in that particular branch of railroad business." The risk which the plaintiff assumed was only such as belonged to the work of a shoveler engaged to clear slides and other obstructions from the track. He was not out on the road, as counsel say, for the purpose "of finding out where the road needed repairing," but to aid in clearing the track where it was obstructed by slides. He was not a mechanic or bridge carpenter, and had nothing to do with the repairing of bridges, nor knew that any bridges were out of repair. It may be admitted that, if the performance of his duties had required that he should ride over the track from place to place where his services were needed to clear the track of obstructions, the risk he assumed included the danger of bridges being undermined or swept out by freshets or floods, when they occurred from inevitable accident, but not when the danger might have been ascertained and averted in time to avoid the injury by the exercise of reasonable care, or of proper precautions. If the bridge was out of repair before the storm, owing to the gradual undermining of the center bents from the action of the water for the time indicated by the evidence for the plaintiff, and the defendant, by ordinary carefulness and inspection, could have ascertained and known its condition, and under such circumstances, and after such an unusual storm, when it knew that its track was obstructed by a slide below the bridge, and that its work train must cross it in carrying the shovelers to their place of service, it was the duty of defendant to send some one over its track, and especially over this bridge, to inspect it and ascertain whether it was in a safe condition, before it sent a heavy engine and caboose loaded with laborers over it; or if the center bents were in a good condition before the storm, and were undermined and washed out by the freshet after the storm, and the defendant could have ascertained the weakened and dangerous condition of the bridge by reason thereof, after it happened and before the accident, by the exercise of reasonable care or precautions by sending out a track walker on the track, or in sending some one

ahead of the train; and did not do so, the risk arose from its negligence, and the defendant would be liable for the injury sustained.

In our judgment, the trial court, guided by the principles of law declared in the cases referred to, which involved injuries to other parties by the same accident, properly submitted in its charge all these questions to the jury for their determination. In *Knahtla v. Railway Co.*, supra, the court says: "It had but one track walker on this section of the road, whose duty it was to pass over the road during the night, and he had not been over this bridge for forty-eight hours; and we think it was a question for the jury to say whether, under these circumstances, with such extraordinary storms prevailing, it was negligence for the defendant to send out the train upon which the plaintiff was being carried, without making any investigation to ascertain the condition of the bridges over which it was to be carried." And, again, in *Carlson v. Railway Co.*, supra, the court says: "Whether the defendant, by the exercise of reasonable care and vigilance, could have anticipated and prevented or provided against the accident, and whether it was the duty of the defendant, in the exercise of reasonable care and prudence, under the facts of this particular case, to have sent men ahead of the train on which the deceased was being carried to inspect and examine the bridge before attempting to go over it with the train, are all questions of fact for the jury." Whether it was a proper precaution, under the facts, to send out a man in advance of the trains, was a question properly submitted to the jury. If it was a necessary and reasonable precaution, the plaintiff had a right to assume that the defendant had done it. It was the duty of the defendant to exercise reasonable care, or to take such precautionary measures as the requirements of the situation demanded; and whether the defendant used such care, or took such precautions as were necessary under the circumstances, as shown by the evidence, was a question of fact to be submitted to the jury for their determination under appropriate instructions from the court.

The claim of the defendant that the accident was not due to any negligence on its part, but was owing to an unusual freshet produced by an unprecedented storm,—something against which no care or vigilance could anticipate or provide,—the instructions of the court fully met. In such case the injury was to be regarded as simply an accident that could not be foreseen by reasonable care and vigilance, and for which the defendant would not be liable. Nor did the court fail in its instructions in respect to the general duty of the master to keep its road in good repair and safe condition, to say that such duty must be considered with some qualification when the road had become dilapidated and out of repair, and is in the process of reconstruction, and the employee engaged in its repair is required in the course of his employment to ride over it, so far as the same was applicable to the facts of this case.

After carefully examining the record, it is our judgment that the instructions given by the trial court fully met every aspect of the case as presented by the evidence, and that the jury were properly apprised of their duty in the premises. We shall not, therefore, consider the case further than to say that we have examined the instructions asked by the defendant, and think that the law in them applicable to the case is covered by the instructions given by the court. These instructions, however, are open to the criticism suggested by the court in *Knahtla v. Railway Co.*, supra. They are 26 in number, nearly all of them very long and argumentative, and would incumber many pages to present them. The plaintiff likewise prepared a long series of instructions which he submitted to the court and asked to be given. It was doubtless expected that the charge of the court would be made up from these instructions, as is done in some of our circuits, but the trial court, as we shall suppose, after examining and using them as advisory, proceeded to charge the jury in its own language by a connected series of instructions fairly covering the material issues presented by the case. The counsel for the plaintiff highly commends this practice in the trial court as better calculated to enlighten the jury, and to aid them in reaching a right verdict, and in this opinion he is sustained by that eminent jurist, Cockrill, C. J., who said: "The charge is made up wholly of requests for instructions from the parties, and the two theories of the case presented by them are not so consistent and harmonious as to render it an easy task for the jury to determine where their duty lay. The fault is inherent in the practice of giving in a charge to the jury the requests for instructions prepared by counsel. They are not uncommonly framed with a view of giving the greatest advantage to the side which presents them, and do not in that event tend to lighten the labors of the jury; and when they are accurately and fairly framed on both sides, and involve no contradictions, the issues are presented in disconnected propositions of law which the jury will find more difficult to comprehend than in a charge presenting all the issues on a single phase of the case together in close contrast, and presenting the whole law of the case as emanating from the court without apparent instigation from either side. What can be a greater paradox in the administration of justice, or more confounding to a jury, than for a court to say to them, as is sometimes done: 'For the plaintiff the court declares the law to be this; for the defendant, so; and on its own motion, as follows,'—as though there were three sides to a legal proposition which the jury are at liberty to choose? It is the duty of counsel to present their prayers for instructions in order to aid the court, and to show their position in the case on appeal; but the better rule for the court would be to treat the request only as counsel's suggestions of what they desire to call the jury's attention to, and to embody no more than the substance of them in the charge. The practice of making

up the charge from the requests for instructions prepared by counsel leads to the constantly recurring argument in this court that the charge to the jury is inconsistent and misleading, and has resulted in the remanding of many causes, and perhaps the miscarriage of justice in many others, by the indulgence of the presumption that the jury was able to reconcile the apparent inconsistencies or penetrate the obscurities of the charge." *Davis v. Railway Co.*, 53 Ark. 129, 13 S. W. Rep. 801. The judgment is affirmed.

(23 Or. 530)

### MORRISON v. McATEE.

(Supreme Court of Oregon. Feb. 27, 1893.)

BREACH OF CONTRACT—MEASURE OF DAMAGES—  
EXPECTANCY OF LIFE—EVIDENCE—CONFLICTING  
INSTRUCTIONS—NOTICE OF APPEAL.

1. In 1872, plaintiff, who was then 60 years old, and M. agreed that M. would support plaintiff during his natural life in consideration of his labor, and plaintiff thereupon entered the service of M., and continued to serve therein until 1890, when M. died, without making any provision for the support of plaintiff. *Held*, in an action against M.'s executor, that plaintiff's measure of damages was a sum which, together with its income at a reasonable rate of interest, and what plaintiff could reasonably contribute to his support by labor, would be sufficient to maintain him from the time of the breach of the contract to the end of his life.

2. While mortality tables are proper evidence in estimating the probable length of plaintiff's life, they are not conclusive, and it was error to confine the jury to such evidence alone.

3. Where the court instructed the jury at defendant's request that, if they found for plaintiff, they should "deduct from the amount otherwise necessary to support [him] any amount which he could reasonably earn during the same time for himself," and, at plaintiff's request, that, if they found for plaintiff, to "assess his damage at such sum as will give him a reasonable support during the probable length" of his life after M.'s death, the instructions were conflicting and misleading, and constituted reversible error.

4. Under Hill's Code, § 537, providing that "the notice of appeal shall specify the grounds of error with reasonable certainty," it is not necessary that the notice shall specify the particular reasons upon which it is claimed the ruling is erroneous, when such ruling is challenged as not the law as applicable to the case, it being sufficient to specify the particular ruling on which appellant relies as error without stating the reasons therefor.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by Jonathan Morrison against B. C. McAtee, executor of William McAtee, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

A. S. Bennett and J. L. Story, for appellant. B. S. Huntington, for respondent.

BEAN, J. This is an appeal from a judgment in favor of the claimant, rendered in a proceeding under section 1134 of Hill's Code, to enforce the claim of Jonathan Morrison against the estate of William McAtee, deceased, for an alleged breach of contract made between plaintiff and deceased, by which the latter agreed to support the former during his life in consideration of such services as he might be able to render. From the claim as pre-

sented to and rejected by the executor, and which forms the basis of this proceeding, it appears that in April, 1872, the claimant, who was then 61 years of age, and the deceased entered into an oral agreement, whereby it was agreed that the claimant should work for the deceased as a blacksmith and general farm laborer as long as he might live or might be able, and, in consideration thereof, the deceased should support and maintain him during the term of his natural life. In pursuance of this agreement the claimant entered into the service of the deceased, and continued to work for him without any compensation other than his maintenance and support, performing such labor as he was required and was able to perform until the 12th day of November, 1890, when McAtee died, leaving a will, but making no provision for the support and maintenance of the claimant, and his personal representatives have failed and neglected to comply with the contract. As the important question on this appeal arises on the instructions of the court, a discussion of the evidence as introduced on the trial is not essential further than to say that it tended to show the making of the contract as alleged, performance by the claimant, and the refusal by the executor of the estate to make any definite or permanent provision for the support and maintenance of the claimant, although he is old and infirm, and unable to support himself; hence there was evidence tending to show a breach of contract, and the motion for a nonsuit was properly overruled.

Before considering the other questions, it is proper to advert briefly to the sufficiency of the assignments of error in the notice of appeal. The following are a sufficient illustration of such assignments for the purposes of this case: "(4) The court erred in sustaining the objection of the claimant to the question propounded for the defendant estate to said witness Jonathan Morrison upon his cross-examination, which question was as follows: 'Didn't Mr. McAtee set aside provisions enough to support you and Mrs. McAtee?' (5) The court erred in overruling the objection of the counsel of the defendant estate to a question asked of said claimant, Morrison, which is as follows: 'I will ask you to state whether you have any means by which you can support yourself other than your claim against this estate?' and permitting the witness to answer: 'No, sir,' over the objection of the defendant estate." "(7) The court erred in instructing the jury that 'where the contract alleged is once shown to exist, the burden of proving that it was abandoned, or that the estate had been released therefrom, is upon the estate before it can be relieved of its liability thereon.' (8) The court erred in instructing the jury: 'The measure of damages in this case, if you find that the plaintiff should recover, is such sum as would pay for Morrison's support and maintenance for the time which Morrison would probably live after the death of McAtee as shown by the mortality tables.'" The contention for respondent is that, although the notice of appeal specifies with reasonable certainty the particular rul-



ings of the trial court which are claimed to have been erroneous, it is insufficient because it does not also specify wherein or upon what ground it is claimed such rulings are erroneous. The provision of the statute that "the notice of appeal shall specify the grounds of error with reasonable certainty" (Hill's Code, § 537) has been repeatedly enforced by this court. Whenever the question has been presented it has always been held that a general assignment of error is insufficient. The sufficiency of such an assignment was carefully considered in the recent case of *Herbert v. Dufur*, 32 Pac. Rep. 302, (decided Feb. 6, 1893,) and further discussion of the question is unnecessary at this time. But we have never held, nor do we think the statute contemplates, that the notice of appeal shall also specify the particular reasons upon which it is claimed the ruling of the trial court is erroneous, when such ruling is challenged on the ground that it is not the law as applicable to the issues and facts of the particular case. In such case it is thought to be sufficient to specify in the notice of appeal the particular ruling of the trial court upon which the appellant would rely as error in the appellate tribunal, without stating the particular reasons for such claim; and this we understand to be the prevailing practice in this state. The object of the assignments of error in the notice of appeal is to notify the respondent and appellate tribunal of the particular error upon which the appellant intends to rely on the appeal, so that the respondent may intelligently prepare his defense, and the court examine the record. The notice of appeal in this case does specify the particular errors upon which the appellant intends to rely upon this appeal, and is, we think, sufficient under the statute.

The charge of the court in this case is made up wholly from requests for instructions by the parties, and, as is often the fact in such cases, however careful and painstaking the trial judge may be, there is an irreconcilable conflict in the instructions as given to the jury. At the request of the defendant estate the court instructed the jury that, "if you should find for the plaintiff, then you should deduct from the amount otherwise necessary to support the claimant any amount which he could reasonably earn during the same time for himself." However, in a subsequent detached and unconnected portion of the charge, at the request of the claimant, the jury were told that if they should find in favor of the claimant they should "assess his damages at such sum as will give him a reasonable and comfortable support during the probable length of Morrison's life, commencing from the 12th day of November, 1890, the date of McAtee's death," to which latter instruction the defendant estate duly excepted. These instructions are inharmonious, conflicting, and misleading, and it is impossible to tell which rule the jury adopted in arriving at their conclusion. Whether they assessed the claimant's damages at such sum as would support him during the remainder of his life according to the rule as given at his request, or whether they

deducted from the amount necessary for such support his probable earnings, as they were instructed at defendant's request, it is impossible to determine. For this reason, if for no other, the judgment must be reversed. The giving of inconsistent and contradictory instructions is error, because the jury will be as likely to follow the one as the other; and the fact that the law may be accurately stated on one side will not obviate error if thus given for the other party. *Thomp. Char. Jur.* § 69; *Schneer v. Lemp*, 17 Mo. 142; *Railway Co. v. Shuckman*, 50 Ind. 42; *Quinn v. Donovan*, 85 Ill. 194; *Van Slyk v. Mills*, 34 Iowa, 375; *Davis v. Railroad Co.*, (Ark.) 18 S. W. Rep. 801; *Clem v. State*, 31 Ind. 480. If the trial court prefers to give the instructions in the form as submitted by counsel, rather than treat such requests as embodying counsel's views of the law, to be used in the preparation of its charge to the jury, it should be especially careful to harmonize such instructions before giving them. If this is not done, the instructions, which should be a guide to the jury, only serve to confuse and mislead them, and, as was said by *Frazer, C. J.*, in *Clem v. State*, supra, "make the trial by jury a most mischievous institution." The evils arising from such a practice was noted by this court in the case of *Conlon v. Railway Co.*, (this day decided,) 32 Pac. Rep. 397. And, further than this, it appears that several of the instructions given at the request of the claimant were erroneous. Take, for example, the one already set out as to the measure of damages. If, as the evidence tended to show, the claimant, while not able by his work or labor to entirely support himself, was able to do some work which would partly compensate therefor, he would certainly not be entitled to recover as damages the entire amount necessary for his support, with no deductions for his probable earnings. The measure of damages for a breach of a contract of maintenance, as we understand the law, is such a sum as would be a just equivalent for full performance, including prospective as well as past damages. *Fales v. Hemenway*, 64 Me. 378; *Schell v. Plumb*, 55 N. Y. 592; *Freeman v. Fogg*, 82 Me. 408, 19 Atl. Rep. 907. In the case at bar, as the consideration for the contract of maintenance was service by the claimant, the measure of damages for a breach of the contract would be a sum of money which, together with its income at a reasonable rate of interest, and what the claimant could reasonably contribute to his own support by work and labor, would be sufficient to support and maintain him from the time of the breach of the contract during the remainder of his life, and not such a sum as would give him a reasonable and comfortable support during that time, not taking into account his probable earnings. The court also, in another instruction, given for the claimant, instructed the jury that the measure of damages "is such a sum as will pay for Morrison's support and maintenance for that time which Morrison would probably live after the death of McAtee, as shown by the mortality tables." This is

not only erroneous for the same reason as the instruction last above referred to, but also because it confined the jury, in determining the probable length of the claimant's life, to the mortality tables introduced in evidence. Standard mortality tables, showing the expectation of life of a given age, are competent for the purpose of showing the probable length of life of any given person, but, in the nature of the case, cannot be conclusive. They are simply the result of calculations based upon a certain average rate of mortality as shown by experience, and assuming that all of the same age are of equal value. But the constitution, habits, and health of individuals differ essentially, and this must be taken into consideration in estimating the probable length of life of any given person, and therefore no ordinary table of expectation of life, although it may offer much valuable information, can alone be taken as a correct rule for estimating the value of the life of any particular individual. *Scheffler v. Railway Co.*, 32 Minn. 518, 21 N. W. Rep. 711. As the other alleged errors will probably be obviated on another trial, we shall pass them at this time. Judgment reversed, and a new trial ordered.

(23 Or. 536)

**ROMAN CATHOLIC ARCHBISHOP v. HACK.**

(Supreme Court of Oregon. Feb. 27, 1893.)

**APPEAL—ASSIGNMENT OF ERRORS.**

Grounds of error assigned as "error of the court, at the trial of this cause, in admitting testimony and documents on behalf of plaintiff, and objected to by defendant, to which ruling defendant excepted, and the exceptions were allowed," and "other errors apparent on the face of the record," are insufficient to present any question for consideration in the appellate court.

Appeal from circuit court, Washington county; F. J. Taylor, Judge.

Action of ejectment by the Roman Catholic archbishop of the diocese of Oregon against Edward Hack. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. H. Tongue, for appellant. R. & E. B. Williams, S. B. Huston, W. D. Hare, and C. H. Carey, for respondent.

**PER CURIAM.** This is an action to recover the possession of real property, and comes here on an appeal by the defendant from a judgment rendered in favor of the plaintiff. The grounds of error upon which the appellant intends to rely in this court are assigned in the notice of appeal as follows: "First. Error of the court, at the trial of this cause, in admitting testimony and documents on behalf of plaintiff, and objected to by defendant, to which ruling defendant excepted, and the exceptions were allowed. Second. Error of the court in excluding evidence and testimony offered by defendant, upon objections of plaintiff, to which rulings defendant excepted, and the exceptions were allowed. Third. Error of the court in in-

structing the jury, to which instructions defendant excepted, and the exceptions were allowed. Fourth. Other errors apparent upon the face of the record." Under the rule repeatedly announced by this court, and as has often been said, these assignments of error are insufficient to present any question for consideration in this court. *Herbert v. Dufur*, 32 Pac. Rep. 302, (recently decided;) *Thompson v. Insurance Co.*, 21 Or. 466, 28 Pac. Rep. 628; *Swift v. Mulkey*, 17 Or. 532, 21 Pac. Rep. 871; *Terminal Co. v. Lowenberg*, 11 Or. 287, 3 Pac. Rep. 683; *State v. McKinnon*, 8 Or. 490. The judgment must be affirmed.

(23 Or. 515)

**ROWLAND et al. v. WILLIAMS et al.**

(Supreme Court of Oregon. Feb. 27, 1893.)

**ADVERSE POSSESSION—CHARACTER AND SUFFICIENCY—INTENT—IMPROVEMENTS—MISTAKE—RECOGNITION OF RIGHTS OF PATENTEE—POSSESSION BY HEIRS AND ADMINISTRATOR.**

1. In an action against the heirs and administrator of M. to quiet title to certain land, it appeared that in 1865, more than 25 years prior to the commencement of the action, M. purchased of persons in possession, and he and his family and administrator and lessees have been in continuous, undisturbed possession ever since; that about July 9, 1875, the value of the improvements on the land amounted to \$8,000; that July 9, 1875, a patent to the land in dispute, and other lands, was issued to a missionary society; that in 1870, and subsequently, by decrees of the federal courts, such patent was set aside because of abandonment by the society, and the latter then abandoned its claim to all land included in the patent, and refunded to purchasers a large sum received in payment for parcels sold; and that in 1890 such society quitclaimed to plaintiffs' grantor, who quitclaimed to plaintiffs in consideration of one dollar. *Held*, that a decree for defendants, establishing their title by adverse possession, was proper.

2. In such case it appeared that M. pre-empted a tract of land adjoining the claim of such society, lived on it the required length of time, and made final proof in 1871. *Held*, that though the improvements on the land in dispute were made by him, supposing it was included in the pre-emption claim, his possession was none the less adverse, if he intended to claim the land improved, since the right of action by such society after it received its patent did not depend on whether or not M.'s entry was intentional.

3. The fact that M. had at one time expressed an intention of making a settlement with such society, and on his deathbed requested a friend to aid his children in securing a deed for the land in dispute, is insufficient to estop his heirs and administrator from claiming title by adverse possession, especially since there is no evidence that M. ever saw any agent of such society, or made any arrangement or offer to purchase from it.

4. In such case, the fact that M. died before his adverse possession had matured into a perfect title does not defeat the title of the heirs, since they and the administrator have had continuous possession since his death, under the claim of right made by him, and Hill's Code, § 1120, provides that the administrator is entitled to the possession and control of the real property of deceased, and to receive the rents and profits, until the estate is settled.

5. The fact that, after the statute of limitations had fully run in favor of the estate, the former widow of M. applied to the proper officers to pre-empt the land in dispute in her

own right, and also sought to quiet her title by decree of court, in no way affects the title of defendants.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by George Rowland and J. Barger against George Williams, administrator of the estate of Louisa Goldstein, deceased, and Clara A. Schutz, Charles F. Michelbach, Louisa Michelbach, Cedelia Michelbach, and William Michelbach, to quiet the title to certain land. From a judgment and decree for defendants, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by MOORE, J.:

This suit was brought to quiet the title to certain premises described in the complaint. The plaintiffs claim title through a patent from the United States government to the Methodist Episcopal Missionary Society, and mesne conveyances from that society to them. The defendant George Williams is the duly appointed and qualified administrator of the estate of John Michelbach, deceased, and the co-defendants are the children of said Michelbach, and claim title by adverse possession. The material facts are as follows: That on July 9, 1875, the Methodist Missionary Society secured a patent to a section of land in the vicinity of Dalles City, Or., under the act of congress approved August 14, 1848, granting lands to such societies. This patent was issued by virtue of section 2447 of the Revised Statutes of the United States, and only operated as a relinquishment of the title on the part of the government. That on December 3, 1879, in the circuit court of the United States for the district of Oregon, in a suit wherein Dalles City was plaintiff, and the Missionary Society of the Methodist Episcopal Church was defendant, the court found that the defendant voluntarily abandoned the premises described in the complaint therein as a missionary station in September, 1847, and that the premises were not thereafter occupied by the society as a missionary station or otherwise, and decreed that said defendant received the patent for the lands therein described as trustee for Dalles City, and ordered a conveyance to be made in accordance with that decree. Like decrees were rendered in the cases of *Kelly v. Same*, (two cases,) 6 Sawy. 126, 6 Fed. Rep. 356. An appeal was taken from these decrees to the supreme court of the United States, where they were affirmed. 107 U. S. 336, 2 Sup. Ct. Rep. 672. After these decrees were rendered the missionary society entirely abandoned its claim under the patent to all lands therein described, as well as to the lands which were embraced in the several decrees. Many persons had bought certain portions of said patented land from the missionary society before these decrees were rendered, paying therefor sums amounting in the aggregate to nearly \$25,000, which was refunded to the respective purchasers after these decrees were affirmed. John Michelbach, the predecessor in interest of these defendants, purchased the land in dispute in March, 1865, from parties who were then in possession, taking a deed therefor. He was in pos-

session of the land when the missionary society received its patent, and also when the said decrees were so affirmed. Prior to the time the patent was issued, he had planted an orchard upon, and fenced, the tract in dispute, erected a dwelling house, slaughterhouse, several barns, and other buildings, and, about the time these suits were concluded, he built a large and expensive house thereon. The value of these improvements was about \$8,000. About 1880 he leased this slaughterhouse and several barns to Messrs. Crate Bros., but retained possession of the dwelling house, at which he died in 1881 or 1882. Some time after Michelbach's death, his widow married a Mr. Goldstein, and left the house in charge of her children, who occupied it, with the consent of the administrator. Mrs. Goldstein soon separated from her husband, and returned to, and continued to reside with, the children, till 1888, when she died, and the defendant Williams was appointed administrator of her estate. The children continued to live in the house a few months after their mother's death, when they moved out, and it was rented by the administrator of the Michelbach estate to one A. N. Varney, who continued to pay rent until about a year before the commencement of this suit, at which time he refused to pay rent any longer to the estate, and claimed to hold under plaintiffs. Messrs. Crate Bros. continued to occupy the slaughterhouse and barns, paying rent therefor to the administrator of the Michelbach estate, for several years, when they transferred their lease to Messrs. Wood Bros., who continued to occupy the same, paying rent to the administrator until the commencement of this suit, and they now are in possession of the same as tenants of the said estate. That on February 27, 1890, the missionary society, in consideration of five dollars, conveyed to one David Graham, by quitclaim deed, a tract of land including the land in dispute; and David Graham, on January 10, 1891, in consideration of one dollar and other valuable considerations, conveyed to plaintiffs, by quitclaim deed, the tract of land in controversy. That neither the missionary society, nor any one claiming under it, ever had any possession whatever of this tract, except the possession claimed by Varney, and neither the society, nor any one under it, made any claim to the land from the date said decree setting aside the title was rendered till Graham purchased, in 1890. That on February 9, 1871, John Michelbach made final proof in the United States land office at Oregon City in support of his pre-emption claim for a tract of land adjoining the claim of the missionary society. That Louisa Goldstein, the former widow of Michelbach, on March 15, 1887, made application to pre-empt this tract of land, but her application was denied by the officers of the United States land office, for the reason that a portion of the land applied for was embraced in the claim of the missionary society, and therefore not subject to entry. That on August 15, 1887, Mrs. Goldstein commenced a suit in the circuit court of Wasco county against the missionary society to quiet her title to this tract, and

on December 6, 1887, she obtained a decree therein. The issues having been joined in this suit, the cause was referred, to take and report the testimony. The referee made his report to the court, which, after duly considering, prepared and filed findings of fact and conclusions of law, and decreed that the defendants were the owners in fee simple, and entitled to the possession, of the land in controversy, from which decree the plaintiffs appeal.

Dufur & Menefee, for appellants. A. S. Bennett, for respondents.

MOORE, J., (after stating the facts.) Upon this state of facts, appellants contend—First, that the decree obtained by Louisa Goldstein against the missionary society is void for want of jurisdiction of the court to render the same; second, that the improvements upon this tract were made under a mistake by Michelbach, who intended them for his pre-emption claim, and hence cannot be adverse; third, that Michelbach had expressed an intention of making a settlement with the missionary society, and at one time he went to Portland for that purpose, and that on his deathbed he requested a friend to aid his children in securing a deed for this land; fourth, that at Michelbach's death the possession, if adverse, had not matured into a title, and his children could take nothing by inheritance.

As to the first contention, it is admitted by respondents that there was no service of the summons upon the missionary society in the case of Louisa Goldstein against it, and hence that decree requires no consideration.

2. The record shows that Michelbach had improved a pre-emption claim, and lived upon it for the required time; that there was an old house upon it; and since there is no testimony to show where Michelbach lived for some time just prior to making his final proof, in 1871, the court must presume that he lived upon his claim. And, even if he had made these improvements upon the tract supposing it was included in his pre-emption claim, the occupancy would not be less adverse, if there had been an intention to claim the land improved. *Caufield v. Clark*, 17 Or. 474, 21 Pac. Rep. 443. Defendants' right is founded upon the fact that the missionary society has for a period of more than 10 years subsequent to the issuance of the patent acquiesced in their possession. When the patent was issued the society had a cause of action against Michelbach, founded upon his entry, and the fact that he had entered upon the land by mistake would be no defense to an action by the owner. The right of action is not based upon the mental condition of the occupant, but upon his entry. "If the fact of knowledge or intent were an essential element of disseisin, then the real owner would have no right of action against one who had entered by mistake until after he was convinced of his mistake, and then, with knowledge of his error, continued to hold, thus altering the character of his possession, and technically ousting the true owner by a change of mental con-

dition." *Erck v. Church*, 87 Tenn. 580, 11 S. W. Rep. 794. The evidence conclusively shows that John Michelbach entered upon the tract in 1864 or 1865, and from that time to 1881 or 1882, at the time of his death, he had undisputed possession thereof; that his administrator and family, from that time till 1891, continued this possession; and that during that time neither the plaintiffs nor their predecessors in interest ever had any possession thereof, or disturbed the possession of the defendants in any portion of the premises. It is conceded that the statute of limitations did not begin to run until the patent was issued, July 9, 1875; and, computing from that time, the defendants have been in possession of the property for a period of 15 years. This possession was open, notorious, and exclusive during all that time; but it is claimed that it was not hostile, nor under a claim of ownership. Adverse possession is founded upon the intent with which the occupant has claimed and held possession. This intent cannot be determined from what the occupant has said in support of his entry and possession, but must be gathered from what he has done to perfect his claim of ownership. The burden of proof falls upon the defendants to establish the adverse possession, and this can only be done by showing such acts as usually accompany ownership, which acts are, in their very nature, hostile to the true owner. In *Swift v. Mulkey*, 14 Or. 64, 12 Pac. Rep. 76, Thayer, J., says: "The legal title draws after it the possession; and a right of entry is not barred unless there has been a disseisin followed by an actual, open, notorious, and continuous adverse possession for the period of ten years next prior to the commencement of the action. To be adverse possession, it must be occupancy under a claim of ownership, though it need not be under color of title." The law presumes every person to be in the legal seisin and possession of the land to which he has a perfect and complete title; and this seisin and possession are coextensive with his right, and continue till he is ousted thereof by an actual possession in another, under a claim of right. *Ang. Lim. § 384*. But if there has been an occupation of the premises for 10 years, unexplained, it will be presumed to be made under a claim of right, and adverse, and to authorize the presumption of a grant, unless contradicted or explained. *Washb. Easem. § 90*. When a person takes possession of land, puts permanent and substantial improvements thereon, treats it as his own, and continues this occupation for the full period of the statute of limitations, his possession is presumed to be hostile, and under a claim of ownership. *Rung v. Shoneberger*, 26 Amer. Dec. 95; *Watson v. Gregg*, 36 Amer. Dec. 176. Proof of such possession and improvement of real property overcomes the presumption of seisin and possession of the true owner; and the burden of proof is then shifted to the owner, to show that such possession and improvement were under some license, indulgence, or special contract inconsistent with the claim of right by the other party. *Washb. Easem. § 91*. When plaintiffs

offered in evidence their paper title, they had made a prima facie case, and the law would presume that they were entitled to the possession. But when the defendants proved that they and their ancestor had been in the open, visible, and notorious possession for a period of more than 10 years; that they had fenced the tract, made costly and permanent improvements thereon, and had in all things treated it as their own,—such evidence would overcome the prima facie case made by the plaintiffs, and raise the presumption that their entry had been one of right, and their claim one of ownership; and if the plaintiffs could not show that such entry and holding had been in subordination of their title, or of those under whom they held, then the defendants must prevail.

3. An offer to purchase land by a party of another is generally such a recognition of the title of the latter as will bar the defense of adverse possession, if made before the statute has fully run. This is particularly so between vendor and vendee before a conveyance, and between landlord and tenant. But the rule is now well established that there is no estoppel except when the occupant is under an obligation, express or implied, to restore the possession at some time, or in some event. A party in possession of lands, acknowledging the title of another, is not estopped from subsequently disclaiming holding under such title if the original entry was not under the person in whom the title is acknowledged. Nor is any other person deriving the possession from such tenant estopped by such acknowledgment. And a party in possession of lands, recognizing the title of a claimant, and agreeing to purchase, may subsequently deny such title, set up title in himself, and show that his acknowledgment was produced by imposition, or made under a misapprehension of his rights. Tyl. Ej. 922. In the case at bar there is no evidence tending to show that Michelbach ever saw any agent of the missionary society, or that he ever made any arrangement with him, or offered to buy the property from the society. Michelbach's request to his friend to aid his children in procuring a deed for the property was a natural desire to protect the interests of those whom he was about to leave, rather than any acknowledgment of the title of the missionary society. Michelbach never was a tenant of the society, nor was there ever a contract to purchase the property from the society by him; and hence he, and those who claim under him, would not be barred by an intention upon his part to recognize the title of the missionary society.

4. Continuity is an indispensable element of an adverse possession. If several persons enter on lands at different times, and there is not a privity of estate between them, the several possessions cannot be tacked so as to make a continuity of possession on which the statute of limitations will operate. But if there is such privity of estate or of title as that several possessions can and should be referred to the original entry, they are regarded as joined and continuous. The

possession of a landlord and his tenant, of an ancestor and his heirs, of a vendor and his vendee, may be tacked to complete the bar of the statute of limitations. There is no break or interruption in the possession. Each possessor is connected with his predecessor, and the whole is a continuous possession. Riggs v. Fuller, 54 Ala. 146; Sedg. & W. Tr. Title Land, § 746. In the case at bar there has been no break in the possession. From July 9, 1875, for a period of more than 10 years, Michelbach, his heirs, and the administrator of his estate, have been in possession. This possession has been connected and continuous. The administrator and heirs have referred to the entry of Michelbach to support their possession. No paper evidence of a transfer of possession is necessary when the property is held under the claim of the first entryman. Crispen v. Hannavan, 50 Mo. 549; Vance v. Wood, 22 Or. 77, 29 Pac. Rep. 73. Section 1120 of Hilla's Code provides that the administrator is entitled to the possession and control of the real property of the deceased, and to receive the rents and profits thereof until the administration is completed. This possession of the administrator is maintained for the purpose of protecting the estate, in order to enable him to pay the debts thereof and to save the property for the heirs. The administrator and heirs have had undisputed possession of the property since the death of Michelbach. They have claimed and held it under the claim of right made by him, and such possession has been continuous, and the privity of estate between them has been maintained without any paper evidence of the transfer from Michelbach. It is true that Mrs. Goldstein applied to the proper officers to pre-empt this property in her own right, and that she also sought to quiet her title by the decree of the circuit court, but the statute of limitations had fully run in favor of the estate before any attempt had been made upon her part to acquire title to the property. The respondents have shown, by clear and convincing proof, that every element of adverse possession has been fully established by them, and the decree of the court below must be affirmed.

(50 Kan. 718)

DONALDSON et al. v. EVERHART.

(Supreme Court of Kansas. Feb. 11, 1893.)

CANCELLATION OF MORTGAGE—FAILURE OF CONSIDERATION—EVIDENCE—REVIEW ON APPEAL.

1. Where Mrs. E. brought her action to cancel a mortgage executed by herself and husband to D., upon a homestead owned by her, on the ground that the consideration of \$5,000 mentioned therein had wholly failed, because D. had not paid, advanced, or loaned any part thereof, and D., the defendant, being the holder of the mortgage, after admitting the execution and recording, denied only generally the allegations of the petition, *held*, that it was not competent for D. to show, by written contracts, letters, and other testimony between the husband and D., that D. received such mortgage as collateral security for the payment of debts of the husband, when it appeared from the evidence of D. that he had never had any conversation with Mrs. E., before or after the execu-

tion of the mortgage, and when the husband, as the witness of D., testified that, in making all of his arrangements with D., he acted for himself alone, and not for anybody else. *Held*, further, that the declarations of the husband to others were not admissible to prove that he acted as agent of his wife.

2. Where the finding and judgment of a trial court are sustained by sufficient evidence, the supreme court cannot reverse the judgment because the evidence of the plaintiff and defendant was directly contradictory to each other. Where a cause is tried before a district judge without a jury upon oral testimony, the trial judge, if sufficient evidence is offered to support the judgment, must decide as to the credibility of the witnesses, and the weight of their testimony.

(Syllabus by the Court.)

Error to district court, Pratt county; S. W. Leslie, Judge.

Action by S. A. Everhart against Thomas Donaldson and others to cancel a mortgage. There was judgment for plaintiff, and defendants bring error. Affirmed.

A. L. Greene, for plaintiffs in error. T. B. Wall and J. C. Ellis, for defendant in error.

HORTON, C. J. On the 14th day of February, 1889, Mrs. S. A. Everhart commenced her action against Thomas Donaldson and E. A. Munch to set aside and cancel a note of \$5,000, dated June 7, 1888, and a mortgage to secure the same, of the same date, on lot 2, in block 7, in Pitzer's addition to the city of Pratt, executed by Mrs. S. A. Everhart and her husband, J. T. Everhart, to Thomas Donaldson, of Waterbury, Conn. It was filed for record on the same day of its execution, but at the time of the commencement of the action the note and mortgage were in the hands of E. A. Munch, in Pratt county, for Thomas Donaldson, who resided in Connecticut. Mrs. Everhart alleged in her petition that the note for \$5,000, and the mortgage given to secure it, were executed in consideration of a promise by Donaldson that he would advance to her husband, J. T. Everhart, \$5,000, to be used by him in the loan business, in which he and Donaldson had been engaged for a long time prior thereto; that Donaldson wholly failed to perform his agreement upon his part; and, therefore, that there was no consideration for the note and mortgage. The defendants, in their answer, admitted the execution of the mortgage of the 7th of June, 1888; that it was duly recorded; but made a general denial as to all the other allegations contained in the petition. Mrs. Everhart, on her part, testified: "Well, Mr. Everhart and Mr. Donaldson came up to dinner, and brought the mortgage with them to sign; and Mr. Donaldson said he had brought out \$5,000.00 with him, for Mr. Everhart to use, and continue in the loan business as heretofore. If he would do this, [give him the note and mortgage for \$5,000,] he would feel safe, and continue in the business. I told him that Mr. Everhart and I had talked it over, and I had at first refused, because I could not, or did not want to, give a mortgage on my home; but finally we concluded, as times was a little hard, and the \$5,000 would help him

greatly in carrying those people [persons to whom Everhart had made loans for the benefit of Donaldson] longer, and he would not have to take the mortgaged property and sell it— We talked it over in that way, and, if he [Donaldson] would give him the \$5,000.00 to loan, I would give a \$5,000 mortgage." Mrs. Everhart testified upon cross-examination that: "Question. You say you had some conversation about this mortgage, and your husband made arrangements with Mr. Donaldson with regard to executing it. Did he do this before or after he came up to the house? Answer. They had talked the matter over. Q. Did Mr. Everhart act for you in the talk and conversation in reference to this mortgage? A. No. Q. Did he have any interest in the property? A. No; it was my own." Miss Lulu Everhart testified as follows: "Q. What relation are you to the plaintiff in this action? A. The daughter. Q. Are you acquainted with the defendant Thomas Donaldson? A. I am. Q. Did you ever hear the defendant Thomas Donaldson say anything with reference to the \$5,000? A. I have. Q. Do you remember now what he said? A. Yes, sir. Q. You may state to the court what you heard him say. A. A day or so after Mr. Donaldson came, I was at the office, helping papa and Mr. Donaldson fix up the notes. After they had gone over them, Mr. Donaldson says: 'Everything seems to be all right, and I have brought out \$5,000, which I will let you have, if you will give me a mortgage on your home; and we will continue in the business as heretofore, and I will feel safe in the matter.'" Thomas Donaldson testified, among other things, as follows: "Q. I will ask you to state whether or not you have advanced to J. T. Everhart any money since the 7th day of June, 1888. A. No, sir. Q. Are you the owner at this time of the \$5,000 mortgage executed and delivered to you by Mrs. Everhart and husband, together with a note, in June last? A. Yes, sir. Q. You may state, Mr. Donaldson, if you ever had any conversation with Mrs. Everhart with regard to this mortgage? A. I never did, sir; not one word. Q. Did you ever have any conversation prior to the time the mortgage was executed to you? A. No, sir. Q. Since that time? A. Not a word. Q. I will ask you to state, Mr. Donaldson, whether or not, at the time this mortgage was executed to you, you knew this property was in her [Mrs. Everhart's] name. A. Not until Mr. Everhart told me at that time. Q. When did you arrive here in Pratt, in 1888? A. I think it was Thursday, the 24th, [of May.] Q. What time did you arrive here on Thursday, the 24th? A. At 9 o'clock. Q. Wasn't it a fact you did bring \$5,000 with you? A. Yes, sir. Q. What for? A. If the business looked as it should, I fetched it out here to loan on short time. Q. Who was to loan it? A. Mr. Everhart. Q. You brought it for that purpose? A. Yes. Q. When did you send that money back? A. The next day. Q. What time the next day? A. I could not be positive, but I think I sent that money back the next forenoon. Q. That was

the forenoon you had the talk with Mrs. Everhart? A. No, I didn't. Q. Why did you conceal it? A. I didn't have any conversation with Mrs. Everhart. Q. You boarded there, and yet never mentioned the fact you had brought \$5,000? A. No. Q. You stayed at Mr. Everhart's all the time you were here? A. Yes, sir. Q. When did you leave Pratt, and go to Waterbury, Conn.? A. I can't tell the date exactly. It must have been, well— What is the date of that contract? Q. Well, say the contract was about the 26th of May. A. It was near the last day of June. Q. You stayed at Mr. Everhart's all the time, except when you were in Sumner county? A. Yes, sir."

Although Donaldson filed a general denial only to the allegations of the answer other than those concerning the execution of the note and mortgage in controversy, he claimed upon his part that the mortgage of June 7, 1888, for \$5,000, was given him by J. T. Everhart, with other notes and mortgages, amounting to \$17,150.13, as collateral security for the payment of \$19,850; that whenever Everhart collected the note of \$17,150.13, and paid in full the sum of \$19,850, with 12 per cent. interest thereon, the note and mortgage of \$5,000, properly released, were to be returned to him; and that Everhart was still in debt to him, and had not complied fully with his contract. A written contract dated the 26th day of June, 1888, to this purport, signed by Thomas Donaldson and J. T. Everhart, was offered in evidence; and Donaldson attempted to show by various letters from J. T. Everhart, and also by the testimony of Mr. Barnes, that the mortgage was executed as collateral security, and not, as alleged by Mrs. Everhart, to obtain \$5,000 of additional money to loan. The written contract and letters of J. T. Everhart were excluded, as were also Mr. Barnes' statements about the conditions upon which the \$5,000 mortgage was executed.

We do not think that there was any error in the exclusion of the oral and written testimony offered by Donaldson. The legal title of the real estate described in the mortgage of the 7th of June, 1888, was in the name of Mrs. Everhart. It was her homestead, as it was occupied as a residence by her family. It is immaterial whether the improvements were paid for by her or her husband. It could not be mortgaged without the joint consent of both. There is no testimony in the record showing, or tending to show, that Mrs. Everhart authorized her husband, J. T. Everhart, to deliver the mortgage of \$5,000 to Donaldson, or any one else, as collateral security for debts, or upon any written or oral contract of her husband. It was not proposed to show by the witness Barnes that he had any conversation with Mrs. Everhart, or that he knew from her anything about the conditions upon which the mortgage was executed. What he learned from Mr. J. T. Everhart, the husband, or from the written contracts executed by the husband in his own name, would not bind Mrs. Everhart, unless J. T. Everhart was her duly-authorized agent.

Donaldson introduced J. T. Everhart as his witness, and after stating that the property mortgaged was in his wife's name, and belonged to her, he further testified: "Question. I will get you to state, Mr. Everhart, if you made the arrangements with Mr. Donaldson for the execution, and the conditions upon which this mortgage should be executed. Answer. Yes. Q. In making these arrangements, I will get you to state for whom you acted. A. For myself. Q. For anybody else? A. No, sir. Q. You wrote that mortgage? A. Yes; I wrote it. Q. Who delivered it to Donaldson? A. I did. Q. Who was present when you delivered it? A. I don't remember of anybody. Q. Who authorized you to deliver it to him? A. No one authorized me. Nothing said about it. Q. Did you have any authority to deliver it to him? A. No. \* \* \* Q. You may state why you joined in the execution of that mortgage with your wife. A. Because we meant to give Mr. Donaldson a \$5,000 mortgage. Q. Was there any other reason why you joined in the execution of that mortgage with your wife? A. Yes. Q. You may state what other reasons there were. A. That he agreed to do certain things, and for that reason we gave him the mortgage. Q. What did he agree to do? A. That he would then continue with me in the loan business as heretofore; that he had brought out this \$5,000, and wanted to let me have that. Q. Was it given to secure that difference? A. No. Q. Was it given to secure \$5,000 that he was to loan you? A. Yes, sir."

The evidence of Everhart no way connected his wife with the delivery of the mortgage as collateral security for old debts, or upon any written contract prior to that date. The testimony offered by Donaldson tended to contradict and impeach Everhart; and if he had been introduced as a witness in her behalf by Mrs. Everhart, and had been permitted to testify, then much of the written and parol evidence offered by Donaldson would have been competent. But as Everhart was his witness, not the wife's witness, the testimony to contradict and impeach him was wholly incompetent; and, as the contracts and letters of Everhart were in no way shown to have been written or signed by Mrs. Everhart, their rejection followed, as a matter of course. Neither was Mrs. Everhart bound by the written contract referred to in the evidence of J. T. Everhart, because it did not purport to be signed by her or for her.

Upon the cross-examination of Mrs. Everhart it was attempted to be shown that she knew the amount of money owed by her husband to Donaldson; that she had executed a prior mortgage to Donaldson for \$1,200 on property belonging to herself and husband; and that, after the execution of the \$5,000 mortgage, her husband had brought her a mortgage, ready for her signature, on her homestead. If Donaldson had shown, by himself or other witnesses, that Mrs. Everhart had agreed with him to secure the debts of her husband by the \$5,000 mortgage, or gave the mortgage to have other mortgages re-



leased, this testimony, and other, might have been competent; but Donaldson stated in his examination that "he never had a word of conversation with Mrs. Everhart regarding the \$5,000 mortgage, before or after its execution." Nothing was said by her to Donaldson, or any one, about the release of any prior mortgage. The declarations of a supposed agent are not admissible to prove agency. Nor are the declarations of an agent, after a transaction, evidence of agency. *Railway Co. v. Nichols*, 8 Kan. 505; *Machine Co. v. Clark*, 15 Kan. 492; *Railway Co. v. Stults*, 31 Kan. 752, 3 Pac. Rep. 522. Therefore, any declarations made by J. T. Everhart to others were not admissible to prove that he was the agent of his wife, Mrs. Everhart.

Finally, it is contended that judgment should have been entered for Donaldson upon the evidence. It cannot be claimed that there was a failure of evidence to support the general finding of the trial judge. Therefore, we cannot disturb the judgment, even if the findings of the trial judge were against the weight or preponderance of the evidence. But upon the record, as presented, the evidence is more favorable to Mrs. Everhart than to Donaldson. "Testimony on paper is not like testimony from the lips, and when a trial judge hears the living voices, and sees the witnesses, who utter it, believes one, and disbelieves others, we cannot decide that the judge, having better opportunities than we, ought to have believed and found the other way." *Railway Co. v. Kunkel*, 17 Kan. 145. The judgment of the district court will be affirmed. All the justices concurring.

(50 Kan. 666)

#### STATE v. ALDRICH.

(Supreme Court of Kansas. Feb. 11, 1893.)

HOMICIDE — PLEA IN ABATEMENT—DYING DECLARATIONS—INSTRUCTIONS.

1. It is not error on the part of the trial court to overrule a plea in abatement, based solely upon the fact that the warrant of arrest directs the officer serving it to bring the prisoner before the magistrate issuing such warrant, instead of directing that he be taken before "some magistrate of the county."

2. The testimony examined, and held, that the court committed no error in receiving in evidence the declarations of the deceased relative to the manner in which he received the wound from which he died.

3. The opening statement of the instructions given by the court reviewed, and held, that it contains nothing of which the defendant can complain.

(Syllabus by Strang, C.)

Commissioners' decision. Appeal from district court, Norton county; G. Webb Bertram, Judge.

Cyrus Aldrich was convicted of murder in the second degree, and appeals. Affirmed.

L. K. Pratt and L. H. Thompson, for appellant. J. N. Ives, Atty. Gen., and L. H. Wilder, for the State.

STRANG, C. This was a criminal prosecution upon an information filed in the district court of Norton county July 23,

1891, charging the defendant with having on the 26th day of May, 1891, killed and murdered one Edward Hagaman. Aldrich was tried at the September term, 1891, and convicted of murder in the second degree. A motion for new trial was overruled, and he was sentenced to serve a period of 10 years at hard labor in the penitentiary. From this judgment and sentence he appeals to this court.

Counsel for defendant alleges the following errors on the part of the trial court: (1) The court erred in overruling the plea in abatement; (2) the court erred in the admission and rejection of evidence; (3) error in giving instructions complained of; (4) in overruling motion for new trial. May 4, 1890, the defendant obtained a loan of one Akers, a farmer living near him, of \$42, and gave a chattel mortgage upon a team of horses to secure the debt. The horses were to remain in the possession of the defendant, for use by him on his farm, until condition of the mortgage was broken, when the mortgagee, or his agent, was to have the right to go upon the defendant's premises and take possession of them. May 26, 1891, the defendant having defaulted on the mortgage, it was turned over to a justice of the peace for collection, and on that day Hagaman, who was a constable, was directed to go and get the money or the property. He called on the defendant, who said he could not pay at that time. The defendant and the constable then called on Mrs. Akers, her husband being absent in Missouri, and the defendant asked further time on the debt, which was refused him. The constable then went back to the premises of the defendant to get possession of the horses. The son and daughter of the defendant were with the horses in the field. The defendant also went to where the horses were, and said he would not give them up, and raised his cane, and told Hagaman he must not touch them. Hagaman then reached towards one of the horses, to take hold of it, when the defendant dropped his cane, drew a revolver from his pocket, and fired at Hagaman. The latter then drew his pistol, and several shots were exchanged, Hagaman being shot through the stomach, which proved fatal.

The first contention of the defendant is that the trial court erred in overruling his plea in abatement. When the case was called for trial, September 21, 1891, the defendant interposed a plea in abatement, alleging that the warrant upon which he was arrested was illegal and void, because it commanded the officer to whom it was directed to take the defendant before the magistrate issuing the same, instead of before "some magistrate of Norton county." We do not think the warrant of arrest in the case is illegal and void for the reason given, which is the only objection thereto. It is not claimed that the defendant objected to going before the magistrate issuing the warrant for a hearing, nor, so far as the record shows, was there any objection by the defendant to submitting to a preliminary examination before such magistrate. And there is no allegation that the defendant

did not have a proper examination before a competent magistrate. The sole contention, so far as this plea is concerned, is that the warrant was void for the reason above mentioned. The warrant was issued upon a complaint properly verified, and was itself in proper form, except that it was in form a special, instead of being a general, warrant. The warrant was not void, and, the defendant having gone before the magistrate issuing it without objection, and there submitted to an examination, of which he does not complain, we do not think the court committed error in overruling the plea in abatement. *State v. Bailey*, 32 Kan. 83, 3 Pac. Rep. 769.

The second contention of the defendant is that the court erred in permitting the dying declarations of the deceased, Haganman, detailing the circumstances in connection with his being shot, in evidence. Before such declarations were permitted to go to the jury a foundation was laid by the following testimony: Dr. Sprague, who was called to see the deceased soon after he was wounded, says: "I found him in a critical condition. I found wounds in two places, one through his hand and one through his body. He was vomiting blood every few minutes. I tried to stop the blood by giving medicine by way of his stomach. He wanted to know if he was badly wounded. I told him that I thought so. He wanted to know if he was fatally wounded, and I told him I thought he was. Then he wanted me to keep him alive until his wife got there. I injected in his arm one fourth grala of morphia, which acted upon him, and the hemorrhage stopped." On cross-examination the doctor further stated: "Question. In your opinion, that blood came from his stomach? Answer. Yes, sir. Q. Could not the blood come from some other way? A. He would not vomit it if not hit in the stomach. Q. Didn't you always tell him he might get over it? A. No, sir. Q. Didn't you hold out to him any possibility at all of his getting over it? A. No, sir. Q. What did he say about living? A. He wanted to know of me if there was a possibility for him to get over it. I told him I thought not. Then he said, 'Well, keep me alive till my wife gets here.' Q. Didn't you tell him that he would probably live till his wife got there? A. Yes. I told him there was a possible chance for him to live for several days. Q. Did he say anything? A. He thought he was fatally wounded. Q. Did you have any further talk with him about his living? A. No, sir. Q. Did he say anything to his wife? A. Yes. He said it was all right whether he lived or died; that he was doing his duty. Q. Did he say he thought the wound was fatal? A. I told him, but I don't know whether he thought so or not. I was well of the opinion that it was a fatal wound. I can't pass an opinion for him. Q. You told him that you thought it a fatal wound? A. Yes, sir. Q. He wanted to know if you thought you could keep him alive till his family got there? A. Yes, sir." Charles Ewart, another physician, was examined on this question, and testified: "Question. State

whether or not that wound was fatal. Answer. Yes, sir. Q. Do you say that he would necessarily die from it? A. Yes, sir. Q. What, if anything, did Haganman say as to his condition, whether or not the wound was fatal, or he would be liable to get well? A. When I first called he told me in about these words: He said, 'They got me this time, but they had to double on me.' Q. Did he seem to have any hope of recovery? A. He didn't express it so. Afterwards he said it was no use in holding up any longer. I knew he was sinking." On cross-examination he said: "Question. What reason did he give for thinking he was fatally hurt? Answer. Because he was shot through the stomach. He knew he could not get over that. Q. Do you know how long he conversed with his wife and boys? A. It might have been five minutes. Q. What did he tell them? A. I don't know. I only heard him tell one of the boys that he must take care of his mother. I remember that he told Eddie that." J. H. Allen was sworn and examined upon this question also, and testified as follows: "Question. What he said to you was before Sprague got there? Answer. I think Sprague and me got there about the same time. Q. Had Sprague seen him yet? A. I don't think he had. Q. Tell what he said about the wounds he received. A. When I came in he said: 'Allen, I am killed. I have got my death shot. I am bound to die.' He said, 'Do you think my wife will get here?' I told him I thought he would last that long. Q. Did you say anything to him about his wounds? A. I told him, 'I believe you are bound to die.'" H. J. Schelle testified as follows: "Question. What did he say about the wound he had received that day? Answer. Why he said he thought it would cause his death. Q. You say he told you that he thought he had to die? A. Yes, sir. Q. What did you say to him? A. I told him there was no hope for him. Q. Did he express any doubt as to whether he was going to live or die? A. He said he was going to die. Q. Did he say anything about any physician? A. He didn't think any of them could save him. Q. What did he say about it? A. He thought they were a long time coming. Q. Did he say he thought they could help him? A. No, sir."

A review of all this testimony makes it appear very clear to us that Haganman had no hope of ultimate recovery at the times when he made his several statements relative to the shooting. The utmost he hoped for was to live a short time,—long enough to see his family. His interview with his family shows that he had no hope of recovery. After talking a few minutes with his wife and children, he said to his oldest boy, Eddie, "You must take care of your mother." The evidence of Dr. Ewart and that of Mr. Schelle was not before the court when Dr. Sprague was permitted to give the declarations of the deceased concerning the shooting; but the court had received at that time the evidence of Mr. Allen, which was very pointed and conclusive upon the question of the deceased's condition. And we think, taking all the evidence on the sub-

ject together, it shows that the deceased had no hope of recovery after he first talked with Dr. Sprague and with Mr. Allen, who talked with Hagaman about the same time Sprague did, both of whom informed him that his wound was fatal. The details of the shooting as given by Hagaman to each of the witnesses were substantially the same, so that, in legal effect, the foundation for the admission of all of such declarations was supported by the evidence of all the witnesses testifying relative to his condition, and frame of mind concerning the same, when such declarations were made. We think the statements of the deceased relative to the shooting when he received the wound from which he died were clearly admissible. Counsel for defendant objects to the opening statement of the court in connection with the instructions. We think, however, the remarks of counsel in his brief on the subject are entirely without excuse. We find nothing in such statement of which either side to the case can rightfully complain. We see no reason why the defendant did not have a proper trial, and therefore recommend that the judgment of the trial court be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(50 Kan. 685)

#### MALLORY v. FERGUSON.

(Supreme Court of Kansas. Feb. 11, 1893.)

CLERK OF COURT—CERTIFICATE AS TO JUDGMENTS AND LIENS—LIABILITIES.

1. It is no part of the official duty of a clerk of the district court to make searches of the records in his office for judgments, liens, or suits pending, affecting the title to real property, and certify to the result of such search.

2. Where a clerk of the district court, who is neither a lawyer nor engaged in the business of making abstracts, signs a certificate appended to an abstract of the title to certain real estate, as follows: "I further certify that there are no judgments, mechanics' liens, or foreign executions on file or of record in this county, or any attachments or other suits pending in said county, against said within-described lands, nor against any of the grantors or grantees herein, nor against any other person through whom title herein is derived, except ———." D. M. Ferguson, Clerk District Court, Miami Co., Kansas. Dated this 8th day of April, 1885. [Seal.]—and receives therefor 25 cents, which is the fee allowed by law for a certificate alone, it will not be presumed, in the absence of evidence, that such clerk agreed to make a careful search, and correctly certify as to the condition of the title to such land, but the burden of showing an express agreement to do so rests on the plaintiff; and such clerk will not be held liable for any mere errors of judgment, or want of skill, in determining the legal effect of a suit pending in the court of which he is clerk. A party relying on the certificate of such clerk, in the absence of such agreement, must himself bear whatever loss ensues from want of skill or honest errors of judgment on the part of such clerk.

3. Whatever liability is incurred in any case by such clerk is to the person for whom the certificate is made, and not to his grantee; and, before the plaintiff can recover, he must show that he employed the defendant to perform the service.

4. The defendant in this case made, on an

abstract of title, the certificate above mentioned, and received 25 cents therefor. There was a suit pending, affecting the title to the lands described in the abstract, which was prosecuted to judgment, and resulted in loss to the plaintiff. The defendant was not a lawyer, nor an abstractor, nor did he claim to have any skill in making searches of records, but erroneously supposed it was his duty to make such certificate. There is no claim that he acted in bad faith or corruptly, but, under the findings of the court, appears to have used such care and judgment as he was ordinarily capable of exercising. *Held*, that the defendant is not liable in this action.

(Syllabus by the Court.)

Error from district court, Miami county; J. P. Hindman, Judge.

Action by Fannie E. Mallory against D. M. Ferguson to recover damages sustained by reason of defendant's certificate to an abstract of title to land. There was judgment for defendant, and plaintiff brings error. Affirmed.

John C. Sheridan, for plaintiff in error.  
Selwyn Douglas, for defendant in error.

ALLEN, J. This action is brought by the plaintiff to recover from the defendant damages which she claims to have sustained by reason of the defendant having certified on the abstract title to a certain lot in Paola, as follows: "I hereby certify that there are no judgments, mechanics' liens, foreign executions, or suits pending on the records of this court against any of the above-named grantors or grantees affecting the title of the above-described real estate, except as above stated. Dated this 8th day of April, 1885. D. M. Ferguson, Clerk of the District Court Miami Co., Kas." Plaintiff alleges, in substance, that, relying upon this certificate, she purchased the property described in the abstract, and paid therefor, in cash, the sum of \$5,000; that, in truth and in fact, there was a suit then pending in said district court wherein one Sutton S. Clover was plaintiff, and William G. Oakman, Hattie E. Oakman, and others were defendants, in which said Clover claimed to own an equitable interest in said lands, and sought to recover the same. Plaintiff further alleges that said suit last mentioned was tried in said district court, and that said Clover was by said court adjudged to be the owner of the undivided one fourth of said property; that plaintiff was compelled to pay \$1,000 to buy in the interests of said Clover, and that she paid attorney fees and expenses in defending said action to the amount of \$385; that she had demanded payment from the defendant, and that he refused. The defendant admits that he was clerk of the district court, and that he signed the certificate set up in the petition. The defendant denies that he was engaged in the business of making abstracts. The defendant alleges that said abstract was made by one C. W. Chandler, who was engaged in the business of making abstracts of title, and that said defendant signed the same as an accommodation to the said Chandler. He alleges that, before signing the certificate, he made a diligent, thorough, and careful examination of the records in his office, and, as a result of said search

and examination, was satisfied of the truth of said certificate. He alleges that he examined all the records and papers in said suit of *Clover v. Oakman*, and was convinced that the title to said real estate was not involved in said suit of *Clover v. Oakman*. The defendant also alleges that the party for whom said abstract was made was unknown to him at the time he signed said certificate, and that he signed it for the sole advantage and profit of said C. W. Chandler. The undisputed evidence shows that the defendant was paid 25 cents for this certificate. It also shows that the title to the land mentioned in the abstract was in dispute in said suit of *Clover v. Oakman*; that *Clover* obtained judgment for a one-fourth interest therein; that the plaintiff bought in said interest, and paid \$1,000 for it; and that she paid attorneys' fees amounting to \$310 in defending against the claim of said *Clover* in that action, she having been made party defendant to the action subsequent to the purchase from *Oakman* and wife of the property described in the abstract. This case was tried before the court without a jury, and a general finding made in favor of the defendant, and judgment rendered against the plaintiff for costs.

There is no showing that Mrs. Mallory, the plaintiff, or her husband, C. H. Mallory, whom the evidence shows was her general agent in making the purchase of the property, had any conversation directly with the defendant. The evidence does show that Mallory employed said C. W. Chandler to make the abstract. It also shows that Mallory paid to Chandler 50 cents, in addition to Chandler's own charges, for the certificates of the clerk of the district court and the treasurer. The defendant claims that his understanding of the matter was that the abstract was made for *Oakman*, and upon this question the testimony is not entirely clear. On cross-examination C. H. Mallory was asked this question: "Question. You may state if you recognize that paper you examine there, (handing witness paper,) and didn't you answer, in reply to that question, this: 'That is the abstract that Mr. *Oakman* presented to us, made by Mr. Chandler?'" Answer. Well, that was part of the papers; yes, sir." C. W. Chandler, on cross-examination, testified as follows: "Q. What did Mr. Mallory say to you about what he wanted that abstract of title for? A. When he first came to the office, he said he wanted it for Mr. *Oakman*,—that is, Mr. *Oakman* wanted the abstract,—and he spoke to us for it. Q. You told him you would not make the abstract for Mr. *Oakman* unless Mr. Mallory would pay for it? A. Yes, sir. Q. Then he told you to go on and make it, and he would pay for it? A. Yes, sir; he said he would see it was paid for. Q. Then you went on and made it? A. I did." The defendant testified, among other things: "Q. Did Mr. Mallory ever say anything to you in connection with the matter? A. I don't recollect Mr. Mallory saying anything. Q. Did he ever have anything to say to you on the subject? A. No, sir. Q. You say you signed this certificate at the request of Mr. Chandler?

A. Yes, sir; C. W. Chandler. I examined the record for Mr. Chandler, at his request. Q. What was Mr. Chandler's business at that time? A. He was in the loan business and the abstract business. Q. Before you signed that certificate at that time, you may state whether you made a careful examination of the records. A. I did make a careful examination of the records. Q. And you may state what, if any, conclusion you came to with reference to anything in that suit affecting the title to that property,—the property alleged to be described in that so-called abstract of title. A. My opinion, according to the best of my judgment, was that it did not affect the title. Of course, it was a complicated case. It was my understanding I was simply to exercise my judgment, as best I could." And again: "Q. Was there any talk in your office, at the time this certificate was certified to, as to who was the owner of this property, or as to whom this abstract was for? A. I understood Mr. Chandler to say he was making it for Mr. *Oakman*, through Mr. Mallory, at the request of Mr. Mallory; that Mr. Mallory was going to purchase the property. Q. There was something said about Mr. Mallory in connection with it? A. In the talk that Mr. Mallory was going to purchase."

The evidence shows that the defendant frequently made similar certificates on abstracts, for which he charged and received the uniform fee of 25 cents. He testifies, however, that he frequently made such certificates without receiving any fee therefor. There is no pretense on the part of the plaintiff that the defendant was either an attorney at law, or engaged in the business of making abstracts of title, except so far as such certificates relate to an abstract. There was no special contract or agreement with reference to this particular certificate, but it was made by the defendant, as he claims, with the understanding on his part that it was his official duty to make such certificates, and that the law allowed him a fee of 25 cents therefor. It is important to determine—First, whether there was any undertaking on the part of the defendant, to perform any services whatever for the plaintiff in this case; second, if there was such undertaking, what services did the plaintiff undertake to perform? There having been a general finding by the trial court in favor of the defendant, all doubts as to the weight of the evidence must be resolved in his favor.

We are not prepared to say that the uncontradicted evidence shows that the defendant was employed by Mrs. Mallory, through her agent, to make this certificate; and, if we were forced to decide this case on this point alone, we should have to hold that the general finding of the trial court in favor of the defendant included a finding that the defendant was not employed by the plaintiff to make the certificate. We do not, however, rest our decision on this point alone, but will consider the second proposition also. If the making of the certificate on the abstract was not done under an employment from the plaintiff, can she recover in this

case? We think the great weight of authority is to the effect that the party making the examination and certificate is liable only to his employer, and never to a stranger or third party. *Hughes v. Investment Co.*, 21 Fed. Rep. 169. In the case of *Houseman v. Association*, 81 Pa. St. 262, Mr. Justice Sharswood, in delivering the opinion of the court, says: "It was decided by the present chief justice at nisi prius, in the case of *Com. v. Harmer*, 6 Phila. 90, that this liability is to the party who asks and pays for the search, and does not extend to his assignee or alienee." The decision in the case of *Association v. Houseman*, 89 Pa. St. 261, seems to be somewhat in conflict with the doctrine as stated by Justice Sharswood in the case above cited. We think that the rule as stated is sustained both by the weight of reason and authority,—that there must be privity of contract to create liability. In the case of *Bank v. Ward*, 100 U. S. 195, the supreme court of the United States holds: "Where A., an attorney at law employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave, over his signature, this certificate, 'B.'s title to the lot [describing it] is good, and the property unincumbered,' C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing, by way of security therefor, a deed of trust for the lot; B., before employing A., had transferred the lot in fee by a duly-recorded conveyance,—a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care; the money loaned was not paid, and B. is insolvent,—held: First, that there being neither fraud, collusion, nor falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate; second, that usage cannot make a contract where none was made by the parties."

We think that the judgment of the district court might be upheld on the ground that there was evidence tending to show that the employment of the defendant was made in behalf of a person other than the plaintiff. We shall proceed, however, with the consideration of the more important question involved in the case,—whether, conceding the existence of such employment by the plaintiff, the nature of the employment renders the defendant liable in this action. The defendant was clerk of the district court of Miami county, Kan. He testifies that in making this certificate he supposed he was merely performing a duty imposed on him by law. It is nowhere made the duty of the clerk of the district court to search the records in his office for judgments, liens, and suits pending, nor does the statute provide any fee for any such service. It is not contended in this case that there was any special contract or agreement between the parties as to the particular service he was to perform; but it is contended on the part of the plaintiff that the defendant was in the habit of making such certificates for pay,—for the uniform fee of 25 cents,—and that

because of such practice he was liable for any error in such certificate. The law does allow the clerk of the district court a fee of 25 cents for his certificate and seal. Can it be said that because the defendant was in the habit of making certificates of the character of this one, and charging therefor the sum of 25 cents, he is liable for any error or misstatement contained therein? Ordinarily the certificate of the clerk of the district court is attached to copies of records or to other written instruments, for which, if made by the clerk himself, he is also entitled to payment. If the defendant had been called upon to make a full transcript of all the records in the case of *Clover v. Oakman*, over his certificate of the correctness thereof, and had he made what purported to be such transcript, to the correctness of which he appended his certificate, we do not doubt that he would have been liable for any error or omission in the transcript, through which the party receiving and paying therefor was injured. In this case, however, the clerk certifies, not to the correctness of a transcript which he has made, but to the legal effect of the whole volume of all the records in his office on the title to this land.

Authorities are cited by counsel for the plaintiff in error, which, he contends, hold the defendant liable. These authorities must be considered with reference to the statutes which were construed by the courts in making their decisions. In the case of *Ziegler v. Com.*, the court says: "In Pennsylvania it has ever been a portion of the duty of the prothonotary to make searches. It is an incident of his office as a keeper of the records of the county. The fee bill gives him compensation for his services and for his certificates." 12 Pa. St. 228. In the case of *Lusk v. Carlin*, 4 Scam. 395, which was an action on the official bond of the recorder of deeds, for failing to note a mortgage in his certificate of search, the court says: "It is contended that it is not a duty of the recorder to examine and give information whether land is incumbered, as it would frequently involve a question as to the legal effect of the conveyance of record. In this sense of examination, he is not bound to make it, but we are of the opinion that he is bound to search and give information of the fact whether there are deeds, mortgages, or writings concerning the land, and refer the party to them, so he may be enabled to judge for himself, and take counsel as to the manner in which the title is affected or the estate incumbered by them. The search should be diligent, and his information true, as for it he is entitled to compensation." The court refers to various provisions of the statutes of Illinois relating to the duty of the recorder, and says: "The whole scope and spirit of these provisions seem to me to point out this service as an official duty of the recorder; and I think the fees, perquisites, and emoluments of his office a good, continuing, and valuable consideration to charge the surety in the bond, within the principle laid down in the case of *U. S. v. Linn*, 15 Pet. 311." In New York and other states it is made the duty

of certain officials having the custody of public records to make searches, and certify the result thereof, and it is held that the officer is liable for any error or misstatement in such certificate. We have not been able, however, to find any case—nor has counsel called our attention to any—where the officer has been held liable on a certificate which the law did not require him to make, and where he received no compensation for making the search. In *Warvelle on Abstracts*, (page 66,) the author says: "It is frequently the custom of the examiner to append to an abstract of this character certificates of the officers having the custody of records examined, yet in the majority of cases the said certificates do not materially enhance the value of the examination as evidence, and, unless forming a part of their official duty, create no responsibility on the part of the certifying officer." This case is in itself a strong illustration of the hardship of a rule which should hold the clerk of the district court liable for any error in such a certificate for the sum of 25 cents, which he would be entitled to have for making any formal certificate whatever. Under the plaintiff's theory of this case, he would be held bound to examine every record in his office which in any wise affected the title to these lands, and to state, over his signature, correctly, the legal effect of every record which in any manner affected the title. There is nothing in this case tending to show that the defendant was called on to make any transcripts of any records in his possession. Had the plaintiff obtained a transcript of the pleadings in the *Oakman Case*, in the exercise of ordinary business prudence she would have submitted such transcripts to a counselor learned in the law, for his opinion as to their effect on the title to this property, and as to the risks she would incur by purchasing the property pending such litigation.

Many authorities are cited by counsel as to the liability of attorneys, physicians, and other persons who fail to use care and skill in their employment. These authorities cast but little light on this case. The general doctrine, we think, is correctly stated in *Story, Bailm. § 435*: "Where the particular business or employment requires skill, if the bailee is known not to possess it, or he does not exercise the particular art or employment to which it belongs, and he makes no pretension to skill in it, there, if the bailor, with full notice, trusts him with the undertaking, the bailee is bound only for a reasonable exercise of the skill which he possesses, or of the judgment which he can employ; and, if any loss ensues from his want of due skill, he is not chargeable." There is no evidence in this case tending to show that the defendant held himself out to the public as skilled in the examination of public records, or in determining their legal effect. He himself testifies that he used such care and judgment as he possessed, and that it was his opinion that the title to the property described in the abstract was not affected by the *Clover suit*. If the plaintiff employed the defendant at all to pass his opinion or to certify as to the effect of the records in that case, she certainly em-

ployed him for a very meager consideration. We are not prepared to say that any consideration whatever was paid in this case for a search. The defendant did not claim to be a lawyer, nor was there any evidence that he claimed to have skill. We think the plaintiff was not entitled to the benefit of any higher order of judgment than the defendant in fact possessed, and that in relying on such a certificate, so obtained, if loss occurs, she must herself bear it, under all the circumstances, as they are shown by the record in this case. Certainly there is a wide difference between the liability of a lawyer, or other person claiming to have especial qualifications for determining questions affecting the title to land, and that of a layman, who neither has nor professes to have any. We conclude, then, that the defendant is not liable for any error in judgment as to the condition of the title to the land described in the abstract, even though such error be a gross one; and it may well be doubted whether he would be liable, where he receives merely the fee allowed by law for a certificate, unless guilty of fraud or willful misstatement. We think the judgment of the trial court was right, and it will be affirmed. All the justices concurring.

(13 Mont. 112)

## STATE v. HUDSON.

(Supreme Court of Montana. Feb. 27, 1893.)

## UTTERING FORGED INSTRUMENTS—VENUE.

Where the forged instrument is mailed in one county and received in another, the venue of the offense of uttering the forged instrument is in the latter county; and *Crim. Pr. Act, § 32*, providing that when a crime has been committed partly in one county and partly in another county, or the acts or effects constituting or requisite to the consummation of the offense occur in several counties, the jurisdiction is in either, does not apply.

Appeal from district court, Gallatin county; F. H. Armstrong, Judge.

James M. Hudson was convicted of uttering forged paper, and appeals. Reversed.

The other facts fully appear in the following statement by DE WITT, J.:

This is an appeal by the defendant from a judgment upon a conviction for uttering, publishing, and passing an alleged forged instrument. The opinion below treats but one of the several points made by appellant, which may be stated as follows: Information was filed in Gallatin county, charging the offense of uttering, publishing, and passing the forged instrument in Gallatin county. The proof was that the defendant deposited the alleged forged instrument in the United States mail at Three Forks, a post office in Gallatin county, directed to the city of Butte, a post office in Silver Bow county, to the Singer Manufacturing Company, the party alleged to be intended to be defrauded by the defendant. The Singer Manufacturing Company, to whom the forged instrument was so sent, received the same at Butte, in Silver Bow county. This was the only testimony as to venue,—as to the place where the defendant uttered, published, and passed the instrument. The court in-

structed the jury, on the matter of venue, that if the state has shown that the defendant mailed the instrument in Gallatin county, state of Montana, addressed to the Singer Manufacturing Company, at the city of Butte, Mont., with the intent, etc., and that the defendant knew the instrument to be false and fictitious, and that the Singer Manufacturing Company received the instrument in the course of mail, that was sufficient. The question now upon the appeal is whether the facts of a mailing of the forged instrument by defendant in Gallatin county, and the due receipt of the same by the Singer Manufacturing Company in Silver Bow county, constituted an uttering, publishing, and passing in Gallatin county. If yes, the venue was proved; if no, the venue was not proved, and the judgment must be reversed.

E. P. Cadwell, for appellant. Henri J. Haskell, Atty. Gen., for the State.

DE WITT, J., (after stating the facts.) The precise question presented here was thoroughly considered in New York in the case of *People v. Rathbun*, 21 Wend. 598. Mr. Justice Cowen wrote an exhaustive opinion, both upon the reason of the proposition, and upon the authority of the decided cases. The case is a standard citation in the text-books. 8 Greenl. Ev. §112; Whart. Crim. Law, § 1451; 2 Bish. Crim. Proc. § 428. In a later case in New York (*People v. Adams*, 3 Denio, 209) the opinion of the court, after speaking of the principle decided in 21 Wend., and after citing other cases, went on to remark: "And to the same effect are the views of the late Mr. Justice Cowen, as expressed in Rathbun's Case. And the principle is too reasonable and just of itself, and too well sustained by adjudged cases, to admit, in my judgment, of any serious doubt." It was held in the Rathbun Case that the venue was in the county where the letter containing the forged instrument was received, and not in the county where it was mailed. Upon that theory the venue in the case at bar should be in Silver Bow county, and not in Gallatin county. We are wholly satisfied with Justice Cowen's views, and nothing new occurs to us which would add to the weight of his reasoning or conclusion. The venue was not, therefore, proved in Gallatin county; and the judgment must be reversed, unless our statute has worked a change in the principle announced in the Rathbun Case. The Rathbun Case discussed the doctrine of an offense being committed partly in one county and partly in another, and concluded that the offense was committed wholly in the county where the letter was received. Our statute provides as follows: "When a crime has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county, and the court in which the prosecution shall have been first commenced shall have precedence." Section 32, Crim. Pr. Act. But in the case at bar the crime was not partly

committed in Gallatin county. The uttering was the offense. There was no uttering until the receipt of the letter in Silver Bow county. The mailing, as above observed, was not the uttering. Had the letter been cut off in its passage from Gallatin to Silver Bow county, or had it been destroyed, or never received, there would have been no uttering at any place. Nor were the acts or effects constituting the offense committed in Gallatin county. That which constitutes the offense was the uttering. If nothing had occurred other than that which occurred in Gallatin county,—that is, if nothing had occurred further than the mailing of the letter in Gallatin county,—there would have been no uttering, and no offense. Nor were the acts or effects requisite to the consummation of the offense committed in Gallatin county. It was not requisite to the consummation of the offense that the letter should be mailed in Gallatin county, or elsewhere. The forged instrument could have gone to the Singer Manufacturing Company by any vehicle other than the mail. The defendant could have handed it to the Singer Manufacturing Company in person. It may be said that, under the facts in this case, there would have been no uttering,—that is to say, the instrument would not have reached the Singer Manufacturing Company, and so be uttered or published,—unless it had been put into the mail, and that, therefore, such depositing in the mail was an act requisite to the consummation of the offense. But on the same line of suggestion it can be said that if a person, having determined to murder, starts from Gallatin county, and travels to Silver Bow county, and there accomplishes the crime of murder, if he had not started from Gallatin county he would not have committed the crime in Silver Bow county, and his so starting from Gallatin county was an act requisite to the consummation of the offense. But it would not be contended that the venue for such crime of murder could be laid in Gallatin county. Again, a murderer might buy his pistol in Gallatin county, then go to Silver Bow county, and commit the offense. It then could be said, on the same line of suggestion, that if he had not bought the pistol in Gallatin county the offense would not have been committed, and that, therefore, the buying of the pistol was an act requisite to the consummation of the offense. Illustrations of this nature might be multiplied. Such acts as mailing the letter or buying the pistol, or a murderer traveling through Gallatin county to Silver Bow county, would be, in those particular cases, preliminary to the commission of the offense, and acts without which, in the particular case, the offense would not be committed, but they were not acts requisite to the consummation of the offense. If such acts were construed to be those requisite to the consummation of the offense, there are but few crimes, the venue of which could not be construed to be in counties other than the actual county where the offense was committed. We are therefore of opinion, in the case at bar, that the venue of the offense, if any



offense were committed, was in Silver Bow county, and that the statute (section 92, *supra*) does not change the principles as announced in the Rathbun Case, and generally followed since the promulgation of that decision.

The judgment is reversed; and it appearing that defendant cannot be convicted in said county on the charge of uttering said instrument in that jurisdiction, it is therefore further ordered that a *nolle prosequi* be entered, and that the court below cause defendant to be discharged from imprisonment on said conviction.

PEMBERTON, C. J., and HARWOOD, J., concur.

13 Mont. 116)

### STATE v. HAYES.

(Supreme Court of Montana. Feb. 27, 1893.)  
GRAND LARCENY—WHAT CONSTITUTES—CONSTRUCTION OF STATUTE.

Under Comp. Laws, div. 4, c. 6, § 93, providing that if any bailee of money, goods, or property convert the same to his own use, with intent to steal, he shall be guilty of grand or petit larceny, according to the amount of the property or value of the goods, chattels, or property converted, in the same manner as if the original taking had been felonious, a bailee of a horse, who converts it with intent to steal, cannot be convicted of grand larceny without regard to its value, though section 78 makes the stealing of a horse of any value grand larceny.

Appeal from district court, Park county; Frank Henry, Judge.

John Hayes was convicted of grand larceny. Motion in arrest of judgment, and the state appeals. Affirmed.

Henri J. Haskell, Atty. Gen., for the state. Matthew R. Wilson, for respondent.

PEMBERTON, C. J. On the 12th day of November, 1892, the county attorney of Park county filed in the court below the following information against the respondent, omitting the caption and formal parts: "In the name and by the authority of the state of Montana, I, Allen R. Joy, county attorney in and for the county of Park, in the state of Montana, who prosecutes for and on behalf of said state, upon information, in the district court of said district, sitting in and for the said county of Park, and duly empowered to inform of offenses committed within said county, come now here upon information, and give the court to understand and to be informed that one John Hayes, late of said county of Park, aforesaid, at the county of Park, in the state of Montana, and within the jurisdiction of this court, on or about the 12th day of August, A. D. 1892, then and there being a bailee of property, to wit, one roan mare, of the value of \$40, a more particular description of which is to the said county attorney unknown, of the property of one W. F. Kirby, and then and there feloniously converted the same to his own use, and did then and there feloniously sell and dispose of the said roan mare with the intent to steal the same, contrary to the form of the statute in such cases made and provided, and against the peace and dignity

of the state of Montana." The respondent pleaded not guilty. On this issue the cause was tried by a jury. The jury convicted the respondent, and fixed his punishment at imprisonment in the state prison for a term of one year. After conviction, counsel for the respondent filed in the lower court the following motion in arrest of judgment: "(1) Because the information in this action does not state facts sufficient to constitute any offense against the laws of Montana. (2) Because the court had no jurisdiction, for the reason that the property alleged to have been converted by the defendant was stated to be of the value of \$40, and the offense, if any, charged in the information, was that of petit larceny." The lower court sustained the motion, and, from the order and judgment sustaining the same, this appeal is prosecuted.

This prosecution was instituted and conducted under section 93, c. 6, div. 4, of the Comp. Laws, and is as follows: "If any bailee of any money, goods, or property shall convert the same to his own use, with intent to steal the same, he shall be guilty of grand or petit larceny, according to the amount of the property or value of the goods, chattels, or property so converted, in the same manner as if the original taking had been felonious; and, on conviction thereof, shall be punished accordingly." The appellant claims that, under the foregoing statute, the respondent could be tried, convicted, and punished as under section 78 of the same chapter, which makes the stealing of any mare, gelding, colt, etc., grand larceny, without reference to the value of such animal, if it be of any value whatever. It is conceded that the felonious stealing of any of the animals, of whatever value, mentioned in said section 78, is made grand larceny. Section 93, *supra*, provides that if any bailee of any money, goods, or property shall convert the same to his own use, with intent to steal the same, he shall be guilty of grand or petit larceny, according to the amount of the money or value of the goods, chattels, or property so converted, in the same manner as if the original taking had been felonious, and shall be punished accordingly. It will be noticed that in said section 93 no mention is made of the nature of the property converted, as entering into the degree of larceny, of which the party may be convicted, or determining the punishment that may be imposed. The amount of the money, or the value of the property converted, is the criterion by which the degree of the larceny is to be determined, as well as the penalty to be imposed. In the theft of the animals mentioned in section 78, *supra*, the value thereof is immaterial, so that the animal is of any value whatever.

Now, then, the question for this court to determine is whether a person tried and convicted under section 93, *supra*, who, being the bailee of a mare, converts her to his own use, with intent to steal, the animal being of a less value than \$50, can be punished as provided under section 78 *supra*, which makes the felonious stealing of such animal, of whatever value, grand larceny. The value of the animal alleged

to have been converted in this case is stated in the information to be \$40. To so hold would require this court to so construe said section 93 to mean that the bailee of any mare, gelding, colt, cow, calf, etc., of whatever value, is guilty of grand larceny, as provided in said section 78. To so hold we must either construe a word into said section 93, such as "nature" or "character," and to hold such words as meaning the same as the words "amount" or "value" of the property converted; or else we would have to hold that said section 93, with the words "according to the amount of money or value of the goods, chattels, or property so converted," eliminated therefrom, would mean the same as it now reads. We think such a construction would amount to judicial legislation. It is for the legislature to enact the laws. It is the duty of the court to construe them as it finds them. These statutes are both highly penal; and in such cases the rule of strict construction applies. In *Endlich on the Interpretation of Statutes* (section 329) we find this doctrine declared: "To determine that a case is within the intention of a statute, its language must authorize the court to say so; but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions, so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. In this characteristic, the difference between liberal and strict constructions is clearly presented. Whilst the letter of a remedial statute may be extended to cases clearly within the same reason and within the mischief the act was designed to cure, unless such construction does violence to the language, a consideration of the old law, the mischief, and the remedy, though proper in the construction of criminal as well as other statutes, is not in itself enough to bring a case within the operation of the former class of statutes. Their language, properly given its full meaning, must, at least by that meaning, expressly include the case; and in ascertaining that meaning the court cannot go beyond the plain meaning of the words and phraseology employed, in search of an intention not certainly implied in them. In other words, whilst a case may come within the purview of a remedial statute, unless its language, properly construed, excludes it, it is excluded from the reach of a criminal statute, unless the language includes it. Unless the proper meaning of the language of the statute brings a case within its letter, the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction; and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended, it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language." And in section 330 the same author says: "It may be here added that the rule of strict construction, in the case of penal statutes, requires

that, where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty; that, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred." In *U. S. v. Wiltberger*, 5 Wheat. 76, Marshall, C. J., delivering the opinion of the court, says: "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." In *Telegraph Co. v. Axtell*, 69 Ind. 199, the court say: "A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and necessary meaning of the act creating it." These authorities, and those that might be multiplied, simply, but strongly, enunciate the elementary doctrine that penal statutes must be strictly construed. We are of the opinion that under no construction of which section 93 is susceptible could the respondent have been tried thereunder, on the information alleging the value of the mare converted to be \$40, and convicted of grand larceny, and punished therefor as under section 78. If the legislature desire to punish bailees of domestic animals mentioned in section 78, supra, who

convert the same with intent to steal, and treat such conversion as grand larceny, as if the original taking had been felonious, then section 98, supra, should be amended by inserting such qualifying words as "nature" or "character" of property, so as to make the offense and punishment the same under both of said sections, as is found to be the case in similar statutes in Missouri and other states. From this view of the case, it is apparent that the lower court had no original jurisdiction to try this cause. The judgment of the lower court is therefore affirmed.

HARWOOD and DE WITT, JJ., concur.

(18 Colo. 259)

**COLLIER & CLEAVELAND LITHOGRAPHING CO. v. HENDERSON, State Auditor.**

(Supreme Court of Colorado. Feb. 20, 1893.)

**MANDAMUS — CONTRACT FOR PRINTING STATE REPORTS — APPROPRIATIONS — AUDITOR'S WARRANTS.**

1. The writ of mandamus should never issue unless the party applying for it shows a clear legal right to have the thing sought by it done in the manner and by the person sought to be coerced.

2. A contract for printing 3,000 copies of the state engineer's report, for distribution among the people of the state, the size of each copy being greatly in excess of 150 pages, is contrary to the requirements of the act of 1889 regulating the printing of such reports.

3. A concurrent resolution adopted by the senate and the house, but not passed by "bill," under the style, "Be it enacted by the general assembly of the state of Colorado," and not approved by the governor, nor passed, notwithstanding his disapproval, by a two-thirds vote, as required by the constitution, is not sufficient to authorize a printing contract of the kind above stated.

4. An appropriation for printing, other than such printing as may be necessary for the ordinary use of the executive, legislative, and judicial departments of the state government, cannot properly be included in the general appropriation bill.

5. No matter how just or equitable a claim against the state may be, no duty devolves upon the auditor to issue his warrant for the payment thereof until an appropriation be made by law for that purpose.

(Syllabus by the Court.)

Mandamus by the Collier & Cleaveland Lithographing Company against John M. Henderson, auditor of state, to compel defendant to issue his warrant for the payment of certain printing performed by petitioner for the state. A judgment of the district court awarding a peremptory writ was reversed in the court of appeals, and petitioner brings error. Affirmed.

The other facts fully appear in the following statement by ELLIOTT, J.:

Mandamus proceeding in the district court. Demurrer to alternative writ overruled, and peremptory writ awarded. In the court of appeals the judgment of the district court was reversed. 30 Pac. Rep. 40. Petitioner brings the cause to this court for final review. The following provisions of the constitution are referred to in the opinion: Article 5: "Sec. 17. No law shall be passed except by bill, and no bill shall be so altered or amended on its

passage through either house as to change its original purpose. Sec. 18. The style of the laws of this state shall be 'Be it enacted by the general assembly of the state of Colorado.'" "Sec. 32. The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject. Sec. 33. No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." "Sec. 39. Every order, resolution, or vote to which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of business of the two houses, shall be presented to the governor, and, before it shall take effect, be approved by him, or, being disapproved, shall be repassed by two thirds of both houses according to the rules and limitations prescribed in cases of a bill."

Riddell, Starkweather & Dixon, for plaintiff in error. J. H. Maupin, Atty. Gen., and H. B. Babb, for defendant in error.

ELLIOTT, J., (after stating the facts.) The application for a writ of mandamus in this case is based upon the following facts: During the legislative session of 1891 both houses of the general assembly adopted the following resolution: "Be it resolved by the senate, the house of representatives concurring, that three thousand copies of the state engineer's report be printed, as prepared, to be, by the state engineer, distributed among the people of the state." Pursuant to the terms of said resolution, and as the general purchasing agent of the state, the secretary of state employed the Collier & Cleaveland Lithographing Company, petitioner herein, to do said printing. The report was divided for convenience into two parts, the amount sought to be recovered by this proceeding being for one part only. Petitioner printed 3,000 copies of the report under his contract of employment, and the same were duly delivered to, and received by, the state. Each copy of the report greatly exceeded 150 pages. The reasonable value of the printing was \$3,733.81. For this sum proper bills and vouchers, duly approved, were presented to the state auditor, and demand was made upon that officer that he issue his warrant upon the state treasury, in favor of petitioner, for the amount of its claim so presented. The auditor refused, and thereupon petitioner instituted this proceeding. "The writ of mandamus," said Chief Justice Beck, in a proceeding similar to this, "should never issue unless the party applying for it shall show a clear legal right to have the thing sought by it done in the manner and by the person sought to be coerced." People v. Spruance, 8 Colo. 319, 6 Pac. Rep. 831. Was it the duty of the state auditor to issue to petitioner the warrant for \$3,733.81, as demanded? Petitioner says, "Yes." Respondent says, "No." The determina-

tion of the issue requires the consideration of two principal questions, which may be stated thus: First. Was the contract of employment entered into between petitioner and the secretary of state duly authorized by law? Second. Was there a ratification of such contract by or on behalf of the state?

The act of 1889, (Sess. Laws, p. 417,) which was in force at the time of the making of the contract between petitioner and the secretary, is directly applicable to this controversy. Section 3 of that act reads as follows: "All officers required by any law of the state to make reports to the governor or legislature shall deposit the same with the governor on or before the fifteenth of November next preceding the regular session of the general assembly; and it shall be the duty of the secretary of state to place said reports, without delay, in the hands of the person authorized to do the public printing, for publication, and to superintend the printing of the same, and to see that it is done in a proper manner. Of each of the reports of said officers there shall be published five hundred (500) copies for the use of the general assembly and state officers: provided, that none of said reports shall exceed one hundred and fifty pages." The contract provided for the printing of 3,000 copies of the state engineer's report, to be by him "distributed among the people of the state." Each copy of said report greatly exceeded 150 pages. Thus the contract, though in pursuance of the concurrent resolution, was contrary to the requirements of the foregoing statute in three particulars, viz. the number of the reports, the size of the reports, and the use to which the same were to be devoted. The concurrent resolution adopted by the senate on January 30, 1891, and by the house on February 6, 1891, cannot be held to be a law of the state. The resolution was not passed by "bill," as provided by sections 17 and 18 of article 5 of the constitution, nor does it appear that the same was approved by the governor, or passed, notwithstanding his disapproval, by a two-thirds vote, as required by section 39 of the same article. The contract for the printing was not authorized by law. Upon the question of ratification, counsel for petitioner relies upon a certain clause in the general appropriation bill, (Sess. Laws 1891, p. 33.) which reads as follows: "For the printing required by the eighth general assembly for the years 1891 and 1892, and the deficiency for the years 1889 and 1890, viz.: house and senate bills; calendar; letter heads and envelopes; materials; committee reports; roll calls; blanks for reports; rules; contested election briefs; bill covers; engrossing blanks; the Session Laws of the Eighth General Assembly, in English and Spanish; reports of state officers, departments, and state institutions; message and inaugural of governor; publishing the amendments to the constitution; the house and senate journals for 1891; the printing of acts or parts of acts; and any printing required by law, or ordered by either branch of the general assembly,—the sum of fifty thousand dollars." The foregoing clause cannot be

held to include the printing in controversy. A valid appropriation for such purpose would require a separate bill. It could not be included in the general appropriation bill. The language of the clause must be restricted to printing, the expense of which is included in "the ordinary expenses of the executive, legislative, and judicial departments of the state," otherwise, being in a general appropriation bill, it would be clearly in violation of section 32 of article 5 of the constitution. The ordinary expenses of printing for the necessary and actual use of the three departments of the state government may, perhaps, be included in the general appropriation bill; but the expense of printing 3,000 copies of the official report of the state engineer for distribution "among the people of the state" cannot be so included.

Thus it appears that the contract between the secretary of state and petitioner was neither authorized nor ratified by any law of the state. Moreover, it does not appear that any appropriation has been made for the payment of any claim arising under such contract. Const. art. 5, § 33. No matter, therefore, how just or equitable petitioner's claim may be, no duty can devolve upon the auditor to issue his warrant for the payment of such claim until an appropriation shall be made by law for that purpose. In re Appropriations by General Assembly, 13 Colo. 316, 22 Pac. Rep. 461; *Institute v. Henderson*, 18 Colo. —, 31 Pac. Rep. 714; In re Continuing Appropriations, 18 Colo. —, 32 Pac. Rep. 272; *Burritt v. Commissioners*, 120 Ill. 322, 11 N. E. Rep. 180; *May v. Rice*, 91 Ind. 546.

The able opinion delivered by Mr. Justice Reed, reviewing this case, renders a lengthy opinion on our part unnecessary. *Henderson v. Lithographing Co.*, 2 Colo. App. —, 30 Pac. Rep. 40. The judgment of the court of appeals, reversing the judgment of the district court, is affirmed.

(18 Colo. 223)

KRETSCHMER v. HARD et al.

(Supreme Court of Colorado. Feb. 6, 1893.)

DEEDS—CONSTRUCTION—DESCRIPTION BY PLAT—PAROL EVIDENCE.

1. A patent ambiguity is that which remains uncertain after all the evidence of surrounding circumstances and collateral facts admissible under proper rules of evidence is exhausted.

2. The general rule is that, where land is described in a deed according to a certain plat, the deed is to be construed in connection with such plat for the purpose of identifying the property intended to be conveyed; but this rule does not exclude other means of identification not in conflict with the plat.

3. Though mere declarations of parties as to the meaning or application of the descriptive part of a deed may not be admissible to explain ambiguous or doubtful words therein contained, nevertheless collateral facts and circumstances established by parol evidence are often admissible for that purpose.

4. In a patent issued by the state of Colorado the land was described as "fractional block number one (1) in the State addition to the city of Pueblo." There was a plat of the State addition, but the deed did not in express

terms purport to convey the block as marked and numbered on the plat. The evidence showed that there was a parcel of land in such addition which might appropriately have been designated as "block 1," though it was not so marked. *Held*, that it was competent to prove by parol evidence that such parcel was generally known as "fractional block 1" in said addition, before the issuance of the patent as well as afterwards; that extrinsic evidence was admissible to show that such parcel was so designated by the public authorities of the state and county for purposes of lease, sale, and taxation; and that it was no contradiction of the plat to apply the descriptive words of the patent to such parcel of land, there being no other parcel in the addition to which the description applied.

(Syllabus by the Court.)

Appeal from district court, Pueblo county.

Action by Gideon H. Hard and others against Charles Kretschmer to recover the possession of certain real estate. There was judgment for plaintiffs, and defendant appeals. Reversed.

The other facts fully appear in the following statement by ELLIOTT, J.:

Appellant, Kretschmer, defendant below, claimed title to the premises in controversy under a patent from the state of Colorado to one Annie E. Hanlon, dated February 15, 1886, and issued in pursuance of a sale by the state board of land commissioners on August 13, 1883. The Hanlon patent describes the land as "situate in the county of Pueblo, and state of Colorado, to wit, fractional block number one (1) and lot number four (4) in block number thirteen, (13,) in the State addition to the city of Pueblo, Colorado, which said described tracts of land have been purchased by the said Annie E. Hanlon." Appellees, plaintiffs below, claimed title under a patent from the state to Gideon H. Hard, trustee, dated February 21, 1889, and issued in pursuance of a sale by the state board of land commissioners on July 9, 1887, in which the lands are described as "situate in the county of Pueblo, and state of Colorado, to wit: All that portion of the south half of the northwest quarter of section thirty-six, (36,) in township twenty (20) south, of range sixty-five (65) west of the sixth principal meridian, which lies north of the Arkansas river, and all that portion of the west half of the northeast quarter of said section, township, and range which lies between the south line of the State addition to the city of Pueblo and the said Arkansas river, containing five (5) acres, more or less." On November 2, 1887, a second or supplemental patent was issued to Annie E. Hanlon by the state board of land commissioners in which the lands were described as "situate in the county of Pueblo, and state of Colorado, to wit: Fractional block number one (1) in the State addition to the city of Pueblo, described as follows, to wit: 'Beginning at the southeast corner of the W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$  of sec. 36, T. 20 S., R. 65 W.; thence northerly along the east line of State addition 348 2-10 feet, more or less, to the southeast corner of lot No. 10 in fractional block No. 2 in said State addition; thence westerly along south line of lots Nos. 10, 9, 8, 7, & 6, to S. W. corner

of lot No. 6, in said block No. 2, on east side of Greenwood St., 211 7-10 feet, more or less; thence along east line of Greenwood street, extending southerly to the Arkansas river, 156 5-10 feet, more or less, (this measurement is to the top of present city slag wall;) thence along meandered line of said river to intersection of half section line between north and south halves of said section 36; thence easterly along said half section line to place of beginning.' Saving and reserving all rights, either at law or equity, which may have been acquired by others to said property, or any part thereof, from the state of Colorado, since executing the patent to one Annie E. Hanlon, wherein said property is described as 'Fractional block number one (1) in the State addition to the city of Pueblo,' and 'lot 4 in block 13 in State addition to city of Pueblo.'" The last patent to Hanlon was evidently designed to correct a supposed uncertainty of description in her first patent.

Urmy & Crane, for appellant. J. M. Waldron and Westcott & McDaniel, for appellees.

ELLIOTT, J., (after stating the facts.) The controversy in this action relates to a parcel of land included in a grant of school lands by the general government to the state of Colorado. Appellant and appellees, respectively, claim title to the land under different patents from the state of Colorado. Appellant, Kretschmer, claims under the older patent. Appellees Hard and his associates claim under a junior patent, but they contend that the older patent is absolutely ineffectual to convey the land, by reason of uncertainty in the description. It is conceded that if the land in controversy was conveyed by the first patent to Hanlon, then appellees have no title. In December, 1877, the state board of land commissioners by resolution authorized their secretary to "take the necessary steps to have that portion of section 36, township 20 south, of range 65 west, belonging to the state school lands, situate adjacent to the town of Pueblo, surveyed and platted according to the provisions of section 27, art. 4, of an act providing for the selection, location, appraisal, and sale or leasing of state lands; and also that he be authorized and empowered to do whatever may be necessary to be done in the matter of annexing the said tract to the town of Pueblo as a state addition to said town or city of Pueblo." In pursuance of this authority the land was surveyed, a plat thereof was made, and a deed was executed designating the lands shown on said map as an addition to the city of Pueblo. The lands were described as "situate in the county of Pueblo, state of Colorado, to wit: The west  $\frac{1}{2}$  of the northeast  $\frac{1}{4}$  of section 36, township 20 south, of range 65 west." By said deed the perpetual right of way and full jurisdiction over all the streets and alleys as laid out and shown by the plat were dedicated to the city of Pueblo. The map and deed were filed for record in the recorder's office of Pueblo county in January, 1878. The resolution

of the land board provided for the surveying and platting of that portion of section 36 adjacent to Pueblo as an addition to that city. The land designated as such addition in the deed of dedication, to wit, "the west  $\frac{1}{4}$  of the northeast  $\frac{1}{4}$  of section 36," bounds the original plat of Pueblo on the west. The addition and the original plat of the city are coterminous throughout the entire eastern boundary of the one and the western boundary of the other. The map of the State addition, as filed, shows 23 blocks and fractional blocks, numbered from 2 to 24, consecutively. The numbering is by Arabic numerals, without other mark or designation, commencing with block 2, near the southeast corner of the land described in the deed of dedication, and extending northward to block 8; thence southward from block 9 to block 15, and so on. A small parcel of land, however, appears upon the map, lying south of block 2,—that is, between block 2 and the river,—which is not numbered on the map as a block. It was shown by the evidence that after the date of the filing of the map the current of the river along the margin of the State addition receded to the southward, and thus the dimensions of that parcel of land between block 2 and the river have been considerably enlarged.

On the trial evidence was introduced, and other evidence was offered, in behalf of Kretschmer tending to prove that the parcel of land between block 2 and the river was generally known as "fractional block 1 in the State addition to the city of Pueblo" at and before the purchase by Hanlon, and from that time on until the purchase by Hard and his associates, as well as afterwards. As early as April, 1880, one G. W. Hughes made a written application to the board of land commissioners to lease the land in controversy, describing the same in his application as "fractional block one (1) of the State addition to the city of Pueblo." The application further stated that Mrs. R. Hughes was the owner of improvements on said fractional block, and that said improvements were of the value of \$100. On April 21, 1880, the land board, acting upon the application of Hughes, executed a lease to him, in which the premises were described as "fractional block one (1) in the State addition to the city of Pueblo." The lease was granted for the term of five years. Four annual payments of rent were made upon this lease, to wit, for the years 1880, 1881, 1882, and 1883. The first three payments were made by Hughes; the last by Annie E. Hanlon, to whom the lease was assigned by Hughes in November, 1882. In August, 1883, Hanlon became the purchaser of the premises, as heretofore stated, the premises being described in the certificate of purchase, as well as in the patent afterwards issued thereon, as "fractional block one (1) in the State addition to the city of Pueblo."

J. S. Green, a witness for appellant, Kretschmer, testified that he had been a civil engineer since 1878; had lived in Pueblo since September, 1881, except two years, when he was state engineer, and resided in Denver; that he had been city engineer of South Pueblo, and also of Pueblo

for a short time; that he was quite familiar with the State addition to Pueblo, and the original town of Pueblo; that he had traced the line bounding the State addition on the east, and in doing so traced the eastern boundary line of the land in controversy; that in doing so he found several stakes resembling those found at the corners of the blocks of the State addition; that in 1882 he and one Baldwin had published a map of Pueblo, South Pueblo, and Bessemer; that over a hundred of the maps were published, and nearly all disposed of in Pueblo; that he had noticed the map, from time to time, in different offices, and that the maps show the land in controversy with the figure 1 thereon, indicating it as fractional block one in the State addition. The same witness also testified that he was interested in the publication of another map, published in 1886, of which there were about 100 sold, and that upon the last-mentioned map the land in controversy was shown to be in the State addition, designated by the figure 1, with the words "not on plat" thereunder. There was also evidence that in April, 1883, the board of county commissioners appointed appraisers to appraise certain lots on certain school lands in Pueblo county, and the improvements thereon, if any. The following month the report of the appraisers was filed in the recorder's office, and among other lands appraised was fractional block 1 in the W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 36, township 20, range 65. The value of the land was appraised at \$150, and the improvements at \$200, and G. W. Hughes was designated as the owner of the improvements. It was admitted that Gideon H. Hard, one of the plaintiffs, was county commissioner at the time the order was made directing the appraisal of said land, and was present and acting as such commissioner. D. L. Smith, one of the plaintiffs, testified that for more than three years before and up to the time of the trial he had been county assessor of Pueblo county, and that prior to the date of the sale made to Hard, his coplaintiff, it had come to his (Smith's) notice that the piece of property bearing the description of fractional block 1 in the State addition had been returned for taxation every year during his term of office, though he denied that he had any knowledge where the location on the ground was of the tract of land so designated as "fractional block 1."

The evidence shows that the first patentee, Annie E. Hanlon, derived her title from one Hughes, and, further, that, Hanlon, by warranty deed executed February 12, 1886, conveyed "fractional block one (1) in the State addition to the city of Pueblo" to appellant, Kretschmer. In behalf of appellant proof was offered to the effect that from some time in April, 1880, up to April, 1886, the land in controversy was continuously occupied by G. W. Hughes as his residence; that it was inclosed during all that time, the north fence running along the south line of River street; that said Hughes had a good, substantial house thereon; that he had a water wheel in the river, for the purpose of operating

machinery at the house; and that this piece of land was known all of that time, and recognized by the people generally in that neighborhood, as "fractional block 1 of the State addition to the city of Pueblo." Further proof was offered to the effect that Kretschmer had resided in the vicinity of the land in controversy since long prior to 1877; that from the date of his purchase from Mrs. Hanlon he had been in possession of the land, except that portion lying immediately west of River street; that immediately after purchasing said premises he had torn down the house built by Hughes, and sold the material; and that in the spring of 1886 he built a brick wall on the bank of the river for the purpose of protecting the land; that he had occupied and used said premises during the spring of 1887 for the purpose of storing wagons and machinery; that he had never abandoned possession of the land since its purchase; that he had always held possession of said fractional block 1 openly, since his purchase, claiming it as his own property; that the land had been generally known since 1877 in the neighborhood as "fractional block 1 in the State addition;" that he had paid all taxes legally assessed against the property for the five years prior to the bringing of this suit; that all the taxes that had been assessed were for the years 1886, 1887, and 1888, and that the property was assessed as "fractional block 1 of the State addition to the city of Pueblo." Other testimony was offered by appellant to show that he had occupied and improved the premises in controversy. The offers of testimony, as above stated, were rejected by the court. In behalf of appellees it is contended that, as no block or fractional block designated as "block 1" is shown upon the plat of the State addition to Pueblo, therefore no title passed by the description in the deed by the land board to Hanlon. Counsel contend that the deed and the plat must be construed together, and that, so construed, there is presented a clear case of ambiguitas patens, which, according to Lord Bacon, is "never holpen by averment." In other words, it is insisted that the patent to Hanlon must be held void for uncertainty, so far as it purports to convey fractional block 1.

In his work on the Law of Evidence Mr. Greenleaf devotes considerable space to the common-law distinction between ambiguitas patens and ambiguitas latens, and summarizes and illustrates the rules governing the introduction of evidence to explain such ambiguities in deeds; and thereupon the learned author remarks: "The patent ambiguity, therefore, of which Lord Bacon speaks, must be understood to be that which remains uncertain to the court after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted." 1 Greenl. Ev. 297-300. In a recent case determined by the supreme court of Missouri Mr. Justice Barclay, speaking for all the members of that court, says: "That parol evidence is sometimes admissible to clear up ambiguity in the descriptive part of a deed is

elementary law, but the difficulty of determining in what particular cases such evidence should be admitted has not been entirely removed by such rules, as the adjudged cases on the subject may be said to establish." The judgment of the trial court in the Missouri case was reversed for error in refusing to admit certain parol evidence to explain ambiguities in the deed of conveyance. The syllabus of the case contains the following: "Where the description of the premises in a deed is ambiguous, parol evidence is admissible to show that a certain body of land in the county had been long known in that locality by that description; that it had been previously conveyed by persons in privacy with defendant by the use of language substantially the same, and also to show the popular name of the tract, and the location on the ground of the monuments mentioned in the deed." *Bollinger County v. McDowell*, 99 Mo. 632, 13 S. W. Rep. 100. Again, in *Marvin v. Elliott*, 99 Mo. 616, 12 S. W. Rep. 899, the same court held that "a deed conveying city property by lot numbers is not void for uncertainty, although the recorded plat shows no division of the blocks into lots; it appearing that the proprietors had always treated the blocks as divided into lots, and that for many years the property had been assessed, conveyed, and generally known by the lot numbers."

In the present case the evidence clearly shows that there was and is a parcel of land lying just south of block 2 in the State addition, and between said block and the river, which parcel is adjacent to the town of Pueblo, as it was in 1877. Such parcel appears in the plat as recorded, and was and is a part of the W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 36 S., range 65 W., and is, therefore, included in that tract of school land which the secretary was authorized to survey and plat, and which is described in the deed of dedication as the "State addition to the town or city of Pueblo." Though such parcel bears no number on the map as recorded, it might very properly have been designated as "block 1;" and it was competent to prove by parol evidence that such parcel was generally known as "fractional block 1" at and before the issuance of the first patent to Hanlon, as well as afterwards. It was competent to prove that it was so designated by the public authorities of the state, as well as of the county, for purposes of lease, sale, and taxation. It was no contradiction of the recorded plat to apply the descriptive words of the first Hanlon patent to such parcel of land. It is a general rule that where land is described in a deed of conveyance according to a certain plat or map, the deed is to be construed in connection with such plat or map for the purpose of identifying the property intended to be conveyed; but the rule does not exclude other means of identification not in conflict with the map. So in this case it does not follow that there cannot be such a parcel of land as "fractional block 1 in the State addition to Pueblo," merely because the marks and figure to indicate such block do not appear on the map. The Hanlon patent



does not purport to convey fractional block No. 1 as marked or numbered on the plat or map, but merely, "fractional block number one (1) in the State addition." Suppose the figure 3 had been omitted by the draughtsman from the parcel of land lying between blocks 2 and 4 as platted, could it be successfully maintained for that reason alone that there was not, and could not be, any such block as block 3 in said State addition, and that no parol proof of the existence and location of such block could be admitted? Such an application of the rule would be exceedingly hypertechnical. The purpose of the rule is to secure, not to defeat, the rights of parties. The rule does not exclude such extrinsic or parol evidence as may be proper and necessary to show the application and meaning of deeds of conveyance. In 1 Greenl. Ev. § 287, it is said: "In the simplest case that can be put—namely, that of an instrument appearing on the face of it to be perfectly intelligible—inquiry must be made for a subject-matter to satisfy the description. If, in the conveyance of an estate, it is designated as 'Blackacre,' parol evidence must be admitted to show what field is known by that name." In this case appellees (plaintiffs below) were obliged to resort to parol evidence in connection with the plat or map on which they rely. The map of the State addition, as platted and filed, does not clearly designate the land in controversy, even according to the theory of appellees. It does not contain any meridian or parallel lines, or lines of the government survey; nor does it show the points of compass. Parol proof would be required to show the location of the original plat of Pueblo or the course of the Arkansas river with certainty. Dr. Bishop, commenting on the construction of written instruments, says: "The rule most conspicuous and wide-reaching of all is that a written contract shall be so interpreted as, if possible, to carry out what the parties meant." The distinguished author refers to certain of the old jurists who commended those judges that are diligent to discover reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury. Bish. Cont. § 380; 1 Chit. Cont. p. 104 et seq. Though mere declarations of parties as to the meaning or application of the descriptive part of a deed may not be admissible to explain ambiguous or doubtful words therein contained, nevertheless collateral facts and circumstances, established by parol evidence, are often admissible for that purpose. Hicklin v. McClear, 18 Or. 126, 22 Pac. Rep. 1057; Proprietors of the Kennebec Purchase v. Tiffany, 1 Greenl. 219; 3 Washb. Real Prop. p. 429; Cullacott v. Mining Co., 8 Colo. 179, 6 Pac. Rep. 211. From the rulings upon offers of evidence in behalf of appellant it is evident the trial court considered that parol evidence was inadmissible to show that the language of the first Hanlon patent was applicable to the land in controversy. In our opinion, much of the evidence offered in behalf of appellant and refused was admissible for that purpose, as above indicated.

The judgment of the district court is accordingly reversed, and the cause remanded.

(18 Colo. 234)

#### 1. re KINDERGARTEN SCHOOLS.

(Suprem.) Court of Colorado. Feb. 17, 1893.)

KINDERGARTEN SCHOOLS—POWER OF LEGISLATURE TO ESTABLISH—CONSTITUTIONAL LAW.

Const. art. 9, § 2, requires the legislature to provide for the maintenance of a uniform system of free public schools throughout the state, for the education of all residents between the ages of 6 and 21 years. Section 3 provides that the public school fund shall remain intact, and the interest thereon only shall be expended in maintaining the schools of the state. Section 7 forbids the use of any public fund to sustain a school controlled by a sectarian denomination. Section 16 provides that neither the legislature nor the state board of education shall prescribe text-books to be used in the schools. *Held*, that the legislature has power to establish a kindergarten department in the public school system for the education of children under 6 years of age.

The opinion of the court is in response to the following question by the house of representatives: "Does the general assembly possess power, under the constitution of the state of Colorado, to provide for the establishment and maintenance of a kindergarten department in the public school system of the state, and for the education therein of children of an age less than six (6) years?"

PER CURIAM. As we are advised, the particular provision of the constitution that gave rise to the doubt your honorable body entertains in regard to the validity of the proposed legislation, is section 2, art. 9, which is as follows: "The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year." And we understand that such doubt is as to whether the language of this section limits the power of the legislature to establish any free schools other than therein specifically mentioned. The rule of construction to be applied to our constitution is announced in *Alexander v. People*, 7 Colo. 155, 2 Pac. Rep. 894, as follows: "The legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, the court will look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited." Unless, therefore, the constitution, in express terms or by necessary implication, limits it, the legislature may exercise its sovereign power in any way that, in its judgment, will best subserve the general welfare. Read in the light of this rule of interpretation, and the wise and liberal

policy of the state in educational matters, the section is clearly mandatory, and requires affirmative action on the part of the legislature to the extent and in the manner specified, and is in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so. This view is in harmony with other sections of the same article. Section 3 provides that "the public school fund of the state shall forever remain inviolate and intact. The interest thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state in such manner as may be prescribed by law." Section 7<sup>1</sup> prohibits the appropriation of the school fund to a certain class of schools only. Section 15 is as follows: "The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors, to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts." Section 16 provides that "neither the general assembly nor the state board of education shall have power to prescribe text-books to be used in the public schools." In the case of *Roach v. Board*, 77 Mo. 488, the supreme court of Missouri, in construing section 1, in connection with section 6, art. 11, of their constitution, (section 1 being, in terms, like section 3, art. 9, of our constitution,) adopted a conclusion seemingly at variance with the views we entertain; but it will be seen in that case great stress is placed on the language of section 6, in that it expressly provided that the public school funds should be faithfully appropriated to the establishing and maintaining of the free schools provided for in section 1, and for no other uses or purposes whatsoever, and that "the two sections, taken together, amount to both a requirement and a prohibition." No provision of our constitution is similar to section 6, art. 11, of the Missouri constitution; and, as we have seen, an appropriation of the school fund is prohibited only as to a certain class of schools. We think, therefore, that under a fair rule of construction, section 3, art. 9, can be held to be a requirement, and not a prohibition, and that such construction is in harmony with the progressive school policy of the state, and will enable the legislature to confer upon all classes of children the advantages of a system that has proven of incalculable benefit. We are of opinion that the legislature has the power, under the constitution, to provide for the establishment and maintenance of a kindergarten department in the public school system for the education of children of an age less than six years.

<sup>1</sup>Const. art. 9, § 7, provides that neither the legislature nor any public corporation shall pay from any public fund anything to sustain any school controlled by any church or sectarian denomination.

(18 Colo. 273)

## In re BOUNTIES.

(Supreme Court of Colorado. Feb. 17, 1893.)

BOUNTIES — KILLING WILD ANIMALS — CONSTITUTIONALITY OF LAW — APPROPRIATION TO PAY WARRANTS — POWER OF LEGISLATURE.

Though Sess. Laws 1889, p. 35, providing a premium for any person who shall kill any wolf, coyote, bear, or mountain lion, which premium shall be paid by the county treasurer, and the amount credited to such officer in his settlement for state taxes with the state treasurer, is unconstitutional as to the manner of payment provided, the legislature may make an appropriation to reimburse county treasurers for money paid out for bounties before the law was declared unconstitutional. *Institute v. Henderson*, 31 Pac. Rep. 714, 18 Colo. —, explained.

Answer to resolution of the house of representatives, inquiring into the legality of an appropriation to reimburse county treasurers for money paid pursuant to Sess. Laws 1889, p. 35.

PER CURIAM. In the case of *Institute v. Henderson*, 18 Colo. —, 31 Pac. Rep. 714, this court held that an act (Sess. Laws 1889, p. 35)<sup>1</sup> entitled "An act to provide for the destruction of wolves, coyotes, bear, and mountain lions, and providing a premium therefor," was unconstitutional as to the manner in which such premiums were to be paid. We are now asked by the honorable house whether or not the general assembly has the power to reimburse county treasurers for the amounts advanced by them as premiums under said bounty act of 1889. The court did not in that case declare the payment of the bounties provided by the law in question unconstitutional, but simply the manner in which the payment was provided for. In the opinion referred to the court uses the following language: "If the legislature desires to pay bounties, it may do so, for all proper purposes, by making the necessary appropriations therefor, to be paid out upon warrants drawn by the auditor upon the state treasurer. Thus the public funds of the state will be protected, and the safeguards provided by the vigilance of the framers of our fundamental law will be given a construction best calculated to prevent the evil aimed at. If warrants have been issued under statutes otherwise free from constitutional objection, and such warrants have not yet been paid, the legislature still has it within its power to make the necessary appropriation for the payment of the same." *Institute v. Henderson*, supra. The several county treasurers having paid bounties under this act prior to the announcement of the opinion in the above-entitled cause, we see no constitutional objection to making an appropriation at this time to reimburse them for the money thus expended.

<sup>1</sup>Sess. Laws 1889, p. 35, provides a premium for any person who shall kill any wolf, coyote, bear, or mountain lion, which premium shall be paid by the county treasurer, and the amount credited to such officer in his settlement for state taxes with the state treasurer.

(18 Colo. 240)

**SCHOOL DIST. No. 26 of HUERFANO COUNTY v. McCOMB.**

(Supreme Court of Colorado. Feb. 20, 1893.)

**ACTION AGAINST SCHOOL BOARD—WRONGFUL DISMISSAL OF TEACHER—PLEADING—EVIDENCE—REVIEW ON APPEAL.**

1. Code 1887, p. 113, § 62, provides that when an action is brought on a written instrument, and the complaint contains a copy thereof, its execution is deemed admitted, unless the answer denying the same is verified. *Held*, that in an action against a school board on a teacher's contract, which was set out in the complaint, where the answer denying its execution was not verified, evidence of the formal execution of the contract, and of verbal statements by individual directors as to plaintiff's employment, was irrelevant, and could not prejudice defendant.

2. Where a teacher who has been dismissed brings an action against the school board for damages, the grounds for dismissal cannot be shown by the board as a justification of their action, unless they have complied with Gen. St. § 3055, providing that "no teacher shall be dismissed without due notice, and on good cause shown."

**Appeal from district court, Huerfano county.**

Action by P. Q. McComb against school district No. 26 of Huerfano county. From a judgment for plaintiff, defendant appeals. *Affirmed*.

The other facts fully appear in the following statement by GODDARD, J.:

This action was brought by Mrs. P. Q. McComb against school district No. 26, Huerfano county, Colo., to recover on account of being discharged and prevented from performing her duties as a teacher under a written contract dated October 15, 1888, whereby she was employed to teach school for district No. 26 in Huerfano county for the period of six months, at \$45 per month. She entered upon the duties of such teacher on the 15th day of October, 1888, and taught two months and a half, for which she was paid the sum of \$112.50. On the 21st day of December, 1888, the board mailed her a letter demanding her resignation. On the 22d she answered, positively refusing to resign, and asking for the board to prefer charges in writing, and inform her of time of hearing. The board declined to prefer charges, but on the 24th day of December, 1888, notified her that the board had employed another teacher. On the 2d day of January she attempted to resume, and was not permitted to do so. Upon the trial below it appeared that plaintiff was unable to obtain employment elsewhere during the term for which she was engaged. Plaintiff recovered judgment for \$152.50. The board brings the case here for review.

D. McCaskill, for appellant. R. A. Quillian, for appellee.

GODDARD, J., (after stating the facts.) The appellant's contention is that the contract sued on is not valid and binding upon the school district, because it is not shown that it was made or authorized to be made and signed by the directors while in session as a board. This objection was not available to the appellant. The con-

tract is set out in *hæc verba* in the complaint, and the answer denying its execution is not verified. Its due execution is thereby admitted. "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument is deemed admitted, unless the answer denying the same be verified." Code 1887, p. 113, § 62. Nor is the effect of this admission changed or affected by the fact that the counsel of appellee tried the case below on the theory that the execution of the contract was an open question. It being unnecessary, under the pleadings, to introduce the contract in evidence to support appellee's cause of action, it is immaterial whether it was admitted without sufficient preliminary proof that the manner of its execution was in every respect formal and legal or not. All the evidence introduced for that purpose, as well as evidence of verbal statements of the individual directors as to the employment of appellee, was irrelevant, and outside of any issue in the case, and could in no way prejudice appellant's rights before the jury.

The validity of the contract, for the purposes of this case, being thus admitted, the only remaining question is, did the court err in refusing to permit appellant to introduce evidence to show a justification for the dismissal of appellee? The statute expressly provides (Gen. St. p. 898, § 3055) that "no teacher shall be dismissed without due notice, and upon good cause shown." It is not claimed that the directors complied, or attempted to comply, with this provision; but it appears from the facts in evidence that they summarily, and without notice or hearing, dismissed appellee from her employment. Therefore, whatever the actual grounds for such dismissal were, if any, they could not be shown as a justification of their conduct in this action, unless ascertained and acted upon in the manner prescribed by the statute. We find no error that could prejudice appellant's rights in the rulings of the court upon the admission or rejection of evidence on the trial of the cause, and, as the evidence admitted clearly sustains the verdict of the jury, the judgment of the court below is affirmed.

(18 Colo. 237)

**PEOPLE ex rel. MAUPIN, Attorney General, v. KEEGAN.**

(Supreme Court of Colorado. Feb. 20, 1893.)

**ATTORNEY—GROUNDS FOR DISBARMENT.**

It is sufficient ground for the disbarment of an attorney that he procured a judgment on a note with the knowledge that it was given to perpetrate a fraud on the maker of the note or on his creditors, and that the attorney procured the judgment to assist another in carrying out such fraud.

Original proceedings by the state on the relation of J. H. Maupin against John C. Keegan to disbar defendant for misconduct in his office of attorney at law. On rule to show cause. Judgment of disbarment.

**Statement by the Court:**

This proceeding was instituted on June 23, 1892, by the attorney general in behalf of the people to procure the disbarment of the respondent for malconduct in his office as a duly-licensed attorney and counselor at law. The relator alleges two grounds upon which such malconduct is predicated.

The first charges that respondent, on the 29th day of December, 1887, fraudulently conspired with Julius Crane and A. F. Parrier to cheat and defraud one William Bergman; that, in pursuance of such conspiracy, they procured said Bergman, without any consideration therefor, to execute his promissory note for \$1,790, payable to Fanny Crane; that on the 29th day of December, 1887, the respondent, in pursuance of such fraudulent conspiracy, filed a complaint thereon in the county court of Arapahoe county, persuaded said Bergman to acknowledge service of summons, and to sign and file an answer to such complaint prepared by respondent, and procured judgment on the pleadings, and issued execution thereon, with knowledge that the note was without consideration, and the judgment so obtained null and void; that on the 24th day of January, 1888, respondent was indicted in the district court of Arapahoe county for such conspiracy, and on the 23d day of January, 1892, was tried and convicted upon said indictment and sentenced to be confined in the county jail of Arapahoe county at hard labor for a term of three months, and to pay a fine of \$500. Respondent sued out a writ of error from the court of appeals, but, a supersedeas being denied, he allowed the writ to be dismissed by failure to prosecute, and served out the sentence.

As a second and further ground of disbarment, relator sets forth certain proceedings in the United States circuit court, sitting in and for the eighth circuit, that resulted in the disbarment of respondent from practice in that court. 31 Fed. Rep. 129.

Upon rule to show cause. Respondent admits that he was convicted as in the first ground alleged; denies that he was guilty of the offense for which he was convicted; and avers that such conviction was illegal, and occurred through his inability to present his defense fully; denies the truth of the alleged facts upon which he was disbarred in the United States circuit court.

Joseph H. Maupin, Atty. Gen., for plaintiff. John C. Keegan, pro se.

**PER CURIAM.** The conviction alleged and admitted might be properly held as *res judicata* of the truth of the facts set forth in the first cause relied on as ground for disbarment. But in view of the fact that respondent has served his sentence thereunder, and realizing the disastrous consequences to him that must necessarily follow from an adverse judgment that will deprive him of his means of livelihood, we have, at counsel's earnest solicitation, concluded to look beyond such conviction, and, from a careful investigation of the

evidence introduced on the trial in the district court, determine if the facts alleged are fully sustained thereby. We are satisfied from such investigation that if any doubt can be entertained of his complicity in the concoction of the scheme, no doubt exists as to his procuring the judgment with the knowledge that a fraud was being attempted, and that he procured it for the purpose of assisting Crane to defraud Bergman, or to aid them in defrauding Bergman's creditors. From a letter to C. D. Fornes & Co., a client for whom he held a collection against Bergman, dated December 28, 1887, (the day previous to his active participation in the scheme,) it appears that he was aware of the fact that Bergman had consulted Crane as to playing "a smart trick on his creditors." Without noticing in detail the evidence furnished by the record, it is conclusively shown thereby that the respondent was guilty of conduct highly reprehensible and grossly unprofessional, and that justly brings reproach upon the honorable profession to which he belongs. The duties imposed upon members of the bar clothe them with important fiduciary responsibilities, and make them amenable to obligations that other members of the community do not share. In no other calling should so strict an adherence to ethical and moral obligations be exacted, or so high a degree of accountability be enforced. A good moral character is one of the essential requisites to admission to the bar in this state, and the tenure of office thereby conferred is during good behavior; and when it appears, upon full investigation, that an attorney has forfeited his "good moral character," and has by his conduct shown himself unworthy of his office, it becomes the duty of the court to revoke the authority it gave him upon his admission. "It is a duty they owe to themselves, the bar, and the public, to see that a power which may be wielded for good or for evil is not intrusted to incompetent or dishonest hands." *Mills' Case*, 1 Mich. 393. Without determining what weight should be given to the fact of his disbarment in the United States circuit court, we find the facts alleged in the first ground fully sustained, and respondent guilty as therein charged. The judgment of the court is that the name of the respondent, John C. Keegan, be stricken from the roll of attorneys. Rule made absolute.

(18 Colo. 255)

**SMITH et al. v. ATKINSON et al.**

(Supreme Court of Colorado. Feb. 20, 1893.)

**ACTION ON INJUNCTION BOND—PARTIES PLAINTIFF—RELEASE OF SURETIES—WHAT CONSTITUTES—DISCHARGE OF PRINCIPAL—EVIDENCE.**

1. In an action on an undertaking given in a suit of injunction, the fact that one of the principals in the injunction has been discharged as a party defendant will not release the sureties on the undertaking, since, the liability of the principals being several as well as joint, an award of damages against one principal is sufficient to hold the sureties.

2. Defendants sued out an injunction to restrain a bank from delivering to plaintiffs cer-

tain money that defendants had deposited in the bank to the credit of plaintiffs in payment of mining property purchased of plaintiffs. After the suing out of the injunction, plaintiffs assigned part of their interest in the money so deposited to S., but did not assign the undertaking given in the injunction suit by defendants. *Held*, that S. was not a necessary party plaintiff in an action on the undertaking.

3. In such case, the fact that plaintiffs were willing to abandon all claim to the money so deposited, provided defendants would reconvey the property to them, does not defeat their right to recover on the undertaking for damages sustained by the wrongful suing out of the injunction.

Appeal from district court, Arapahoe county.

Action by Nicholas N. Atkinson and another against Joel W. Smith and another on an undertaking given by defendants in suing out an injunction against plaintiffs. From a judgment for plaintiffs, defendants appeal. Affirmed.

The other facts fully appear in the following statement by HAYT, C. J.:

On October 3, 1881, Joel W. Smith and H. A. W. Tabor deposited in the bank of Leadville, to the credit of J. F. Chaney and N. N. Atkinson, appellees herein, the sum of \$85,200, upon a contract for the purchase of certain mining property. Immediately after making this deposit, Smith and Tabor, alleging some defect in the title to the property purchased, sued out an injunction restraining the bank from paying over any part of the sum so deposited. Upon the 11th of July, 1882, they voluntarily procured a dissolution of the injunction theretofore obtained by them. The present action is brought upon the undertaking given in the injunction suit. The undertaking is in the usual form prescribed by the Code, but is not signed by plaintiff Tabor. It is signed by Joel W. Smith, W. B. Daniels, and B. F. Smith. Appellees, not being able to gain possession of the money deposited to their credit, on January 31, 1882, contracted to sell to Sullivan, Hall, and others three fourths of the property theretofore sold to Smith and Tabor, provided appellees could lawfully make such transfer. It was further provided that, in case such transfer could not be made, Sullivan and others were to have three fourths of the money deposited by Tabor. Pursuant to this agreement, Sullivan and his associates, on July 22, 1882, received from the bank three fourths of the principal, to wit, \$63,900. The principal question in the injunction suit arose upon the defendants' cross complaint, seeking a reconveyance to them of the property. The defendants in that suit, appellees here, were defeated in their contention in this respect in this court on April 27, 1888. The bank of Leadville became insolvent, and closed its doors July 24, 1883, and the remaining \$21,300 left in the bank after Sullivan and others had withdrawn \$63,900 was never paid over by the bank. Upon the trial of this case the appellees offered no proof tending to establish their allegation that the bank was not solvent long after the injunction had been voluntarily dissolved, but abandoned all claim to recover the principal, and asked for damages in the nature of

interest only. Tabor, one of the plaintiffs in the action for an injunction, was not made a party to this suit by the original complaint. Afterwards he was made a party defendant by an amended complaint. To this his codefendants objected, and sought to have him discharged as an improper party. Tabor also interposed the statute of limitations as a defense by a special demurrer, which was sustained. The suit proceeded to judgment against the other defendants. The judgment in favor of appellees is for the sum of \$6,600 and costs of suit. The case is brought here by appeal.

A. F. Gunnell and Benedict & Phelps, for appellants. L. C. Rockwell, for appellees.

HAYT, C. J., (after stating the facts.) It is admitted that under section 161<sup>1</sup> of the Civil Code, as found in the Session Laws of 1887, it was not necessary to the maintenance of this action that an award of damages should first have been made against the principals in the injunction suit, Tabor and Smith. It is contended, however, that no action can be sustained against the sureties unless damages are assessed against all the principals; that, in no event could there be an award of damages against one of the principals only. It is claimed that the liability of Tabor and Smith is joint, not several, and that the discharge of Tabor should have worked a discontinuance of this suit. Tabor and Smith were jointly and severally liable as principals for the wrongful suing out of the injunction, and an award of damages against either is sufficient to maintain an action against the sureties upon the undertaking. This is true, in the absence of the Code provision, and, while this provision does away with the necessity for an award of damages before bringing suit, permitting instead the damages to be assessed against all parties in one action, this does not change the joint and several nature of the liability. The assessment of damages against Smith would have been sufficient to maintain the action upon the undertaking, in the absence of the Code provision, and so, under it, the discharge of Tabor does not necessarily discharge his codefendants. It was not necessary for either Smith or Tabor to sign the undertaking. Their liability depended not upon the undertaking, but upon the antecedent wrongful suing out of the writ of injunction. As Sullivan, Hall, and others, on January 31, 1882, became interested in the money deposited in bank, it is contended that they were necessary parties plaintiff in this action. We do not think that this claim is well founded. The original demand being in favor of Atkinson and Chaney, they have an undoubted right to maintain the present action for the entire sum. At common law an assignment of a part of an entire claim

<sup>1</sup>Civil Code 1887, § 161, provides that in suing on an undertaking given in a suit of injunction it shall not be necessary to bring suit in the first instance against the principal on such undertaking, to ascertain the amount of damages sustained, but the principal and surety may be sued together.

does not give the assignee a right of action in his own name, and it has been held in a number of cases that this rule of the common law has not been changed by the reformed procedure. The present suit upon the undertaking, which has not been assigned, can only be maintained by the obligees named herein. *Pom. Rem. & Rem. Rights*, § 137; *Cable v. Railway Co.* 21 Mo. 133; *Leese v. Sherwood*, 21 Cal. 151.

It is finally contended that plaintiffs ought not to recover, because, as it is said, the damages sustained were occasioned by their own act. This contention does not appear to be well founded. By the terms of their contract with Tabor and Smith the purchase price of the property was to have been deposited in the Bank of Leadville, to the credit of plaintiffs. The money was so deposited, but by the act of Tabor and Smith it was rendered unavailable to plaintiffs, and expensive litigation thereby precipitated. The fact that plaintiffs afterwards were willing to abandon all claim to the money, provided they could recover the property deeded, or if it appears that they preferred the property, rather than the money, should not defeat their right to damages. Finding that they could not obtain the purchase price, it was natural that they should desire a reconveyance of the property. Had Tabor and Smith consented to such reconveyance, the controversy would without doubt have been adjusted upon this basis. They would not so consent. By moving for a dissolution of the injunction by which the money was tied up, Tabor and Smith confessed that the writ was wrongfully sued out, and plaintiffs' right to damages must be sustained.

The judgment will be affirmed.

(18 Colo. 264)

WOLF v. BURKE et al.

(Supreme Court of Colorado. Feb. 20, 1893.)

CONFLICT OF LAWS—STATUTE OF FRAUDS.

Gen. St. 1893, § 1517, provides that every contract for the sale of lands, or an interest therein, "shall be void, unless the contract, or some note or memorandum thereof," is in writing, but does not prohibit the bringing of an action in cases falling within its provisions. *Held*, in a suit in Colorado on a parol contract made in Idaho, to be performed therein, for the sale of a mining property in Idaho, that the validity of the contract is determinable under the laws of Idaho; and where the contract was valid at common law, and there was no evidence to show its invalidity under the laws of Idaho, there can be no presumption against its validity in Colorado.

Error to district court, Arapahoe county.

Action by Hyman E. Wolf against Thomas J. Burke and others. Judgment for defendant Burke, the other defendants not having been served, and not appearing. Plaintiff brings error. Reversed.

The other facts fully appear in the following statement by HAYT, C. J.:

By the amended complaint, Thomas J. Burke, C. A. Weed, and R. L. Hopkins are made defendants, plaintiff in error alleging that on September 3, 1885, and for a long time before and after said date, these

defendants were partners doing a general mining and other business under the name and style of the Cœur D'Alene Bed-Rock Flume Pool, and were engaged in the construction of a mining ditch or flume, in Idaho territory, for the purpose of mining the property purchased by them from plaintiff, as hereinafter described; that said R. L. Hopkins was the manager of said work, and had charge and control of the business of said partnership; that, on or about the date first mentioned, defendants, acting by the said Hopkins, manager, and defendant Burke in person, bought from plaintiff, and plaintiff bargained and sold to defendants, all his right, title, and interest in and to certain mining property situated in Idaho territory. It was then and there agreed that plaintiff should, by suit, obtain title of one Sanders in and to a one-sixth interest in the Lucky Gulch placer claim in Shoshone county, Idaho Ty. It is further alleged that the parties mentioned then and there agreed that defendants would pay plaintiff for all of said property \$20,000, as follows: For Sanders' title, when the same should be obtained by plaintiff, \$1,154.18, together with all expenses necessarily incurred by plaintiff in obtaining such title, and for title then in plaintiff; the balance, viz. \$18,845.82, in payments as follows: \$1,200 cash in hand, which was then and there paid, and \$17,645.82 on or before the 31st day of December, 1885, or in payments as follows: \$5,881.94 on or before November 2, \$5,881.94 on or before December 1, 1885, and the balance on or before December 31st following. Plaintiff agreed to make a deed for his interest in said property to defendant Burke, and place the same in bank at Murray, Idaho, to be delivered to defendant Burke, or to defendants, upon their making the deferred payments as above specified. In pursuance of said agreement, plaintiff alleges that he then and there executed a deed as required by said agreement, and delivered the same to the Bank of Murray, for said defendants, or for said Burke, and on November 12, 1885, the first deferred payment being then overdue, and unpaid to plaintiff, defendants and defendant Burke represented to plaintiff that they were not prepared to make the payment in full, but would pay plaintiff \$550 thereon, and for the remaining \$5,331.94 they would give their note at 30 days after date, upon condition that plaintiff would extend time of all of the subsequent payments 30 days, which proposition plaintiff accepted. Thereupon said Burke gave plaintiff his check for \$250, as a part of the first payment, which is all of the said \$550 which was ever paid by said defendant; that said Hopkins promised plaintiff that the balance, \$300, should be paid plaintiff in a few days. In pursuance of said agreement, defendants, acting by said Hopkins, manager,—he being thereunto duly authorized by said Burke, acting in person,—made and delivered to plaintiff their promissory note, as follows:

"\$5,331.94. Murray, Idaho, November 12, 1885. Thirty (30) days after date we promise to pay to the order of H. E. Wolf five thousand three hundred thirty one

and 94-100 dollars, at Bank of Murray, Murray, Idaho, value received, with interest before and after maturity at the rate of ——— per cent. per annum until paid. Cœur D'Alene Bed-Rock Flume Pool. R. L. Hopkins, Manager."

Thereupon such agreement for extension of time for payment of balance, and receipt for amount paid, were entered into, as follows:

"Dated Sept. 3, 1885. H. E. Wolf to Thomas J. Burke: The inclosed deed will be delivered to Thomas J. Burke, or order, upon the payment by said Burke or his attorney to H. E. Wolf, or to his order, at the Bank of Murray, Idaho, of the sum of \$17,645.84, at any time on or before the 31st day of December, A. D. 1885, or in payments as follows, to-wit: \$5,881.94 on or before November 2, 1885; \$5,881.94 on or before December 1, 1885; \$5,881.94 on or before the 31st day of December, A. D. 1885. Said deed to be deposited in escrow in Bank of Murray, Idaho, subject to above conditions. Witness my hand and seal this 3d day of September, 1885. H. E. Wolf. [Seal.] Witness: W. B. Heyburn."

"Received on account of this escrow contract, \$5,881.94, being first payment due thereon, and I hereby extend the time when each subsequent payment is due thirty days from the date in said contract specified. H. E. Wolf."

—Which said last-mentioned paper was deposited in the Bank of Murray, Idaho. It was further alleged that, in pursuance of this agreement, plaintiff brought suit against Sanders for his interest in said placer claim, and, as the result of said suit, obtained title thereto, to himself, for the benefit of said defendants, as per their agreement. Plaintiff alleges that in bringing such suit, and obtaining such title, he necessarily incurred and paid out the sum of \$124.10. It is further alleged that no part of said note, and no part of the deferred payments have been made, and same are wholly unpaid and due plaintiff, together with interest thereon; that the deed from plaintiff has been, since the same was made, in the Bank of Murray, and still remains in said bank, in accordance with the agreement between plaintiff and defendants. Plaintiff demands judgment for the amount of said note and deferred payments, with interest upon the same. The defendant Burke, for answer to the amended complaint, denies generally and specifically each allegation therein contained. Upon these issues the cause was tried to a jury; the other defendants not having been served, and not appearing. The trial resulted in a verdict and judgment for the defendant in error. Plaintiff in error brings the cause to this court for review.

Teller & Orahoad, for plaintiff in error.  
Wolcott & Vaile, for defendant in error.

HAYT, C. J., (after stating the facts.) The district court was of the opinion that the contract was in contravention of the statute of frauds, and void. If we are to assume that the contract is void in consequence of not being in writing, it

must be so by reason of the laws of the territory of Idaho. The contract was made, and is to be performed, in that territory, and the property to be affected by its terms is there situate. By well-settled principles, the validity of the contract, under these circumstances, must be determined by the laws of Idaho. It was a valid contract at common law, and no evidence was introduced to show that it was not valid under the laws of the territory of Idaho. No presumption should therefore have been indulged in, against the validity of the contract, by reason of any statute of this state. This was expressly decided in the case of *Railroad Co. v. Betts*, 10 Colo. 437, 15 Pac. Rep. 821; and the court cited with approval *Whitford v. Railroad Co.*, 23 N. Y. 465, in which case the court says: "Where the condition of the law of another state becomes material, and no evidence has been offered concerning it, our courts will presume that the general principles of the common law, which we always consider to be consonant to reason and natural justice, prevail there. But no such presumption obtains respecting the positive statute law of the state. There is generally no probability in point of fact, and there is never any presumption of law, that other states or countries have established, precisely or substantially, the same arbitrary rules which the domestic legislature has seen fit to enact." As this doctrine is now well settled, and the contrary has only been incidentally insisted upon in this court, we shall consider the same as the accepted law of this jurisdiction.

It is contended by the defendant that the eighth section of the statute of frauds of this state does no more than establish a rule of evidence; that under it parol evidence of a written agreement, or of one that should be in writing, must be excluded; but that the contract itself does not fall under the condemnation of the statute, so as to render it void. It is stated that the laws of Idaho cannot affect the rules of evidence in force in this state, and cases are cited in support of this proposition. The statutes upon which such decisions are based are dissimilar, however, from the eighth section of the statute of frauds of this state. They are mainly couched in the language of the fourth section of the English statute of frauds, which reads: "No action shall be brought upon any agreement which is not to be performed within the year," etc. It has been held that the words, "No action shall be brought," of this statute, refer to the remedy, and that the writing is required only for the purposes of evidence. The leading case upon this statute is *Leroux v. Brown*, 74 E. C. L. 800. The case was decided after an exhaustive discussion, participated in by some of the most eminent barristers of England. The opinion is an instructive one; the point decided being that an oral agreement made in France, and valid there, cannot be enforced in England, if within the fourth section of the English statute of frauds. The decision is based, however, entirely upon the language of the fourth section. The words, "No action shall be brought," were held



to apply to the remedy, and not to the rights and merits of the contract. And the judges drew a distinction in this respect between the fourth and seventeenth sections of the English statute, and said that a suit might be maintained on a contract void under the latter, for the reason that it does not prohibit the courts from entertaining jurisdiction, although providing, with reference to contracts falling within the terms of this section, that "no contract shall be allowed to be good." There is no material distinction between the eighth section of our act and the seventeenth section of the English act; the one providing, as it does, that the contract shall be void, and the other that it shall not be good. It will thus be seen that the case of *Leroux v. Brown* is against the position taken by appellee in this cause. The case of *Downer v. Cheseborough*, 38 Conn. 39, is relied upon. The case is quite dissimilar from the case at bar, in two essential particulars, to wit: (1) It arose under a statute providing that no action should be brought; (2) it related to personal property only. In this case it was held, in a suit brought in Connecticut against the indorser upon a promissory note in blank, that parol evidence of a special agreement, at variance with that implied by law, would be received. By the law of the state of New York, where the note was made, indorsed, and made payable, such evidence was not receivable. The opinion admits that the decisions are not uniform, and rests its conclusion largely upon the case of *Leroux v. Brown*, supra, and quotes from page 827 of Judge Story's work on the Conflict of Laws. We have already shown that the English case is not in point, it being predicated upon a statute dissimilar from ours. Now, if we turn to section 630 of Judge Story's work, we will find this language, (section 630b): "There are certain rules of evidence which may be affirmed to be generally, if not universally, recognized. Thus, in relation to immovable property, inasmuch as the rights and titles thereto are generally admitted to be governed by the law of the situs, and as suits and controversies touching the same, ex directo, properly belong to the forum of the situs, and not elsewhere, it would seem a just and natural, if not an irresistible, conclusion, that the law of evidence of the situs, touching such rights, titles, suits, and controversies, must and ought exclusively to govern in all such cases." In section 631 the author applies the doctrine of the text to the validity of contracts under the statute of frauds. The construction given the English statute in *Leroux v. Brown* has not been universally accepted. As we have seen, the rights and titles to real property are governed by the law of the situs, and there is strong reason, supported by good authority, for saying that the law of evidence of the situs respecting such rights and titles should also govern. *Tulloch v. Hartley*, 20 Eng. Ch. 113; *Story, Conf. Laws*, supra.

Our statutes being dissimilar, a further review of decisions upon statutes like the fourth section of the English act would be unprofitable. Our statute reads as fol-

lows: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." Gen. St. 1883, § 1517. Of this statute it is to be observed that it is unlike the English statute, in that it does not prohibit the bringing of an action in cases falling within its provisions, but declares that the contract itself shall be void in such cases. In addition to the text quoted from Judge Story, we have direct authority to the effect that such a statute does not affect the rules of evidence governing contracts like the one now under consideration. The case of *Houghtaling v. Ball* is directly in point. It was before the supreme court upon two occasions. The first opinion is reported in 19 Mo. 84, and the last in 20 Mo. 563, when the court held that a contract for the sale and delivery of goods, valid in the state where made, will be enforced in the state of Missouri, unaffected by the statute of frauds. The court, without determining whether or not, if the statute of Missouri were the same as the fourth section of the English statute, it would feel bound to follow *Leroux v. Brown*, supra; pointed out the distinction between the two statutes; and inasmuch as the Missouri statute did not provide that no action should be brought, but declared the contract itself void, it was held not to apply, and that the contract might be enforced in the Missouri courts. See, also, *Yates v. Borough*, 56 Pa. St. 21; 1 Amer. Law Reg. (N. S.) notes, pages 15, 16.

The right of the plaintiff to maintain the present action depends largely upon the question of Hopkins' agency. The evidence upon this point is very conflicting. The entire trial in the court below proceeded upon the assumption that the eighth section of the statute of frauds of Colorado controlled. This was error, for which the judgment of the district court must be reversed. This error, without doubt, largely influenced the determination of the question of agency. The judgment is reversed, and the cause remanded.

(18 Colo. 242)

#### PEOPLE v. RAYMOND et al.

(Supreme Court of Colorado. Feb. 20, 1893.)

##### CRIMINAL LAW—APPEAL BY THE STATE.

1. A writ of error to review a judgment in favor of a defendant in a criminal case does not lie, at the instance of the state, at common law.

2. The act establishing the court of appeals (Laws 1891, § 1) provides that "no writ of error from, or appeal to, the supreme court shall lie \* \* \* unless the judgment, or, in replevin, the value found, exceeds \$2,500. \* \* \* Section 4 gives the court of appeals jurisdiction to review final judgments of inferior courts in civil cases, "and in all criminal cases not capital," and its jurisdiction shall not be final "in criminal cases," and writs of error shall lie to review final judgments "in the same manner as is \* \* \* provided by law for such reviews by the supreme court." Section 15 provides that writs of error shall lie to the su-

preme court to "review every final judgment of the court of appeals in cases which, under this act, might have been taken to the supreme court in the first instance. \* \* \* Appeals shall be perfected, and the writ of error made a supersedeas, in the same manner, and under the same conditions, as in cases brought from other courts." Gen. St. p. 366, § 972, in force when the foregoing act was passed, makes the conditions above referred to applicable to the defendant, and not to the state. *Held*, in a criminal case, where defendants' conviction by the trial court was reviewable in the first instance by the supreme court, but defendants appealed to the court of appeals, and the state submitted to the jurisdiction of such court, which rendered judgment in favor of defendants, that the state cannot thereafter have such judgment reviewed in the supreme court by writ of error. Elliott, J., dissenting.

#### Error to court of appeals.

George R. Raymond and James P. Hadley were convicted of a crime, and appealed to the court of appeals, where judgment was entered in their favor. 30 Pac. Rep. 504. Thereupon the state took the case to the supreme court on a writ of error, and defendants moved that the writ be dismissed. Motion allowed.

Joseph H. Maupin, Atty. Gen., H. B. Babb, Caldwell Yeaman, J. B. Belford, and Thomas Ward, for the People. Frank C. Goudy, A. M. Stevenson, C. D. May, and Sam B. Berry, for defendants in error.

GODDARD, J. This writ of error was sued out by the people to review a judgment of the court of appeals in favor of defendants in error. A motion is made by defendants in error to dismiss the writ on the ground that a writ of error does not lie, at the instance of the people, to review a judgment in favor of the defendant in a criminal case. The people predicate the right to a writ and review upon page 121, § 15, Laws 1891, which is as follows: "Writs of error from, or appeals to, the supreme court, shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken for review to the supreme court in the first instance. Such writs of error shall be sued out, or appeals taken, within sixty days after the rendition of the final judgment, and not thereafter. Any case in the court of appeals, not within the final jurisdiction thereof, shall be transferred to the supreme court upon motion of a defendant in error or appellee, made within such time as such party may be, by law or rule of court, required to file a brief in the case; and such case shall be for hearing in the supreme court the same as if originally taken there, and all bonds or other obligations shall remain in full force and effect. When any such case is taken to the supreme court, all pleadings, abstracts, papers, briefs, and other things pertaining to the case, shall be transferred to the supreme court, and new briefs and abstracts shall not be required except by special rule, in particular cases. Appeals shall be perfected, and writ of error made a supersedeas, in the same manner, and under the same conditions, as in cases brought from other courts." The case is one that might, under the act establishing the court of appeals, have been brought

to this court for review in the first instance by defendants, and might, under the provisions of the section cited, have been transferred from the court of appeals to this court, on motion of the people, if they had elected to do so within the time prescribed. The question, therefore, presented, is, can the people, having submitted to the jurisdiction of that court, after a judgment therein adverse to them, bring that judgment here for review by writ of error?

A writ of error to review judgments in favor of a defendant in criminal cases does not lie, at the instance of the state, at common law. Mr. Archbold, speaking of cases wherein a writ of error will lie in England, says judgment must have been given on an indictment, and it must be a judgment against the defendant; for there is no instance of error being brought upon a judgment for a defendant, after an acquittal. 1 Archb. Crim. Pr. & Pl. (8th Ed.) p. 623. In this country it is almost uniformly held that the writ will not lie at the instance of the state, without a statute clearly conferring the right. *State v. Jones*, 7 Ga. 422; *People v. Corning*, 2 N. Y. 9; *Com. v. Cummings*, 3 Cush. 212; *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *Com. v. Harrison*, 2 Va. Cas. 202; *State v. Kemp*, 17 Wis. 690; *State v. Burns*, 13 Fla. 185; *State v. Copeland*, 65 Mo. 497; *People v. Royal*, 1 Scam. 557; *U. S. v. Sanges*, 12 Sup. Ct. Rep. 609. The right exists only when conferred by statute, and by "one expressed in the most plain and unequivocal terms, such as cannot be turned by construction to any other meaning." *State v. Reynolds*, supra. Section 5, c. 517, of the judiciary act, under consideration in the case of *U. S. v. Sanges*, and upon which the attorney general relied as entitling the government to a review of the judgment of the circuit court quashing an indictment, is as follows: "Appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct to the supreme court, in the following cases: \* \* \* In any case that involves the construction or application of the constitution of the United States." Mr. Justice Gray, after an extended and thorough review of the decisions upon this question by the courts of England and this country, says: "The decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the state, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law,"—and concludes by referring to the act mentioned, in the following language: "In none of the provisions of this act, defining the appellate jurisdiction, either of this court or of the circuit court of appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant." The statute under con-

sideration in *State v. Jones*, supra, was as follows: "All causes of a criminal or civil nature may, for alleged error in any decision, sentence, judgment, or decree of any such superior court, be carried up from the counties of the respective districts aforesaid to the judges of the supreme court, \* \* \* to be by said supreme court revised and determined." It will be seen that this statute is as broad and comprehensive in its terms as the act under consideration. The court in that case held that the act above cited did not authorize a review of criminal cases at the instance of the state. In speaking of the act, it said: "It certainly asserts that all causes of a criminal nature may be carried up to the supreme court, but it does not declare by whom. It does not say by the state. If, however, it be conceded that it confers the right equally upon the state and the defendant, yet this generality of meaning is qualified by subsequent provisions, so as, by fair implication, to limit the right to the defendant. In prescribing the manner in which decisions, etc., in criminal cases, shall be taken up, provision is made applicable to the defendant. None is made for the state, *eo nomine*, and that made for the defendant is not applicable to the state. The inference from these facts is irresistible that the law does not, in any of its provisions, contemplate the state, and that it leaves the state, in this regard, subject to the general law." 7 Ga. 426. In like manner the general language used in section 15 of the act establishing the court of appeals is qualified and limited by the law then in force, providing for writs of error in criminal cases to other courts. The latter clause of the section expressly provides that "appeals shall be perfected, and writ of error made a supersedeas, in the same manner, and under the same conditions, as in cases brought from other courts." By reference to the act wherein such conditions are prescribed, (page 365, § 972, of the General Statutes,) it will be seen that the same are made applicable to the defendant, and not to the state; and, notwithstanding the writ is, in express terms, by that section, made a writ of right, and issues, of course, in all criminal cases not capital, it has always been recognized as a right conferred only upon the defendant. The statute under consideration was enacted to establish the court of appeals, and define its jurisdiction, and no intent is manifested therein to change the practice in either civil or criminal cases; but its whole tenor and effect are to provide for the exercise of that jurisdiction in conformity with the general procedure and practice then existing, so far as it is applicable, and the general terms therein used should be read in the light of that purpose. Section 1 of the act reads as follows: "No writ of error from, or appeal to, the supreme court, shall lie to review the final judgment of any inferior court, unless the judgment, or, in replevin, the value found, exceeds two thousand five hundred dollars, exclusive of costs. \* \* \*" If the literal terms of this section are to prevail, the controversy is at an end, and the writ must be quashed. By construction alone can its issuance be

said not to be in conflict with the terms of this section. It is only by restricting its language to civil cases that the jurisdiction of the supreme court in any criminal case can be upheld. It is conceded that the language should be so restricted when considered in connection with the other parts of the act.

Something is predicated upon the fact that the jurisdiction of the court of appeals, as defined in section 4 of the act, is not final in criminal cases. The same is true of the district courts of the state. They are not courts of final jurisdiction; but, under the accepted doctrine for 30 years in this state, their judgments are final in criminal cases, so far as a review by the people is concerned. Its provisions pertinent to this inquiry are as follows: "Sec. 4. The said court shall have jurisdiction—First. To review the final judgments of inferior courts of record in all civil cases, and in all criminal cases not capital. \* \* \* Third. It shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the constitution of the state or of the United States is necessary to the decision of the case; also, in criminal cases. \* \* \* Writs of error from, or appeals to, the court of appeals shall lie to review final judgments within the same time, and in the same manner, as is now, or may hereafter be, provided by law for such reviews by the supreme court." If its general terms are not to be restricted, the people can, on writ of error, review in the court of appeals all judgments of the district courts in favor of defendants, in criminal cases,—a conclusion that no one will accept. Reading this statute in the light of the common law, the prior statutes of this state, and the accepted practice thereunder, we think it is clear that the legislature intended by the language used in section 15 to provide for writs of error to the court of appeals under the same conditions and at the instance of the same parties, entitled to the writ to other courts, as provided by the then existing law. We find no intention therein expressed to confer the right upon the state, and thereby establish an anomalous practice, and one in contravention of those maxims of our law that experience has found necessary for the protection of the citizen against arbitrary power. Writ of error dismissed for want of jurisdiction.

ELLIOTT, J., (dissenting.) It is with some diffidence that I undertake to state the reasons which impel me to dissent from the majority of the court. The elaborate opinion prepared by my Brother Goddard, and concurred in by the chief justice, is not without support from other judicial decisions. Nevertheless, I am firmly convinced that reason, logic, and the approved rules of statutory construction, if not the greater number of precedents, require that the motion to quash the writ of error in this cause should be denied. In passing upon the motion to quash, the following is the only question to be considered and determined: Is the supreme court vested with jurisdiction by

writ of error in behalf of the people, as well as the accused, to review judgments of the court of appeals, in cases of this kind? The majority opinion assumes that the question whether the supreme court has jurisdiction to review a judgment rendered by the court of appeals in a criminal case must be determined by the construction to be given to the act creating the latter court. In my opinion, the question depends rather upon the true interpretation of that act; there being no room for construction as to those sections by which the question must be determined. The members of the court are agreed that the judgment of the district court in this cause might have been taken for review to the supreme court in the first instance, section 1 of the court of appeals act being applicable to civil cases only. I readily agree that, unless section 1 be limited to civil cases, there would be no court of this state by which a person convicted of a capital crime might have the record of such conviction reviewed. In view of such consequences, any mind animated by a sense of justice and humanity is led to seek some rule of construction to prevent the section from having such effect. The maxim, "*noscitur a sociis*," furnishes the key to such construction. He is known by his companions. That the section was intended to apply to civil cases only is manifest by the associated words, "unless the judgment, or, in replevin, the value found, exceeds two thousand five hundred dollars, exclusive of costs." These words are peculiarly applicable to civil but not to criminal cases. So it appears that an approved maxim of statutory construction, as well as an almost overwhelming necessity, approves the limiting of section 1 to civil cases. But, as will presently appear, the construction given to sections 4 and 15 by the majority opinion is not sustained by any such rule, and certainly not by any such necessity. What does the court of appeals act provide in reference to a review of judgments in criminal cases? It is conceded that the court of appeals is vested with jurisdiction to review judgments in criminal cases not capital. But by the third clause of section 4 it is expressly provided that the jurisdiction of the court of appeals shall not be final in criminal cases. No exception is made. The statute does not say that the judgment of the court of appeals shall not be final in cases wherein the judgment is against the accused, nor is there any room for inference that it was intended that such judgment should be final in case it should be against the people. The language is: "It [the court of appeals] shall have jurisdiction, not final, \* \* \* in criminal cases." No limitation or qualification whatever. From the language of section 8, we are led to expect that provision will be found in the act for the review of judgments rendered by the court of appeals in criminal cases, since the jurisdiction of that court is expressly declared not to be final in such cases. Turning to section 15, we find that such provision has been made. Bearing in mind that the judgment of the district court in this cause might have been reviewed by the supreme court in the first

instance, the first clause of section 15 is very plain: "Writs of error from, or appeals to, the supreme court, shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken to the supreme court in the first instance." There is nothing in this language from which it can be reasonably inferred that the review by the supreme court is to be confined to cases wherein the judgment of the court of appeals is against the accused, nor is there anything to indicate that such review does not extend to cases in which the judgment of the court of appeals is against the people. On the contrary, the language is clear, unambiguous, unequivocal, and positive, that the writ shall lie to review "every final judgment of the court of appeals in cases which, under this act, might have been taken to the supreme court in the first instance." The last clause of section 15 provides that "appeals shall be perfected, and writs of error made a supersedeas, in the same manner, and under the same conditions, as in cases brought from other courts." There is nothing in this language to indicate that writs of error to the court of appeals, in criminal cases, are confined to such judgments as are against the accused. The language of the last clause of section 15 would have been just as appropriate and just as necessary if in the first clause of the section it had been provided in still more express terms that a writ of error should lie to review judgments adverse to the people in criminal cases. Thus it appears that, in order to deny the right of the state to review a judgment of the court of appeals in a criminal case, it is necessary to give a forced construction to section 4, as well as section 15. Section 4 must be made to read: "It [the court of appeals] shall have jurisdiction, not final, \* \* \* in criminal cases" wherein the judgment of the criminal court is against the accused. Section 15 must be made to read: "Writs of error from, or appeals to, the supreme court, shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken for review to the supreme court in the first instance," except in criminal cases wherein the judgment of the court of appeals is in favor of the accused. What reason or rule of construction can be found, requiring the addition of such words to the statute?

It is easy to understand how the rule has obtained that a judgment of acquittal in a criminal case is not subject to review in error at the suit of the state. The defendant, having been put in jeopardy and acquitted, cannot, under the constitution, be tried again for the same offense; and, since a review of the record of acquittal would be unavailing to the state, appellate courts have refused to allow a writ of error in such cases, even when the general language of the statute has been broad enough to sustain the jurisdiction. A very rigid rule of construction might well be adopted by the courts under such circumstances. But where there has been no jeopardy the reason for the rule denying the writ of error to the state does not apply. "*Cessante ratione, cessat lex*."

The reason ceasing, the rule ceases. In this case the defendants were not acquitted. On the contrary, they were adjudged guilty by the trial court. They themselves sought a review of their cause by the appellate judiciary of the state. Two avenues of appeal were open to them, but, by the positive terms of the statute, both avenues led to the supreme court, as the final arbiter to determine the errors of which they complained. They were bound to know that the court of appeals was not vested with final jurisdiction of their cause. They were bound to take notice that their cause was subject to review by the supreme court either before or after the court of appeals should have passed upon it. Having voluntarily invoked the jurisdiction of the appellate judiciary for the purpose of having questions of law investigated and settled, why should they, any more than the state, be permitted to arrest the investigation upon the opinion of an intermediate appellate tribunal, the jurisdiction of which is expressly declared not to be final in such cases. The decision of the court of appeals cannot, under the statute, be regarded as settling the law of the case; its jurisdiction not being final. The state is not asking to put the defendants again in jeopardy. Having once put them in jeopardy, and convicted them, all the state now asks is that such conviction shall stand, and that the original judgment of the trial court shall be enforced, unless it shall be found, in pursuance of such a course of review as the statute provides, that there was error in the record of such conviction. Speaking upon this subject, an eminent author upon criminal law says: "In England, writs of error, the practical object of which is generally to bring whatever appears of record under the review of a higher tribunal, seem to be allowable to the crown in criminal causes; but the courts of most of our states refuse them, and refuse the right of appeal to the state or commonwealth, except where expressly authorized by statute, as in some states they are. In Maryland the state may have a writ of error, at common law, to reverse a judgment given on demurrer in favor of a defendant; and in some other states questions of law may, without specific statutory direction, be reviewed by this proceeding, or by appeal, on prayer of the state. The question is not free from difficulty; but probably some judges have refused the writ to the state, from not distinguishing sufficiently between cases in which the rehearing would violate the constitution and cases in which the prosecuting power has the same inherent right to a rehearing as a plaintiff has in a civil suit." 1 Blw. Crim. Law, § 1024. As intimated at the outset, judicial precedents are not in accord upon questions like the one at bar. No case precisely analogous to this has been presented. The authorities cited below, however, very clearly sustain the position that the writ of error lies at the suit of the state to review questions of law; and, further, that where, in a criminal prosecution, error of law has occurred after conviction, the state may

bring error for the purpose of reviewing and reversing the judgment, that thereby the penalty of the law may be enforced. In *State v. Buchanan*, Har. & J. 317, the point was directly held that a writ of error lies at the instance of the state in a criminal prosecution. In *Com. v. Taylor*, 5 Bin. 277, the court of quarter sessions having arrested judgment after conviction of a misdemeanor, the supreme court entertained a writ of error, reviewed and reversed the judgment of arrest, and "directed that the record should be remitted to the quarter sessions, that they might proceed to give judgment against the defendant." In *State v. Norvell*, 2 Yerg. 24, the supreme court expressed the opinion, in a case where there had been a conviction for manslaughter, and the judgment had been improperly arrested, and the prisoner discharged, that such judgment of discharge might be reversed on error, and judgment on the conviction rendered against the defendant. See, also, *Com. v. Anthony*, 2 Metc. (Ky.) 399; *State v. Ross*, 14 La. Ann. 364; 11 Amer. & Eng. Enc. Law, 948, and notes. It is no purpose of mine to approve the policy of providing for a review of judgments of the court of appeals by writ of error in cases of this kind. It might be better if the statute were otherwise. Nevertheless, its plain provisions should be upheld, until modified. According to a wise principle of the criminal law, the accused is entitled to the benefit of every reasonable doubt as to any question of fact necessary or essential to sustain a conviction against him. To give due effect to this principle, every question of the law applicable to the proceedings whereby the guilt or innocence of the accused is to be ascertained should be considered and passed upon, with due regard to his security from wrongful conviction; for example, questions arising upon the introduction of testimony, the charge of the court, and the like. If these requirements are not observed, an appellate court will reverse the case. But when, after legal arraignment and fair trial, an accused person has been found guilty, the interests of the state should certainly be regarded as equal to those of the convict, in construing the law provided for the punishment of his crime. In my opinion, the true rule in criminal jurisprudence is: Before and during trial, strict construction, to the end that the innocent may not be convicted; after just and lawful conviction, liberal construction, to the end that punishment may be inflicted, the majesty of the law upheld, and society protected.

(3 Colo. App. 170)

**BRIGHT v. FARMERS' HIGHLINE CANAL & RESERVOIR CO. (HACKBERRY TREE, LAND & STOCK CO., Intervener.)**

(Court of Appeals of Colorado. Feb. 13, 1893.)

**MANDAMUS TO IRRIGATION COMPANY — PLEADINGS — FURNISHING WATER.**

1. In mandamus to compel a canal company to sell plaintiff 70 inches of water for his 80 acres of land, it appeared that for 5 years plaintiff had bought 70 inches of water, and

used a portion of it on school land, which he sold to a stock company, to which he represented that 30 inches of his 70 inches of water went with the land. The next spring plaintiff offered to pay for 70 inches of water for his 80 acres, which the canal company refused to sell, and plaintiff brought mandamus. Defendant set up plaintiff's sale of land to the stock company, and his representations as to the 30 inches of water; alleged that 40 inches were enough for the 80 acres of plaintiff; and filed a cross bill, asking that the rights of plaintiff and the stock company in the 30 inches of water be determined in favor of the stock company, which intervened, and filed a similar answer and cross bill. *Held*, that that portion of the answer setting up the equitable claims of the stock company should have been stricken out, since the court could not, even by agreement of parties, change an arbitrary legal proceeding brought to enforce a specific duty into a suit in equity, and adjudicate the equities between petitioner and intervener.

2. That portion of the answer alleging that defendant was not legally obliged to sell 70 inches of water to petitioner was good, and the court properly denied the petition of plaintiff, since plaintiff could only demand an adequate supply of water, and the evidence showed that 40 inches was enough for 80 acres of land.

Appeal from district court, Jefferson county.

Mandamus, by Oliver L. Bright against the Farmers' Highline Canal & Reservoir Company, the Hackberry Tree, Land & Stock Company, intervener, to compel defendant to sell plaintiff 70 inches of water. From a judgment denying plaintiff's petition and allowing the intervener 30 inches of plaintiff's 70 inches of water, plaintiff appeals. Modified.

The other facts fully appear in the following statement by REED, J.:

An application for a mandamus, brought by the appellant as petitioner against the Farmers' Highline Canal & Reservoir Company as respondent to compel it to sell and deliver to the petitioner 70 inches of water from the ditch, to be by him used in irrigating an 80-acre tract of land occupied as a farm. It appears that petitioner commenced to occupy the land in 1872. In 1873 he purchased from the original company owning and operating the same ditch 75 inches of water, and annually purchased the same quantity until 1882, when he voluntarily reduced the quantity to 70 inches, which he continued to purchase annually until 1889. From 1885 to 1889, inclusive, he was farming upon a portion of section 36, school land, which he had bought. This land, as well as the home 80, was irrigated by the same water,—70 inches,—part being used on each tract. Some time in 1888 petitioner advertised the land on the school section for sale, and in such advertisement occurs the following: "Two-thirds under ditch, water right, besides living water." The only water right was that part of the 70 inches used by the petitioner. An agent applied to the petitioner to get the sale of the land, and was informed by the petitioner that 30 of the 70 inches which he purchased, and to which he was entitled from the ditch company, went with the land. The negotiations resulted in a sale of the land. The Hackberry Tree, Land & Stock Company became the owner from the purchaser. No water, or right to pur-

chase water, was conveyed, the right of the purchaser company resting upon the application of the water by the grantor for five years to the land sold, and his parol statements in the advertisement, and to the agent who made the sale, that 30 inches of water went with it. In the ensuing spring petitioner demanded from the respondent the entire 70 inches of water for use upon his original 80 acres, and tendered payment for it. The Hackberry Company demanded the 30 inches for use upon the land purchased. Appellant (petitioner) filed his suit for a mandamus to compel the sale to him of the entire quantity, relying upon his former use, and alleged prescriptive right to the same. The respondent answered, denying some of the allegations in the petition, setting up the facts above stated, and the claim and demand of both parties to the water in controversy, and avowing their willingness to deliver the water to either when the legal right should be established. It denied the allegation in the petition that the entire 70 inches of water was necessary to irrigate the 80 acres of the petitioner, and alleged that 40 inches was all that was necessary to properly irrigate it. The respondent further, by its answer, or in the nature of a cross complaint, asked "that the rights and priorities of the said petitioner and the said company in and to the said thirty inches of water, being a part of the seventy inches of water mentioned in the petition therein, may be heard, adjudged, and determined, and that the said the Hackberry Tree, Land & Stock Company may be adjudged to be entitled to the same, and for such other further and different relief as may be just and proper, and for its costs." On the 11th of November, 1891, the Hackberry Company applied to be made a party, and by the court was allowed to intervene and become a defendant. It filed an answer and cross complaint in its own behalf, nearly identical with that of the respondent. The petitioner replied to the answers and cross complaints of the respective defendants. A trial was had to the court. A large amount of testimony was heard. The finding and judgment of the court was as follows: "Doth find for the intervening defendant as against the plaintiff, and doth find that the said the Hackberry Tree, Land & Stock Company, intervening defendant, is entitled to receive from the defendant the Farmers' Highline Canal & Reservoir Company, as against the plaintiff, the thirty inches of water for irrigation purposes, being a part of the seventy inches of water for which this action is brought, and which is claimed by the plaintiff herein; and doth further find that the right to the same was sold and conveyed by said plaintiff to the intervening defendant; and that by his conduct the plaintiff is estopped from claiming the same as against the intervening defendant; and that the plaintiff is not entitled to the same, or to demand or receive the same from the defendant; and doth order judgment to be entered accordingly. Wherefore it is ordered, adjudged, and decreed, and the court doth order, adjudge,

and decree, that the plaintiff's petition herein be denied, and that as to the plaintiff the said defendant go hence without day, and do have and recover of and from the said plaintiff its costs in its behalf laid out and expended, to be taxed, and do have execution therefor; to which finding and decision the plaintiff, by his counsel, duly excepted. And it is further ordered, adjudged, and decreed, and the court doth further order, adjudge, and decree, that the prayer of the intervening defendant be granted; and that the said intervening defendant is entitled, as against the plaintiff herein, to the right to ask, demand, and receive of and from the defendant herein the thirty inches of water for irrigating purposes, and being a part of the seventy inches of water for which this action was brought; and the said plaintiff is not entitled to receive said thirty inches of water, or any part thereof; and that the said intervening defendant do have and recover of and from the said plaintiff its costs in its behalf laid out and expended, and do have execution therefor,"—from which an appeal was taken to this court.

Ezra Keeler and H. N. Sales, for appellant. J. W. Horner and J. E. Robinson, for appellees.

REED, J., (after stating the facts.) The proceeding was an application for a mandamus to compel the defendant corporation to deliver to the petitioner 70 inches of water to irrigate his tract of 80 acres. His right to it is predicated upon prescription, or a supposed statutory prescriptive right by reason of formerly having for a number of years purchased and received that quantity. To enforce this supposed right application was made for the writ. The action or proceeding appears to have been misunderstood by the court and counsel. The proceeding by mandamus is a purely legal, civil proceeding; no element of equity or application of equitable law is or can be involved. It is "directed to any person, corporation, or inferior court of judicature, \* \* \* requiring them to do some particular thing, therein specified, which pertains to their office or duty." 3 Black. Comm. 110. "Is directed to some person, corporation, or inferior court requiring them to do some particular thing therein specified, which appertains to their office or duty, and which is supposed to be consonant with right and justice, and when there is no other adequate remedy at law." *Kendall v. U. S.*, 12 Pet. 524. In *Rex v. Barker*, 3 Burrows, 1265, Lord Mansfield said: "Where there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be a matter of public concern, or attended with profit,) and a person is kept out of possession or dispossessed of such right, and has no other specific, legal remedy, this court ought to assist by a mandamus upon reasons of justice, as the writ expresses, \* \* \* and upon reasons of public policy to preserve peace, order, and good government." The general statutory definition in the United States is: "That the writ runs to an infe-

rior tribunal, board, corporation, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." See *Boggs v. Railroad Co.*, 54 Iowa, 435, 6 N. W. Rep. 744; *Fremont v. Crippen*, 10 Cal. 211; *State v. Gracey*, 11 Nev. 223. "The writ only lies to enforce duties imposed by law, and neither stipulation nor the agreement of the parties can change the uses or the extent of the writ of mandamus." The legal right to the writ must be clear and unquestionable, and the performance of the duty specifically imposed. See *Freon v. Carriage Co.*, 42 Ohio St. 30; *People v. Green*, 64 N. Y. 499; *Railroad Co. v. Wisdom*, 5 Helsk. 125. It will not lie to enforce private contracts. *Benson v. Paull*, 6 El. & Bl. 273; *State v. Bridge Co.*, 20 Kan. 404; *People v. Dulaney*, 96 Ill. 503; *Tobey v. Hakes*, 54 Conn. 274, 7 Atl. Rep. 551. "It is considered to be a harsh remedy, and to be substituted for the ordinary process only in extraordinary cases." *State v. Railroad Co.*, 42 La. Ann. 133, 7 South. Rep. 226. The writ has always been kept within its own narrow limits, and the courts have universally been unwilling to extend its operation. *Blair v. Marye*, 80 Va. 485; *State v. Young*, 33 La. Ann. 923.

It will readily be seen that the respondent in its answer, and what may be regarded as a cross complaint, in setting up the supposed equitable rights of the Hackberry Company, and praying that it be decreed to be the owner of the water in controversy, exceeded the limits of the defense allowed by law, and that part should have been disregarded or stricken out. Nor could the court, even by request and agreement of parties, change an arbitrary legal proceeding, brought to enforce a specific duty, into a suit in equity, and adjudicate the equities between the petitioner and the intervener. Such equities can only be adjusted by the proper proceeding instituted by one of the contending parties. So far as the answer of the respondent, by the allegations contained, sets up facts showing it was not legally, nor in the performance of a specific duty, obliged to deliver the water, or, in other words, in so far as it set up the facts to defeat the issuance of the writ, was proper, and the issues thus formed were competent to be tried. The evidence shows that the petitioner formerly claimed and bought 75 inches of water for the 80-acre tract; that he afterwards voluntarily reduced it to 70 inches; that for some years he took that quantity; that he then bought land on the school section, and applied water to that for 5 years. These facts show conclusively, when taken in connection with nearly all the testimony, that the water was not all needed for the 80-acre tract; that 40 inches was an adequate supply,—as much as was sold by the respondent and used by other consumers generally in the vicinity. His supposed prescriptive right was neutralized or destroyed by his five-years' application of the water to other lands. The most he could lawfully claim was an adequate supply. The administration of a franchise like that of respondent requires absolute impartiality



when there are no fixed legal priorities; hence the court was warranted in finding that the petitioner had no fixed legal prior right to 70 inches of water; that for the entire neighborhood one-half inch to the acre was deemed sufficient, and was all adjoining land-owners claimed or received; and that the further fact that he for five years applied the water successfully to his original farm and the school land was conclusive that it was in excess of his home needs. The court was warranted, therefore, from the premises, in finding that the respondent was not legally compelled to furnish the amount of water demanded, and the petitioner was not entitled to the writ. That part of the finding must be affirmed. With such finding, on application for a writ of mandamus, the power of the court was exhausted. It was without jurisdiction to hear and determine the respective rights of petitioner and intervener. The balance of the finding and judgment wherein the intervener is decreed entitled to the water as against the petitioner and respondent is reversed, and held for naught, being in excess of the authority of the court. The judgment denying the writ of mandamus is affirmed. Judgment refusing mandamus affirmed; balance reversed.

(3 Colo. App. 151)

#### DONOVAN v. GATHE.

(Court of Appeals of Colorado. Feb. 13, 1893.)  
FRAUDULENT CONVEYANCES — CHANGE OF POSSESSION.

On an issue as to whether a bill of sale by one F. to defendant, of a meat market and its contents, was in fraud of F.'s creditors, it appeared that before the sale F. spent most of her time looking after the business, assisted by defendant. Afterwards, F. was in the market, as before, but defendant claimed he told several persons that he had "bought her out," and that she was at work for him. No new sign was put up, and no notice was given in a newspaper of the sale. After the sale, F. stated, when asked if she had sold out, "They say I have," and finally said, "I sold out to that man." Held, that there was no such viable and notorious change of possession of the property transferred to defendant as would vest him with the title, against existing creditors of F.

Error to Phillips county court.

Action of attachment by James Donovan against E. M. Freeman, in which C. E. Gathe intervened, and claimed the attached property under a bill of sale. From a judgment for the intervener, and dissolving the attachment, plaintiff brings error. Reversed.

Wm. T. Rogers, for plaintiff in error.

**BISSELL, J.** By the sale of some chattels, Joshua Stone became, in the winter of 1889, a creditor of Mrs. E. M. Freeman, who lived in Holyoke, Colo. This debt afterwards became the property of the plaintiff in error, James Donovan, who brought this suit to recover it, and sued out a writ of attachment to aid in its collection. For some months prior to the time the writ was served, Mrs. Freeman had been the owner and keeper of what

was called the "Star Meat Market," in the village where she lived. From early in October, 1889, down to the time of the alleged sale, on the 4th of February, C. E. Gathe was in her employ, working about the market. Early in February Mrs. Freeman seems to have become somewhat embarrassed, and on the 4th day of that month executed to Gathe what purported to be a bill of sale of the market and its contents. On the 6th, two days later, Donovan instituted suit against Mrs. Freeman, sued out his writ, and levied on part of the contents of the shop to satisfy his claim. Gathe filed what purported to be an affidavit under the justice's act to assert his title to the property. The claim of this intervener was related by Donovan upon two grounds: First, that the paper which he filed in court did not comply with the requirements of the statute relating to interventions in justices' courts; and, second, because there was no such viable and notorious change of possession of the property transferred to Gathe as would vest him with the title against existing creditors or innocent purchasers. In reality these are the only two questions presented in the case. The testimony concerning these matters can scarcely be said even to be conflicting. What has been antecedently stated is not denied, and what the case shows on the subject of the transfer of possession is about equally well established. In respect of this last matter the record shows that Mrs. Freeman lived in the rear of the shop, which was used as a meat market. Prior to February 4th she was the declared and ostensible owner of the property, and probably for the major part of the time was in the market, engaged in selling meats, taking the money paid therefor, and looking after the business generally, aided and assisted solely by the intervener, Gathe. From the date of the alleged sale, on the 4th of February, to the time of the levy of the writ, there was, so far as the world was concerned, no change either in the apparent possession, or the exercise of the apparent rights of ownership. According to the testimony of Gathe, the intervener, "after February 4, 1890, she was in the shop, the same as before, selling meat and taking in money, but she was at work for me. There was nothing done, only I told several parties I bought her out. Did not put up any new sign, or take down any. There was none there, only 'The Star Meat Market.' I was going to put notice in the paper, but did not have time. Was closed up February 6, 1890, and opened up again February 10, 1890. Then I went and had some bills printed. A few days after that, I put them up in the shop." Mrs. Freeman, the alleged vendor, gave the same testimony. One of the defendant's witnesses had a conversation with Mrs. Freeman the day following the sale, and to him she stated, when asked whether she had sold out, "They say I have," and after repeating this remark several times, finally said, "I sold out to that man." There was no testimony whatever offered by the intervener, nor is there any contained in the record, which in any manner tends to show that, after the trans-

action between Mrs. Freeman and Gathe, anything was done to notify the world of the change of ownership, or that there was any alteration in the possession of the property. On this evidence judgment was entered for the intervener, the property was released from the attachment, and the attaching creditor brings error.

That the sale was void, under our statute of frauds, as against creditors or bona fide purchasers for value, is not open to question. The statute has been repeatedly construed, and it is universally held that to make a sale valid, as against creditors or purchasers, the transfer of possession must be complete, and the purchaser's control of the property must be open and notorious, and such as to advise the world of the change in the title. It has been said: "The vendee must take the actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller, and into the purchaser. This must be determined by the vendee using the usual marks or indicia of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property. The possession must be exclusive of the vendor. A concurrent or joint possession is not admissible." *Cook v. Mann*, 6 Colo. 21; *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. Rep. 966; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. Rep. 809; *Atchison v. Graham*, 14 Colo. 217, 23 Pac. Rep. 876. Weighed and considered in the light of the principle declared in these cases, the evidence did not justify a finding in favor of the intervener. There was no attempt to alter the apparent relation of the parties, or to change the possession and control of the property. If the question of good faith were permitted to enter into the determination of the question, very grave doubts would arise whether the transaction was a legitimate transfer of property, or was an attempt to hinder creditors in the collection of their just claims against the original proprietor. Whatever may have been the motive, the transaction cannot stand, as against the attaching creditor.

It was somewhat seriously contended in argument that the court erred in treating the paper filed by the intervener as an affidavit, under the statute entitling him to be heard in the assertion of his claim of title. There is a good deal of doubt whether the affidavit was in the prescribed form. The affiant failed to point out or specify or describe the property to which he claimed title, and there was nothing in it which could be considered to be even a substantial compliance with this statutory requisite. It is unnecessary to determine whether it might be held sufficient after judgment to uphold the recovery, since on the main question presented the finding is against the intervener, and he can never recover, under his evidence. For the error committed by the court in adjudging the title to be in the intervener, as against the attaching creditor, this judgment must be reversed.

(21 Nev. 390)

## SAWYER v. DOOLEY, County Treasurer.

(Supreme Court of Nevada. March 8, 1893.)

## TAX SALES—SUMMARY PROCEEDINGS—CONSTITUTIONAL LAW—ASSESSMENT—EQUALIZATION.

1. The summary process provided by statute for the sale of property for delinquent taxes amounting to less than \$300 does not deprive a person of property without due process of law.

2. Such summary proceedings do not deprive a person owing less than \$300 of the equal protection of the laws, although, where the amount is more than that sum, there must be a regular action in court for its collection. This is only a reasonable exercise by the legislature of the right to classify the taxpayers.

3. A statute can only be declared unconstitutional where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute is unjust or oppressive or impolitic, or conflicts with a spirit supposed to pervade the constitution, but not expressed in words.

4. There is nothing in the constitution of Nevada which indicates that it was intended to confer upon county assessors the sole right to assess property, or upon county commissioners the sole right to equalize its valuation.

5. Article 3 of the constitution, dividing the state government into three great departments, does not prohibit one department from exercising powers in their nature belonging to one of the other departments, unless that power is either expressly or impliedly conferred upon the other department by the constitution. That article only refers to the state government as created by the constitution.

6. The right of a de facto member of the board of assessors and equalization to exercise the duties of his office cannot be collaterally questioned.

7. As all property is to be assessed at its actual cash value, the fact that the act (St. 1891, p. 56) provides that different kinds of property shall be assessed by different assessors, does not make it in conflict with article 10 of the constitution of Nevada, requiring a uniform and equal rate of taxation. The cash value may be as well and accurately determined by several men and boards as by one.

8. As the act provides that all railroads, however owned, are to be assessed by the state board, and all other property by the county assessors, it is not in conflict with section 2, art. 8, of the constitution, requiring corporations to be taxed the same as individuals. It makes no improper discrimination between corporations and individuals.

9. In all systems of government power must be lodged somewhere, and the fact that the power given the state board may be abused is not a sufficient argument against the authority of the legislature to place it there, nor against the right of the board to exercise it.

10. The act is simply an exercise of the right of the legislature to classify property for the purposes of taxation, and as, in authorizing the board to assess property, it applies to all railroads in the state, it is a general law, and not in conflict with section 20 of article 4, forbidding special laws for the assessment and collection of taxes.

11. The act authorizes the board to equalize the value of railroads, as well as other property, and to raise the assessed value of the same, without regard to whether the owner applies for a reduction of the valuation.

(Syllabus by the Court.)

Appeal from district court, Lincoln county; G. F. Talbot, Judge.

Action by George S. Sawyer against W. J. Dooley, county treasurer, to restrain de-

fendant, as tax collector, from selling certain property of plaintiff for delinquent taxes. There was judgment for defendant for the amount of the tax, and plaintiff appeals. Reversed.

The other facts fully appear in the following statement by BIGELOW, J.:

Action brought to restrain defendant, as tax collector of Lincoln county, from selling certain property of the plaintiff for taxes delinquent for the year 1891, amounting to \$50.05. The agreed facts are that the plaintiff was the owner of certain property, which was duly assessed by the assessor of that county for the year 1891; that the county board of equalization made no change in the valuation, but the state board of assessors and equalization raised it, in common with all other property in the county, 10 per cent. The plaintiff duly tendered the amount of the tax due from him upon the original assessment, but the tender was refused. At the commencement of the action the court granted a temporary restraining order, but upon the final hearing it was dissolved, and judgment rendered for the defendant for the sum of \$57.05, the amount of the tax and penalties, together with costs of suit. The plaintiff appeals.

The act of 1891 (St. 1891, p. 56) creates the state board of assessors and equalization, to consist of the governor, state comptroller, secretary of state, attorney general, and state treasurer. This board is to assess all railroads, and the rolling stock and side tracks of all railroads, in the state. The value of all side tracks is to be apportioned to the county where situated, and also a part of the total assessment of main track and rolling stock, in proportion to the number of miles of railroad in the county. All other railroad property, and all other property, is to be assessed by the several county assessors. The state board is to act as a board of equalization, and may increase or lower the entire assessment roll of any county, or any class of property or individual assessment contained therein. Section 12 of the act reads: "If the owner of a railroad assessed by the state board be dissatisfied with the assessment made by the said board, such owner may, \* \* \* apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it," a statement of the change is to be made to the county auditor.

George S. Sawyer, in pro. per. T. J. Osborne, Dist. Atty., Tremore Coffin, and J. D. Torreyson, Atty. Gen., for respondent.

BIGELOW, J., (after stating the facts.)

1. Where the amount of a delinquent tax is less than \$300, the statute (St. 1891, p. 147 et seq.) authorizes the county treasurer to sell the property upon which the tax is a lien by simply giving certain notices, instead of there being an action brought in a court, and judgment ob-

tained, as must be done where the tax is more than that amount. It is first claimed that this law is unconstitutional, because it deprives a person of property without due process of law. This point has, however, been too often decided adversely to the appellant to be now open to further controversy. So far as we know, it has been uniformly held, from the time when the objection was first made, upon grounds that seem entirely satisfactory, that the clause of the constitution under consideration does not prohibit the collection of taxes by summary process, instead of by regular proceedings in court. *State v. Central Pac. R. Co.*, 21 Nev. —, 30 Pac. Rep. 689; *Gibson v. Mason*, 5 Nev. 288; *Davidson v. New Orleans*, 96 U. S. 97; *Kelly v. Pittsburgh*, 104 U. S. 78; *High v. Shoemaker*, 22 Cal. 363.

2. The appellant further claims that the provision of the statute for a summary collection of taxes denies to him an equal protection of the laws, and hence is in conflict with the fourteenth amendment of the constitution of the United States. This is based upon the fact already stated, that, where the tax amounts to over \$300, there must be a regular action in court for its collection. He is, however, given the same protection that all other persons that owe less than \$300 are given, and we think that this, instead of being an unlawful discrimination against the appellant, is simply the exercise of the right to make a classification of taxpayers, which, within reasonable limits, we believe the legislature has full power to adopt. Good and sufficient reasons appear why, in cases where the tax is only for a small amount, neither the state nor the taxpayer should be burdened with the additional labor and expense of an action at law. But as in these summary proceedings the statute must be more or less strictly complied with, they are often defective, and do not result in the collection of the delinquent tax. This being so, where the amount is large, the legislature has doubtless wisely provided that there shall be a regular action at law, as being more likely to result in compelling the payment of the tax. This classification is governed by the same principle which, as we shall see, we think authorizes the legislature to provide different assessors, and different methods of equalizing the valuation, of different classes of property.

3. State boards of assessment and equalization are so generally established throughout the various states of the Union, and their validity has been so often passed upon and sustained by the highest courts in the land, that there is scarcely a question presented in this appeal that has not been already presented and overruled in some other case. Perhaps it would be a sufficient answer to the principal argument made by the appellant to say that the courts cannot "declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights granted or protected, by the constitu-

tion." Cooley, Const. Lim. 197. Nor can this be done because of the apparent injustice or impolicy of the law, nor because it is opposed to a spirit supposed to pervade the constitution, but not expressed in words, nor upon any loose and vague interpretation of the instrument. *Id.* 202, 204. The presumption is that an act of the legislature is valid, and it must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them. *State v. Humboldt Co.*, 21 Nev. —, 29 Pac. Rep. 974. So, even if we agreed with the plaintiff concerning the oppressive character of this law, (which we do not,) we should be powerless to give him a remedy upon any such grounds.

4. But, coming to such specific objections to the law as we think it necessary to notice, we find nothing in the constitution which indicates to our minds that it was intended by that instrument to confer upon county assessors the sole power to assess property, nor upon county commissioners the sole right to equalize the valuation thereof. Neither do we find any implied prohibitions in that instrument against the creation by the legislature of the board provided for in this act. As at present advised, we are of the opinion that these matters are proper subjects for the regulation and control of the lawmaking body.

5. A number of the points made by the appellant are founded upon a misapprehension of the scope and meaning of article 3 of the constitution. That article divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers. For instance, the governor or the judiciary shall not be members of the legislature, nor shall they make the laws under which we must live. But this is quite a different thing from saying that no member of the executive or judicial departments shall exercise powers in their nature legislative, but which are not particularly charged by the constitution upon the legislative department; such as where the board of commissioners for the insane make rules for the management of the asylum, or a court establishes rules for the transaction of the business coming before it. It would be impossible to administer the state government were the officers not permitted, and required, in many instances, to discharge duties in their nature judicial, in that they must exercise judgment and discretion in determining the facts concerning which they are called upon to act, and in construing the laws applicable to them. Hence we see no constitutional objection to members of the executive branch being charged with the

duty of assessing property, or of acting upon the board of equalization, for neither of these functions have been, either expressly or impliedly, placed by the constitution upon either of the other departments; for certainly, although in equalizing valuations a board may act in a judicial capacity, the constitution nowhere contemplates that the judicial department, as organized by article 6, shall discharge that duty. This construction is supported by two well-considered cases decided by the supreme court of California, (*People v. Provines*, 34 Cal. 520; *Staude v. Commissioners*, 61 Cal. 313.) where the matter will be found elaborately discussed. See, also, *Story, Const.* § 525, and *Mayor, etc., v. State*, 15 Md. 376, 455.

6. We need not inquire whether the governor can be constitutionally required to act as a member of the board. Among several reasons for this, a sufficient one is that he is at least a de facto member, and his title to the office cannot be collaterally questioned. As to the public, his acts are valid. *Mecham, Pub. Off.* § 330; *Walcott v. Wells*, 21 Nev. —, 24 Pac. Rep. 367.

7. The act does not violate article 10 of the constitution, which requires a uniform and equal rate of assessment and taxation. All property, whether assessed by the board or by the county assessors, must be assessed at its actual cash value, and there is no reason why this value may not be as accurately determined by several different men and boards as by one. In fact, it might sometimes be done much better, as one man, although an expert upon the value of horses and farms, might know but little of railroads or other property. If not, this would be an equally good argument against the system of separate county assessors and boards, and require all the property in the state to be assessed and equalized by one man or one board. All that is required is a uniformity of taxes, and not a uniformity in the manner of assessing or collecting them. *San Francisco & N. P. R. Co. v. Board of Equalization*, 60 Cal. 12, 80.

8. Under the act the property of corporations is taxed the same as the property of individuals; so it is not in conflict with section 2 of article 8 of the constitution. The act provides that all railroads shall be assessed by the state board, and all other property by the county assessors; and this applies, of course, without regard to whether the railroad or other property is owned by corporations or individuals. The fact that railroads are generally owned by corporations cuts no figure in the argument, for they may be, and in one quite notable instance in this state have been, owned by individuals. All that this section of the constitution probably means is that the property of corporations shall be subject to the same taxation as the property of individuals, and no one can claim that this act either exempts them from their share of the public burdens or unfairly discriminates against them. They pay the same rate of taxation that individuals pay, upon what is, theoretically, at least, the same valuation,—the cash value of their property. Perhaps, if the act applied only to corpora-

tions, it might still be valid, but it is unnecessary to consider this.

9. This brings us to the further objection that the act places arbitrary power in the hands of the board, and thus enables them to show favoritism. Any assessor or board of equalization may do this, and it is consequently no sufficient argument against the constitutionality of this law. There is no more probability that this board will do so than that it would be done by county boards of equalization. In all systems of government power must be lodged somewhere. Wherever it is placed it may be abused, and consequently this is no sufficient reason for denying its existence in a particular instance. Such abuse, if sufficiently gross, might subject the offenders to removal from office, and they are answerable politically to their constituents.

10. It is next said that this is a special law for the assessment and collection of taxes, and consequently in conflict with section 20 of article 4 of the constitution, forbidding such legislation. This has been, perhaps, the most serious objection made to the validity of legislative acts creating state boards of assessors and equalization, but it has now been so often raised and overruled that there is but little more to be said about it. It is founded upon a misapprehension of what is meant by the term "special law," as used in the constitution. That is well defined by Mr. Justice Paxson in *Wheeler v. Philadelphia*, 77 Pa. St. 338, 348, where he said: "Without entering at large upon the discussion of what is here meant by a 'local or special law,' it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition. \* \* \* For the purpose of taxation real estate may be classified. Thus, timber lands, arable lands, mineral lands, urban and rural, may be divided into distinct classes, and subjected to different rates. In like manner, other subjects, trades, occupations, and professions may be classified; and not only things, but persons, may be so divided." The question of what constitutes a special law within the meaning of the constitution has often been before this court, and the principles laid down in the various decisions show clearly that this act is not open to that objection. It is general, because it applies to all railroads within the state, which constitute a distinct class or species of property, concerning which it was proper to adopt a different plan of assessment from that applicable to other kinds. *Youngs v. Hall*, 9 Nev. 212, 218, 225; *State v. Irwin*, 5 Nev. 111, 120; *Ex parte Spinnery*, 10 Nev. 323; *State v. California M. Co.*, 15 Nev. 234, 248, 256; *State v. Boyd*, 19 Nev. 43, 5 Pac. Rep. 735. Railroads now constitute a large and important part of the property of our state, entirely distinct from other kinds, and requiring many laws and regulations for their management and control, specially applicable to them. Good reasons for a change existed in the abuse of the former methods of as-

essment, whereby, although there was no possible difference of value, a road was sometimes assessed at twice the figure in one county that it was in an adjoining county. Such glaring injustice, either to the road or to the people, called for a remedy, and in providing for its assessment by the state board the legislature has simply applied the same principle of classification that it might apply to any other distinct species of property. To be sure, the same end might have been reached by simply creating a state board of equalization with power to raise or lower individual assessments, but it would have amounted to the same thing; and it was for the legislature to choose between the two systems, either of which would be equally valid and efficacious. So long as classification is not based upon an invidious or unreasonable distinction with reference to the same kinds of property, the courts cannot interfere. *People v. Henderson*, 12 Colo. 369, 21 Pac. Rep. 144. In *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. Rep. 57, where the validity of a quite similar law was under consideration, the court said: "But there is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose. \* \* \* The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the state in the legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals in the proceeding to value it." We deem this language entirely in point in this case, although in some respects there is a difference between the constitution of Kentucky and our own. The following cases are also more or less applicable, and support our conclusions: *Franklin Co. v. Railroad Co.*, 12 Lea, 521, 534; *St. Louis, etc., Ry. Co. v. Worthen*, 52 Ark. 529, 535, 13 S. W. Rep. 254; *State Railroad Tax Cases*, 92 U. S. 575; *Cummings v. Bank*, 101 U. S. 153; *Spalding v. Hill*, 86 Ky. 656, 7 S. W. Rep. 27; *Dubuque v. Railroad Co.*, 47 Iowa, 196.

11. It is also said that the act is special, because it authorizes the board to equalize the assessment of all other classes of property except railroads, but denies that

right as to them. Perhaps this could be admitted, and yet the constitutionality of the act successfully maintained, but we deem it unnecessary to do so. A careful examination of the law convinces us that it was the intention of the legislature that the board should equalize the valuation of railroads, as well as other property. The argument to the contrary is based upon the reading of section 12 of the act, which, it is contended, only authorizes the board to equalize railroad assessments where the owner is dissatisfied. As, where the valuation is too low, he would not be likely to apply for any change, this construction supports the contention. The wording of the section gives some color to this view, but, taken altogether, we think it clear that such was not the intention of the act. Such a construction would be absurd, and hence should, if possible, be avoided. The power to increase the assessment is expressly given, but it is a lame and impotent conclusion to suppose that this was intended only to be done where the owner made complaint, which it is reasonably certain he never would do. Boards of equalization are created to correct injustice and inequalities in the assessment of property; and where they have jurisdiction of property, and in some cases may lower the valuation thereon, it should require very clear language to lead us to the conclusion that it was not intended, no matter what mistake had been made, that they should also increase it. The very fact of the creation of the board signifies something broader than this. There never was much reason for holding, even under the general revenue law, that there must be a complaint to authorize a board to review an assessment; but there is less under this act. The common-sense view of the matter seems to have been taken by the supreme court of Arkansas in *Palaski County Board of Equalization Cases*, 49 Ark. 518, 527, 6 S. W. Rep. 1. We are of the opinion that the act of 1891, creating this board, is in all respects constitutional and valid. But the only decree that should have been entered in the case was one of dismissal, and in favor of defendant for his costs of suit. Instead of that, judgment was rendered in his favor for the entire tax and penalties. For this error the judgment must be reversed, with instructions to the lower court to proceed in accordance with this opinion.

MURPHY, C. J., concurs.

(97 Cal. 403)

ALLIN v. WILLIAMS. (No. 19,076.)

(Supreme Court of California. Feb. 25, 1893.)

NOTE SECURED BY MORTGAGE—ACTION AGAINST INDORSEE—EVIDENCE.

1. The indorser of a note secured by a mortgage given by the maker is liable, after judgment against the maker in a suit to foreclose, for any deficiency arising on the sale under foreclosure.

2. A contention by defendant that a person who indorsed a note for him had no authority to do so, is untenable where it appears

that defendant afterwards indorsed on the note a waiver of payment and protest, since such act constitutes a ratification of the indorsement.

3. Money was deposited with defendant, as trustee, to pay off an indebtedness on a note owned by plaintiff, but the payee refused to accept payment, because the note was not then due. He then loaned out the fund without any authority from plaintiff, who, being dissatisfied with the loan, caused defendant to transfer to him the mortgage and note given to secure the loan, defendant indorsing the note. The proceeds of the loan were used by the borrower to pay a debt due by him to defendant, which had been secured on the same land, and this land was at the time declining in value. *Held*, that the court was justified in finding that defendant's indorsement of the note was intended as further security for its payment, and not merely to transfer the title thereto.

4. Where a mortgage given to secure a note has been foreclosed, the land sold, and a deficiency judgment entered up against the mortgagor, an indorser of the note is not entitled to an assignment of such judgment before he has paid the balance due on the note.

Department 1. Appeal from superior court, Los Angeles county; W. J. Clark, Judge.

Action by John Allin, trustee, against R. Williams, to recover a balance due on a note indorsed by defendant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

John Haynes, for appellant. A. R. Metcalf, for respondent.

HARRISON, J. In February, 1888, 10 individuals, including the plaintiff and the defendant herein, borrowed upon their individual credit the sum of \$10,000, for the use and benefit of the Pasadena Lake Vineyard, Land & Water Company, a corporation in which they were interested, (\$5,000 thereof from the San Gabriel Valley Bank, and \$5,000 from a Mrs. Banta,) for which they gave their joint and several notes. About a month afterwards the corporation paid to the defendant a sufficient sum of money therefor, for the purpose of taking up the notes and repaying the sums thus advanced, and the defendant deposited the same with the San Gabriel Valley Bank, to the credit of "R. Williams et al." He immediately paid the loan that had been made by the bank, but Mrs. Banta refused to accept the money on her note, for the reason that it would not mature for nearly a year, and thereupon the money for its payment, viz. \$5,221.98, was left in the bank to the aforesaid credit. Prior to this time the defendant had contracted to sell to one Webster certain real property in Pasadena, and Webster had contracted to sell a portion of the same property to one Wilson. Webster was owing defendant \$5,000 on his contract of purchase, and Wilson was owing to Webster a little more than this amount on his contract with him; and on April 18, 1888, in pursuance of an arrangement between them for the purpose of liquidating these several obligations, the defendant made a conveyance of the land to Wilson, Webster uniting therein. Wilson executed to the defendant his note for \$5,000, payable February 10, 1889, and secured the same by a mortgage upon the land, made to the defend-

ant, as trustee for the 10 individuals who had signed the Banta note; and on April 21st the defendant transferred the aforesaid sum of \$5,221.98 from the account of "R. Williams et al." to his own personal account in the same bank. In September of that year several of these individuals expressed a dissatisfaction with his acts relating to the money, and thereupon the defendant, acting through his attorney, Wright, who was one of the 10, surrendered to Wilson the aforesaid note and mortgage, and took from him a new note for \$5,000, maturing February 10, 1889, payable to "R. Williams or order," together with a mortgage on the same property, securing its payment, and on the same day indorsed the note to the order of "John Allin, as trustee," the plaintiff herein, and assigned the mortgage to him, "in trust for the benefit" of the 10 contributors, naming them. After the Wilson note had matured, the plaintiff brought an action thereon, making Wilson and the defendant herein defendants in the action. Wilson suffered default, and the plaintiff, having dismissed the defendant herein from the action, took judgment against Wilson for the amount of the note, and for a sale of the mortgaged property. Upon the sale under that judgment the property was bid in by the plaintiff for the sum of \$2,400, and the sheriff returned a deficiency judgment of \$3,737. Thereupon the plaintiff, as trustee for the benefit of the 10 contributors, brought this action to recover from the defendant the amount of this deficiency.

1. The action against the defendant is for the purpose of enforcing his liability as an indorser upon the Wilson note. The averments of a recovery of judgment in the action against Wilson, and of the proceedings thereunder, are for the purpose of showing that a portion of the note has been paid by subjecting the security given therefor to a sale, and thus determining the amount to be recovered from the defendant. The right to maintain an action against the indorser of a note whose payment has been secured by a mortgage given by the maker, after judgment has been recovered against the maker in a suit to foreclose, was established in *Vandewater v. McRae*, 27 Cal. 596.

2. The court finds that Wright, who was the defendant's attorney, by whom the indorsement was made, was fully authorized to indorse the note, and there was sufficient evidence before it to authorize this finding. Aside from the general power of attorney which he had given him, the defendant directed Wright, at the time he was leaving the state, in September, just after objection had been made by the contributors to his disposition of the money, to fix the matter up to suit those who were making those objections, and while he was absent from the state he sent a telegram to Wright to exercise his best judgment in arranging the matter. In addition to this, the defendant himself, after his return to Pasadena, indorsed upon the note a waiver of payment, presentment for payment, protest and notice of protest, and the court was authorized to treat this act as an affirmation and ratification of the prior indorsement by his attorney.

3. The appellant contends that his indorsement of the note to the plaintiff was without consideration, and merely for the purpose of transferring the title thereto, and that he did not incur the liability of an indorser. An indorser may show, as between himself and his immediate indorsee, that the indorsement was made merely for the purpose of transferring the note from a nominal holder to the true owner, as from an agent to his principal; or that the circumstances under which the indorsement was made were such as would render it inequitable to enforce an indorser's liability against him, (*McPherson v. Weston*, 85 Cal. 90, 24 Pac. Rep. 732;) but in any such case the burden of establishing such a defense to the apparent liability attendant upon his indorsement rests upon the indorser. The court below found upon evidence (which we think amply sustains its finding) that the "indorsement on the said note was made for the purpose of making the said defendant liable as an indorser of said note, and giving to the persons for whose benefit the plaintiff prosecutes this action the additional security of such indorsement, and was made and received in settlement of the differences which existed between the defendant and the said persons, and that it is untrue that said indorsement was without consideration." When the money was placed in the hands of the defendant, he was but a mere depository thereof for the purpose of paying the Banta note, and, after Mrs. Banta had refused to accept it until the note should mature, he still held it in trust for the 10 contributors, without any authority to make any other disposition of it. Although some of these contributors expressed an opinion that the money ought not to lie idle, but should earn as much interest as they were paying to Mrs. Banta, still the defendant does not claim to have had any express authority to make a loan of it, but seeks to uphold his action by showing that there was a general desire that it should be loaned. He does not claim to have spoken specifically to more than three or four of the contributors, and they contradicted his statement, and, as well as the others, testified that the loan to Wilson was made without their knowledge. Under this evidence the court was authorized to find that the making of the loan to Wilson was his own act, and those for whom he held the money had the right to hold him responsible for any loss. They had the right to demand of him a transfer to another trustee of all of the money which had originally been placed in his hands for the purpose of paying the Banta note, irrespective of the use which he had made of it; but, instead thereof, they agreed to accept a transfer of the Wilson note and mortgage, with the additional security of the defendant's indorsement. This was a direct advantage to the defendant, as it relieved him from the obligation to make immediate payment of the trust money, and gave him the contingent advantage of having his obligation entirely satisfied out of the mortgage security given by



Wilson. The defendant does not contend that there was any express agreement by which his indorsement of the Wilson note was to be taken in satisfaction of his liability for the money left with him in trust, but insists that the circumstances under which the indorsement was made show that it was so intended. Instead, however, of it appearing in the evidence that it was the intention of the parties to accept the Wilson note and mortgage in satisfaction of the obligation of the defendant, the circumstances and negotiations between them at the time of the transaction show that the parties were dealing at arm's length, and that the contributors were demanding the indorsement of the defendant as an additional security; and the court was justified in finding that it was given for that purpose. It is undoubtedly true that when a trustee holds funds which it is his duty to invest, and when the beneficiaries are interested chiefly in the income resulting from such investment, he will not be held liable for a depreciation of the security, or even for a loss in an investment that was made by him in good faith, and upon suitable security which was ample at the time of the investment. But this rule has no application to the present case. The defendant was a trustee of the moneys placed in his hands for the sole purpose of paying the Banta note, and when that could not be done his duty was merely to hold the money until those for whose benefit he held it should give him definite directions. He was at no time a trustee for the purpose of lending, or with power to lend, the money. The court, moreover, finds that his acts in making the loan were not only not authorized by the contributors, but also that the loan itself was not made in good faith. The land which he took from Wilson as security for the note was at the time held by him as security for an obligation of Webster to himself, and he was pressing Webster for payment. Although several of the witnesses testified that, in their opinion, the land was at that time a sufficient security for the loan, yet they were unable to corroborate their opinion by evidence of a sale of any land in that vicinity at any time between the transaction with Wilson and the time of the trial, and it appeared that within a little more than a year it sold for less than half the amount of the loan. It was also shown that lands were then declining in value, and Webster was himself willing to deduct \$1,200 from the amount due him from Wilson, in order to effect the arrangement by which Wilson should be substituted for himself as the debtor to the defendant. These facts authorized the court to find that the defendant dealt with the trust property for his own profit, in violation of section 2229, Civil Code, and, consequently, that he did not act in good faith in making the loan. Section 2234, Id.

4. The judgment in the case of *Allin v. Wilson* is not set forth in the record, and we cannot say that it is of such a character as to constitute a bar to the present action. The mere filing of a dismissal with the clerk, or the entry of an order of

dismissal in the minutes of the court, would not, of itself, constitute such a bar. The facts shown in reference to the dismissal justify the conclusion that it was filed before the hearing of the matter upon the default of Wilson.

5. It was not necessary that the plaintiff should have alleged in his complaint or shown an offer to assign to the defendant the deficiency judgment against Wilson, or that the judgment herein should direct that such assignment be made. Although an indorser is entitled, upon payment of a note which he has indorsed, or of a judgment against the maker rendered thereon, to an assignment thereof, yet such assignment is not a condition of the plaintiff's right of recovery, but is a right accruing to the defendant by reason of his payment.

6. A considerable portion of the brief on behalf of the appellant has been devoted to a discussion of the relative rights of the plaintiff and the defendant in the property bought under the Wilson judgment, as well as in the deficiency judgment, in case he shall satisfy the present judgment; and he argues therefrom that, as he is liable for only his share of the Banta note, there can be no right of action against him until that share shall have been ascertained by a sale of the property bought in under the Wilson judgment, and the means of collecting the deficiency judgment against Wilson shall have been exhausted. It is unnecessary for us, however, to pass upon these questions, as they are not involved in this action. This is an action by the plaintiff, as trustee for the 10 contributors, to recover from the defendant the unpaid amount of the note taken by him from Wilson, and indorsed to the plaintiff. The relative rights and obligations of the defendant towards the several contributors can be presented in an action for their adjustment at the settlement of the trust, after the Banta note shall have been paid. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(3 Cal. Unrep. 732)

MAXWELL v. BOARD OF SUP'RS OF LOS ANGELES COUNTY. (No. 19,109.)

(Supreme Court of California. Feb. 11, 1893.)

MANDAMUS TO COUNTY BOARD—ADVERTISING CONTRACT.

1. Under St. 1891, c. 216, § 25, subd. 25, providing that the board of supervisors shall fix the price of all county advertising, mandamus will not lie to compel such board to contract for such advertising by giving public notice calling for proposals.

2. Such statute repeals Pol. Code, § 3766, providing that county advertising must be contracted for with the lowest bidder.

Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Mandamus at the relation of H. M. Maxwell to compel the board of supervisors of Los Angeles county to give public notice calling for proposals for county advertising. From a judgment dismissing the

petition, entered upon an order sustaining a demurrer to it, relator appeals. Affirmed.

E. A. Meserve, for appellant. James McLachlan, Dist. Atty., and B. M. Marble and Waldo M. York, for respondents.

**PER CURIAM.** This appeal is taken from a judgment of dismissal of a petition for a writ of mandate, after demurrer sustained to such petition on the ground that it did not contain facts showing a cause of action. It depends for its determination upon the construction to be given to subdivision 23 of section 25 of the county government act of 1891, as affecting the provisions of section 3766 of the Political Code as it stood before the passage of the act. It has been held in the case of *Publishing Co. v. Whitney*, 32 Pac. Rep. 237, (this day decided,) that the county government act repeals so much of section 3766, Pol. Code, as requires the board of supervisors to contract for the publication of the delinquent tax list by advertising for sealed proposals to do the same, and awarding the advertising of the list to the lowest bidder. It is plain that the legislature intended to make it the duty of the board of supervisors themselves, in the exercise of a proper discretion, to fix the price of such advertising, without any necessity for giving public notice calling for proposals from those wishing to do such work; but the contract for advertising is to be made by the proper officer, and for a price not exceeding that fixed by the board of supervisors.

Judgment affirmed.

(97 Cal. 373)

**MCCORMICK v. SUTTON et al.** (No. 18,053.) (Supreme Court of California. Feb. 24, 1893.)

**TOWN SITES—DEED FROM TOWN—TITLE ACQUIRED—ADVERSE POSSESSION.**

1. Where a patent to a town site has issued, a deed from the town authorities, of a town lot, vests in the grantee a title which cannot be afterwards questioned collaterally, if at the time the patent issued no mine had been discovered, and the land was not known to be mineral.

2. Where a person holding the title to a lot has general possession thereof, her constructive possession extends to the whole of the lot, except such parts as are actually occupied by persons holding adversely to her; and they cannot set up title by adverse possession to any parts of the lot except those occupied by them.

Department 2. Appeal from superior court, Tulare county; John M. Corcoran, Judge.

Action by Margaret McCormick against Frederick Sutton and another to quiet title to land. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Reversed.

Wheaton, Kalloch & Kierce, for appellant. J. F. Rooney and F. W. Street, for respondents.

**McFARLAND, C. J.** This is an action to quiet title to a piece of land described as lot 50 in a certain block in the city of Sonora, county of Tuolumne. The de-

fendants filed separate answers, and each claimed title to a large portion of said lot by virtue of an alleged location and ownership of a quartz-mining claim, called the "San Guiseppi Quarts Mine;" and defendant Sutton further averred that he had been in the adverse possession of that portion of said mine which is embraced in said lot 50 for more than five years before the commencement of the suit, and pleaded the statute of limitations. Judgment went in the lower court for the defendants, and the court decreed that Sutton was entitled to the possession of all that part of said lot 50 which was included within the said alleged mining claim. Plaintiff appeals from the judgment, and from an order denying a new trial.

It appears from the findings that on March 24, 1874, the government of the United States issued its patent of the town site of the city of Sonora to the trustees of said city. Said lot 50 was a part of said town site, and was conveyed by the said trustees on the 6th of August, 1874, to one Oliver Cowan; and by several mesne conveyances the title under the said town-site patent to said lot 50 passed from said Cowan to the appellant before the commencement of this action. About nine years afterwards, to wit, in January, 1883, the respondent Sutton and one Gerlach undertook to locate a certain quartz-mining claim, generally known as the "Guiseppi." They posted and recorded a notice claiming 1,500 feet along a certain quartz ledge, with 300 feet surface ground on either side, properly designated its boundaries, and since then have done sufficient work within said boundaries to comply with the laws of congress upon the subject. The surface location included a large part of lot 50. The apex of the vein located was outside of said lot 50, but the vein, in its dip, extended under the surface ground of said lot. Gerlach afterwards conveyed his interest to Sutton, and the respondent Halsey claims the right of possession under a contract with Sutton.

It is not entirely clear upon what theory the court below decided the case in favor of respondents. It is true that there is a finding to the effect that Sutton held the mining claim adversely for more than five years; and counsel for respondent, in some parts of his brief, seems to found his right upon such adverse possession. But some of the findings of the court and arguments of respondent seem to go upon the theory that the town-site patent did not convey any mines that might be in the land, although not discovered until after the date of the patent of the town site. The court also found that the said Cowan, the original grantee from the town authorities, did not occupy said lot 50 as a residence, or as a place of business, or for any purpose; and from a quotation made by counsel for respondent from the opinion of the court in *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, and quoted in *Richards v. Dower*, 81 Cal. 44, 22 Pac. Rep. 304, it would seem that both court and counsel were of opinion that mines discovered within the patented town site, before the occupation of a lot for business or residence purposes, could be held against the

grantee from the town site, although not discovered until after patent to the town site had issued. If the judgment of the court went upon any such theory, it is sufficient to say that the law is clearly established to be that a patent to a town site conveys a perfect title, in fee, except as to such land as was known to contain valuable mines before the issuance of the patent. *Smith v. Hill*, 89 Cal. 123, 26 Pac. Rep. 644, and cases there cited; *Deffebach v. Hawke*, *supra*; *Davis v. Wiebbold*, 189 U. S. 507, 11 Sup. Ct. Rep. 628. *Richards v. Dower*, *supra*. The expression referred to in the opinion in *Deffebach v. Hawke* is as follows: "A mine is not reserved unless it is not only known, but known to be valuable, at the date of the patent, or discovered to be so before the occupation or improvement of the land containing it for residences or business under the town-site title." It seems to be contended that the meaning of this expression is that although a town-site patent may have issued, and a deed to a lot thereof may have been regularly granted by the town authorities to an individual claiming it, before any known mine had been discovered, still, if a mine had been discovered before the occupancy of the lot for residence or business purposes, then the newly-discovered mine would hold, as against the grantee under the town site. But this is clearly not so. In *Deffebach v. Hawke* the suit was commenced by the holder of a mining claim which had been entered at the land office, and no patent had issued for the town site. The defendants in that case claimed that, although they had no patent under the town site, still they had occupied the lot for business purposes before the location of the plaintiff's mine, and therefore they claimed that their right of possession was superior to that of the mine claimant. It was admitted, however, in that case, that the land was known to be valuable mineral land before its occupation for business or residence purposes, and therefore the court held that the right of the owners of the mine was superior to that of the defendants; and the opinion of the court can be construed to mean nothing else than this: That when a patent to a town site has issued, and a deed made to a lot owner, the latter will hold, as against any claimants of a mine discovered, made subsequent to his original occupancy of the lot for business or residence purposes. But, when a patent has issued to a town site, a deed from the town authorities of a town lot carries to the grantee a perfect title, where no mine had been discovered, and the land was not known to be mineral, at the date of the patent. *Davis v. Wiebbold*, *supra*. And the regularity of the conveyance from the authorities of the town site to the claimant of a town lot cannot be afterwards questioned collaterally. In the case at bar, lot 50 was not known to contain a valuable mine at the date of the patent; and therefore the respondents obtained no title to any portion of the lot by virtue of the attempted mining location, made nearly nine years afterwards.

This leaves only the question of adverse possession to be disposed of. Most of the

work done by respondents upon their asserted mining claim was done outside of lot 50. A small amount of work was done underground, within the boundaries of said lot 50; and there was an actual occupancy of only a small portion of the surface of said lot 50 by the respondents. They had an arastra there, and a dump pile, although it does not appear how much of the dump pile was made within five years before the commencement of the suit. There may also have been an occupancy of some other small portions of the lot. But respondents contend that having located their mine, covering a large portion of lot 50, and having continued to work on some part of the general location, the work outside of lot 50 gave them constructive possession of all of lot 50, within the lines of their mining location. But we do not think that this contention can be maintained. At the time of the attempted location of the mining claim, lot 50 was no longer public land of the United States, but had passed into private ownership; and the attempted location of a mine upon said lot in the manner prescribed for the location of mines on the public domain was invalid. Moreover, the appellant and her grantors were themselves, during the whole time, in possession of the whole of lot 50, except such parts thereof as were actually occupied by respondents, having it inclosed with a fence, and using it for pasturage. If the findings of the court can be construed as finding that they were not thus in possession, they are not, as to that subject, justified by the evidence. The testimony of James McCormick clearly shows that there was such possession on the part of plaintiff and her grantors, and there is no evidence contradicting it. Moreover, respondents' counsel admits such possession, and in his brief says: "It is true that appellant, during such time, was in the general possession of lot 50." If it be admitted, therefore, that, as claimed by appellants, the notice of location of the mining claim was a written instrument, within the meaning of section 322, Code Civil Proc., and would carry constructive possession to the boundaries designated in it, still that doctrine only applies to unoccupied land, of which there is no possession in the true owner. But, where the owner of the true title is also in possession, the constructive possession follows his title, except as to that part of the land which is in the actual adverse possession of the intruder. *Sample v. Cook*, 50 Cal. 29; *Labory v. Orphan Asylum*, (Cal.) 32 Pac. Rep. 231, and cases there cited. Therefore, in the case at bar, the appellant having the true title, and being in general possession of lot 50, her constructive possession went to the whole lot, except the portions actually occupied by the respondents; and respondents cannot be held to have an adverse possession of any portion of lot 50, except those parts thereof of which they were in the actual possession, and the judgment of the court that they were entitled to the possession of all of lot 50 embraced in their mining location was erroneous.

These views make it unnecessary to no-

tice any other points made in the case. Certain records of judgments which were offered in evidence by respondents, but excluded by the court, are printed in the transcript; but they are so printed improperly, and can have no consideration. Judgment and order reversed, and cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

(97 Cal. 353)

FOX v. HALE & NORCROSS SILVER MIN.  
CO. et al. (No. 15,238.)

(Supreme Court of California. Feb. 17, 1893.)

APPEAL BOND—SUFFICIENCY—CORPORATION AS SURETY—JUSTIFICATION.

Code Civil Proc. § 1056, provides that a corporation with a paid-up capital of \$100,000 or more, for the purpose of becoming surety on undertakings required by law, shall be accepted as sole surety on such undertakings, the insurance commissioner having power to examine into its affairs, and to require it to file statements of its assets and liabilities, and, whenever the latter exceed the former, it shall do no business in the state till the deficiency is paid up. Section 1067 provides that the officer taking an undertaking required by law, except in case of such a corporation, must require the sureties to make affidavit that they, either singly or collectively, are worth the sum specified in the undertaking; but no such corporation shall be accepted as surety whenever its liabilities shall exceed its assets. Section 942 provides that an undertaking in an appeal from a money judgment does not stay the proceeding unless executed by two sureties in double the amount named in the judgment. Section 948 provides that when the sufficiency of the sureties are excepted to they must justify before the lower court or county clerk. Held that, where such a corporation becomes sole surety on an appeal from a money judgment, the sufficiency of the surety may be excepted to, as provided by section 948, and it must show surplus assets equal to its undertaking.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver Mining Company and others. Judgment for plaintiff. Defendants appealed, and proceed by a writ of prohibition or supersedeas to stay proceedings on the judgment pending appeal. Proceedings dismissed.

Lloyd & Wood, Mastick & Waters, and Wm. F. Herrin, for appellants. Wm. T. Baggett and Lindley & Eickhoff, for respondent.

BEATTY, C. J. This is an application by some of the defendants in the above-entitled action for a writ of prohibition or supersedeas to restrain the superior court from enforcing its judgment against them pending their appeal to this court. By the judgment appealed from the plaintiff, Fox, recovered of the defendants, who are petitioning here, a little more than a million of dollars, and the amount of the undertaking necessary to stay proceedings pending the appeal is therefore in excess of two millions of dollars. Code Civil Proc. § 942. Such an undertaking in the proper amount—\$2,030,000—was duly filed,

but the only surety by which it was executed was the Western Surety & Guaranty Company, a corporation with a paid-up capital of no more than \$100,000, incorporated under the laws of the state of California for the purpose, among others, of making, guarantying, or becoming surety upon bonds or undertakings required or authorized by law. Within due time the respondent, Fox, in pursuance of section 948, Code Civil Proc., excepted to the sufficiency of said undertaking and surety, and thereafter, upon notice duly given, the officers of said corporation appeared before the county clerk, and proved the fact of incorporation, and full compliance by said company with all conditions necessary to entitle it to do business. They also proved that its entire capital stock of \$100,000 was paid up and intact. Upon this proof the county clerk certified that said corporation had justified to his satisfaction, and accepted its said undertaking as a good and sufficient undertaking to stay proceedings under said judgment pending the appeal. Notwithstanding this action of the clerk, the superior court was entertaining and proceeding to hear and determine a motion by respondent to issue its execution to enforce said judgment, when the appellants sued out the alternative writ or order to show cause, issued herein.

At the hearing the facts above stated were admitted or proved, and, though certain preliminary questions of practice were raised by the demurrer and answers then filed, all such matters were waived in the argument, and the single question submitted for decision was whether this corporation, with a paid-up capital of barely \$100,000, is sufficient as sole surety upon an undertaking to secure more than 20 times that sum. The proposition that it is in fact sufficient is, on its face, a palpable absurdity. A corporation which has only a hundred thousand dollars can no more pay a loss of two millions than a natural person can. It is true that there is a personal liability on the part of the stockholders of a corporation for their proportion of its debts, and it is suggested that it was shown that some of the stockholders of this corporation were men of large means. But that fact does not help us to a construction of the law. Counsel for petitioners could not deny that the solvency and sufficiency of the stockholders of such corporations is a circumstance of which the law takes no account. If, under the statute upon which they rely, this undertaking is sufficient, it would be equally so if its amount, instead of two millions of dollars had been twenty millions, and if the stockholders, instead of being in some instances men of means, were every one of them notoriously insolvent.

The sole question, therefore, to be determined is whether the statute of March 12, 1885, (St. 1885, p. 114,) or sections 1056, 1057, Code Civil Proc., as enacted in 1889, (which are, in effect, a re-enactment of the statute of 1885,) require the construction contended for by the petitioners, viz. that a corporation of the character therein defined must be accepted as sole and sufficient surety upon any undertaking, no matter

what the disparity between its amount and the amount of the corporate assets. To indicate the argument of counsel, we quote sections 1056, 1057, Code Civil Proc., with their italics: "(1056) *In all cases where an undertaking or bond with a number of sureties is authorized or required by any provision of this Code or of any law of this state, any corporation with a paid-up capital of not less than one hundred thousand dollars, incorporated under the laws of this state or any other state of the United States for the purpose of making, guarantying, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the state where it was originally incorporated, has such power, and which shall have complied with all the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as surety or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons' sureties: provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements, and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper; and until such deficiency is paid up such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per cent. of capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force.* (1057) *In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are such residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount be equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section may become one of*

such sureties. *No such corporation shall be accepted in any case as a surety whenever its liabilities shall exceed its assets as ascertained in the manner provided in section 1056.*"

It cannot be doubted that this corporation meets all the conditions required to bring it within the application of the words, "may become and shall be accepted as," etc., in section 1056, but we do not attribute to those words the sweeping force which petitioners claim for them. No doubt they must be allowed some operation, but if it is possible to find a meaning for them which will justify their insertion in the statute without convicting the legislature of having enacted an absurdity, they must be limited to such meaning; or, in other words, if the apparent object and policy of the law is subserved by taking them in a qualified and restricted sense, while one of its principal objects is utterly defeated by giving them their largest possible significance, the former interpretation must be preferred. Now, the apparent object of this law was not only to enable corporations of the class designated to become cosureties upon undertakings required in legal proceedings, but to make the sole undertaking of such a corporation equivalent to the joint undertaking of two or more natural persons. To accomplish that object, the use of the language quoted, or something equivalent, was necessary, and the words chosen are as apt for the purpose as any that could be suggested, their only fault being that, taken literally, they seem to mean something more, viz. that such a corporation is not only sufficient as a surety,—the same as a natural person,—and sufficient by itself, without a cosurety, but also sufficient as surety for any amount, no matter how much greater such amount may be than the value of its assets. But to allow this clause of the act such unlimited operation would defeat its general policy, which is undoubtedly to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals. Such a judgment, when docketed, becomes a lien upon all real estate of the judgment debtor in the county. By the levy of execution liens may be established not only upon real, but also upon personal property; but all such liens are removed by the filing of a proper stay bond; and it is not to be supposed that the legislature intended to discharge one security without providing an equivalent where a corporation becomes surety upon the stay bond, any more than in the case where the sureties are natural persons. The force of these considerations is not in the slightest degree impaired by either of the italicised clauses in section 1057. By the first, corporations are merely exempted from annexing to their undertakings the usual affidavit required of natural persons. For this exception a good and sufficient reason is found in the fact that they cannot, in many cases, be residents of the state in any sense, nor in any case in the ordinary sense of the word, and they need never be, if they possibly can be, either householders or freeholders within the state. And as to their ability

to pay, a full equivalent for the affidavit ordinarily required is supplied by the insurance commissioner's certificate. Nevertheless, the last clause of the section seems to imply that the undertaking of such a corporation shall be accompanied by an affidavit showing that its liabilities do not exceed its assets, computed according to the rule of the statute, in which case it is incapable of becoming surety or co-surety for any amount whatever. But this clause does not necessarily imply that, so long as the assets of the corporation are equal to its liabilities, or, in other words, that so long as it has available assets applicable to the payment of losses equal in amount to 80 per centum of its capital stock, it may become surety for any amount in excess of such assets. All that it necessarily implies is that the corporation may go on doing business, i. e. executing bonds in such amount as other provisions of the statute authorize. What, then, is the amount for which such corporations are authorized to become surety? This question is not answered by the act of 1885, or by sections 1056, 1057 of the Code of Civil Procedure. Nor is any express provision as to this matter to be found in any other statute. In the absence of such provision, petitioners claim that the amount is unlimited. We think, on the contrary, that the question may be safely decided upon analogous provisions with respect to natural persons. When a corporation executes an undertaking in pursuance of section 942, Code Civil Proc., exception to the sufficiency of the surety may be taken in pursuance of section 948, with exactly the same effect as if the undertaking had been executed by natural persons. In response to such exception the corporation must justify upon notice, and, in addition to the facts which qualify it to do business, it must, like natural persons, show surplus assets equal to the amount of its undertaking. For these reasons it follows that the undertaking in this case was and is wholly insufficient to stay execution. Proceeding dismissed.

We concur: DE HAVEN, J.; PATERSON, J.; HARRISON, J.; GAROUTTE, J.

(97 Cal. 379)

CROSSMAN v. KENNISTON. (No. 14,816.) (Supreme Court of California. Feb. 25, 1893.)  
MUNICIPAL OFFICERS—REMOVAL—STATUTES—REPEAL BY IMPLICATION.

Act March 30, 1874, (St. 1873-74, p. 911,) provides that any member of any board of city officers who shall be found guilty of any willful violation of official duty shall be deprived of his office. Section 2 provides that any person may file a complaint charging the officer with such violation, and, if the charges are sustained, the officer may be deprived of his office, "and the court may enter a judgment for one hundred dollars in favor of the complainant." Act March 13, 1883, (Municipal Corporation Act; St. 1883, p. 266,) § 811, provides that no officer of a city shall be interested in any contract with or in furnishing supplies for such city or its officers in an official capacity; that any willful violation of such provisions shall be ground for removal from office, "and shall be

deemed a misdemeanor, and punished as such." *Held*, that the act of 1874 is inconsistent with the latter act, and was repealed thereby. *Fraser v. Alexander*, 16 Pac. Rep. 757, 75 Cal. 147, followed.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Crossman against Kenniston for removal of defendant from the office of trustee of the city of San Bernardino on account of willful misconduct in office. From a judgment of removal, defendant appeals. Reversed.

Rolle & Freeman and Hargrave & Bledsoe, for appellant. E. Crossman and Harris & Gregg, for respondent.

PATERSON, J. The plaintiff filed an accusation against the defendant, who is a member of the board of trustees of the city of San Bernardino, charging him with having willfully violated his official duty as a city trustee, and asking that he be removed from office. It was alleged that while holding the office of trustee he leased a certain building to the city, to be used by the latter as a city hall, and that he received pay for the use of the building; that he also let to divers city officials teams belonging to a firm of livery stable proprietors of which he was a member, and collected pay from the city for the use thereof. A demurrer to the accusation, and a motion to dismiss the proceeding, were filed and overruled. Thereupon an answer was filed, the cause was heard on the merits, the allegations of the complaint were found to be true, and judgment was entered as prayed for. From this judgment the defendant has appealed.

The act of March 30, 1874, provides that any member of any board of officers, state, city, or county, who shall be found guilty of a willful violation of any provision of the statute prescribing or defining his duties, or who shall be found guilty of any other willful violation of official duty, shall be deprived of his office. Section 2 of the act provides that any person may file a complaint charging the officer with a willful violation of official duty; that thereupon a citation may be issued, and a summary hearing had, and if, upon such hearing, the charges are sustained, the officer may be deprived of his office, and the court may enter a judgment for \$100 in favor of the complainant, and for his costs of suit. But this act, so far as it provides for the removal and punishment of municipal officers for malfeasance in office, is inconsistent with the provisions of section 811 of the municipal corporation act, passed March 13, 1883, (St. 1883, p. 266,) which reads as follows: "No officer of such city shall be interested, directly or indirectly, in any contract with such city, or with any of the officers thereof in their official capacity, or in doing any work or furnishing any supplies for the use of such city or its officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and, if audited and allowed, shall not be paid by the treasurer. Any

willful violation of the provisions of this section shall be a ground for removal from office, and shall be deemed a misdemeanor, and punished as such." The act of March 30, 1874, (St. 1873-74, p. 911,) provides for a judgment of removal from office, and a judgment in favor of the complainant for \$100. The act of March 13, 1883, provides for a judgment of removal, and conviction of a misdemeanor, to be punished as such. Manifestly the remedy and penalty provided in the former act are different from those provided in the latter act. This being the case, the latter act repealed the former, and the proceeding must be dismissed. *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. Rep. 757. It is claimed by respondent that the case just cited was overruled in *Wickersham v. Brittan*, 93 Cal. 34, 28 Pac. Rep. 792, and 29 Pac. Rep. 51. In this he is mistaken. The only matter decided in the *Wickersham* Case germane to the present inquiry was that the decision in *Fraser v. Alexander* was obiter dictum in so far as it held that the act of March 30, 1874, was repealed by the provisions of the constitution of 1879, but nothing was said in that case impairing the decision in *Fraser v. Alexander* as to the effect of section 55 of the county government act upon the act of March 30, 1874. The judgment is reversed, with directions to the court below to dismiss the proceeding.

We concur: GAROUTTE, J.; HARRISON, J.

(97 Cal. 362)

CROSSMAN v. LESHER. (No. 14,762.)

(Supreme Court of California. Feb. 25, 1893.)

MUNICIPAL OFFICER—REMOVAL—ACCUSATION—BY WHOM PRESENTED.

Pen. Code, § 889, providing that when proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation in writing, as provided in sections 758 and 772, does not authorize a private person to file an accusation in writing for the removal of a city trustee for official misconduct in leasing a building and letting teams to the city, and collecting pay therefor from the latter, since section 772 provides for proceedings on such accusation for "charging and claiming illegal fees for services rendered or to be rendered in his office," or neglect "to perform the official duties pertaining to his office;" and for other willful or corrupt misconduct the accusation must be presented by the grand jury, as provided in section 758.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by Crossman against Leshner for removal of defendant from the office of trustee of the city of San Bernardino on account of willful misconduct in office. From a judgment for defendant, plaintiff appeals. Affirmed.

E. Crossman and Harris & Gregg, for appellant. Rolfe & Freeman and Hargrave & Belcher, for respondent.

PATERSON, J. The charges of the plaintiff, in his accusation filed herein, are of the same nature as those referred to in *Crossman v. Kenniston*, 32 Pac. Rep. 448, v.32p.no.5—29

(No. 14,816, this day filed.) By the accusation the plaintiff herein sought, as in the *Kenniston* Case, to remove the defendant from his office as city trustee. The matter was heard before another department of the superior court. Judgment was entered in favor of defendant for his costs, and plaintiff has appealed.

Counsel for appellant herein—counsel for respondent in No. 14,816—rely upon a proposition not presented in the other proceeding. They claim that under section 889 of the Penal Code plaintiff is authorized to commence and prosecute this proceeding. That section reads as follows: "When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information in writing, as provided in sections 758 and 772." We see no merit in this contention. The section referred to simply provides that proceedings for removal of public officers may be commenced by either an accusation or an information, as provided in sections 758 and 772. Section 772 provides for proceedings in the superior court upon an accusation in writing, filed by any person against any officer, for "charging and claiming illegal fees for services rendered or to be rendered in his office," or neglect "to perform the official duties pertaining to his office." It is not claimed in this case that the defendant charged or collected illegal fees, or that he has refused or neglected to perform any official duty. The accusation charges the defendant with an entirely different kind of misconduct in office. When the proceedings are for any willful or corrupt misconduct in office, other than such as are mentioned in section 772, they must be commenced by accusation presented by a grand jury, as provided in section 758. It is only when the misconduct complained of consists in charging and collecting illegal fees, or failure or neglect to perform the official duties imposed upon the officer by law, that the prosecution may be had upon the complaint of an individual.

Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(97 Cal. 411)

HAAS v. WHITTIER et al. (No. 19,020.)

(Supreme Court of California. Feb. 25, 1893.)

INSOLVENCY—PREFERENCES—JUDGMENT NON OBSTANTE VERDICTO.

1. Insolvent act of 1880 (section 55) forbids an insolvent to make any preference by transfer, and provides that any transfer of property by such insolvent, not made in the ordinary course of business, shall be prima facie evidence of fraud. *Held*, that the prima facie presumption of fraud and preference may be overcome by the uncontradicted evidence of the insolvent and the agent of the creditor who acted in the matter of the transfer, showing that the transfer was made in good faith, and that there was no intent to make or secure any preference over other creditors; the question of intent in such case being one of fact.

2. In an action by the assignee of an insolvent attacking a transfer by the insolvent to a creditor on the ground that it was a fraudulent preference, the jury returned a general



verdict for plaintiff, and found specially that the transfer was not made in the usual course of business; that it was not made to give the creditor any preference; that such creditor had no reasonable cause to believe that the transfer was made to prevent the insolvent's property from coming into the hands of the assignee, or to prevent it from being distributed ratably among the creditors. *Held*, that judgment should be entered for defendant, notwithstanding the general verdict; Code Civil Proc. § 625, providing that, where special findings are inconsistent with a general verdict, the former control.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Abe Haas, assignee in insolvency of the estate of Edgar Sessions, an insolvent debtor, against W. F. Whittier, W. P. Fuller, Jr., F. N. Woods, Bryant Howard, and I. A. Lothian, surviving partners of the firm of Whittier, Fuller & Co. From an order granting a new trial and refusing defendant's motion for judgment because the general verdict for plaintiff was not supported by the special findings under Code Civil Proc. § 625, providing that, where special findings are inconsistent with a general verdict, the former control, defendants appeal. Reversed.

The following are the instructions referred to in the opinion:

The part of plaintiff's fourth instruction given is as follows: "In determining the question of whether Whittier, Fuller & Co. had reasonable cause to believe that the debtor was insolvent at the time he made the assignment, you will consider all the facts and circumstances by which the parties were surrounded, so far as known to them, or either of them, or to their agent, who was negotiating the assignment. It is not necessary that positive knowledge of the insolvency of the debtor should exist; neither is ignorance of the law any excuse, as all men are presumed to, and must, know the law. If you believe that the debtor was at the time in such a condition financially that he could not pay his debts from his own means as they became due, and the said Whittier, Fuller & Co. knew that fact, or had reasonable cause to believe it, and under such circumstances obtained a transfer of the property mentioned in the complaint in payment of their claim, then you should find for the plaintiff." The court refused to give the remainder of such instruction, which was as follows: "And the fact that either Sessions or said Whittier, Fuller & Co., or its agent, may have supposed at the time that the debtor would be able, in the course of time, to work out of debt, does not make any difference in the case. The solvency or insolvency of the debtor is not a question of the possibility of his paying off his debts in the course of time, but it is a question of his ability to pay as they become due in the ordinary course of business, and the fact that a debtor transferred a large portion of his property to one creditor without making provision for an equal distribution of its proceeds to all of his creditors, and especially when the transfer is made not in the due course of business, and is made under the pressure of the creditor, these are all facts and circum-

stances to be considered by you in determining whether the assignment was made or intended as a preference of said Whittier, Fuller & Co., and also in determining whether they had reasonable cause to believe at the time that he was insolvent."

The following is plaintiff's fifth instruction, which was allowed: "You are further instructed that a transfer of a considerable portion of his property by Sessions to said Whittier, Fuller & Co., the property being of a different character from that which Whittier, Fuller & Co. were accustomed to deal in, and made for the purpose of satisfying a debt, is not a transfer made in the usual and ordinary course of business; and a transfer not in the ordinary course of business is *prima facie* evidence of fraud."

Plaintiff's sixth instruction, as follows, was refused: "It does not alter the case that Whittier, Fuller & Co. acted in this matter through an agent, for, although they were not personally present, yet, having acted through an agent, and especially as they have received the benefit of the assignment, it is in law the same as if they had acted personally in the matter. And, furthermore, as a matter of law, Whittier, Fuller & Co. had knowledge of everything known to their agent, and whatever the agent had cause to believe they had cause to believe; and, therefore, if you find that the agent knew, or had reasonable cause to believe, that Sessions was insolvent at the time said transfer was made to said firm, and that such transfer and payment was made with a view to prevent said property from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of the insolvent act, such transfer is void, and you should find for plaintiff for the amount stipulated, to wit, \$356.99, with interest thereon at the rate of 7 per cent. per annum from the 26th day of November, 1887."

Defendants' first, third, fourth, and fifth instructions were as follows: (1) "The question of fraudulent intent is one of fact, and not of law. The jury are exclusive judges of all questions of fact." (3) "You are further instructed, in this case, no actual fraud is charged against these defendants, but the complaint simply charges that the assignment in question was made to defendants by Sessions, and was accepted by these defendants with a view to give a preference to defendants, with a view to prevent the property so transferred from coming to the assignee of said Sessions in insolvency, and to prevent the same from being distributed ratably among his creditors, and to defeat the objects of the insolvent act of 1880; and that the defendants had reasonable cause to believe, and knew, that said Sessions was insolvent, and that the transfer was made for the purpose mentioned. Now, if you believe from the evidence that defendant [had not reasonable cause to believe as charged and] had no other intent than to collect an honest debt due them by Sessions, and had no intent of defeating the insolvent law, then you must find for

the defendants." Said instruction being modified by the court by inserting in said instruction the words inclosed in brackets. (4) "Even if you believe from the evidence that Sessions was insolvent at the time of the transfer, and even if he did make the transfer with intent to prefer the defendants to other creditors, if you believe from the evidence that the transfer was made for a valid debt to defendants, and that there was no intent on the part of the defendants to defeat the operation of the insolvent law, [and no reasonable cause on their part to believe as charged,] you must find for the defendants." Said instruction being modified by the court by inserting in said instruction the words inclosed in brackets. (5) "If you believe from the evidence that Sessions did not transfer the property with the view or intention to give preference to defendants, it makes no difference what were the views or motives of the defendants in receiving the property, or what they suspected or believed about the solvency of Sessions; and you should find for the defendants."

H. A. Barclay, for appellants. Graves, O'Melveny & Shankland, and Chapman & Hendrick, for respondent.

**PER CURIAM.** This is an action brought to recover a sum of money, which the plaintiff, as assignee of an insolvent debtor, Edgar Sessions, claims should be paid him in his representative capacity by the defendants, W. F. Whittier et al., by reason of their having received from the insolvent, and converted to their own use, certain goods delivered to them in satisfaction of a debt due the defendants by the insolvent. The proposition upon which the plaintiff based his claim for a recovery is that the defendants had received the property by a transfer made by the insolvent with the intention of giving them a preference over his other creditors. The cause was tried before a jury, and they gave a general verdict for the plaintiff, but found "No" upon the special issues submitted to them. The special issues were: (1) At the time that Edgar Sessions transferred to Whittier, Fuller & Co. the goods described in the complaint, was he able to pay his debts from his own means as they became due? (2) Was the transfer of said goods by Sessions to Whittier, Fuller & Co. made in the usual and ordinary course of business of said Sessions? (3) Did Sessions make said transfer with a view to give a preference to said Whittier, Fuller & Co.? (4) Did Whittier, Fuller & Co., at the time they received said transfer, have reasonable cause to believe that it was made with a view to prevent Sessions' property from coming to his assignee in insolvency? (5) Did Whittier, Fuller & Co., at the time of said transfer, have reasonable cause to believe that the transfer was made to prevent said property from being distributed ratably among his creditors? The defendants moved the court for a judgment in their favor, because the general verdict was not supported by the special findings, under section 625, Code Civil Proc. The plaintiff made a motion for a new trial.

and the court below considered the two motions together, refused that of the defendants, and granted that of the plaintiff, from which rulings this appeal is taken.

The real questions involved in the case are whether the trial court was justified in believing, upon the evidence, and contrary to the view of the jury, that the preference denounced by section 55<sup>1</sup> of the insolvent act had been given, and whether such errors of law had been committed on the trial as warranted a new trial. It would have been useless to have entered judgment for the defendants on the special issues found by the jury if the trial court had not considered the evidence sufficient to support the special findings of the jury, or had believed itself to have committed errors of law on the trial; for, immediately following the order for judgment for defendants, the court would, by granting a new trial, have rendered the judgment inoperative. The jury found, as it was proper they should, under the evidence, that the transfer was not made in the usual and ordinary course of business. This, of course, made the transaction *prima facie* a preference not allowed by section 55 of the insolvent act. But they also found, as we think justifiably from the evidence, that neither of the parties had in fact any intention to violate the law denouncing a preference in favor of one creditor over others. If the court was not right in coming to a different conclusion from the evidence, then it could not, in the exercise of its discretion, grant a new trial on that ground. As we look at the evidence, it is all one way,—that both parties were desirous that all creditors should share alike. This is shown in part by the fact that both of them were willing and desired that a general assignment should be made for all creditors, and were prevented from taking this course by the advice of an attorney, who thought

"Insolvent Act of 1880, (section 55): "If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure, payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of, this act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of fraud."

It could not be done. The creditor's agent wished to secure his debt; the debtor wished to settle it in some way, and preferred to make a general assignment; and for this, also, the creditors were willing, if they were advised it could be done; but they did not proceed in that way, as they were advised to the contrary by an attorney at law. It is clear that there was no intent to make or to secure a preference over other creditors. The main idea of the insolvent was to secure all his creditors alike. He had his choice to make an assignment, which, under the advice he had, he was justified in not doing, to be attached, which would render his chance to pay all his creditors worse, or to pay his creditor in goods, as he had not the money. This shows the contrary of any intention on his part to make a preference of one creditor over another. The truth is, he seems to have been very anxious to do the best he could for all his creditors. The creditor had no ground to believe that the debtor intended to make any preference such as the law denounced.

The declarations of the insolvent and the agent of Whittier, Fuller & Co. are directly to the point that they did not have the least intention of preferring any creditor. The insolvent was a witness for the plaintiff in this action. He is contradicted in his material statements by no witness. And the evidence of both these witnesses was not on this trial given orally in the presence of the court, but was, by agreement, read from the transcript of the case made up when it was in this court on a former appeal. 25 Pac. Rep. 917. There was nothing, then, in their manner or appearance (as the court did not have them before it) which could have influenced that tribunal to disbelieve their positive statements, and we perceive nothing in the circumstances to raise any such disbelief. The presumption, *prima facie*, which the law makes from the unusual nature of the transfer is entirely done away with by the testimony of these two uncontradicted witnesses, and the jury was right in its special findings. The court below had, therefore, no legal ground to doubt the correctness of their conclusion, and should not have done so.

The question then recurs, what, if any, were the errors in law committed by the trial court? That tribunal should not have directed a verdict for the plaintiff, as the respondent contends it should, for the question of intent to make a fraudulent preference, denounced by the statute, was one of fact. *Bull v. Bray*, 89 Cal. 298, 26 Pac. Rep. 873. And, as we have seen, there was no evidence except the *prima facie* presumption, which was entirely done away with, to support any such theory of the case as the plaintiff contends for.

The next contention of respondent in support of the court's action is that the court erred in striking out a portion of the fourth instruction. The matter which it was proper should be contained therein as an instruction in the part stricken out was fully covered by the fifth instruction for the plaintiff and the part of the fourth given. The matter concerning the responsibility of Whittier, Fuller

& Co. for the acts of their agent in the plaintiff's sixth instruction was sufficiently explained in the plaintiff's fourth instruction granted, and the balance of what was refused was given by the court in the first instruction for plaintiff. We perceive no objection to the first instruction given for defendants. It is sustained by *Bull v. Bray*, 89 Cal. 298, 26 Pac. Rep. 873. Neither do we perceive any valid objection to the third and fourth instructions asked and given for defendants. The fifth instruction is in accordance with the law of this case, as settled by the appellate court in 87 Cal. 613, 25 Pac. Rep. 917.

It is further claimed that the jury found contrary to the fourth instruction given by the court for the plaintiff, and therefore the new trial should have been granted. Taking all the instructions together, such was not the effect of the findings by the jury. They were not told by the instruction last mentioned to find for the plaintiff at all events, but that, if they believed certain facts existed, or things had been done by defendants, they would find for plaintiff; and the basis on which this instruction is placed as one element necessary to show a wrongful intent is, did defendants know, or have reasonable cause to believe, the debtor was insolvent when they took the transfer? But the insolvency of the debtor, known to the creditor when he took the transfer, was not the only condition on which the jury were told that they could find for plaintiff. Taking all the instructions together, and interpreting them fairly, the jury had the right, if the evidence warranted, to find that the defendants and the debtor had no intent to make a preference in violation of section 55 of the insolvent act. This they did find in effect, and in so doing they did not violate the instructions of the court. We think that the court below should not have granted a new trial, but should have rendered judgment for the defendants on the special findings, and therefore the order granting a new trial is reversed, and the court below directed to enter judgment for defendants as herein indicated.

(97 Cal. 388)

NORTON v. ATCHISON, T. & S. F. R. CO.  
(No. 14,614.)

(Supreme Court of California. Feb. 25, 1893.)

JUDGMENT BY DEFAULT—FAILURE TO SERVE SUMMONS—SETTING ASIDE ON MOTION—OFFER TO PLEAD—AFFIDAVIT OF MERITS—EVIDENCE.

1. Code Civil Proc. § 473, providing that a court may relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect," has no application to a motion to set aside a judgment by default for want of service of summons, and hence such motion need not be accompanied by any affidavit of merits, nor need defendant offer to appear, and plead to the merits.

2. Where a judgment is entered by default against a nonresident defendant, who has not been personally served with summons within this state, the court has power to set it aside on a motion in the same action, if such motion is made within a reasonable time, and an independent action need not be brought.

3. Ten days after the rendition of such judgment is a reasonable time within which to file such motion.

4. Where, on the hearing of such motion, the evidence is conflicting as to whether or not defendant was served within the state, a finding that such service was not made will not be disturbed.

In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by C. V. Norton against the Atchison, Topeka & Santa Fe Railroad Company. After judgment for plaintiff by default, defendant appeared, and moved to set aside the judgment on the ground that there was no legal service of summons. An order granting said motion was affirmed in department. Affirmed.

William Fuller, for appellant. A. Brunson and Hunsaker, Britt & Goodrich, for respondent.

McFARLAND, J. This is an appeal by plaintiff from an order of the superior court granting a motion of defendant to quash the service of summons, to set aside and vacate the default of defendant, and to set aside and vacate the judgment which had been entered in the case in favor of plaintiff. The appeal was heard in department 2, and the order of the court below was there, upon an opinion prepared by Belcher, C., affirmed. 30 Pac. Rep. 585. Upon a petition by appellant, urging strongly that there was no authority in the court to grant said motion, a hearing was ordered in bank. After a further and full consideration of the point made, we are satisfied that a correct conclusion was reached in department. The respondent is a corporation formed under the laws of Kansas, and having its principal place of business in, and being a resident of, that state. The action, which is in personam, was commenced in San Diego county, and the sheriff of that county returned that he had personally served the summons on the 19th of November, 1890, on K. H. Wade, general manager of defendant, "by delivering to said defendant personally, in the county of San Diego, a copy of said summons," etc. No appearance having been made by respondent within 10 days, its default was entered by the clerk on the 1st day of December, 1890. On the 3d day of December, 1890, judgment was entered by the court against defendant, the judgment reciting that defendant had been regularly served with summons. Within 10 days thereafter, to wit, on December 12, 1890, respondent, by its attorneys, served and filed a notice that "the defendant in the above-entitled action will appear for the purpose of this motion only, and for no other purpose, and will move the court to set aside and recall the execution heretofore issued in this case, and to set aside the judgment and default heretofore entered on the 1st day of December, 1890, and to quash service of summons herein, upon the ground that said service is not such as is authorized by law, and that said court has no jurisdiction of defendant to enter said default or judgment, and that the same is void." Affidavits were filed by both parties on the hearing of this mo-

tion, but appellant objected to the entertainment of any such affidavits on the part of respondent. On the 23d of January, 1891, the court granted a motion quashing the service of the summons, vacating the judgment, etc. From that order plaintiff appeals.

It is contended strenuously by appellant that such a motion can be maintained only when based upon section 473 of the Code of Civil Procedure; that this motion is not based upon that section, and is not accompanied by any affidavit of merits, which affidavit has been held to be necessary when proceeding under the section; and that under that section a party can be relieved only upon an offer to appear and plead to the merits. Appellant relies on this point upon *People v. Harrison*, 84 Cal. 608, 24 Pac. Rep. 311; *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197; *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66, and some other cases cited. But the cases cited go no further than to hold that a motion to vacate a judgment cannot be made after the expiration of six months, or, with respect to one ground for setting aside the default, after one year, unless it be void on its face. The recent case of *Jacks v. Baldez*, (Cal.; filed December 28, 1892,) 31 Pac. Rep. 899, might also be cited in support of what appellant deems to be the correct position. But those authorities relate to cases which come clearly within, or should have been brought under, the provisions of said section 473. The main provision of that section is that a court may relieve a party from a judgment taken against him "through his mistake, inadvertence, surprise, or excusable neglect;" and it is quite clear that the provision just quoted has no application to the ground upon which respondent moved in the case at bar. Defendant here is not asking relief from its neglect, or mistake, or default of any character. Its contention is that the court has no jurisdiction over it, and no power to compel it to answer to the action. It does not ask to be allowed to come in and answer, but contends that in its situation it cannot be called upon to answer; therefore there can be demanded of it no affidavit of merits. In the cases cited the parties making application to set aside the judgment confessed some neglect or misconduct from which they sought to be relieved, and thus come clearly within the provisions of said section, and, of course, were compelled to comply with the provisions of the section under the construction which the court had given them. Moreover, they were residents of the state, and within the territorial jurisdiction of her courts; while in the case at bar respondent is a non-resident, and beyond such jurisdiction, except so far as the statute of this state can provide, and has provided, for jurisdiction under special circumstances. It was clearly, then, the duty of the court to quash the service of the summons, when it appeared to it that the return of such service was false; and the vacating of the judgment was an incident which necessarily followed, provided that the proceeding by motion by which this result was sought to be accomplished was a proper one. In

Freeman on Judgments (commencing at paragraph 105) there is a chapter on "Vacating judgments under statutes," and various statutes of different states, similar to section 473 of our Code, are reviewed, and the distinction between proceedings under those statutes and proceedings independent of them is stated; and in paragraph 108 the author says: "In all cases an affidavit of merits must be made and filed, except where it appears that the court had never acquired jurisdiction of the moving party, and that its judgment against him is void; but in this class of cases he is entitled to relief independently of those statutes." In *Bell v. Thompson*, 19 Cal. 707, the court makes this same distinction,—section 68 of the practice act being at the time of that decision the same substantially as the present section 473 of the Code; and also in *People v. Greene*, supra, in *Society v. Thorne*, 67 Cal. 53, 7 Pac. Rep. 36, and other cases. See, also, *Ladd v. Stevenson*, 112 N. Y. 325, 19 N. E. Rep. 842, and *Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. Rep. 887. In *Cowles v. Hayes*, 69 N. C. 410, the court, in discussing a motion similar to that in the case at bar, say: "The motion is not made under section 133, Code Civil Proc. The plaintiff does not ground his claim to relief on his own mistake, inadvertence, surprise, etc., but he puts it on the ground that the judgment of which he complains was irregular, and against the course and practice of the court."

Appellant contends that there should have been an independent action brought to set aside the judgment, but we do not think so. The general common-law rule is that courts have power over their judgments during the entire term at which they are rendered, and may vacate them on motion. *Freem. Judgm.* § 90 et seq. Many of the courts have vacated judgments after the expiration of the term, but it was established in California that such jurisdiction was exhausted at the close of the term, unless kept alive by some motion or appropriate proceeding during the term. *Bell v. Thompson*, 19 Cal. 706; *Shaw v. McGregor*, 8 Cal. 521; *Robb v. Robb*, 6 Cal. 21; *Baldwin v. Kramer*, 2 Cal. 582. Under our present system terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time, (*People v. Greene*, supra,) and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for any motion; but, however that may be, there is no question in the case at bar as to reasonable time, because the motion was made within 10 days after the judgment. It is admitted that a motion to vacate a judgment is a direct, and not a collateral, attack; and if, as we hold, a motion was the proper proceeding in this case, of course any fact going to show the invalidity of the judgment could be presented at the hearing of such motion. Where a return shows that a nonresident was personally served with summons within the state, and it is made to appear to the court that such return was false, it would be strange if, within a reasonable time, the court could not,

upon application, set aside the service, or the false return of service, and vacate the judgment. There is no reason why, in such a case, the nonresident should be put to the necessity of an independent action. We hold, therefore, that, where a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons, and vacate the judgment. This is as broad a statement of the rule as the facts of this case require; and, so holding, we think that the order of the court below should be affirmed.

With respect to the question of fact whether or not the respondent in the case at bar was served within the state, the evidence before the lower court was conflicting, and we would not be warranted in disturbing the finding of the court as to that fact. Upon this point we are satisfied with the said opinion prepared by Commissioner Belcher in department. The order appealed from is affirmed.

We concur: PATERSON, J.; DE HAVEN, J.; HARRISON, J.

BEATTY, C. J., (concurring.) Before terms of court were abolished it is clear that a default judgment entered upon a false return of personal service of summons could have been set aside upon motion made within the term. The abolition of terms cannot be held to have abolished the remedy by motion, but only the limitation of time within which the motion must be made; and if, under section 473, Code Civil Proc., a defendant may be relieved on motion from a default judgment taken against him through his mistake or excusable neglect, provided his motion is made within a reasonable time, not exceeding six months, a fortiori he should be relieved on motion made within the same time, when he has been guilty of no neglect. None of the decisions cited are in conflict with this view. They merely hold that judgment will not be vacated upon motion made after the lapse of the prescribed period unless it is void upon its face, which is quite consistent with the proposition that a motion made within the statutory period may be granted as well when the defendant is wholly without fault as when he has been guilty of neglect, mistake, etc. As to the conditions upon which the order should be made, the statute only requires the imposition of such terms as may be just; and when, as in this case, the court finds that the defendant has never been brought within its jurisdiction, it would not be just to require it to answer to the merits, or to make an affidavit of merits. Upon these grounds I concur in the judgment.

(97 Cal. 384)

DARBY v. ARROWHEAD HOT SPRINGS HOTEL CO. (No. 19,101.)

(Supreme Court of California. Feb. 25, 1893.)

PAROL EVIDENCE.

In an action against a corporation to recover money it appeared that plaintiff had

been a stockholder in the corporation, and had made advances to it to the amount sued for; that he had transferred his stock and interest in defendant corporation to other stockholders therein by a written instrument which recited that he sold "all right, title, and interest of whatsoever nature in and to all property \* \* \* hitherto and now belonging to" defendant, including all "claims and advances." *Held*, that parol evidence was admissible to show to whom the claim for "advances" mentioned in the instrument belonged, and that they were those which formed the basis of the action.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by R. R. Darby against the Arrowhead Hot Springs Hotel Company for money loaned. From a judgment for defendant, plaintiff appeals. Affirmed.

Holloway & Kendrick and Ray Billingsley, for appellant. Chapman & Hendrick and H. C. Rolfe, for respondent.

PER CURIAM. The plaintiff, R. R. Darby, brought this action to recover a certain sum of money from the defendant, an hotel corporation, claimed by him to have been loaned to the corporation. The defendant denied all the allegations of the complaint, except that the defendant was a corporation; and for a further and separate defense alleged that before the commencement of this action the plaintiff had sold and transferred to other parties, every indebtedness due by the defendant to the plaintiff, which included the present demand; and that at the time the action was brought the plaintiff was not the owner or holder of any demand against the defendant. The court below found all the allegations of the answer to be true, and rendered judgment in favor of defendant for costs, etc. From that judgment, and from an order refusing a new trial, this appeal is taken.

The main ground assumed by the plaintiff and appellant for a reversal of the judgment and order is that the court erred in the admission in evidence of a certain deed from the plaintiff to three other persons, who were stockholders in the hotel corporation. The objection made was that the evidence proffered was irrelevant and immaterial, and not responsive to any of the pleadings in the case. If it is sufficiently appears from the recitals of this instrument that the plaintiff's claim against the hotel corporation for loaned money was transferred and assigned to the three persons named in that instrument as transferees, then, of course, the deed was relevant and material to the issues raised in the pleading. To our minds the recitals above adverted to, taken in connection with the circumstances of the transfer proved by the plaintiff himself, make it clear that it was intended by that instrument to sell and transfer to the three parties above named the demand against the hotel corporation, which is the basis of plaintiff's action. The language describing a part of the property, and which affects the matter in hand, runs thus: "And also all right, title, and interest of whatsoever nature in and to all property, real, personal, and mixed, in San

Bernardino county, hitherto and now belonging to the Arrowhead Hot Springs Hotel Company, a corporation, including all furniture and fixtures, insurance, papers, stock, books of account, bills receivable, accounts, claims, and advances, business and good will." The plaintiff had shown by evidence that he was a stockholder in the corporation; and that he had made to it loans and advances to the amount he sued for; that the other stockholders, four in number, had also made such loans, and that he had sold his stock and interest in the hotel company property by instrument of writing to the three grantees in the deed. The instrument in question was certainly not one by the terms of which the transferees and purchasers were selling any stock or claims for the money they had loaned or advanced. The hotel corporation did not have and could not have belonging to it any shares of stock which it could sell or transfer; neither could such a corporation have any claims for money advanced or loaned. Therefore it is very clear that the only other person or party to this instrument who had any stock or claim for advances, which he transferred or could transfer, was the plaintiff. It does not appear from the language of the instrument, therefore, with absolute certainty, to whom the "advances" mentioned in the deed belonged; but, taking the evidence of the plaintiff that he had made advances of money as a stockholder, and that of the transferees of the plaintiff's interest in the hotel company, it is plain that the advances intended to be transferred were those which formed the basis of this action. The argument suggested by the appellant against this view of the matter is that the language of the deed as affecting these "advances" is too plain to admit of any explanation whatever; that it is there distinctly asserted that these advances belonged to the hotel company, and therefore no explanation by parol could be admitted which could vary the meaning of that language. But, as we have seen, such an hotel corporation could not, according to the rules of law, advance money to any one, as a bank or commission merchant could; therefore it appears on the face of the instrument itself that such advances made to some one could not belong to the corporation. "Courts cannot adopt a construction of any legal instrument which shall do violence to the use of language or the rules of law." 2 Pars. Cont. (7th Ed.) p. 495. This being so, it seems pertinent to show in this matter what advances were transferred by the deed, and, as it were, identify to whom they belonged when the instrument was executed, and thus to explain this language of the contract by reference to the circumstances under which it was made. Code Civil Proc. §§ 1647, 1856-1860; *Brewster v. Lathrop*, 15 Cal. 21; 2 Pars. Cont. (7th Ed.) p. 550. It will be observed here, also, that the corporation against which this suit is brought is not a party to the instrument offered in evidence. The three stockholders to whom the transfer was made, and the fourth, who made it, are the sole parties. The fifth stock-

holder is not a party in privity with them in the matter. It would seem, therefore, that the strictness of the rule against the admission of parol evidence to explain this contract should be relaxed in a case like this. "In such cases much of the reason which prohibits the introduction of extrinsic evidence falls, and with it the prohibition falls." 2 Pars. Cont. (7th Ed.) p. 687. We therefore think that the deed and the evidence explanatory of it were admissible. There being no prejudicial error shown by the record, the judgment and order are affirmed.

(5 Wash. 624)

**SPOKANE ST. RY. CO. v. CITY OF SPOKANE**  
KANE et al.

(Supreme Court of Washington. Jan. 31, 1893.)

**MUNICIPAL CORPORATIONS — CONTROL OF STREETS  
—INTERFERING WITH STREET RAILROAD.**

1. Spokane City Ordinance, authorizing the street-railway company to construct its tracks in the streets, provided that "nothing herein shall be deemed or construed to mean that the city relinquishes any of its rightful authority over the streets, \* \* \* but the city \* \* \* shall have \* \* \* full power \* \* \* to enter upon said streets, or any part thereof, for \* \* \* the construction of sewers or other public works." *Held*, where the company constructed its tracks in the center of a street, that the city could thereafter construct a sewer in the center of the street, even though there was room on either side of the track to permit its construction without interfering with the railway.

2. In a proceeding by a street-railway company to restrain a city from building a sewer in the center of the street occupied by plaintiff's track, the allegation of the complaint relied on to show that defendant was proceeding unreasonably in the prosecution of the work, and unnecessarily interfering with plaintiff's rights, was that "said sewer can be constructed in the center of said street, if necessary, without injuring plaintiff's property, and without interfering with the operation of plaintiff's street railway." *Held*, where there was no allegation of defendant's proceeding wantonly or maliciously, that the presumption that it was proceeding properly was not negatived, and the complaint failed to state a cause of action.

Appeal from superior court, Spokane county; W. G. Langford, Judge.

Action by the Spokane Street-Railway Company against the city of Spokane and R. A. Jones. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Turner, Graves & McKinstry and Kin-naird & Happy, for appellant. P. F. Quinn, City Atty., for respondents.

HOYT, J. Plaintiff brought an action against the defendants, and sought to restrain them from proceeding with the construction of a certain sewer, for the reason that in the prosecution of the work by the contractor, in accordance with the plans and specifications therefor, the railway of the plaintiff, and the operation of the same, would be greatly interfered with. The superior court sustained a demurrer to the complaint, and, plaintiff electing to stand thereon, judgment of dismissal was

rendered, from which it has prosecuted this appeal.

Two questions are presented by the record for our decision: First, had the city the right to construct its sewer along the street in question, in the center thereof, notwithstanding the fact that there was room upon either side of the track of the plaintiff to permit of its construction without interfering therewith? and, secondly, if it had such right, were the allegations of the complaint sufficient to show that in the prosecution of the work, as proposed, the rights of the plaintiff would be unreasonably interfered with?

As to the first question above suggested, it may be stated, as a general proposition, well established by the authorities, that a city has absolute control over its streets, and every part thereof, for the purpose of constructing sewers, or making other improvements which the welfare of the city demands; and unless there is some special allegation which shows that a different rule prevails as to the street in question, this general rule must be held to establish the affirmative of said proposition. In our opinion the grant of a franchise to a street-railway company, to construct and operate its road along any highway of the city, would be subject to this general rule, even although there was no reservation of any rights of the city in the ordinance by which such franchise was granted. But we are not called upon to decide as to this, for the reason that, in the ordinance by which the plaintiff was authorized to construct its said road, there was an ample reservation of the rights of the city. Section 10 of said ordinance is substantially as follows: "Nothing herein contained shall be deemed or construed to mean that the city relinquishes any of its rightful authority over the streets, or any parts of them; but the city, by its agents, officers, or contractors, shall have and retain its full power and authority to enter upon said streets, or any part thereof, for the laying of gas pipes, water pipes, the construction of sewers, or other public works." And it will be seen therefrom that the rights of the city are fully protected, and that the right to thus control its streets must be held to have been preserved as well in that portion thereof covered by the tracks of the plaintiff as in any other. If such had not been the intention, there would have been no need of the provision that the rights granted the plaintiff were subject to the rightful authority of the city to enter upon said streets, or any part thereof, for the construction of sewers, etc. It is clear that without such reservation the city could enter upon the parts of the street not covered by the tracks, and, to give any force to such reservation at all, it must be held to refer to that portion of the street thus covered. The city, then, had the right to construct the sewer in the center of the street, as it was proposing to do.

The allegation relied upon by the appellant to show that the city was proceeding unreasonably in the prosecution of the work, and therefore unnecessarily interfering with the rights of the plaintiff, is



the following: "The plaintiff further alleges that said sewer can be constructed in the center of the said street, if necessary, without injuring the plaintiff's property, and without interfering with the operation of plaintiff's said street railway." It is claimed on the part of the appellant that this allegation, being taken as true, establishes the fact that it is not necessary that the city should interfere with the rights of the plaintiff at all in the construction of said sewer. In determining the effect to be given to this language, the allegations or want of allegations in the complaint, as a whole, must be taken into consideration. In such complaint there is no allegation tending in the least degree to show any bad faith on the part of the city in its determination to construct said sewer in the manner proposed. There is no allegation that in doing the acts which were sought to be restrained the city was intending to wantonly or maliciously interfere with the rights of the plaintiff. If such allegations had been in the complaint, though they would perhaps have been, to a certain extent, but legal conclusions, they might have aided the contention of the appellant as to the construction which should be put upon the language above quoted; but, in their absence, we must construe such language as it reads, and, if there is any doubt as to the proper construction, that most unfavorable to the plaintiff must be taken. The only fact alleged in this clause is that the work can be done without interfering with the rights of the plaintiff, and this allegation alone is relied upon to show that the plan under which said sewer was being constructed was unreasonable. That the action of the city council in determining upon such plans of construction, in the absence of any allegation of malice or wantonness in coming to such determination, prima facie established the fact that the plan proposed was a reasonable and proper one, seems to us clear; and we are also satisfied that such presumption is not overcome by the allegation that the work can be done without thus interfering with the rights of the plaintiff. Under these circumstances, this allegation must be construed as though the language used was that it was possible to construct the sewer without interfering with the rights of the plaintiff, but the fact that the work might possibly be done in some other manner than the one proposed would not establish the fact that such proposed plan was unreasonable or improper. It is contended on the part of the appellant that, if such allegation had been that the work could be practicably done in some other than the way proposed, the addition of the element of practicability would have been simply a legal conclusion. In a certain sense, this is no doubt true, and in such a sense the allegation that the work can be done at all is a legal conclusion; but, in another and ordinary sense, such allegation may be said to be one of fact, or at least such as good pleading allows to be so alleged. There is hardly any pleading but what is full of allegations which, when critically analyzed, are nothing more than legal conclusions.

Conclusions of law and allegations of fact are often so intimately connected that it is almost impossible to allege the one without including more or less of the other. To allege that a certain thing can be done, if treated as an allegation of fact, is substantially different from an allegation, similarly treated, that the work can be practicably done. It follows that the presumption that the city was proceeding properly, and in such a manner as not to unreasonably interfere with the rights of the plaintiff, was not negatived by any allegation in the complaint, and that for that reason a cause of action was not stated. The demurrer was therefore rightfully sustained, and the judgment rendered thereon must be affirmed.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

(5 Wash. 518)

**STATE ex rel. CUMMINGS v. SUPERIOR COURT OF KING COUNTY et al.**

(Supreme Court of Washington. Jan. 16, 1893.)

**ACTION COMMENCED IN WRONG COUNTY—CHANGE OF VENUE—DEFENDANT'S AFFIDAVIT OF MERITS.**

1. Code Proc. § 162, provides that the fact that an action is commenced in the wrong county shall not prevent a trial in such county, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county. Held that, if a defendant files the affidavit as required, the court in the county in which the action is brought has no jurisdiction, and if it proceeds to try the cause a writ of prohibition will issue.

2. Where the defendant, at the time of demanding a change of venue, files an affidavit of merits, and a demand for a bill of particulars, and, on such bill of particulars being furnished him, files his answer, the statute is sufficiently complied with.

Petition by the state of Washington, on the relation of J. H. Cummings, against the superior court of King county and Hon. Richard Osborn, a judge of said court, for a writ of prohibition to prevent defendant from proceeding to the trial of a certain action. Writ granted.

C. E. Shepard, for relator. Hughes, Hastings & Stedman, for respondents.

HOYT, J. The defendant was not served in the county in which this action was commenced, nor was he a resident of that county, but, on the contrary, was a bona fide resident of the county of Pierce, in which service of process was made upon him. Such being the case, King county was not the proper county for the trial of the action. It is, however, provided in section 162, Code Proc., that such fact shall not prevent a trial of the cause in the county in which the action has been commenced unless the defendant, at the time he appears, and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county. It follows, as a necessary consequence, that upon such affidavit of merits being filed, and demand made, as required in said section, the cause cannot be tried in the court where the action has been commenced.

This provision, in our opinion, is equivalent to one which declared that such court should have no jurisdiction of the action for the purposes of trial. If the trial could not be had in that county, then the court had no jurisdiction for that purpose. Under these circumstances, if such court should proceed with the trial of the cause, it would be proceeding without jurisdiction, and, under the rule established by this court in the case of *North Yakima v. Superior Court of King Co.*, 4 Wash. 655, 30 Pac. Rep. 1053, should be prohibited from so doing. We are satisfied with the rule announced in that case, and do not think that the fact that advantage of the error in proceeding with the trial might be taken by the defendant upon an appeal from a judgment rendered in the cause takes this case out of the rule there announced. Such remedy by appeal is entirely inadequate, and cannot deprive the defendant of his right to have the court stopped from proceeding in a matter in which it has no jurisdiction.

It follows that, if the defendant has complied with the provisions of said section 162, he is entitled to the writ. In our opinion the record shows a substantial compliance with the provisions of such section. It is true that the defendant, at the time he demanded that the trial should be had in the proper county, did not demur or answer; but he filed an affidavit of merits, and a demand for a bill of particulars, and, upon such bill of particulars being furnished him, filed his answer in the action. If the section should be construed as contended for by respondents, a defendant would be deprived of the right to demand a bill of particulars, however necessary such might be to a proper preparation of his answer. To so hold would allow a plaintiff, by bringing his action in the wrong county, to deprive the defendant of a substantial right. In our opinion the section should be so construed as to make it available to defendant, if he seasonably invokes its aid, and, by filing a proper affidavit of merits, shows that he has a defense which will necessitate a trial. It is possible that, even after the filing of the demand and of the affidavit of merits, the court would be justified in holding the cause until the issues had been made up; but after such demand had been made, and the affidavit of merits filed, the right to try the case was taken from the court, and, at most, it could only hold it until it had been settled by the pleadings that there was an issue for trial. The writ of prohibition must issue as prayed for.

STILES and SCOTT, JJ., concur.

(5 Wash. 524)

**MESTERMAN v. HOME MUT. INS. CO. OF CALIFORNIA.**

(Supreme Court of Washington. Jan. 17, 1893.)

**INSURANCE—AGENTS—KNOWLEDGE OF ADDITIONAL INSURANCE.**

Plaintiff applied to an insurance company for insurance, and, on such application, several companies, including defendant, issued policies, and placed the same with the

company to which application was made for delivery to plaintiff. *Held*, that the latter company was agent for defendant and the other companies, and its knowledge of the additional insurance is chargeable to defendant.

Appeal from superior court, Spokane county; R. B. Blake, Judge.

Action on a policy of insurance by Albrecht Mesterman against the Home Mutual Insurance Company of California. Plaintiff had judgment, and defendant appeals. Affirmed.

Stott, Boise & Stott, for appellant. Thomas C. Griffiths, for respondent.

HOYT, J. Although there are some cases holding the contrary, we think the decided weight of authority, as well as the better reasoning, is in favor of the rule that an insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, or the application thereof, if, at the time that it was so issued, the fact of such violation was known to the company, or its duly-authorized agent. That the Northwest Fire & Marine Insurance Company had knowledge, at the time of the issuance of the policy by the appellant, of the existence of the additional insurance which it is alleged rendered it void, is made entirely clear by the proofs, and is in fact conceded; hence, under the rule above stated, a policy issued by it could not be avoided on account of such additional insurance.

It only remains to determine as to whether or not the appellant is chargeable with knowledge of the facts thus known to said company. There is some proof tending to show that the fact of such additional insurance was communicated to the appellant, but such fact was not established by undisputed proofs. It follows that, if there was no other ground upon which the appellant could be held liable, the action of the court in taking the case from the jury would have been erroneous, as it is not competent for a court to instruct a jury to find a verdict unless the facts warranting such instruction are established by undisputed proofs. It will therefore be necessary for us to investigate the relation which the said Northwest Fire & Marine Insurance Company bore to the appellant and to the respondent. If in what it did it was acting solely as agent of the respondent, then the appellant would not be bound by the knowledge which it had any further than the same was communicated to it. If, on the contrary, it was acting as the agent of the appellant, the knowledge which it had was in law the knowledge of the appellant, whether communicated to it or not. That an insurance broker, who is employed by any one to place insurance, is the agent of the person thus employing him, and not of the company with which the insurance may be placed, is well settled by the authorities; but, in our opinion, the facts in this case show that said company was not acting as an insurance broker employed by the respondent. He had made his application to such company for the entire amount of insurance which he desired, and had truthfully stat-

ed all the facts required by the company to enable it to act upon his said application. There is nothing whatever in the record to show that he had in any manner instructed said company to place any of the amount for which he had applied with other companies. No knowledge is brought home to him of any change in the application made by him to said company for the entire amount of the insurance. Under this state of facts, when he received the policies for the full amount of insurance by the hands of said company, we think he was justified in assuming that all of them had been issued in pursuance of his said application, even although some of them were issued by other companies, especially as the policies of such other companies had printed upon them, when delivered to him, a statement that the company to which he had made his application was the agent of the company which issued the policy.

The contention of the appellant that the indorsement that the company which delivered the policy was its agent was unauthorized cannot be sustained as against the respondent. The Northwest Fire & Marine Insurance Company was its agent, at least for the purpose of the delivery of the policy, and the assured had the right to assume that, as it was delivered to him, it came from the hands of the appellant. Under all the circumstances of the case, it must be held that said Northwest Fire & Marine Insurance Company was the agent of the appellant, and not of the assured, in the matter of the issuance and delivery of the policy in question. It follows that the knowledge of said company was the knowledge of the appellant. All the facts upon which this conclusion is founded were established by undisputed proofs; hence the instruction to the jury to return a verdict for the plaintiff was proper, and the judgment rendered thereon must be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

(5 Wash. 534)

#### LEWIS v. GILBERT.

(Supreme Court of Washington. Jan. 19, 1893.)

##### CERTIORARI—WHEN LIES.

As an appeal lies from an order denying a motion to vacate a judgment, certiorari does not lie to review such judgment, though the time limited for an appeal therefrom had expired before the motion to vacate was decided.

Certiorari to superior court, Spokane county; James Z. Moore, Judge.

Action by W. Abbott Lewis against Harry Gilbert. Plaintiff had judgment, and defendant brought certiorari. On motion to dismiss. Granted.

Turner, Graves & McKinstry, for petitioner. H. M. Herman, for respondent.

HOYT, J. On May 18, 1891, the plaintiff recovered a judgment against the defendant in the superior court for Spokane county. Soon after the rendition of such judgment,

the defendant filed a motion to vacate the same, for various reasons set out in said motion. After argument by counsel for the respective parties, the court took such motion under advisement, and, on the 30th day of November following, entered an order overruling and denying the same. Some months thereafter the defendant sued out of this court a writ of certiorari to bring the record here for review, and seeks thereby to have said judgment vacated and set aside.

The first question presented for our decision is as to whether or not such defendant had a remedy by appeal. It is conceded that, if such remedy was available to him, certiorari will not lie. The ground upon which it is claimed by the defendant that he should be allowed relief by way of such writ is that the court held his motion to vacate the judgment until more than six months had elapsed after the date of its rendition, and that, by reason of such lapse of time, no appeal from such judgment would lie. If defendant could have no relief against an order improperly refusing to vacate the judgment, made by the superior court, there would be much force in this contention. But, even if such were the fact, it might well be questioned whether or not, in the light of the fact that for the full statutory time the defendant could have sought relief against the judgment by appeal, and neglected to avail himself of this right, he could, after the expiration of such time, get relief by virtue of the writ of certiorari. However, we are not called upon to decide as to this last question. From the order refusing to vacate the judgment an appeal could have been prosecuted to this court. See *Railroad Co. v. Black*, 3 Wash. St. 327, 28 Pac. Rep. 538; *Myers v. Landrum*, (Wash.) 31 Pac. Rep. 33. And such being the case, it appears to us that he had an adequate remedy by appeal, and for that reason cannot prosecute this writ. All the grounds upon which he now seeks to have the judgment set aside could have been presented to the lower court upon such motion, and a review of its decision by this court would have served every purpose that is sought to be accomplished by this writ. Upon an appeal from the decision upon said motion, this court would have been called upon to determine as to whether or not there was sufficient reason to justify the court in setting aside the judgment; and that is the very question which we would be called upon to decide under this writ. Defendant could therefore, by having prosecuted his appeal from the order denying said motion, have entitled himself to exactly the same measure of relief that he could upon a determination of the questions raised by this writ upon their merits. The remedy by appeal was therefore available to defendant, and fully adequate to protect his rights. It follows that he was not entitled to have the record brought here by certiorari, and that the writ must be dismissed.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

(5 Wash. 577)

**REICHENBACH v. LEWIS et al.<sup>1</sup>**

(Supreme Court of Washington. Jan. 24, 1893.)

**NOTICE OF APPEAL—VALIDITY—PRIOR APPEAL PENDING.**

A notice of appeal filed during the pendency of a motion to dismiss a prior appeal already perfected, for failure to file a transcript within the required time, has no effect, and the second appeal will be dismissed.

Appeal from superior court, Spokane county; R. B. Blake, Judge.

Action by Agnes Reichenbach against W. A. Lewis, Edgar A. Oliver, and William Oliver, copartners doing business as Oliver Bros., and others. Judgment was rendered against defendants Oliver by default. From an order overruling their motion to set aside the judgment, defendants Oliver appeal. Dismissed.

Felghan, Wells & Herman, for appellants. F. T. Post, for respondent.

STILES, J. Appellants served a notice of appeal February 16, 1892, and within the time required by law filed said notice and a proper bond. Thereafter, and on August 2, 1892, respondent served upon appellants' attorneys a motion to dismiss said appeal upon the ground that no transcript had been prepared and filed with the clerk of this court, and that the time for such filing had expired. Said motion to dismiss was heard October 14, 1892, and the appeal dismissed. It appears that immediately after the service of the motion to dismiss appellants served another notice of appeal and a bond. The appeal based on this second notice is now moved against, and it must also be dismissed. Pending a motion to dismiss a perfected appeal the cause was in this court, and no new notice of appeal filed in the superior court during such pendency would have any effect. Appeal dismissed.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

<sup>1</sup>Rehearing denied. See 32 Pac. Rep. 998.

(5 Wash. 580)

**JEAN v. DEE.**

(Supreme Court of Washington. Jan. 24, 1893;  
LAND ACQUIRED UNDER HOMESTEAD ACT—LIABILITY FOR DEBTS.

Rev. St. U. S. § 2296, providing that no lands acquired under the provisions of the homestead act shall be liable for any debt contracted prior to the issuance of the patent therefor, applies though the land ceased to be occupied as a homestead after the issuance of the patent.

Appeal from superior court, Klickitat county; Sol. Smith, Judge.

Ejectment by Adolphe Jean against Fred Dee. From a judgment for defendant, plaintiff appeals. Reversed.

Presby & Spaulding, for appellant. H. Dustin and John A. Brown, for respondent.

HOYT, J. Plaintiff brought ejectment to secure possession of certain real estate described in his complaint. Issues were made and the case tried. Findings and

judgment in favor of the defendant. From such judgment, plaintiff prosecutes this appeal.

Upon the trial, plaintiff showed a chain of title from the government to him. To meet this, defendant put in evidence, against the objection of the plaintiff, the judgment roll in a case wherein D. M. Osborn & Co. were plaintiffs and D. H. Kathan and D. H. Clark were defendants. The defendant D. H. Kathan was the one under whom, as patentee of the government, the plaintiff claimed title. Such judgment roll being in evidence, the defendant introduced further proof, showing that the land in question had been sold by virtue of an execution issued thereon, and that he held the same as grantee of the purchaser at such sale. It will thus be seen that the defendant's rights depend entirely upon the question as to whether or not such judgment was a valid one as against the defendant Kathan, and the further question as to the sufficiency of the proceedings had upon the execution issued thereunder to divest the said Kathan of his title to the property in question. It is alleged on the part of the plaintiff that such judgment is absolutely void, for the reason that upon the face of the record it appears that the court never had jurisdiction to render the same. It is clear from this record that there was no such service of the summons as, independent of the proceedings in attachment which were instituted at the time suit was commenced, would confer any jurisdiction upon the court to render judgment against either of the defendants to the action. This is practically conceded by the respondent; but he claims that, attachment proceedings having been instituted, and a levy thereunder made by the sheriff, the publication of the summons was sufficient to give the court jurisdiction. It follows that if, for any reason, the levy under the attachment proceedings was invalid, the court never obtained jurisdiction to render the judgment relied upon by the respondent. There can be no valid attachment, unless property is found, liable to attachment upon which the same can be made. It is therefore necessary for us to decide as to whether or not the land upon which the attachment levy was made was at the time liable to execution by virtue of a judgment rendered upon the claim which was the subject-matter of the action. It appears from the face of the proceedings that the note upon which such action was brought was executed in 1882. It further appears from the record before us that the land was acquired by the said defendant Kathan by virtue of the homestead laws of the United States, and that the patent therefor did not issue until 1884. Such being the fact, it could not be made to respond to the judgment rendered upon such claim. It is provided in said homestead law that "no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issue of the patent therefor." This language is broad and comprehensive, and admits of but one interpretation. From it it is conclusively made to appear that the grant by the government to the home-

steader was subject to the condition that the grant thus made should not be divested, nor in any manner affected by any proceedings growing out of a claim which antedated the issue of the patent. Respondent seeks to meet this objection by urging that this provision in the homestead law was intended only for the protection of one actually occupying the land as a homestead, and that, so soon as he ceased thus to occupy it, he could no longer avail himself of such provision. Even if this were so, there is not enough in this record to show that this land was no longer occupied by the entry man as his homestead. The only thing that appears in the record tending in that direction is the fact that at the time the attachment proceedings were instituted he was absent from the state. But this fact alone would in no manner raise the presumption that this piece of land was no longer occupied by him as a home. We are, however, unable to agree with the contention of the respondent as to the effect of this provision of the homestead law. As we view it, it is not a question of exemption at all. There is no obligation upon the homesteader, by virtue of the laws of the United States, to occupy the same as such after the date of the issue of the patent. Hence the provision must be construed as an absolute condition annexed to the grant, and to in no manner depend upon the fact of the continued occupancy of the granted land by the patentee. It follows that at the date of the levy of the attachment the property in question was not subject to such levy, and such proceeding, having found no rem to attach itself to, failed, and could in no manner aid subsequent proceedings. The judgment offered in evidence by the respondent was therefore absolutely void, and should have been excluded. But, even if such judgment were valid, it appears from the facts to which we have above referred that the land in question could never be made subject thereto, for the reason that the claim upon which the same was rendered antedated the issuing of the patent. It follows that the defendant could assert no rights founded upon a sale of the land upon an execution on such judgment. The judgment must be reversed, and a new trial had.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

(5 Wash. 643)

#### STATE v. VAN CLEVE.

(Supreme Court of Washington. Jan. 31, 1893.)

##### LARCENY—INDICTMENT—AMENDMENT.

Where an information charges that defendant, on a certain day, in the county of S., did steal "17 head of horses, of the value of \$700, being then and there the property of one Wm. Burbank," the averment of the owner's name is material, as it is the only identification of the act charged, and it is error to amend the information by changing the owner's name from William to Walter.

Appeal from superior court, Spokane county; R. B. Blake, Judge.

William Van Cleve was convicted of theft, and appeals. Reversed.

Thos. C. Griffiths and Richard W. Nuzum, for appellant.

STILES, J. Appellant was tried in the superior court of Spokane county on the 4th day of March, 1892, upon an information charging him with having stolen 17 head of horses. The information filed, and to which he pleaded not guilty, charged that the horses were the property of "Wm." Burbank. After the commencement of the trial the court allowed the prosecutor to amend the information by changing the name of Burbank from "Wm." to "Walter." Among other exceptions, the appellant presents this ruling as error, and seeks a reversal of the judgment.

It is conceded by the appellant that an information might be amended in this manner if the amendment went to matters of form merely, and not to a material allegation. The question, then, is whether the change in the name of the party whose property is alleged to have been stolen is a material allegation. The charging part of the information was that appellant "did unlawfully and feloniously steal, take, and drive away seventeen head of horses, of the value of \$700, being then and there the property of one Wm. [Walter] Burbank." As we read this charge, the only possible means that the appellant had of identifying the particular act with the commission of which he was charged was by reference to the alleged ownership of the property. No distinguishing marks of the horses were given, and no place, except the county of Spokane. William Burbank might easily have been one person and Walter Burbank another, and each might have suffered the loss of horses by theft on or about the 15th of December, 1890. The charge of theft of the property of either could not be proven by evidence satisfying the jury of the theft of property of the other; and, if in this case there had been no amendment of the information, the testimony showing that Walter Burbank's horses had been taken would have been such a material allegation as would have defeated the prosecution. It must therefore follow that the amendment was unlawful, and the judgment must be reversed. *People v. Hughes*, 41 Cal. 235. The vice of this sort of an amendment is made clear when reference is made to the statute, which requires informations to be sworn to, that the defendant shall be arraigned, and that a certain time shall be allowed him to plead. Code Proc. §§ 1231, 1269, 1271. This information was verified February 27, 1892. At the time it was amended, no reverification was made, no arraignment was had, and no plea was entered. The judgment is reversed, and the cause remanded to the superior court for further proceedings.

DUNBAR, C. J., and HOYT, ANDERS, and SCOTT, JJ., concur.

(5 Wash. 264)

**TACOMA LUMBER & MANUFACTURING CO. v. WOLFF.**

(Supreme Court of Washington. Jan. 25, 1893.)

**APPEAL BY ONE DEFENDANT — DISMISSAL OF ACTION AS TO CODEFENDANT.**

Where a judgment is obtained in the lower court against two defendants, only one of whom appeals, and a judgment is entered by the appellate court directing the dismissal of the action, plaintiff is entitled to have the judgment modified so as to dismiss the action only as to the appellant, and allow the judgment against the other defendant to stand. *Hildebrandt v. Savage*, 30 Pac. Rep. 643, 32 Pac. Rep. 109, and 4 Wash. 524, followed.

On petition for rehearing. For decision on appeal, see 31 Pac. Rep. 753.

**SCOTT, J.** A petition for rehearing has been filed in this case, calling the attention of the court to the fact that judgment was obtained by the plaintiff in the superior court against *Huntington & Little*, the contractors, for the said materials which were furnished to them. There was no appeal by *Huntington & Little* from the judgment, and respondent asks that the judgment in this court be so far modified as to direct a dismissal of the cause only as to *Samuel Wolff*, who did appeal, and that it be allowed to stand as against the contractors, *Huntington & Little*. The respondent is entitled to this under the ruling in *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. Rep. 643, and 32 Pac. Rep. 109. Consequently the order of this court, heretofore made, directing the action to be dismissed, is modified to that extent, and the superior court is directed to dismiss the same as to *Samuel Wolff*, the appellant, and the said judgment is allowed to stand in full force as against said contractors, *Huntington & Little*.

**ANDERS and HOYT, JJ., concur.**

**STILES, J.** Upon authority of *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. Rep. 643, and 32 Pac. Rep. 109, I concur.

(5 Wash. 564)

**BRYGGER et al. v. SCHWEITZER et ux.**

(Supreme Court of Washington. Jan. 24, 1893.)

**PUBLIC LANDS—UNIVERSITY—SELECTION—APPEAL TO SECRETARY OF THE INTERIOR.**

1. Plaintiffs and defendants claimed the same land: plaintiffs under a university selection, defendants under a homestead entry. The commissioner of the general land office having rendered a decision adverse to plaintiffs, an appeal was taken to the secretary of the interior. Pending the appeal, and before it had been heard, the commissioner, through some inadvertence, authorized final proof as to defendants' entry, and on its return a patent was issued. *Held* that, as this was irregular, it could not affect the rights of plaintiffs, who, in establishing their claim, were entitled to show what was done in the land office subsequent to issue of the patent, as well as before.

2. The fact that plaintiffs made no objection to the taking of proof would not affect their rights, as such taking was clearly irregular.

3. A selection of land reserved for university purposes, though ineffectual at the date

thereof, by reason of an existing adverse claim upon the land, becomes effectual upon the termination of such claim.

Appeal from superior court, King county; *I. J. Lichtenberg*, Judge.

Action by *Anna Sophia Brygger*, executrix, and *Ole Schillestad*, executor of *John Brygger*, against *John Schweitzer* and *Nancy Schweitzer*, his wife. Judgment dismissing the action. Plaintiffs appeal. Reversed.

*Jenner, Legg & Williams, Jacobs & Jacobs*, and *W. Lair Hill*, for appellants. *Thompson, Edsen & Humphries*, for respondents.

**HOYT, J.** Appellants brought this action to have the defendants declared to hold the title to certain property described in the complaint as their trustees, and to have the title decreed to and quieted in them. The court below, after hearing, dismissed the action, and plaintiffs have appealed.

The respondents' first contention is that the complaint is insufficient to support the case made by the proofs, if one is made. It is no doubt true that the complaint is not as full in some respects as it should have been, but, after a somewhat careful examination of all the pleadings and of the proofs, we are satisfied that the respondents were not misled to their prejudice in the presentation of their case, or in meeting that of the plaintiffs, by any errors or omissions in the complaint; and, such being the fact, and this being a suit in equity, we shall disregard any technical errors in the pleadings, and proceed to determine the rights of the parties upon the proofs.

Plaintiffs claim under a university selection, made by the territory of Washington under the act of July 17, 1854, and by virtue of the provisions of the act of March 14, 1864; and the first question to be determined is as to whether or not they have any standing in court by virtue of such selection. If they have not, of course they must fail in their action, however erroneous may have been the action of the land department in issuing the patent to the respondents. A stranger could not interfere to protect the rights of the United States or any other person. Do the facts shown by the proofs establish a *prima facie* claim upon the part of the plaintiffs, independent of any questions growing out of the claim of the respondents? As to this question, it is not necessary for us to say more than that it seems to have been decided in favor of the rights of the plaintiffs by this court in the case of *Keane v. Brygger*, 3 Wash. 338, 28 Pac. Rep. 653. From what was said in that case, and from the action of the general land office in regard to the rights of a person holding under a university selection in all respects similar to this, it follows that, if no rights had interfered to prevent such action, the title of the plaintiffs would have been affirmed and made perfect by the action of the secretary of the interior as to the piece of land in controversy in this action, as it was to that involved in the case above cited. But for the intervention of the claim of the respond-

ents, the title of the plaintiffs would have been made perfect by the action of the land department, and that which would have had the force of a patent would have been granted to them. They are, therefore, in a condition to assert their rights as against the United States if the title was still vested in it; and, the title having passed to the respondents, they are in a situation to likewise assert their rights as against them; and if, from all the facts in the case, it appears that their rights are superior to those of the respondents, so that, but for mistake or inadvertence on the part of the land department, the title would have passed to them, instead of to the respondents, it will be the duty of the court to give them the benefit of such title as they would have obtained from the United States but for its error in wrongfully passing the title to the respondents.

The first question above suggested having been determined in favor of the plaintiffs, we must enter upon an examination of the rights of the respondents, and see whether or not they are superior to those of the appellants. Respondents claim by virtue of a homestead entry made in 1879, and if at that time, under all the facts shown in the record, the land was a part of the public domain, unoccupied and unappropriated, the respondents' rights, founded upon such homestead entry, would, in the regular course of business, have rightfully culminated in the passage of the legal title to them. The important question, therefore, is as to whether or not the land in question was covered by the university selection at the date of the said homestead entry. It is objected upon the part of the respondents that much of the proof introduced by the appellants to establish the regularity of the university selection was of a date subsequent to the issuance of the patent, and that as, by the issuance of said patent, the jurisdiction of the land department over said land was terminated, such proofs were incompetent and could in no manner affect the rights of the respondents under said patent. This would doubtless be true if the patent had issued regularly, and not in fraud of the rights of the plaintiffs, or those under whom they hold. But such was not the case. Prior to the issue of said patent, a contest had been waged in the land office on behalf of the university selection, and the entry of the respondents at one time held for cancellation. It was afterwards, by the action of the commissioner of the general land office, reinstated, and the university selection held for cancellation. From the action of the commissioner in thus holding the university selection for cancellation, an appeal to the secretary of the interior was duly taken and perfected, and under a uniform course of practice in the department of the interior no action could properly be taken in regard to said homestead entry until such appeal had been heard and decided. Notwithstanding such practice, by some inadvertence on the part of the commissioner of the general land office, final proof was authorized to be taken as to the homestead entry of respondents, and upon the return of such proofs to his office

the patent was issued. Under these circumstances the issue of the patent was clearly irregular, and could in no manner affect the rights of those who, at the date of its issue, were duly prosecuting such appeal from such decision of the commissioner of the general land office. The only effect of the issuing of the patent under these circumstances was to transfer the legal title to the respondents, and make it necessary for those who otherwise would have been entitled to have their adverse claims adjudicated in the land office, to have them adjudicated in the courts; and if in the courts they are able to establish such a state of facts as would have entitled them to the patent, if not already issued, at the hands of the United States, then the courts must see that they get the same benefit by decreeing the title held by the respondents to be so held for the use and benefit of such adverse claimants.

It is further objected upon the part of the respondents that neither the plaintiffs nor any one else made any objection to the taking of such final proofs on the part of the respondents. But, in view of what we have just said, the allowing of such proofs to be taken pending the appeal to the secretary of the interior was clearly irregular, and for that reason no one could lose rights which they already had by virtue of their contest in the land department, on account of a failure to appear and contest the making of such final proofs. These considerations show that, in our opinion, the contention of the respondents that nothing that was done in the land department after the issuance of the patent could be of any avail to plaintiffs, is untenable. It is true that after such issuance the land department could not interfere with the title to the land, but, if such title passed from the government pending the decision of a question necessarily involved in such issuance, such land department must be held to have jurisdiction to continue that contest to a proper determination, and its findings of fact in relation thereto will be as binding upon the courts, in determining as to whether or not an equitable as well as a legal title passed by said patent, as though they had been found before the same was issued. However, as we look at the proofs, it sufficiently appears that the land department was in full possession of the facts, which in the Jensen Case were determined by it to be sufficient to show that the land had been regularly withdrawn from settlement from the date of its selection in 1864, before the date of the issuance of said patent; and, as the facts in that case and this one were exactly the same, it follows that at the time such patent was issued such facts were before the land department as, under its view of the law, as shown in the said Jensen Case, would have prevented the issuance of such patent, and would have compelled the cancellation of the homestead entry of the respondents, and the certification of the land under the provisions of said act of March 14, 1864. It is true, perhaps, that all of these facts did not reach the land department in the ordinary and regular course of the contest



between those holding under the university selection and the homestead entry, but they were all before the land department in some way, and its attention called to the same, before the issuance of said patent; and, in view of the practice of said department to relieve parties against inadvertence in not making a full showing in the original contest when the facts are shown even upon appeal, it must be presumed that, if facts in any shape were before the secretary of the interior prior to the issuance of the patent, which satisfied him that under the law the university selection was good, and that those holding under it should be protected, he would see that such protection was given either by allowing the additional facts to be made a part of the record in the case before him, or by ordering a rehearing before the commissioner or the register and receiver of the local land office as to him might seem proper. As to whether or not the secretary of the interior correctly interpreted the law in the Jensen Case is not now an open question here, on account of the above-cited decision of this court. In our opinion, under the circumstances under which this patent issued, the fact that it has so issued cannot at all control the limits of the inquiry in this case. The only effect which it can have is to compel us to make the inquiry and determine the law upon the facts, and enforce our conclusions as to the title as against the respondents by appropriate decree, instead of the land department being called upon to make such investigation, and by its patent place the title where, under the facts and the law, it belongs. Thus far we have discussed the case upon the theory that the fact that Lemuel J. Holgate relinquished his homestead entry before the date of the university selection was essential to the upholding of said selection, and we have simply followed the ruling of the secretary of the interior in the Jensen Case, and assumed that a like ruling would have been had in this, as the facts are exactly the same, if the land office had not been deprived of jurisdiction by the inadvertent issuance of the patent.

This is sufficient to decide the case, but another very important question is presented by the record. It is conceded that the homestead entry of Lemuel J. Holgate was duly canceled in 1871. The university selection was made in 1864. No adverse interest in the land was asserted by any one until 1879. Thus, even if we assume that the relinquishment by said Holgate in 1864 was not in this case, or was not effectual, the fact would still exist that from 1871 until 1879 this land was vacant public land, except from the force of said university selection. Such being the case, under the proof shown by this record, we think the selection, even though ineffectual before, became fully effectual upon the cancellation of the said homestead entry in 1871. It is true that, as a general rule, grants which are not effectual by reason of some adverse claim to the land at the date thereof will not become effectual upon the termination of such adverse claim. Respondents have

cited a large number of cases to sustain this doctrine. We have given them a somewhat careful examination. But, in our opinion, they do not affect the question at bar. They simply go to the question of the effect of a present grant, which by its terms does not take effect upon certain lands. In such a case the courts have universally held that, if it did not thus take effect, it would never take effect. The most of these decisions have been in reference to land grants to railroads, or to states for railroad purposes, but the grants which have been construed by the courts in these cases were special grants of land within certain limits to which no adverse claim existed. And it is clear that such a grant must take effect at once on all that it can ever cover. Such are the very words of the grant. Lands within certain definite bounds are granted, but it is provided that as to any of the lands thus described, to which adverse interests obtain, the grant shall not take effect; and the decisions cited by respondents only give effect to the language of the grant. But in the case of selections like the one under consideration, an entirely different question is presented. Here there is no grant of any definite description of land. Full authority is given to the territory to determine as to what lands are to be covered by the grant. The only limitation upon such authority is that in its exercise the rights of adverse claimants shall not be interfered with. If, at the time a selection is made, there is an adverse claim to the land, the selection must yield to it; but it may well be held that the selection is effectual for all purposes excepting as against the one having the adverse claim, and upon its termination the selection have force as against the government. An application of the universal rules of construction as to questions of this kind will compel us to hold that such was the effect of the selection of the land in question. But, even if such is not the law, the facts of this case bring it in principle within the decision of the supreme court of the United States in *Durand v. Martin*, 120 U. S. 366, 7 Sup. Ct. Rep. 587, for, in our opinion, the action of the authorities of the territory in maintaining this selection by themselves or by their grantees should be treated as a new selection each day that it is so continued. It would follow that upon the cancellation of the Holgate entry in 1871, the selection became effectual.

In the case above cited it is held that an assertion of rights under a selection at a time when the land was subject to such selection will have force, even although at the time the original selection was made there were existing adverse claims to the land, which made it incapable of selection; and under the facts shown in this record we think that it must be held that the territory was asserting its rights under said selection, and seeking to have it certified under the act above cited at all times from the date of such selection up to the time that the land department of the United States lost jurisdiction of the land. It is perhaps true that the territory was not actively importuning the land department all or any of the time, but it

had sold the land, and, under the provisions of the act of congress above cited, a bona fide grantee became the owner thereof as against everybody, even the United States. The only thing necessary for him to do to make his title perfect was to establish the fact that he was a purchaser of the territory in good faith. If he was such purchaser, then his equitable title to the land was perfect, and the certification by the secretary of the interior upon proof of such facts was only necessary to pass to him the legal title. Under these circumstances, whenever the grantee of the territory asserted any rights to the land, he must be held to have so asserted it by virtue of such selection, and to have in effect, on each and every day during which he claimed any rights to the land under his purchase from the territory, asked in the name of the territory that his title under such selection be recognized and perfected. If such be the effect of the acts of the grantee of the territory, enough appears in the record to show that the selection was many times made effectual, under the ruling of the supreme court above cited, by the acts of the plaintiffs, or those under whom they claim. In our opinion, the land department committed an error of law in holding the university selection for cancellation, and reinstating the homestead entry of the respondents. It follows that, in our opinion, the selection was effectual from its date, and that, if it was not, it became effectual upon the cancellation of the Holgate entry in 1871, eight years before there was any attempt to enter the lands by the respondents. Hence the rights of the respondents are inferior to the rights of the appellants, and the decision of the lower court holding otherwise was erroneous, and must be reversed.

There is still left the question as to what equity demands in the disposition of the case. In our opinion, the rights of all will be best subserved by a reversal of the decree dismissing the bill, and a remittance of the cause to the court below, with instructions to take proofs—First, as to what the land would now be worth if no improvements had been made thereon by the respondents; second, as to the cash value of all the improvements made by the respondents; and, third, as to the reasonable value of the use and occupation of the land by the respondents. That upon such proofs the court shall find the facts in relation to each of these questions, and thereafter decree to plaintiffs, at their option, a sum equal to the value of the land so found, and make such decree a lien enforceable against the land by sale thereof, or decree to them the absolute title to such land upon the payment by them of the value of the improvements made by the respondents, less the value of the use and occupation of the premises by them. It is therefore ordered that the judgment and decree be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

DUNBAR, C. J., and SCOTT, ANDERS,  
and STILES, JJ., concur.

v.32p.no.5—30

(5 Wash. 632)

# LAURENDEAU v. FUGELLI.

(Supreme Court of Washington. Jan. 31, 1893.)

## PUBLIC LANDS—ENTRIES OF IMPROVED LANDS—REPLEVIN.

1. An entry on inclosed and improved land, occupied and claimed by another under a certificate from a railroad company, is not authorized by 23 U. S. St. at Large, 321, forbidding the fencing of public land, or preventing settlement thereon; but the person so entering is a naked trespasser, though after entry he files a statement of pre-emption. *Laurendeau v. Fugelli*, 21 Pac. Rep. 29, 1 Wash. St. 559, 31 Pac. Rep. 421, followed.

2. The doctrine that a landowner cannot maintain replevin for crops grown on the land by a person in actual adverse possession does not apply where such person is a mere trespasser.

3. In replevin for crops, which plaintiff claims because of alleged ownership of the land on which grown, and of which defendant has possession, the title to the land may be inquired into. *Laurendeau v. Fugelli*, 21 Pac. Rep. 29, 1 Wash. St. 559, 31 Pac. Rep. 421, followed.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Replevin by P. Laurendeau against Peter Fugelli to recover a certain crop of hay. Judgment of nonsuit. Plaintiff appeals. Reversed.

Pruyn & Ready, for appellant.

H. J. Snively, for respondent.

The owner of land cannot recover in replevin for crops grown thereon by one in actual adverse possession. *Halleck v. Mixer*, 16 Cal. 574; *Page v. Fowler*, 28 Cal. 605; *Kimball v. Lohmas*, 31 Cal. 154; *Page v. Fowler*, 37 Cal. 100; *Wilkins v. McCue*, 46 Cal. 661; *Martin v. Thompson*, 62 Cal. 618; *Smith v. Cunningham*, 67 Cal. 263; *Mather v. Trinity Church*, 8 Amer. Dec. 603; *Brown v. Caldwell*, 13 Amer. Dec. 660; *Page v. Fowler*, 39 Cal. 412; *Pennybecker v. McDougal*, 46 Cal. 662.

HOYT, J. The questions presented by the record in this case are in all respects similar to those presented by a case between the same parties decided by the territorial supreme court, reported in 21 Pac. Rep. 29, and another, also between the same parties, decided by this court in October last, (31 Pac. Rep. 421;) and it is conceded that, if the rule established in those cases is to prevail, the judgment rendered by the court below cannot stand. Respondent contends, however, that the rule thus established is wrong; that the facts in the case show that he was in adverse possession of the premises, as against the plaintiff, and had been in such adverse possession for several years, and that, such being the case, the title to the hay cut by him on the place while thus in possession was vested in him, and that plaintiff could not recover the same, or the value thereof, in replevin.

The general rule, that the owner of land cannot recover in such an action for crops grown thereon by one in actual adverse possession, is established by an almost universal current of authority. This is clear from the brief of respondent, in

which a large number of cases so holding are cited; and, if the facts in this case make such rule applicable, the court, in deciding the cases above referred to, was in error, and such decisions should be overruled. But, in our opinion, they do not. That rule obtains in the interest of public policy, as between the owner of land and one occupying the same adversely to him, and growing crops thereon. The theory of the cases holding such to be the rule is that, though the entry upon the land may constitute a trespass, yet, if possession thereunder is maintained until it becomes adverse to the rightful owner, it ceases to be a trespass, and becomes to a certain extent an interest in the land, which, if continued, will ripen into what is equivalent to a good title thereto, and that, such being the case, those dealing with one thus in peaceable possession should not be called upon to look into the question of the title to the land. But in this case the possession of the respondent, though it may be said to have been in a sense adverse to that of the plaintiff, was not such a one as could ever ripen into any title, as against the plaintiff, or any other person. Such entry was, under the decision of the supreme court of the United States in *Atherton v. Fowler*, 98 U. S. 512, unlawful, and not such as could be the foundation of any right whatever. It follows that, however long it might have been continued, it was no better upon the last day than upon the first. Besides, the finding of facts in the case at bar show that the possession of respondent has at all times been maintained by force. It cannot, therefore, be said to have been such peaceable, adverse possession as would give to him any rights as against the person who, but for such unlawful exhibition of force, would have been in possession of the land. In our opinion, the above-cited cases were decided rightly, and, following the rule therein announced, the judgment rendered in the lower court in the case at bar must be reversed, and a new trial had.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

(5 Wash. 554)

#### IHRIG v. SCOTT et al.

(Supreme Court of Washington. Jan. 24, 1893.)  
CONTRACTOR'S BOND—ERECTION OF PUBLIC BUILDING—ACTION BY SUBCONTRACTOR.

1. Under Code Proc. § 800, providing that "no bond required by law, and intended as such bond, shall be void for want of form or substance, recital or condition, nor shall the principal or surety on such account be discharged," *held*, that a contractor's bond given to the directors of a school district under Laws 1887-88, p. 15, providing that when public buildings are erected the contractors shall give bonds, is not void because the state of Washington is not named therein as obligee, or because the statutory form is not followed.

2. Laws 1887-88, p. 15, which provides that municipal corporations, when erecting public buildings by contract, shall take a bond from the contractors for the faithful performance of the contract, and that laborers and material men shall have a right of action thereon, pro-

fects those who furnish material or labor under a subcontract, as well as those who furnish them in other capacities.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by C. W. Ihrig against John Scott, as principal, and E. Leonhard and others, as sureties, on a contractor's bond. From a judgment for defendants, plaintiff appeals. Reversed.

Pruyn & Ready, for appellant. H. J. Snively, for respondents.

HOYT, J. One John Scott entered into a contract with school district No. 3, Kittitas county, for the erection by him of a schoolhouse for said district. At the time the contract was entered into, said John Scott, as principal, and the other defendants, as sureties, made and delivered to the officers of said school district a bond, of which the following is a substantial copy: "Know all men by these presents, that we, John Scott, as principal, and ———, sureties, are held and firmly bound unto Wm. R. Abrams, John A. Shoudy, S. W. Barnes, P. H. W. Ross, and L. R. Grimes, board of directors of school district No. three, (3,) of the county of Kittitas and state of Washington, and their successors in office, in the penal sum of forty thousand dollars, (\$40,000.00,) good and lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our, and each of our, heirs, executors, and administrators, jointly and severally, firmly, by these presents. Sealed with our seals, and dated this 1st day of July, A. D. 1890. Whereas, on the 24th day of June, A. D. 1890, the board of directors of school district No. three, (3,) of Kittitas county, state of Washington, duly awarded the above-bonded John Scott, principal, a certain contract to furnish the materials and labor for, and to construct, erect, and complete, a certain brick school building on block No. forty-two, (42,) Shoudy's first addition to the city of Ellensburg, Washington, for the sum of thirty-eight thousand six hundred and fifty dollars, (\$38,650.00,) good and lawful money of the United States, according to the plans and specifications prepared by W. A. Ritchie, architect, and according to the terms and conditions to that certain contract entered into on the 30th day of June, A. D. 1890, by the president and secretary, on the part of said school district No. three, (3,) of Kittitas county, Washington, and by the said John Scott on his own part: Now, therefore, if the said John Scott shall pay to all subcontractors, mechanics, laborers, and all persons whatsoever, who shall in any way engage in the construction of said building, and to all persons who shall, by his direction, furnish any material whatsoever for the purpose of being wrought into said building, all sums to become due to such persons by reason of such laboring upon or furnishing materials for said building, and shall keep and save harmless the said school district from all mechanics' liens that may be filed against said building by such persons, then this obligation to be void; otherwise, to remain in full force and virtue." The

plaintiff furnished certain material and labor to said John Scott, as such contractor, to be used, and which was used, in the construction of said schoolhouse. Not having been paid therefor, he brought his action upon said bond, claiming that by the provisions of the act of January 31, 1888, (Laws 1887-88, p. 15,) he was entitled to recover upon said bond the amount thus owing to him by said contractor. When said bond was offered in evidence, the defendants objected to its admission for the reason that such defendants were not liable to the plaintiff upon said bond because the state of Washington was not named therein as obligee, and such bond was not the statutory bond it was claimed to be. This objection was sustained, exception taken, and the action of the court in thus excluding the bond is assigned as error here.

It will be seen that, by the objection thus made, defendants attacked said bond upon two grounds: First, that the state of Washington was not named as obligee; and, second, that it did not sufficiently appear that the bond was executed under the provisions of the act above referred to. That a mistake in the naming of the obligee is not a fatal defect in a bond which is executed, pursuant to the requirements of a statute, in the interests of the public, when, notwithstanding such error, it clearly appears from the bond taken as a whole that it was intended to be such a one as is required by the statute, is fully established by the authorities. See *State v. Wood*, (Ark.) 10 S. W. Rep. 624; *Ray Co. v. Brock*, (Mich.) 6 N. W. Rep. 101. The simple fact, then, of the want of the proper obligee in this bond, is not fatal to it, if, from its terms, the object for which it is executed appears. Even a superficial examination will show such to be the fact. No one can read the bond, in the light of the statute above referred to, without at once coming to the conclusion that in executing it by the principal and sureties, and the acceptance thereof by the proper officers of the school district, there was an intention on the part of all to provide the security required by said statute, in the interests of such as might thereafter, by virtue thereof, become entitled to protection. This would be the rule without the aid of any curative statute; for while it is true that, under the old rules existing at common law, much technical accuracy was required in regard to instruments of this nature, yet, even in the absence of any statute, such rule has been, by the decisions of the courts, very much modified; and at this time courts look more to the substance than to the form, in determining as to whether or not such instruments shall have force. But if there was doubt upon this question, unaided by statute, this doubt must be resolved in favor of the rule which upholds bonds of this kind by the provisions of our statute. Section 800, Code Proc., is as follows: "No bond required by law, and intended as such bond, shall be void for want of form or substance, recital or condition, nor shall the principal or surety on such account be discharged; but all the

parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond." And under any deficiency in this bond must be held to be cured. See *Faurote v. State*, (Ind. Sup.) 11 N. E. Rep. 472; *Id.*, 23 N. E. Rep. 971. It follows that neither of the grounds of objection to said bond presented to the court below was tenable, and the action of the court in sustaining the same was therefore erroneous.

It is further objected in this court that said bond was not available in the action brought by the plaintiff, for the reason that his complaint showed that he was a subcontractor, and that the statute (Laws 1887-88, p. 15)<sup>1</sup> in question did not contemplate the protection of subcontractors. In order that that objection might avail respondents, it should have been made in the court below, and not for the first time here. But we are well satisfied that, even if it was properly raised, it could not aid the contention of respondents. In our opinion, the statute in question protects those who furnish material or labor by virtue of a subcontract as well as those who furnish the same in any other capacity. The object of the statute was to give the same relief by a proceeding upon the bond as could be had, in the case of the erection of a building by a private owner, by the enforcement of a lien against such building; and, such being the evident intention of the statute, it should receive such construction at the hands of the courts as will make it available for such purpose. That a subcontractor may be required, in a suit to foreclose a lien, to make further proof than would be required of the one who had himself done all the labor for which the lien was claimed, does not prevent the enforcement of his lien, when such further proof is made; and the fact that such subcontractor, in enforcing his rights as against the bond given by virtue of the provision of said statute, would also be called upon to make additional proofs that would satisfy the court that he was not indebted to any one who had furnished materials or performed labor for him in the course of the prosecution of his work as such subcontractor, cannot deprive him of the benefits of the statute. The bond should have been allowed to go in evidence, and for the error in excluding it the judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

<sup>1</sup>Laws 1887-88, p. 15, provides that municipal corporations, when erecting public buildings, where the same are let on contract, shall take a bond from the contractors, with sufficient sureties, for the faithful performance of the contract; and laborers and material men shall have a right of action on such bond, for labor done and materials furnished, on the failure of the contractor therefor.

(5 Wash. 621)

**WILLSON v. NORTHERN PAC. R. CO.**

(Supreme Court of Washington. Jan. 31, 1893.)

**CARRIERS—EJECTION OF PASSENGER—EXCESSIVE DAMAGES.**

1. Where a person is wrongfully ejected from a train, she is entitled to recover for humiliation and mental suffering caused thereby, though the ejection was unaccompanied by violence, insult, or indignities, and though the conductor believed that she had no right to ride on such train, and acted in good faith in ejecting her.

2. Where, in an action to recover for a wrongful ejection from a train, it appeared that plaintiff was treated with proper courtesy by defendant's conductor, and no force was used in ejecting her, and that the only cause for mental suffering was the publicity given to her ejection, in having the attention of the other passengers called thereto, and in being compelled to accept financial aid from a stranger, a verdict for \$1,900 is excessive, and the court acted within its discretion in reducing the amount to \$500.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Hensle M. Willson against the Northern Pacific Railroad Company to recover damages for a wrongful ejection from defendant's train. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Mitchell, Ashton & Chapman and Andrew F. Burleigh, for appellant. Thompson, Edsen & Humphries, for respondent.

SCOTT, J. On June 29, 1891, the respondent purchased a ticket from Vincennes, Ind., to Seattle, Wash., via St. Paul, Minn., over appellant's road. On July 2d, soon after leaving St. Paul, the ticket exchanger passed through the train, and took up the tickets of the passengers, giving them exchange tickets in return. By mistake the respondent was given an exchange ticket to Missoula, Mont., instead of to Seattle. The mistake was unnoticed at the time, and respondent traveled upon this ticket, over the various divisions of appellant's road, from St. Paul to Missoula, arriving there on the 4th day of July. Just before reaching this point, the conductor of the train took up the respondent's ticket, whereupon he was informed by her that her destination was Seattle; that her original ticket, which had been taken up, was purchased to that point. After some conversation the conductor said to respondent that he would telegraph back, and undertake to ascertain the facts, and get the mistake rectified. He did telegraph, accordingly, and received an answer stating that "Mrs. Walker's ticket was to Missoula, Montana." It seems that a mistake was made in the name, in sending this answer. The conductor claims that he only sent one telegram, and that this was an answer to it, and that the name of Mrs. Walker was evidently meant for Miss Willson. He then informed respondent that she would have to purchase a ticket to Seattle, or he could not carry her any further than Missoula. The price of a ticket from Missoula to Seattle was \$30.30, and respondent did not have sufficient money with her to pay for one, of which fact she

informed the conductor. Some of the other passengers had become interested in respondent's behalf, and protested against her being compelled to leave the train. But the conductor insisted there was no other alternative, if she did not pay her fare for the remainder of the distance. One of the passengers said to the respondent that, if she was required to leave the train, to do so, and that he would then purchase a ticket for her from Missoula to Seattle, and that she could re-enter the car, and continue her journey. At Missoula the conductor again said to the respondent that she must pay her fare for the remainder of the distance, or leave the train. Whereupon respondent got up from her seat, but without taking any of her wraps or baggage, and walked out upon the platform, followed by the conductor and by the passenger aforesaid. The conductor held the train a few moments at this place, while this passenger purchased a ticket for the respondent to Seattle, whereupon she re-entered the car, and resumed her seat, arriving at Seattle without any material delay. Soon after her arrival at Seattle, the appellant's agents, having further investigated the matter, and having found there had been a mistake made in exchanging tickets with respondent, tendered her the sum of \$30.30, which had been paid for the ticket from Missoula to Seattle. She declined to receive this, and brought an action for damages. A jury trial was had, which resulted in a verdict in her favor for \$1,900. Upon a motion for a new trial the superior court required her to remit \$1,400 of this sum, which she did, and the judgment was allowed to stand for \$500. Whereupon the railroad company appealed.

Appellant contends that the respondent should be limited in her recovery for damages to her actual money outlay; that she should not be allowed to recover anything for humiliation or mental suffering; that there was nothing in the treatment which respondent received which should cause any feeling of humiliation or mental suffering; that there must first be a physical injury, as a foundation for such a recovery; that a recovery for more than the extra fare paid in this case would be, in effect, a recovery for punitive or exemplary damages, which are never allowed except in cases attended with insult, indignities, or oppression, and are not recoverable in this state in any event. *Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. Rep. 1072. The respondent does not claim to have received any physical injury, and was not subjected to any abusive treatment. She admits that the conductor treated her in a gentlemanly manner, and it appears she understood he was simply obeying the regulations of the railroad company in dealing with her as he did. The principal damages which respondent claims to have suffered were in the publicity given to the matter, in having the attention of the other passengers attracted thereto, and in being put under obligations to the gentleman who purchased her ticket, in so being compelled to accept financial assistance from him, and in the sense of wrong which she suffered. By reason of these

matters she claims to have been very much annoyed, humiliated, and disturbed in her peace of mind. The respondent had no acquaintances aboard the train upon this occasion, except such as she had made upon the trip. She was 21 years of age, and had traveled some upon railroad trains before this time, but not extensively. Owing to her inexperience in this direction, it seems she was an object of some solicitude upon the part of her relatives, in starting her upon this journey. An uncle purchased a through ticket for her, and accompanied her from Vincennes to Chicago, there putting her aboard the regular sleeping car for Seattle, so that she might travel through without a change of cars.

From an examination of many cases bearing upon these questions we are led to the following conclusions: That there is no distinction to be drawn between a case like this, where the passenger vacates the car upon being told to do so by the conductor, and one where resistance is offered, and no more force is used by the agents of the company than is necessary to eject, as the passenger has no right to resist, but must rely upon an action for damages. It is as much a wrongful expulsion in one case as in the other. *Railroad Co. v. Griffin*, 68 Ill. 499; *Railroad Co. v. Connell*, 112 Ill. 295; *Hall v. Railroad Co.*, 15 Fed. Rep. 57; *Townsend v. Railroad Co.*, 56 N. Y. 295. Such actions are not necessarily founded upon a breach of the contract to carry, but properly lie in tort, upon the theory that, when the relation of passenger and carrier is established, a wrongful violation of the contract upon the part of the carrier is a breach of a public duty. An action of case would lie therefor at the common law. *Poullin v. Railway Co.*, 47 Fed. Rep. 858; *Yorton v. Railway Co.*, (Wis.) 21 N. W. Rep. 516; *Walsh v. Railway Co.*, 42 Wis. 23; *Head v. Railway Co.*, 79 Ga. 358, 7 S. E. Rep. 217. In this last case it will be observed that the syllabus, with regard to the force used, is somewhat at variance with the facts, as stated in the opinion. It is apparent that there was no question of undue force or violence involved. Of course, no question as to the form of the action can arise under a system of code pleading, where the facts are stated, (*Hall v. Railroad Co.*, supra,) and there is no attempt to raise any such question in this case. By the great weight of authority, it is well established that the sense of wrong suffered, and the feeling of humiliation and disgrace engendered, if any, is an actual damage, for which the injured party is entitled to compensation, in this class of cases. *Smith v. Railroad Co.*, 23 Ohio St. 10; *Railroad Co. v. Flagg*, 43 Ill. 364; *Railway Co. v. Chisholm*, 79 Ill. 584; *Railroad Co. v. Connell*, supra; *Railway Co. v. Bambray*, (Pa. Sup.) 16 Atl. Rep. 67; *Quigley v. Railroad Co.*, 5 Sawy. 107; *Hamilton v. Railway Co.*, 53 N. Y. 25; *Railway Co. v. Flx*, 88 Ind. 381; *Railway Co. v. Holdridge*, 118 Ind. 281, 20 N. E. Rep. 837; *Finch v. Railway Co.*, (Minn.) 49 N. W. Rep. 329; *Carsten v. Railway Co.*, (Minn.) 47 N. W. Rep. 49; *Hoffman v. Railway Co.*, Id. 312; *Railway Co. v. Bray*, (Ind. Sup.) 25 N. E. Rep. 439. That such claims are here regarded as falling within the class

known as "compensatory" and not "exemplary," damages, see *Dray Co. v. Hoefler*, supra. Those cases to which our attention has been called, most directly in point, in support of the proposition that there can be no recovery for wounded feelings, etc., where the agents of the railroad company acted in good faith, and used no unnecessary force in ejecting the passenger, and subjected him to no insult or other indignity in so doing, are *Fitzgerald v. Railroad Co.*, 50 Iowa, 79, and *Paine v. Railroad Co.*, 45 Iowa, 569. Also, see *Dorrah v. Railway Co.*, (Miss.) 3 South. Rep. 36, and *Trigg v. Railway Co.*, 74 Mo. 147. The two cases first cited, from Iowa, fairly sustain the doctrine contended for by appellant. It is apparent, however, that the feelings are not as deeply involved in cases like those as in the one we have under consideration; and the same is true, in a greater degree, of the two succeeding cases cited. In the *Paine Case*, 45 Iowa, the passenger had been unable to procure a ticket at the ticket office of the company, and upon going aboard the train he refused to comply with the rule requiring passengers to pay 10 cents in addition to the regular fare, where payment was made upon the train. The *Fitzgerald Case*, 50 Iowa, involved the right of a passenger to ride upon a freight train in violation of the rule of the company prohibiting passengers from boarding freight trains except at the depot, and forbidding conductors to permit passengers to get upon the train after it had left the depot. The two cases last cited, in 3 South. Rep. and 74 Mo., are cases where the passenger had been carried by his point of destination. It is evident that in all these cases the feelings of the passenger were not as deeply involved as in the present case. No imputation of falsehood could possibly arise from the circumstances. A party claiming to have purchased a ticket for a greater distance than the one he held entitled him to ride might have his word doubted by fellow passengers. Very likely, different opinions would be entertained as to the truthfulness of such a claim by the other passengers. He might be believed by some, and disbelieved by others. A passenger, realizing this, and that he might thus to some extent become an object of suspicion, would feel more or less mortified thereby. It is true, different individuals would suffer in greater or less degree. To some, perhaps, it would amount to no more than a trifle, while in other cases it might be severe. This, of course, would be a question for the jury to determine. The case of *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, was also cited by appellant as sustaining the position it contends for, but it is evident, so far as these cases are in point, that they are completely overborne by the cases previously cited. The contention that there can be no recovery for such damages, where there has been no direct physical injury, is clearly untenable, under the weight of the authorities. Nor is the right to recover therefor limited to this class of cases. See *Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. Rep. 598; *Same v. Simpson*, (Tex. Sup.) 11 S. W. Rep. 385; and *Same v. Rosentreter*, (Tex. Sup.) 16 S. W. Rep. 25,—which were cases involv-

ing failure to deliver telegrams furnishing information of the illness and death of relatives.

The respondent excepted to the order of the court requiring her to remit \$1,400 from the verdict. She insists, upon this appeal, not only that the judgment should be affirmed, but that the original amount which the jury found she was entitled to should be reinstated; and she claims that, having taken an exception thereto, and preserved the question of record, it is properly before the court. A number of cases have been cited by her as to the right and power of courts to interfere with verdicts in such matters. We do not feel called upon to undertake a review of them, as the law is too well settled that where it appears that a verdict is excessive, and that the jury must have been influenced by passion or prejudice in finding so large an amount, the court will reduce it. This is firmly established. Under the circumstances of this case, we think that \$500, the amount for which the judgment was rendered, was amply sufficient to cover any possible injury plaintiff sustained.

Affirmed.

DUNBAR, C. J., and ANDERS, J., concur

(50 Kan. 155)

In re GUNN.<sup>1</sup>

(Supreme Court of Kansas. March 11, 1893.)

SUPREME COURT — ORIGINAL JURISDICTION — HABEAS CORPUS — LEGISLATURE — COMMITMENT FOR CONTEMPT.

1. The constitution of the state ordains that the supreme court shall have original jurisdiction in proceedings in habeas corpus.

2. Under the statutes of this state, no court or judge shall inquire into the legality of any judgment or process whereby the petitioner is in custody, or discharge him, when the term of commitment has not expired, upon any process issued for any contempt of any officer or body having authority to commit, if such contempt does not arise upon proceedings to enforce the remedy of a party.

3. The supreme court has power to inquire on habeas corpus into the lawfulness of imprisonment by an order or resolution of the house of representatives of the state.

4. The house of representatives of Kansas has power to compel witnesses to attend and testify before the house, or one of its committees, having an election contest concerning a member thereof properly pending before it for investigation.

5. If a witness duly subpoenaed in this state to testify before the house of representatives of Kansas, or a committee of that house, having a contest of election concerning the seat of a member thereof properly pending before it for investigation, willfully refuses to attend or testify, he is in contempt of the authority of the house, for which the house may cause him to be arrested and brought before that body, and such body may, upon proper proceedings, lawfully imprison the contumacious witness.

6. The constitution of the state ordains that the legislative power of the state shall be vested in the house of representatives and the senate; that the number of representatives shall never exceed 125; that a majority of each house shall constitute a quorum; and that each house shall establish its own rules.

7. Under the constitution and statutes, the house of representatives consists of 125 members, and 63, being a majority, constitutes a quorum.

8. When a number of persons come together at the hall of the house of representatives in the state capitol, at a regular session, commencing on the second Tuesday of January of each alternate year, claiming to be members of the house of representatives, those persons who hold certificates of membership from the secretary of state, certified by him under his seal of office, in accordance with the determination of the state board of canvassers, are the only persons entitled to participate in the organization of the house. Such certificates of election confer title upon the holders thereof, governing their associates and everybody who has a lawful duty to determine who are elected representatives, until there can be an adjudication by the house itself to the contrary.

9. Where a majority of the members of the house of representatives in this state, each one of whom holds a certificate of membership, prescribed by the statute, meets at the usual and customary hour in the hall of the house of representatives at the state capitol, at the regular time for the commencement of a session of the legislature, and perfects an organization as a house, appoints its committees, and initiates legislation, such body is duly organized, and is the constitutional house of representatives, although the governor, or senate, or both, refuse to communicate with or recognize it as the house of representatives. Such a house of representatives, so constituted and organized, may keep and publish a journal of its proceedings, and such journal, when properly kept and published, imports absolute verity. Such a house also has the power, under the constitution and laws, to imprison for contempt contumacious witnesses in proper proceedings pending before it.

10. The constitutional house of representatives of the state, regularly organized, having a quorum, and transacting business in the hall of the house of representatives at the capitol, provided for its sessions, cannot be ousted or destroyed as a house by the refusal or neglect of the governor, or of the state senate, or of both, to communicate with it.

11. If an office is filled, and the duties pertaining thereto are performed by the officer or a body de jure, another person or body, although claiming the office under color of title, cannot become an officer or body de facto, and an officer or body claiming to be such de facto cannot oust or destroy the power of an officer or body de jure by taking partial possession of the room or office where the officer or body de jure is in possession and transacting business.

12. Where the constitutional house of representatives of the state convenes at the time and place provided by law, perfects its organization, appoints its committees, and initiates legislation, and continues to transact business, its power is not usurped or destroyed as the house of representatives by the organization in the same room of another pretended house of representatives, composed of 54 members, having certificates of election; but being less than a constitutional quorum, although such body is recognized by the governor of the state and by the state senate as a house, or as a de facto house of representatives. Nor can such pretended body forbid or prevent the constitutional house of representatives from exercising its power, under the constitution and laws, to imprison for contempt.

13. "The house of representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all

<sup>1</sup>For dissenting opinion, see 32 Pac. Rep. 948.



other bodies, officers, and tribunals within this state. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity with the constitution, and, if they have not been, to treat their acts as null and void." *Burnham v. Morrissey*, 14 Gray, 226.

(Syllabus by the Court.)

Original proceedings in habeas corpus by L. C. Gunn to obtain his discharge from an arrest made by C. C. Clevenger, acting sergeant at arms of the house of representatives of the state, on the ground that such house was an illegal body, and such officer had no authority to make the arrest. Writ denied.

Eugene Hogan, for petitioner. Noah Allen, Asst. Atty. Gen., G. C. Clemens, Frank Doster, and W. C. Webb, for the governor. T. F. Garver, Chester I. Long, W. H. Rossington, and David Overmyer, for respondent.

HORTON, C. J. On the 15th of February of the present year, L. C. Gunn was arrested by C. C. Clevenger, and soon thereafter he presented his petition to one of the justices of this court, asking to be discharged from arrest and restraint, upon the ground that Clevenger had no authority to arrest or detain him. He alleged that Clevenger was acting as the sergeant at arms of an alleged house of representatives that had no authority to act as a house. The warrant issued to Clevenger as sergeant at arms for the arrest of Gunn was signed by George L. Douglass, as speaker, and attested by Frank L. Brown, as chief clerk, and was attached to the application. Subsequently a return was filed by Clevenger, as sergeant at arms, justifying the arrest of Gunn, and alleging that his detention was lawful, upon the ground that he (Clevenger) was the sergeant at arms of the constitutional house of representatives of the state of Kansas, duly organized by the election of Douglass as speaker, Brown as chief clerk, with the other proper officers, and that Gunn refused to obey a subpoena personally served upon him to appear before the committee on elections, and testify as a witness in a proper investigation then pending before such committee of the house. To that return a traverse has been filed by the petitioner, who has associated with his attorney counsel representing the governor of the state. Upon the allegations of the pleadings thus framed, this court has a proper matter before it to hear and determine. We may remark, in this connection, that oral evidence was offered upon the trial concerning various matters which was objected to by the petitioner. In deciding this case and declaring the law thereon, this court has sustained the objections to all the evidence as to any matters occurring after the organization of the two houses referred to, except it

has considered the evidence of the Honorable J. M. Dunsmore as to the hall or room where the two bodies held their sessions and transacted business, and his further evidence that the two bodies or houses acted separately and independently of each other. The court has, however, examined and considered the journals of the state senate, of the Douglass house, and of the alleged Dunsmore house, and also the official records of the office of the secretary of state concerning the issuance of certificates of election to members of the house for 1893. The constitution of the state gives this court original jurisdiction in habeas corpus, and this is a proceeding of that character.

The liberty of a citizen is in controversy. But the statute of this state provides that no court or judge shall inquire into the legality of any judgment or process whereby a party is in custody, or discharge him, when the term of commitment has not expired, in the following case, among others: Third. For any contempt of any court, officer, or body having authority to commit. Therefore we have before us, necessary for our determination, the question whether the body or the house which authorized Clevenger as sergeant at arms to arrest and detain Gunn had any legal or constitutional authority so to do. If there were one house only, or the proceedings of one house only, to consider, our duty in this matter would be plain and easy, but it appears from the journals presented to us that on January 10, 1893, (the day appointed for the organization of the house of representatives of the state of Kansas,) there met and attempted to organize at the capitol, in representative hall, two houses, which since that time have acted separately and independently of each other.

We will examine briefly the organization, or attempted organization, of these two alleged houses. Before doing so, however, it is best to understand how a house of representatives may be legally organized. Judge McCrary, in his work upon Elections, in section 509, says: "It is to be observed in the outset that when a number of persons come together, claiming to be members of a legislative body, those persons who hold the usual credentials of membership are alone entitled to participate in that organization; for it is, as we have had occasion several times to repeat, a well-settled rule that, where there has been an authorized election for an office, the certificate of election, which is sanctioned by law or usage, is the *prima facie* written title to that office." Judge McCrary, the writer of these words, occupied for several terms a seat in the house of representatives at Washington. He was chairman for many years in that body of the committee upon elections. Subsequently he was a member of President Hayes' cabinet, and later he was the honored judge of the United States circuit court for the eighth circuit, embracing Kansas. His book is a standard work, both from his ability and experience, and acknowledged to be the leading authority in this country upon the questions therein discussed.

But, again, we have what is known as a "standard work" on parliamentary or legislative practice. It is found in almost every public library, is examined and referred to by every legislative assembly and every congressional body, and its title is "Cushing's Law and Practice of Legislative Assemblies." Section 229 of that work reads: "The right to assume the functions of a member in the first instance, and to participate in the preliminary proceedings and organization, depends wholly and exclusively upon the returns or certificates of election." And in section 240 it is said: "The principles of parliamentary law applicable to the question are perfectly simple and plain, founded in the very nature of things, established by the uniform practice and authority of parliament, confirmed by reason and analogy. These principles are as follows: First, that every person duly returned is a member, whether legally elected or not, until his election is set aside; second, that no person who is not duly returned is a member, although legally elected, until his election is established; third, that conflicting claimants, both in form legally returned, [that would be where two persons had certificates,] are neither of them entitled to be considered as members until the question between them has been settled; fourth, that those members who are duly returned, and they alone,—the members whose rights are to be determined being excluded,—constitute the judicial tribunal for the decision of all questions of this nature." Upon this question of certificates, we also cite the contest in the United States senate from Montana, which is the latest utterance of the highest legislative body in this land. In the report of the majority of the committee it is said: "The majority of the committee are of opinion that, if this body of persons had lawful and constitutional certificates of their election, that title is a good title against all the world, governing their associates in that body, governing the senate, governing everybody who has a lawful duty to determine who are lawfully elected representatives, until there can be an adjudication by the house itself to the contrary; and that nobody can be heard to say, and that no authority can be permitted to inquire into or determine, the actual facts of the election as against that title." 51st Cong. 1st Sess. (21 Cong. Record, pt. 3, pp. 2906-2910.) The majority of the committee were all Republican members of the United States senate; but Senator Gray, from Delaware, one of the most distinguished lawyers and Democrats of that body, made a minority report, and in such report admitted the rule proclaimed by the majority of the committee concerning certificates of election issued to members of a legislature. In his report he said: "I may say, for the minority of the committee, that we accept as a postulate the proposition laid down by the senator from Massachusetts, and do not differ at all, in considering this case, from him in the position that we should seek here, in the first place, to discover the lawful body clothed with legislative power who has chosen a senator, and that, to determine

whether it be such lawful body, we shall be bound, in the first instance, by the fact that such body is composed of members who hold credentials from an officer or board clothed with authority in the premises to make such credentials." This subject has also received the recent attention of the supreme court of Nebraska in a case in which the opinion was handed down as late as the 17th of January of the present year, upon a matter involving the certificate of the election of a member of the legislature. The court said: "It is contemplated that each house of the legislature shall be organized by the persons who are *prima facie* members thereof. It requires no argument to prove the disastrous consequences of a different construction of the constitution." *State v. Van Camp*, 54 N. W. Rep. 114. We may add that the scenes which have occurred in this capitol during the past four weeks are sufficient justification for the view of the supreme court of Nebraska. But, more than this, our own statutes clearly provide that the legislature—that the senate and the house of representatives, when they convene—shall, in the first instance, be constituted only of those members who have certificates of election. They provide that, after an election is held in November, speedy steps shall be taken for the returns of the county canvassing boards. Then the clerks of these boards shall make returns to the state board of canvassers; and then, after a certain length of time, the state board of canvassers shall make an examination of these returns, and order certificates to the persons appearing to be elected. Further, the state of Kansas has been in existence for over 30 years. It is recognized everywhere that practice and usage are to be considered upon questions of this character. It has been the universal practice and usage of the legislative houses of Kansas to be organized by the admission, in the first instance, of persons holding certificates of election. This has been the practice. Now, against this, what can be said, and what authorities are brought?

A case is cited from Maine, (70 Me. 609,) and, in our view, with the exception of a few words in the opinion, we concur in all that is said by the supreme court of that state. In that state the returns were made to the state canvassing board. Under the authority of the constitution, the state officials submitted certain questions to the supreme court as to their duty concerning the canvass of those returns. The supreme court of Maine gave advice, which, in substance, was that the state board should canvass those returns as they appeared upon their face; that they were ministerial officers only, and had no authority whatever to go back of the returns, or to hear and act upon other evidence. In violation of the constitution of that state, in violation of the statutes of the state, and contrary to the express advice of the supreme court of the state, the board of canvassers refused to accept the returns duly filed with them. Under such a condition of affairs, the supreme court of Maine ruled that those returns were better evidence than the fraudulent certificates issued by the state board

of canvassers, in violation of the constitution, in violation of the statutes, and contrary to the advice of the supreme court.

In this case no such condition of affairs appears. There has been offered in evidence the certified list of members who appear to have been elected. Accompanying that certificate is a statement of the returns on file in the office of the secretary of state, with the number of votes each member received. We should here say that, while there has been much discussion about what fraudulent canvassing boards might do, and what frauds canvassing boards might commit, there has not been presented in this case any evidence showing that the returns of election on file in the office of the secretary of state could have been canvassed in any manner other than they were canvassed and declared.

But, more than this, there has been presented what is known as the "Revised Journal of the Dunsmore House." We judge that the journal has been carefully prepared, and that it is attempted therein to state fully what occurred, according to the views of the parties or of the body under whose order it was prepared and approved; yet the journal, day after day, seems to recognize that only certified members have authority to act. We read: "On the call of the roll received from the secretary of state, the following members were present, and answered to their names." And it gives the names of 58. "The following members were present, and did not respond to the call of the roll;" 57. Then it says: "Total number of members present, 115;" being more than a constitutional quorum. Therefore this journal at that place only counts the members who appear upon the roll of the secretary of state. It says the number was 115,—fifty-eight voting, answering the call, and fifty-seven not answering the call." It then states: "The following named contestants for seats were present;" but does not include them in the quorum or in the number of 115. It says they numbered 10.

Again, on the second day of the meeting of what is known as the "Dunsmore House," we read: "The house met pursuant to adjournment. Speaker Dunsmore in the chair. The roll was called, and the following named members answered to their names;" and the number is 57. That is all that answered. Then it says: "The following members were present, but did not answer to the roll call;" and they were 16. And then it says: "The whole number of members present was seventy-three,"—16 and 57, being 10 more than a constitutional quorum; and every day of this journal the same record is kept up until after the report of the committee on elections and certain other persons were admitted. So, not only do the authorities hold that the persons having the certificates of election are the ones to participate in the organization of the house of representatives, but the revised journal of the Dunsmore house shows that its members recognized that rule, if this revision is correct. We know that Mr. Rich has made some different state-

ments. We know that a certain journal presented here, of the same body, reads differently. We are now accepting the revised journal as the true statement of the condition of affairs in the Dunsmore house. Of course, the petitioner cannot object to that journal. So we say, not only do the authorities, parliamentary and legislative, sustain the theory that the persons having certificates are the ones to organize; not only do the practice and the usage prevailing in Kansas since its admission as a state sustain that rule, but the newly-prepared journal of the Dunsmore house recognizes this, and states, not that the contestants voted, not that the contestants appeared for the purpose of being counted, but excludes them all the time, until after they were admitted upon a report of the election committee, and it counts only those who answered the roll call, and then counts several who did not answer. It seems that while 10 contestants are marked in the Dunsmore journal as present, but not voting, 10 names on the certified roll are wholly omitted. Any rightful reason for such omission does not appear. We cannot perceive any valid reason for such omission, even if 10 certified members had their seats contested. Every person duly returned to a house of representatives, and having a certificate, is a member thereof, whether elected or not, whether eligible or not, until his election is set aside. And this must be set aside by the house, not by the individual members before organization, not by any one member, not by any contestant, not by any mob. Before organization, a few members properly elected, meeting in caucus or otherwise, cannot pass upon the "elections, returns, and qualifications" of the members of the house to be thereafter organized. If one member, before organization, can object to any other member duly returned and having a certificate, then all members can be objected to, and there could be no one left to organize any house. In McCrary on Elections (2d Ed., § 204) the practice is thus stated: "Where two or more persons claim the same office, and where a judicial investigation is required to settle the contest upon the merits, it is often necessary to determine which of the claimants shall be permitted to qualify and to exercise the functions of the office pending such investigation. If the office were to remain vacant pending the contest, it might frequently happen that the greater part of the term would expire before it could be filled; and thus the interests of the people might suffer for the want of a public officer. Besides, if the mere institution of a contest were deemed sufficient to prevent the swearing in of the person holding the usual credentials, it is easy to see that very great and serious injustice might be done. If this were the rule, it would only be necessary for an evil-disposed person to contest the right of his successful rival, and to protract the contest as long as possible, in order to deprive the latter of his office for at least a part of the term; and this might be done by a contest having little or no merit on his side, for it would be impossible to

discover in advance of an investigation the absence of merit. And, again, if the party holding the ordinary credentials to an office could be kept out of the office by the mere institution of a contest, the organization of a legislative body—such, for example, as the house of representatives of the United States—might be altogether prevented by instituting contests against a majority of the members; or, what is more to be apprehended, the relative strength of political parties in such a body might be changed by instituting contests against members of one or the other of such parties. These considerations have made it necessary to adopt and to adhere to the rule that the person holding the ordinary credentials shall be qualified and allowed to act pending a contest and until a decision can be had on the merits."

Now, why should not this principle be followed? Why should not this rule, which is universal throughout the states of this Union, and which is accepted and adopted by congress, be followed in the state of Kansas? It has history to sustain it. It has the wisdom of long years of legislative experience to sustain it. It has reason to sustain it. And let us here remark that in every state of this Union where, through political excitement or personal contests, a different rule has been adopted, disturbance, violence, and almost bloodshed have always occurred. You take Alabama, where they attempted to hold two independent houses, and disastrous consequences followed, until public opinion compelled those two bodies to meet together and act in harmony. You take Montana, where they attempted to disregard this well-settled rule, and disturbance and conflict occurred. You take Maine, where the state board of canvassers refused to canvass the returns on file in the office of the secretary of state as required by the constitution, and bloodshed seemed at times imminent; but public opinion in that state compelled those two separate bodies to unite and act together for the benefit of the state, and not for the benefit of any party. You take the state of Kansas, for the past three or four weeks, and will any one declare that the violation of this well-settled rule or this recognized practice of all legislative assemblies has conduced to the peace, to the quiet, and to the good order of the citizens of Kansas, or to the peace and good order of the legislative assembly of the state? Then, why not, if this court has the power,—and we will come to that hereafter,—why not, if this court has the power, shall it not recognize that house which has followed the usual and ordinary practice of all legislative assemblies in organizing? The reasons are stronger in this state for permitting only those persons having certificates of election to participate in the organization of either house of the legislature because, under the rule declared by this court, a board of canvassers cannot act arbitrarily or fraudulently, if prompt proceedings are taken in the courts to compel them to discharge their duty properly. "Where a canvassing board wrongfully neglects or refuses to canvass

returns which are regular in form, the courts may, by mandamus, compel the board to canvass and declare the result from the face of the returns; and if a canvass has been wrongfully or improperly made, and the board has adjourned sine die, the courts may compel it to reassemble and make a correct canvass of all the returns before it at the time of the first canvass." *Lewis v. Commissioners*, 16 Kan. 102; *Rosenthal v. Board*, (Kan.) 32 Pac. Rep. 129. In some of the states a contrary doctrine has been declared; but the rule in this state affords better protection against any canvassing board acting corruptly, fraudulently, or wrongfully. It may seem plausible, without full consideration, to say that only those members of the legislature who are actually elected, whether having certificates or not, are the persons that should organize or hold seats in either house. But some method of organization is necessary; some written title must be created or exhibited before any person can be regarded as having a *prima facie* right to a seat in the legislature. Those persons having certificates, and only those, must be permitted to organize, and no authority can change or overthrow that right or *prima facie* written title of a member, except the house itself; and the members of the house cannot be regarded as a legal or constitutional house until there is some temporary or permanent organization by a majority thereof; that is, by 63 members having certificates of election. The certificates of election give a title to the members holding the same, which must govern their associates until there can be an adjudication by the house itself to the contrary; that is, by a constitutional house having a quorum.

The journal of the *Dunsmore* house states the number of persons who were present and answered the roll call, and then states how many persons were present who did not answer, and the quorum is made up. How? By counting the persons who answered to the roll call. That is right,—sometimes 55, sometimes 57, and sometimes 58; and then by counting, in addition, as the journal says, persons upon the roll who were present, but did not vote. Can this be done?

We know that very much has been asserted about the prevailing practice in Washington in the house of representatives under what is known as the "Reed Rule," and many persons who have not taken time to examine this question have said that under the Reed rule in any assembly, or in any legislature, or in any convention, if persons are present and do not vote or answer to their names, the speaker or the clerk may count them in order to make a quorum. It would look to us that what is known as the "*Dunsmore House*," or the persons who prepared this revised journal, acted upon this theory, because in no other way could they count a quorum. But an examination of what is known as the "Reed Rule" permits no such thing whatever to be done. The Reed rule was a subject of investigation before the supreme court of the United States upon what is known as the "Tariff Bill." It is reported in *U. S. v. Ballin*, 144 U. S. 1, 12

Sup. Ct. Rep. 507. It appears from the decision that before the speaker or the clerk counted any one present, not voting, the house of representatives had expressly adopted a rule upon that question; and the rule is as follows: "On the demand of any member, or at the suggestion of the speaker, names of members sufficient to make a quorum in the hall of the house, who do not vote, shall be noted by the clerk, and recorded in the journal, and reported to the speaker, with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business." The supreme court says that after the house adopts such a rule, under the authority of the house itself, the speaker may order persons present and not voting to be counted to constitute a quorum; but that court did not hold, in the absence of an express rule, that the speaker or the clerk, or any other person, could assume that those persons, present in a house, who do not answer to their names on the roll call, or who do not vote, shall, for the purpose of a quorum, be counted as present. Therefore the counting of such votes in the record or journal of the Dunsmore house has no foundation to rest upon. There is no pretense that such a rule as the Reed rule was adopted by either of the houses. There is no pretense that the speaker of the Dunsmore house had any authority from the house to do what was done in this case. But, more than that, the persons who were called and counted as present and voting, in order to constitute a quorum in the Dunsmore house, were never members of the Dunsmore house,—never recognized Mr. Dunsmore as speaker. According to the evidence of Mr. Dunsmore, each one of the bodies or houses, after it organized, acted separately, and had nothing whatever to do with the other. Speaker Reed never called, in order to constitute a quorum, the name of any person in the house of representatives who refused to consider and recognize him as speaker of that house. Even under such a rule as was adopted by congress, he would not have called the name of any person who had not recognized that body as the constitutional body,—the legal house.

Something was said upon the argument of the admission in the Douglass house of persons not eligible to seats in the legislature. That matter is wholly immaterial at this time. The house, after it is organized, "is the judge of the elections, returns, and qualifications of its own members;" but, before organizing, the persons having certificates, whether eligible or not, are the members to organize. Before organizing, there is no one—no house—to reject or oust a member holding a sufficient certificate. There is no one—no house—to pass upon his eligibility or election. Until the house is organized, the certificate is the lawful title that controls. The American and English Encyclopedia summarizes the law of the worth of a certificate of election as follows: "It is settled that when it is made the duty of certain officers to canvass the votes, and issue a certificate of election in favor of the suc-

cessful candidate, a certificate of such officers, regular upon its face, is sufficient to entitle the person holding it to the possession of the office during an action to contest the right." Volume 6, p. 373, c. 17; *Clough v. Curtis*, 134 U. S. 367, 10 Sup. Ct. Rep. 573; *State v. Buckland*, 23 Kan. 259. But in the case of *Privett v. Bickford*, 23 Kan. 52, this court said: "Upon this question [eligibility] the weight of authority seems to be, as in our opinion is the better doctrine, that where the disability concerns the holding of the office, and is not merely a disqualification to be elected to an office, a person who is ineligible at the election will be entitled to enter upon and hold the office, if his disability be removed or cured before the issuance of the certificate, and before entering upon the discharge of the duties of the office for which he is elected. If a person may hold the office, he may be elected while he is under disqualification; and if he becomes qualified after the election, and before the holding, it is sufficient. In the one case the disqualification strikes at the beginning of the matter,—that is, it prohibits the election of an ineligible candidate; in the other case the disqualification relates only to the holding of the office. The constitution expressly provides that the disability may be removed by a vote of two thirds of all the members of both branches of the legislature. When the electors of Harper county voted for the plaintiff, they had the right to look at, and to build their expectations upon, this provision, because, although at the election the plaintiff was ineligible to hold office, yet they knew that the legislature had the right to remove the disability, and, if removed, he was entitled to the possession of the office to which he was preferred by the majority of the electors. If our constitution provided that the plaintiff was ineligible to be elected, instead of being ineligible to hold office, the contention of the defendant would be good; but as the ineligibility is not as to the election, but only the holding of the office, such ineligibility is cured by the subsequent removal of the disqualification. The conclusion reached by us also fits the intimation in *Wood v. Bartling*, 16 Kan. 109, that, where a majority of the electors vote for an ineligible candidate, the election is not a nullity. In England it has been held that, where electors have personal and direct knowledge of the ineligibility of the majority candidate, the votes cast for such candidate are void, and the minority candidate is elected. In this country the great current of authorities sustains the doctrine that the ineligibility of the majority candidate does not elect the minority candidate, and this, without reference to the question as to whether the voters knew of the ineligibility of the candidate for whom they voted. It is considered that in such a case the votes for the ineligible candidate do not elect him, because of his ineligibility—but the other or minority candidate cannot be considered as elected.

Let us now take up the organization of the two alleged houses: First the Douglass house. There can be no reasonable question but that George L. Douglass, the

speaker, who signed the warrant of arrest, and Frank L. Brown, who attested the warrant as chief clerk, and C. C. Clevenger, the sergeant at arms, who made the arrest we are now investigating, were elected to their several positions by 64 member of the house of representatives holding certificates of election, and that a majority of the 125 members voting for them held certificates in accordance with the returns on file in the office of the secretary of state. Mr. Justice Brewer, in delivering the opinion in *U. S. v. Ballin*, said: "The question, therefore, is as to the validity of this rule, and not what methods the speaker may, of his own motion, resort to for determining the presence of a quorum, nor what matters the speaker or clerk may, of their own volition, place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceeding. \* \* \* The constitution provides that 'a majority of each [house] shall constitute a quorum to do business.' In other words, when a majority are present, the house is in a position to do business. Its capacity to transact business is then established,—created by the mere presence of a majority,—and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and, when that majority are present, the power of the house arises." The constitution of our state ordains that a majority of each house shall constitute a quorum. The house of representatives consists of 125 members; 63 is a majority and a quorum. When a majority or quorum are present, the house can do business; not otherwise. A quorum possesses all the powers of the whole body, a majority of which quorum must, of course, govern. If less than 63 members are present in the house, there is no quorum. The body may adjourn from day to day, but cannot elect officers, transact business, or admit new members. Less than a quorum cannot "judge of the elections, returns, and qualifications" of the members of the house. A major part of the whole of a house is necessary to constitute a quorum, and a majority of the quorum, of course, as we have said, may act; but, if the major part withdraw so as to leave no quorum, the power of the minority to act ceases. *Brown v. District of Columbia*, 127 U. S. 579, 8 Sup. Ct. Rep. 1314. Then, under the usual forms of law, under the universal practice adopted in this state, and in all the legislative bodies of all the states of the Union, the Douglass house was organized by a legal and constitutional majority, as evidenced by the certificates of election.

There has been some contention that there were irregularities in the organization of the Douglass house. Now, what was the irregularity, if any? The statute of this state provides that, when the house of representatives convenes, the secretary of state shall lay before it a roll.

Of what? A roll of the certified members of the house according to the returns in his office. Upon the day that the house of representatives met, Secretary of State Osborne went into the hall about an hour and twenty minutes after the members had assembled, with a roll. The statute says he might have brought that in and left it. There seems to have been a contention whether he should preside, and the secretary of state, probably desiring no trouble with these conflicting interests, stepped out. All that Secretary Osborne had was a certified list of members from his office. When he stepped out, a member presented another. Somebody has said that that was dated the day before. It was a duplicate of the other roll. Secretary Osborne read his roll in this court, and it was compared, in the presence of the court, with the roll certified to the day before. There was no difference between these rolls. The provision requiring the secretary of state to lay the list before the members is only directory. It does not prevent a legislative body from organizing. Of course, there might have been a little more formality about this matter. There might have been a little more order. There might have been less excitement. But, when Secretary Osborne withdrew, another roll was produced,—a roll which everybody admits was a duplicate of his roll. The house organized upon that roll. We have said that Speaker Douglass and the other officers received more than a majority of the duly-certified members of the house. The speaker of the house known as the "Dunsmore House" received no votes from the 64 members. There does not seem to be any reasonable contention about that. How many Mr. Dunsmore did receive it is impossible to tell, because his was a viva voce vote. The two houses organized about the same hour, nearly simultaneously, but the elections of the temporary and permanent speakers of the Douglass house were prior in time to the election of the officers of the Dunsmore house. The complete organization of the first was prior to that of the latter. After the Dunsmore house had elected a temporary speaker by a viva voce vote, Secretary Osborne returned to the hall of the house of representatives, and passed to such person the certified roll from his office of members of the house holding certificates of election; but, at the instance of some one in the Dunsmore house, all the names on this roll were not called. Ten members were omitted,—not counted. After there was a temporary organization of the Douglass house, Joseph Rosenthal, of Haskell county, by general consent, was voted in as a member in the place of A. W. Stubbs, but he did not appear and answer as a member until after its permanent organization. On January 12th, Joseph Rosenthal, Stephen Meagher, and T. G. Chambers, (all Democrats,) appeared in the Douglass house, filed their oaths of office, and recognized the Douglass house as the legal house of representatives of the state. At this time, both Meagher and Chambers held certificates of election. The returns in the office of the secretary of state showed that they were elected.

Therefore, since January 12th, the Douglass house has been composed of 66 members with certificates of election, and also Joseph Rosenthal, who was admitted after its temporary organization, making 67 members,—more than a majority of the house, and more than a "quorum," as defined by the constitution of the state. All concede that Rosenthal was duly elected. Under these circumstances, why was not the Douglass house a legally organized house of representatives on the 10th and 11th days of January, 1893? In this connection it is significant that the governor did not recognize the Dunsmore house until January 12th, the third day of the session, and the senate did not formally recognize the Dunsmore house until January 14th, the fifth day of the session. If the Douglass house was organized on the 10th of January, and was in session on the 11th day of January, before either house had been recognized, why was not that house at that time the properly organized house? The constitution says that the legislature shall consist of a house of representatives and a senate. On the 10th the governor had not recognized the Dunsmore house; on the 11th the governor had not recognized the Dunsmore house; neither had the senate recognized either house; neither had the governor recognized either house. Now, it is conceded that a house of representatives has other duties than mere legislative ones. Before it sends its communication to the governor, before it sends its communication to the senate, if it legally meets and organizes, is it not a house? Has it not the right to protect itself? Has it not the right to issue subpoenas? Has it not the right to examine those things which pertain solely and exclusively to the house itself? Supposing in this case there was no recognition of the Dunsmore house by the governor or the senate, and the Douglass house had issued its warrant upon proper resolutions; could it be said the Douglass house was not the constitutional house because it had not received recognition from the governor, or because it had not yet received recognition from the senate? Up to this time, everybody admits that there might be some little delay about such things. It often occurs in legislative experience that one body is organized some days before the other. There may be conflicting interests about organization, sometimes in the senate, but more often, of course, in the lower house. Now, the point we desire to make is this, and it seems to us conclusive and unanswerable: That, if the Douglass house had a constitutional majority of the certified members upon the 10th and 11th days of January, then during those two days it was the house, it was the legal house, it was the constitutional house, and had the right to do all those things necessary, outside of legislative matters, for its protection, for preventing disturbance, for purging itself of illegal members. It had the right, then, to punish parties for contempt, if they disobeyed its orders. Let us take an illustration: One hundred and twenty-five members of the legislature meet together, and there is no con-

flict. They organize the house, and the senate is delayed in its organization, and the governor delays in answering its communications. Has not that house during the time of this delay all the rights of the legal and constitutional house of representatives? Has it not the right, the moment it is legally organized, to require order within its body? Has it not the right, the very minute it is organized, to say to any person within its hall who attempts to insult its speaker or disturb a member, "We will lay hands on you, because inhering in this body is the power of its own protection?" It was decided in *State v. Hillyer*, 2 Kan. 17, that: "There is no constitutional inhibition of the session of one branch of the legislature when the other is not in session; and, sensible, the separate action of one body may be valid in the absence or nonorganization of the other." It was said by Kingman, J., in that case: "If it be admitted, as claimed, that, when acting in their legislative capacity, the proceedings of one house when the other is not in session, have no validity, it can only be upon the ground that their legislative power is a unit, though distributed, and the parts can only act in unison, and neither the reason nor principle would apply to this case. But the principle contended for cannot be admitted. If, at the commencement of the regular session of the legislature, the senate, for any cause, should fail for weeks to organize, there can be no doubt that it would be perfectly competent for the house to perfect its organization, appoint its committees, and initiate legislation." Then, if the Douglass house was legally organized, and had a constitutional majority, it had the right to keep a journal before the governor recognized it; it had the right to keep a journal before the senate recognized it. The journal of a legislative body commences at its very organization. The journal of a legislative house does not commence with the recognition from the governor; it does not commence with the recognition from the senate. If the Douglass house was legally and constitutionally organized, and was legally and constitutionally in session, is not the journal of the Douglass house made on the 10th and 11th days of January binding and conclusive upon this court? This court has said that a journal properly made by the legislature is such evidence. *Division of Howard Co.*, 15 Kan. 194. We are now referring to the journal of the Douglass house made on the 10th and 11th days of January, before any recognition of either body, before the recognition from the senate or governor of any house. Either we must say that the house of representatives depends for its existence upon recognition from the governor, or depends for its existence upon recognition from the senate, or depends for its existence upon the recognition from both of these, or else we must say that the journal kept by the body that is organized is the conclusive journal to this court up to the time of the recognition of the other house. Then it seems to us that thus far in the case there ought to be no disagreement.

Now, the Douglass house having been



legally organized, and having made a journal for a day or two before any recognition of either house, it seems that this journal, for those days, must be received as evidence for all it recites. As the Douglass house has continued in existence ever since it was legally and constitutionally organized, its journal must import absolute verity, not only for the two days before recognition of the Dunsmore house, but during all of the time of its existence, unless it has in some way been ousted, destroyed, or dissolved. Clearly, if its legislative journal is good for January 10th and 11th, it is good for all time, if the Douglass house was legally organized, and continued during the days of its journal to be a legal and constitutional house. At this time, without going extensively into the transactions of the two bodies, it is sufficient to say that the Douglass house has always met in the hall of representatives in the capitol, where it has been usual and customary, since the erection of that hall, for the house of representatives to meet and transact business. It is true that another body, called the "Dunsmore House," with 58 members having certificates, met in a portion of the same hall; and hence there were two alleged houses in the same hall, doing or attempting to do business. The two alleged houses are the real cause of the contention now before us. If they were not, there would not be any trouble in this case, and there probably would not be this case for the court to hear and decide. It is also clear that, so far as it could do business, the Douglass house has carried on business.

At this point it is urged with great ability and zeal that this court has no jurisdiction to pass upon the question of the legality of either of these two houses, as it appears that there were two alleged houses. Its right to do so is denied by the petitioner and by the able counsel who represent the governor. As was said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 404: "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should." The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful, because it is unpleasant. With whatever doubts or with whatever difficulties a case may be attended, we must decide it as best we can, if it be brought before us. We have no more right to decline to exercise the jurisdiction thus given than to usurp that which is not given.

Let us see what the authorities are upon this point. We read again from the able work of Judge McCrary. He says: "The cases in which the official acts or votes of members of a legislative body who are such de facto only, and not de jure, have been held valid, are all cases in which there has been no question as to the legality of the body in which they sat. They are cases in which the body admitting such persons was, in doing so, acting within its admitted jurisdiction, and in such cases the courts will not inquire into the title of such members to their seats. The courts

in such cases will go no further than to inquire as to the legal status and the authority of the body as a whole; but where there are two bodies, each claiming to be the legislature, then the court, whose duty it is to respect and execute the acts of such legislature, must of necessity decide which is the legislature." Section 517. Then, again, under the constitution of Maine, the legislature could propound questions to the supreme court of that state, and in a certain case they did propound questions; and this is what the supreme court of Maine said: "When different bodies of men, each claiming to be and to exercise the functions of the legislative department of the state, appear, each asserting their title to be regarded as the lawgivers for the people, it is the obvious duty of the judicial department, which must inevitably, at no distant day, take up the question, and pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of them lawfully represent the people, from whom they derive their power. There can be but one lawful legislature, and the court must know for itself whose enactments it will recognize as laws of binding force when brought judicially before it. In a thousand ways it becomes essential that the court should forthwith ascertain and take judicial cognizance of the question, which is the true legislature?" 70 Me. 609.

Now, in 71 Me., in a case concerning an office, not upon questions submitted, but upon a case concerning an office which was brought before the court in the regular way, the court repeats the identical language used in the advice given upon the former occasion. *Prince v. Skillin*, Id. 361. If it is the obvious duty of the judicial department to pass upon the claims of two legislative bodies or assemblies, then it is also the duty of the judicial department to pass upon the legality of two different houses, both claiming to be the house of representatives. In 1859, George P. Burnham was imprisoned and restrained of his liberty by John Morrissey, at Boston, who justified such restraint upon the ground that he was the sergeant at arms of the commonwealth of Massachusetts, and that he had arrested and detained Burnham by virtue of a warrant from the speaker of the house of representatives, to answer for a contempt in refusing to comply with an order of a special committee of the house. Proceedings in habeas corpus were commenced by Burnham before the supreme court of Massachusetts for his discharge, and, after a hearing of the case, that court held that Burnham was lawfully in the custody of the sergeant at arms, by virtue of the warrant of the house of representatives. Hoar, J., speaking for the court, said, among other things: "The house of representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by this court. That house is not the legislature,

but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers, and tribunals within the commonwealth. Especially is it incompetent and proper for this court to consider whether its proceedings are in conformity with the constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity with the constitution, and, if they have not been, to treat their acts as null and void." *Burnham v. Morrissey*, 14 Gray, 226; *State v. Kenney*, (Mont.) 23 Pac. Rep. 733; *State v. Meadows*, 1 Kan. 91; *State v. Barker*, 4 Kan. 436; *Graham v. Horton*, 6 Kan. 343. It has been said that there are some views the other way, and cases from Pennsylvania and Georgia are cited. In the Pennsylvania case the exact question as to the division of the legislature was not before the court. If the court intended to say in that case an injunction would not be granted against the supreme legislature, this court would readily concur with it. If it intended to go further than that, this court then calls attention to the fact that upon "political questions," as they are denominated in Pennsylvania and Georgia and some other states, this court has heretofore differed from the courts of those states.

In the case which involved the late Gov. Martin, (17 Pac. Rep. 162,) the question was raised whether he could be compelled by writ of this court to organize a county in this state. Gov. Martin had been advised that, under the decisions of Georgia and Pennsylvania and other states, this court had no authority whatever by writ of mandamus or other proceedings to give him advice or direct him in a ministerial matter. He came before this court saying the court had no authority to inquire into any matter against him as governor. This court examined the matter patiently and carefully. There were no politics in that case. The governor believed his duty was one way, and this court, after examining the matter, said that the rule laid down in Pennsylvania and Georgia and in other states was not the best rule, and was not the one which should be recognized. We referred directly to Pennsylvania and Georgia decisions upon this question. The latter were to the effect that the court cannot compel the governor to perform a ministerial act; that it cannot touch anywhere his domain of duties of any kind or character. It is true, dissenting opinions were filed in some of those cases; but it is the majority of the court that always rules. A majority of the court in Pennsylvania and Georgia held that neither the supreme court nor any other court had any right to inquire about the duty of the governor concerning any matter, whether ministerial or discretionary. In the Martin Case the first point of the syllabus reads: "Where purely ministerial duties are by statute imposed upon the governor, and such du-

ties are only such as might be devolved upon any other officer or agent, the performance of such duties may be controlled by mandamus or injunction." *Martin v. Ingham*, 38 Kan. 641, 17 Pac. Rep. 162. In the Pennsylvania case, parts 1 and 2 of the syllabus read: "1. The governor is the absolute judge of what official communications to himself or his department may or may not be revealed, and is the sole judge, not only of what his official duties are, but also of the time when they should be performed. 2. The governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity." *Hartranft's Appeal*, 85 Pa. St. 433. In the Georgia case, the supreme court of that state differed widely from the opinion of the supreme court of this state. The third part of the syllabus reads: "However clear it may be, as a general legal proposition, that when a mere ministerial act is required to be performed, by law, on the part of an executive officer, and individual rights depend on the performance of that act, the proper tribunals of the county have jurisdiction to compel its performance, yet, for political reasons alone, the chief magistrate of the state cannot be compelled, by mandamus, to perform such ministerial act." *State v. Towns*, 8 Ga. 360. *Warner, J.*, in delivering the opinion, among other things said: "If, as has already been remarked, it was competent for the legislature to impose this ministerial duty, of issuing a commission to a clerk, on the executive officer of the government, wholly independent of, and in addition to, the other functions devolved upon that officer by the constitution, why may he not, when the performance of this ministerial act, so required by law, is essential to the completion and enjoyment of individual rights, be considered, quoad hoc, not as an executive, but as a merely ministerial, officer, and therefore liable to be directed and compelled to perform the act by mandamus? Viewed as strictly a legal question, we cannot offer any satisfactory reason why he should not, according to the general principles of the law; and it was in this point of view alone this question was considered by this court in *Bonner v. Pitts*, [7 Ga. 479.] Indeed, no other view of it was presented for our consideration on the argument of that case. But while we are unable to give a satisfactory legal reason why the remedy sought should be denied to the citizen, yet we are satisfied that, for political reasons alone, the remedy by mandamus ought not to be enforced against the chief executive officer of the state. The ultimate effect of this remedy, in case of refusal by the governor to obey the laws of the land, would be to deprive the people of the state of the head of one of the departments of the government. This ministerial act, required by the law, is to be performed by the same officer who is, by the constitution, placed at the head of one of the departments of the government, and is required, by the constitution, to perform certain other duties, of which

the people may not be deprived." In the case of *Martin v. Ingham*, supra, a part of the opinion was quoted to show how the question should be viewed strictly as a legal question, and how the question was viewed by the supreme court of Georgia as a legal question. But the supreme court of Georgia, after admitting that "it was unable to give a satisfactory legal reason why the remedy [mandamus] sought [in that case, against the governor] should be denied to the citizens," said "that, for political reasons alone, the remedy by mandamus ought not to be enforced against the chief executive of the state." The supreme court of Georgia, therefore, upon the ground that the question was a political one, decided that the remedy by mandamus does not exist in that state to compel the performance of purely ministerial duties imposed by statute upon the governor. In Kansas, the supreme court, differing from the Georgia supreme court, held that, where purely ministerial duties are imposed by statute upon the governor, the performance of such duties may be controlled by mandamus or injunction, (38 Kan. 641, 17 Pac. Rep. 162;) so, in this state, as before stated, the supreme court has differed from Pennsylvania and Georgia in what are considered political questions or political matters. In the case of *Martin v. Ingham*, found in 38 Kan. 641, 17 Pac. Rep. 162, the decisions are cited. They are all gone over, and in a most learned and able opinion by Mr. Justice Valentine this whole question is examined, and, so far as that particular question was concerned, was then settled. This court differed from the supreme courts of the states of Pennsylvania and Georgia; and although the governor of this state said, "You have no right to give me advice," and although it was said the governor was beyond the power of this court, and we should hesitate before we attempted to enforce his duties, this court unanimously went upon the discharge of its work in the best way it could, and, in response to the suggestion that the governor would not obey, said: "It is said that, if the governor opposes the order or judgment of the court, it cannot be enforced, for he has entire control of the militia. But are the courts to anticipate that the governor will not perform his duties? Should not the courts rather presume that, when a controversy is determined by the courts,—the only tribunals authorized by the constitution or the statutes to construe the laws and determine controversies by way of judicial determination,—that the governor, as the chief executive officer of the state, would see that such determination should be carried into full effect? Such would be his duty, and no one should suppose that he would fail to perform his duty when his duty is made manifest by judicial determination of the courts. No department should ever cease to perform its functions for fear some other department may render its acts nugatory, or for fear that its acts may in some manner affect the conduct or the status of some other department." In this case we are not called

upon to make any order concerning the governor. In this case we are not called upon to make any order concerning the state senate. We are simply called upon to exercise our judicial determination as to which is the legally organized and constitutional house of representatives. There can be no conflict; there should be no conflict. The court is answerable to the people of this state. The governor is answerable to the people of this state. The house is answerable to the people of this state.

But, again, in 1879 the house of representatives of this state associated with itself some persons above the number of 125. An act was passed by the legislature. It was passed by what was called the "House." It was passed by the senate, and approved by the governor. It was published in the state paper. And yet, when that act of the legislature came before this court for examination, it said "that the house of representatives had no lawful authority to pass the act," and it wiped it out of existence. There was no conflict between the governor and the senate or the house in doing this thing. Supposing the legislature of 1879 had passed every act by votes of that character, and they had been proclaimed and published, this court would have declared every such act void.

It is said that we cannot find a line in the constitution giving this court authority to pass upon this question of organization. It is the acknowledged power of this court to finally pass upon every act of the legislature. It is the acknowledged power of this court to declare acts of the legislature void. In the case in 28 Kan. 724, (the *Francis Case*), there was nothing upon the face of the act to show but what it was a legal enactment. It was properly signed. It was properly enrolled. It was properly published. But this court went into the house of representatives, and examined its journal, and ascertained that the house was not a constitutional body, and it stamped the so-called "Act" out of existence. It had the power to do it, and that decision has been recognized ever since. Mr. Justice Valentine, speaking for the court in that case, said: "Now, generally, under affirmative and mandatory constitutional provisions, the legislature may do more than is required; but it cannot do less, if it does its duty. Under negative and prohibitory constitutional provisions, however, the legislature may often refrain from doing things which are not prohibited; but it can never do what is prohibited. Under this negative and prohibitory clause of the section, the legislature may fix the number of representatives at less than one hundred and twenty-five, but it can never fix it at more; and there is no power in the state which can fix it at more. Therefore, whenever the house of representatives consists of more than one hundred and twenty-five members, some of such members must be there illegally. Such was the case in 1879. The house of representatives at that time consisted of one hundred and twenty-nine members. Four of these members, to wit, the four from Rooks, Rush, Harper, and

Kingman counties, who were not provided for by law, and being the last members admitted, were not entitled to their seats. And the act in controversy was passed only by the assistance of their votes. Except for their votes, or at least three of their votes, the act would not have received a constitutional majority of the votes of the members of the house; and, not counting their votes, the act did not receive a constitutional majority. Now, we do not think that their votes should be counted, and therefore we think the act in controversy must be held as not having passed the house of representatives, and as void." It is said that the court cannot inquire by quo warranto into the right of membership of these respective bodies. This court said that in the Tomlinson Case, in 20 Kan. 692; but, when this court has the ultimate right and duty to pass upon acts of the legislature, it has also the right to pass upon the organization of the legislature, or either or both houses, although it has no right whatever, after the legislature is organized, to deal with any question concerning "the elections, returns, and qualifications of its own members."

Whether Gunn is rightfully restrained of his liberty by a legal house of representatives is not a political, but a judicial, question, and this court, therefore, must have authority to inquire and determine whether the house has been properly organized, and is such a house as is authorized by the constitution of the state to establish its own rules, to keep and publish a journal, etc. *Burnham v. Morrissey*, 14 Gray, 226; *State v. Cunningham*, (Wis.) 53 N. W. Rep. 35; *Id.*, 51 N. W. Rep. 735; *Giddings v. Blacker*, (Mich.) 52 N. W. Rep. 944; *State v. Kenney*, (Mont.) 23 Pac. Rep. 733. In *Rice v. State*, 7 Ind. 334, it is said: "The constitution of the state, relative to acts of the legislature, is the paramount or supreme law. That, when the two conflict, the acts of the legislature must yield as utterly void. That it is the duty of the courts, in every case arising before them for decision, to decide and declare the law governing the case. The duty of the courts to give construction to laws, and to declare void or disregard, because not law, those legislative acts in conflict with the constitution, grows, of necessity, out of the other duty of declaring what the law is." *Campbell v. Dwiggins*, 83 Ind. 473; *Cooley*, Const. Lim. 45. In *Prouty v. Stover*, 11 Kan. 235, Mr. Justice Brewer, speaking for the court, said: "Three questions are presented, two of which, at least, must be decided in favor of the plaintiff before he will be entitled to the relief sought: First. Could a majority of members present in the joint session, and voting, elect, or did it require a majority of all the members elected to the two houses? Second. Did the house of representatives consist of more than ninety members? Third. Can this court look back of the final declaration of the result by the joint convention, to see whether, upon either of the votes, any one other than the one declared elected was in fact elected? These questions, as can readily be seen, are, so far as this court is con-

cerned, of a delicate nature, for they concern the regularity of the proceedings of the legislative branch of the government; and they are also questions of great moment, for they involve the rightfulness of the organization of at least one body of the legislature." In that case this court decided: "Where the legislature is made an electoral body, and a proceeding is had to contest the validity of an election by such body, the courts are not precluded by the action of the house in admitting members from inquiring into the legality of certain representative districts, and the rights of the members from those districts to vote at such election."

But it is claimed that the Douglass house has been destroyed, ousted, or dissolved by the recognition of the Dunsmore house by the governor and the senate. The governor did not recognize the Dunsmore house until January 12th, the third day of the session; and the senate did not formally recognize the Dunsmore house until the 14th day of January, the fifth day of the session. It is true that it appears the secretary of the senate went to the Dunsmore house and presented communications before that date, but he explains that it was not by order of the senate, but because some of the senators asked him to do so. The conclusion we have reached is that, taking the journals before us, the house that the governor recognized consisted of 58 members,—not a constitutional quorum, not a constitutional majority; the house that the senate recognized consisted of 58 members,—not a constitutional quorum, not a constitutional majority. It has been said that as the governor must act in this matter, that as the senate must act in this matter, should not their actions be final and conclusive? That seems to be one theory. If that is the correct view, the court's connection with the case would be very brief. All we would have to do would be to ask: "What did the governor do? What did the senate do?" We admit that for certain purposes recognition from the governor should be considered. We admit that for certain purposes recognition from the senate should be considered. All departments of the government should pay all proper respect to the acts of all other departments. The governor, overwhelmed with business, perplexed with the duties surrounding him, not having time to investigate, recognizes a body which is not a constitutional body. The senate passed a resolution to investigate, but, examining the journal, I cannot find any report upon that resolution. It recognizes a body not a constitutional body. Is such a recognition final? Is it conclusive? Does it bind this court? Is the end of the duty of this court to simply inquire what are the records in the office of the governor and the senate? We admit that, if, after such recognition, the Douglass house had voluntarily departed from their room, and gone their several ways to their homes, and the 58 members had increased its membership in any way it pleased, by lawyers, by doctors, by anybody, and they had gone on and continued business without interference

and without challenge, such recognition would have some weight. But that is not the case presented here.

On January 13th Senator Baker presented to the state senate, of which he is a member, the following protest of himself and 13 other members, and asked to have it spread upon the journal: "Whereas, at the general election held in the state of Kansas on the 8th day of November, 1892, there were chosen by the electors, participating therein, 125 certain members of the house of representatives of the state, each of whom received a plurality of the votes cast in their respective districts; that certificates thereof from the county clerks of the districts, certifying that, upon a canvass duly and legally made in their respective districts, said certain 125 representatives received certain votes, were filed with the secretary of state, as provided by law; that the state board of canvassers of Kansas, as provided by law, duly met on November 23th, 1892, canvassed the returns, and determined that said 125 certain persons had been duly elected to the office of representative in their respective districts, and a record was made of such determination by said board, and is now in the custody of the secretary of state of Kansas; that after making said full and complete canvass of said returns, and having fully and completely discharged its duties according to law, said state board of canvassers, on December 1st, 1892, adjourned sine die; that, after said adjournment, the secretary of state, who was ex officio a member of said board, issued certificates of election to those ascertained by said canvass to have been elected members of said house of representatives. And whereas, on Wednesday, January 4th, 1893, the supreme court of Kansas, the same being the highest judicial tribunal in the state, in an action then and therein pending, wherein one Joseph Rosenthal was relator and the state board of canvassers was respondent, after carefully considering said case, decided that after the state board of canvassers had once convened and duly canvassed the returns of all the votes before them and on file in the office of the secretary of state aforesaid, and had fully and completely discharged its duties, and had adjourned sine die, that the state board of canvassers could not on its own order reconvene for the purpose of making any different or further canvass of said returns, and that the court had no power or authority, under the statutes, to order the state board of canvassers to meet and further canvass the returns, so that other and different certificates of election might be issued, or for any other purpose. And whereas, on Tuesday, January 10th, 1893, at the time appointed by law for the assembling and organization of the state senate and the house of representatives of the state of Kansas, that said certain 125 persons, excepting Mr. A. W. Stubbs, the Republican opponent of said Rosenthal, who declined to meet and act, met in representative hall, in the state house, at Topeka, Kan.; that upon a call of the roll prepared by the secretary of state of the

state of Kansas, containing a list of all those holding certificates of election, according to the determination of the state board of canvassers, it was ascertained that said 125 persons, excepting said Stubbs, were present at said time and place, and thereupon each of said persons, to the number of 64, whose names are hereinafter set forth, took the oath of office required by the constitution and laws of the state of Kansas, and duly qualified as representatives of said state; that thereafter said 64 proceeded to organize by the election of a temporary speaker, and, after a temporary organization had been effected, not only said 64, but at least three others, recognized the organization; and said 64 participated in the election of a speaker for said house of representatives; and that 64, being a legal majority of all those holding certificates as aforesaid, voted for and elected the Hon. Geo. L. Douglass, as speaker of said house of representatives, the names, numbers of district, and politics of those participating in the election of Speaker Douglass being as follows, to wit: [Here the districts and names, etc., were copied.] And whereas, notwithstanding the above and foregoing facts, other persons of the said 124, and independent of said 64, together with some persons, not holding certificates of election of said state board of Kansas, participated in selecting one J. M. Dunsmore as a pretended speaker, in violation of both statute and parliamentary law: Now, therefore, we, the undersigned, being members of this senate, in the name of law, order, decency, and constitutional government, the good name and credit of the state of Kansas, most emphatically protest and object to recognizing the alleged house of representatives presided over by said Dunsmore as a lawful body. Lucien Baker. Milton Brown. D. Mc. Taggart. S. T. Danner. W. A. Morgan. James D. Williamson. H. F. Robbins. E. T. Metcalf. S. O. Thacher. Jno. C. Carpenter. K. E. Willcockson. W. E. Sterne. J. W. Parker. Chas. F. Scott."

Senator Taylor presented the following protest, and asked that it be spread upon the journal of the senate: "To the president of the senate: I hereby formally protest against the recognition of the alleged secretary of the house, now claiming recognition on this floor, because it virtually decides the most important question that ever came before this senate without investigation and without debate. Edwin Taylor."

Senator O'Bryan presented the following protest, and asked that it be spread upon the journal of the senate: "I, Ed. O'Bryan, senator from the 29th senatorial district, do hereby enter my protest against the action of the president of this body in recognizing Ben C. Rich as chief clerk of a house of representatives of the state of Kansas, as I believe the said house of representatives to be illegally organized, and is not the legal body, and should not be recognized. Ed. O'Bryan."

Subsequently Senator Brown filed a further protest in the state senate, which

concluded as follows: "To recognize the Dunsmore house will be to defeat needed legislation, as that house is illegal and unconstitutional."

On January 11th Senator Parker filed a protest in the state senate against recognizing Mr. Rich as chief clerk and Hon. J. M. Dunsmore as speaker. On the same day, Senator Baker, with 13 of his associates, also filed a further protest in the state senate, which, among other things, stated: "It will not, nor can it be, denied that on the 10th day of this month, at 12 o'clock noon, being the usual hour for organization of the legislature of Kansas, there assembled in the hall of the house of representatives 64 persons, constituting a constitutional majority of such house, each holding from the state board of canvassers a duly-authenticated certificate of election issued by such board; nor can it be denied that then and there, in a lawful and regular manner, these 64 members organized the house of representatives, by the election of George L. Douglass as speaker, and the choice of the other usual and necessary officers. It is also a fact that, prior to that time, the supreme court of the state of Kansas had, in a proper case before it, decided that no person not holding a certificate of election was entitled to participate in the organization of the house of representatives. At the same time there assembled in the hall 58 persons, each holding a certificate of election, who withdrew and separated themselves from the majority of the house above mentioned, and refused to and did not participate in the proceedings of the organization. Thereupon these 58 persons, being a minority of the house of representatives, unlawfully introduced among their own number 10 persons who held no certificates of election, and who were defeated at the polls in opposition to 10 of those constituting the majority. The minority of the legislature then assumed to produce and have qualified these 10 persons as members, and, in connection with them, assumed and pretended to organize the house of representatives. The names of these persons unlawfully introduced as members, and the majorities by which they were respectively defeated, is hereto appended: J. W. Howard, beaten by 1,050 votes; D. M. Howard, (Shawnee,) beaten by 444 votes; Ed Shellabarger, beaten by 193 votes; V. Gleason, beaten by 26 votes; W. H. White, beaten by 8 votes; H. Hellstrom, beaten by 8 votes; J. N. Goodwin, beaten by 5 votes; F. B. Brown, beaten by 42 votes; John Morrison, beaten by 15 votes; O. M. Rice, against whom a tie was decided in accordance with the law. That thereupon these 58 persons, acting together with the 10 persons who then and there respectively usurped the offices of representatives, without any form of trial or right thereto, or without submitting their claims of right to any tribunal, then and there unlawfully pretended to organize themselves as the house of representatives of the state of Kansas, and from that time up to the present the revolutionary body so organized has riotously and tumultuously seized and held

the hall of the house of representatives, and has obstructed the lawfully organized house of representatives in the transaction of any business."

Senator Taylor followed with a protest of his own, which stated, among other things, that "previous to such organization it appears clear to me that no person or persons, however connected, have the right or the power to say that certain persons holding certificates are not elected, and certain other persons not holding certificates are elected. No matter how great a wrong may have been done to any individual by means of the mistaken or fraudulent issuance of a certificate of election, a greater wrong would inure to society itself if the contestee or his friends, acting not as a legally constituted tribunal, were themselves, in advance of organization, to pass upon the issues joined, and set such certificates aside without due process of law. To whatever extent such irregular proceedings are countenanced or encouraged, to that extent the orderly course of society is jeopardized. The forms of law are a part of the law, and it appears clear to me that, if the forms of law had been adhered to in the organization of this house of representatives, there would be no question as to who constituted its membership. It may be that strict justice would have seated these contestants, but the injustice of irregular ways of getting at justice would be intolerable."

Thereupon the following protest was presented to the state senate: "I. W. P. Dillard, senator from the eighth district, do hereby protest against the action of the senate this 14th day of January, 1893, in passing the resolution called 'House Concurrent Resolution No. 1,' and for the reason that I am satisfied that said resolution was not passed and transmitted to the senate by a legally constituted or constitutionally organized house of representatives. W. P. Dillard, Senator."

All of these protests appear in the journal of the state senate presented in evidence on the part of the petitioner. Senators Taylor, O'Bryan, and Dillard, who filed the foregoing protests, are not Republicans, and were not elected as Republicans. They are not members of the minority party of the senate, or of the majority party of the house, presided over by Hon. George L. Douglass. The journal of the Douglass house also shows that on January 10th, before any recognition of the Dunsmore house, a committee, appointed to prepare a written address from the members of the Douglass house to the governor, called upon and presented the same to him. This was signed by 64 members of the house of representatives having certificates of election, setting forth the organization and officers of the Douglass house, and asking recognition. The members of that committee were Hon. W. M. Glenn, Hon. C. E. Lobdell, and Hon. J. K. Cubbison. Subsequently, and before any recognition of any house, the Douglass house appointed a special committee to prepare an address to the governor, which was presented in writing to him. That committee con-

sisted of Hon. E. W. Hoch, Hon. J. B. Remington, Hon. J. K. Cubblison, Hon. James A. Troutman, and Hon. C. E. Lobdell. The address was signed by 64 members of the house of representatives having certificates of election, and concluded as follows: "We, therefore, in behalf of the people of the state of Kansas, and on behalf of the good name and credit of our state, and in the name of law, order, decency, and good government, call upon you, as the governor of the state of Kansas, to recognize the Hon. George L. Douglass as the legal and qualified speaker of the house of representatives of the state of Kansas, and ask that the protection of the law be thrown around him in exercising the duties of his office. We present to your excellency this memorial, because we believe it to be our duty that the governor and the good people of the state should be informed of the true condition of affairs now existing in the hall of the house of representatives, and be informed of the illegal and revolutionary actions of a portion of our fellow citizens." The state senate has 40 members. At the time of these protests, one John M. Price, a Republican, was absent. The house of representatives has 125. Therefore it appears from the journals of the senate and house of representatives that 17 senators having certificates of election, and 64 members having certificates of election, making a total of 81 members, objected to recognizing the Dunsmore house as the house of representatives, and subsequently, on January 12, 1893, with the 64 members of the Douglass house having certificates of election, two others, Hon. Stephen Meagher and Hon. T. G. Chambers, also having certificates of election, and Hon. Joseph Rosenthal, admitted by motion in the Douglass house, united, making in all, with the senate protesting members, 84 members, being more than a majority of the entire membership of the legislature, including all the members of the senate and house, as opposed to the recognition of the Dunsmore house as the house of representatives. We refer to these matters in the journals as showing the vigorous opposition of the members of the legislature to the recognition of the Dunsmore house, and the official and public challenges to which that house was incessantly and continuously subjected. The constitution ordains, as before stated, that it takes a majority of each house to constitute a quorum. If 58 members—a minority of the house—with lawful certificates, acting with 10 men who have not any credentials, but who claim that they were really elected, may, before or after an organization, go behind the written credentials or *prima facie* title of the members duly declared elected to make up a quorum or house, then a dozen members, or any number less than a quorum, can do the same thing, and it would be impossible to organize or conduct a free legislative government according to constitutional or orderly methods. Any person can set up the claim that he has been elected to the house, regardless of the truth of the matter; and if a certificate of election does not clothe the person

who receives it with the lawful and rightful authority to act as a member, subject only to the judgment of the house after there is an organization of the members having certificates into an actual and acting house, the organization and control of the house must be in the hands of those who, by physical force, have the superior power to seat themselves as members, whether elected or not. The ballots, the votes, the returns, the certificates in such a case, would count for naught. The governor cannot recognize as a house a body which has no quorum, which is not a constitutional house. The governor cannot create a house out of an unorganized or unconstitutional body, at his own will. He cannot abolish or destroy by his order any legal or constitutional house of representatives. The senate cannot create or abolish a house of representatives. It cannot recognize an unorganized or an unconstitutional body as a legal or constitutional house. Neither can the governor and the senate together create, at their own will, a legal or constitutional house. Neither can they both abolish or destroy a legal or constitutional house. The house of representatives is a body authorized by the constitution of the state, and for certain purposes is independent and separate from the senate or the governor. Each house keeps and publishes its own journal; each house establishes its own rules; and each house is the judge of the elections, returns, and qualifications of its own members. The legislative power of this state is vested in a house of representatives and senate, not in the governor and senate alone.

But, again, it is claimed that the Dunsmore house has become a *de facto* house by the recognition from the senate, the governor, the executive officers, and others. As has already been said, if the house known as the "Dunsmore House" had full and unlimited possession of the hall of representatives, and the rival party had ceased its existence, the question of a *de facto* legislature would have strong force in this case. There often comes a time in the conduct of all bodies and officers when, on account of public interests, irregularities, and even wrongs, are cured. There comes a time when usurpation is successful. There comes a time when revolution is accomplished, and must be recognized. But a *de facto* house, a *de facto* government, usurpation of power, and unlawful methods are not accepted, if a constitutional house, a constitutional government, rightful authority, and legal methods are existing, transacting business, as against defective, irregular, unwarranted acts, and unconstitutional exercise of power. But here is a valid and constitutional house attempting to carry on business. Every day of its session, so far as its journals show, the Douglass house challenged the rightfulness of the Dunsmore house. It challenged the action of the governor. It challenged the action of the state senate. And the very first act of the senate and the Dunsmore house was seized by a court of this state, and throttled out of existence. Although the tem-



porary order of injunction was made by the district court of Shawnee county, until it is reversed or vacated by proper proceedings in this court it is as valid and binding between the parties as the order of the supreme court of the state. This court must take knowledge of all the usual and ordinary incidents which are transacted around it, and it is unnecessary to say that the challenge has been so successful that various bodies have divided upon this question, and there has been no acquiescence and no general agreement among the people that the Dunsmore house is the house of representatives. "An officer de facto must be in the actual possession of the office, and have the same under his control. If the officer de jure is in possession of the office,—if the officer de jure is also the officer de facto,—then no other person can be an officer de facto for that office. Two persons cannot be officers de facto for the same office at the same time." *McCahon v. Commissioners*, 8 Kan. 438. This court subsequently reaffirmed this rule in the case of *Brady v. Theritt*, 17 Kan. 468, using the following language: "We have already held that two persons cannot be officers de facto for the same office at the same time." *McCahon v. Commissioners*, supra. Practically it was again stated in the case of *State v. Durkee*, 12 Kan. 309. The supreme court of Nevada, in the case of *State v. Blossom*, reported in 10 Pac. Rep. 430, states the rule in this way: "If an office is filled, and the duties pertaining thereto are performed by the officer de jure, another person, although claiming the office under color of title, cannot become an officer de facto." *Leonard, J.*, in delivering the opinion of the court in the above case, uses the following language: "The principal ground urged by relator in support of his petition is that Harris and others were the de facto board, and that their acts as such were good and binding in law as to the public and third parties. The general principle stated by counsel for relator, that, as to the public and third parties, the acts of de facto officers are binding, is well settled and admitted. \* \* \* There were two boards, each claiming that the other was unlawful, each urging and maintaining the validity of its own acts, each proceeding as though the other did not exist in the matter of employing teachers, etc. \* \* \* It is undoubtedly true, as claimed by counsel for relator, that the new trustees would have become a de facto board if the old ones had not acted as such; but, since they did as above stated, were they not the de facto board? Two physical bodies cannot occupy the same place at the same time, and two persons cannot be officers de facto for the same office at the same time. If the office is filled, and the duties appertaining thereto are performed by an officer de jure, another person, although claiming the office under color of title, cannot become an officer de facto." *McCahon v. Commissioners*, 8 Kan. 441; *Boardman v. Halliday*, 10 Paige, 232; *Morgan v. Quackenbush*, 22 Barb. 80; *Cohn v. Beal*, 61 Miss. 399. In *Boardman v. Halliday*, 10 Paige, 232, the court held: "Where there

is but one office, there cannot be one officer de jure and another officer de facto in possession of the office at the same time." The Douglass house is the body or house de jure; is in possession of the office; is in possession of the hall,—at least, it is holding its sessions and transacting its business in representative hall. Then the other body, the Dunsmore house,—the minority, the so-called "De Facto House,"—has not the exclusive possession of the hall; has not the exclusive possession of the office; and has not ousted, destroyed, or dissolved the Douglass house.

We are referred to two cases from Georgia,—*Gormly v. Taylor*, 44 Ga. 76, and *Railroad Co. v. Little*, 45 Ga. 370. In both of these cases the principal question for decision was as to the validity of acts of the general assembly of Georgia under a section of the constitution of that state, which provides that "no session of the general assembly, after the second under this constitution, shall continue longer than forty days, unless prolonged by a vote of two thirds of each branch thereof." Both decisions were rendered by a divided court, but in neither case were there two rival legislatures or houses in dispute. If we had a case like *Railroad Co. v. Little* before us, the question of a de facto law would be very strong. After going over all the matters connected with it, the court, among other things, says: "In this case there was a hot dispute over the matter. Men honestly differed as to the truth of the case, and the decision was made. It has been acted upon for two years by the people, by the executive, and by this court, until it has become an accomplished fact." 45 Ga. 370. Whenever an act of the legislature is brought into this court, which is not a violation of the constitution, which has been acted upon by the people of the state for two years, and which has been acted upon by this court as a completed and binding enactment, a de facto law may come into existence. When such a case comes, we will decide. But there is no such case presented by the journals. There is no such case presented by the argument. There is no such case for us to pass upon. The Dunsmore house never had but 58 constitutional members. It never had the legal power to create any more members. It therefore never had the legal power to enlarge its existence. So long as there is a legal and constitutional house of representatives carrying on business in the identical hall where it is usual and customary for its business to be transacted, it seems to us that this question of a de facto house of representatives has not arisen to that dignity or acquiescence worthy of serious consideration. Is it possible that a body consisting of less than a quorum—less than a majority—can be a constitutional house of representatives under any circumstances, whether by recognition or otherwise? It is necessary that a majority of members elected to each house, voting in the affirmative, shall be necessary to pass any bill or joint rule. No act not having received a constitutional majority of the votes of the mem-

bers of the house can ever become a law. It is immaterial what the senate may do, what the governor may do. A constitutional majority of the votes of the house of representatives is necessary for legislative action in any case. In the case of *State v. Board of Com'rs of Ford Co.*, 12 Kan. 441, it was ruled that "where the legislature has seemingly recognized the existence of a county organization of a certain county by passing an act providing for the holding of terms of the district court therein, but where such county, up to the time of such seeming recognition, never had any organization, de facto or otherwise, such recognition does not have the effect to create an organization." In the recent case of *Murphy v. Moles*, (R. I.) 25 Atl. Rep. 977, which cites the leading cases upon the recognition of de facto officers, the law is thus stated: "Reputation and acquiescence are controlling elements in determining the validity of official acts as those of an officer de facto." The case of *State v. Smith*, 44 Ohio St. 348, 7 N. E. Rep. 447, and 12 N. E. Rep. 829, has been cited to establish the doctrine that certain persons may be de facto members of the house to which they belong, although not de jure members. That case, and similar cases from Michigan and other states, which have been cited, have no application. There were not two houses or two legislatures in session in Ohio. In that case the senate was legally organized, and for a time, it is conceded, a quorum were present, and its journal properly made. Subsequently about 20 members, being a majority, left the senate chamber, and it is asserted that 17 members, less than a quorum, proceeded to transact business; admitting other members, and continuing its journal as showing that a majority of the senate were present and acting. The supreme court held, under the circumstances, that the journal or record of the senate imported absolute verity, and could not be impeached by parol testimony tending to show less than a quorum were present. Whether that decision would be good law in this state, in view of the decision in *State v. Francis*, 26 Kan. 724, we need not now inquire; but it is a different case than the one we are investigating, because the *Dunsmore* house never legally organized, never had a legal majority, never had a constitutional quorum, and therefore never had a legal journal to conclusively import anything. But even in the Ohio case the chief justice vigorously dissented, and, among other things, said: "By the averments of this reply there was no senate,—simply a number of its members wholly without power to act. There was no senate journal, but a false and fraudulent pretense of one; and, for aught that appears in this case, this pretended journal might, if offered in evidence, or brought before us, be relied upon to establish, in part, the facts averred. \* \* \* The attempt to sustain the act in question by the rule relating to officers de facto is a palpable misapplication of a familiar doctrine; \* \* \* but in the case before us there was not the slightest color of authority to constitute the persons members of

the senate who are relied upon to give vitality to the act. Their title to their seats has never risen higher than a deliberate plot to circumvent a plain command of the constitution. But it must be remembered that the averment of the reply is that less than a quorum (17 members) were present when this act was passed. There is another principle which is fatal to the view here contended for and adopted by the majority. There is no form of direct attack upon the authority of these pretended senators to act recognized by the law. The present is the only available form of attack upon their proceedings. Quo warranto would not lie to call in question their authority to exercise the functions of senators. The present is to be treated as a direct attack, for the reason that no other form of attack can be made. The principle is well established that, where a direct attack upon a proceeding cannot for any reason be made, it may be collaterally questioned. *Vose v. Morton*, 4 Cush. 31, and cases there cited." The Georgia, Ohio, Michigan, and other similar cases are of the class referred to by McCrary on Elections, (2d Ed., § 517:) "The cases in which the official acts or votes of members of a legislative body who are such de facto only, and not de jure, have been held valid, are all cases in which there was no question as to the legality of the body in which they sat."

From all that we have said, our conclusion is, and must imperatively be, that the house known as the "Douglass House" is the legal and constitutional house of representatives of the state of Kansas, and, being such house, it has the power to compel witnesses to appear and testify before it or one of its committees in election contests arising in that body. It has full power to punish for contempt any witness who refuses to appear when personally subpoenaed in an election contest or other proper proceedings pending. It has also the power to protect itself from disorder, disturbance, or violence. It has never been destroyed, ousted, or dissolved since its organization. It is a body or house "having authority to commit." *Anderson v. Dunn*, 6 Wheat. 204; *Burnham v. Morrissey*, 14 Gray, 226; *In re Falvey*, 7 Wis. 630; *People v. Keeler*, 99 N. Y. 463, 2 N. E. Rep. 615; *Rap. Contempt*, § 2.

It has been suggested that we should hesitate to give an opinion in this case upon the legality of either of the contending bodies claiming to be the house of representatives, because unpleasant complications might arise therefrom; and it has been even suggested that the governor and the senate will not find their way clear, after what has passed, to communicate and act with the legal house known as the "Douglass House," and therefore, as a result, that appropriations may fail; that the governor's office, and all the other departments of the government, including the judiciary, will have no funds with which to transact public business. More unfortunate still, it has been suggested that the educational, charitable, and penal institutions of the state will be closed and the inmates discharged for want of

money with which to operate them. We trust that such will not be the result. We assume that the governor of the state is honest and patriotic. We assume that the members of both houses and the senate are honest, and actuated by worthy motives; and we trust that in the end there may be some way, as in Alabama, as in Maine, by which the legal bodies and the governor can act harmoniously and unitedly. The questions involved in this case are above partisanship. They concern the public; they concern the state; and party and partisanship should be wholly disregarded by each and by all. Let the mistakes of the past be corrected, and the unfortunate differences pass without further comment into oblivion. Let mutual concessions prevail, and then, perhaps, amicable relations between the belligerent and discordant elements may be restored. "He serves his party best who serves his country most." The gravity of the subject we fully understand. Certainly no constitutional or public question can be more solemn than that arising from the present contention respecting the organization of the house of representatives. While we deplore the occasion which compels us to hear and determine this case, we feel constrained by the imperative command of the constitution, and by our own conscientious discharge of public duty, to declare these views irrespective of policy or expediency. Entertaining the views we do, we cannot consent to rob the highest judicial tribunal of this state of its constitutional rights; nor can we consent to exalt the executive or the senate of the state above the demands of justice, of safety, or the welfare of the people.

But if all the unfortunate circumstances should arise which have been predicted, disastrous and fearful as they may be, we believe the consequences will be more unfortunate to the people of this state, and put all the people in greater peril, if this court should, by a majority of its members, declare and proclaim that the refusal of the governor or the senate, or of both, to recognize the constitutional house of representatives, wipes the house out of existence, when it is attempting to carry on its duties in a legal and lawful way,—wipes out the house, and takes from the people its most popular branch of the legislature, that body which is closest and dearest to their hearts. In all history, at all times, in a representative government, the lower house, or the "popular branch," as it is called, has been generally regarded as more in touch with the people, with the voters, and therefore more closely the representative of the people, than the senatorial or the longer-term body of the legislature. If the senate, consisting of 40 members, may, with the governor, decide by recognition what persons, whether elected or not, are members of the house of representatives, and what body, whether elected or not, is the house of representatives, then a majority of the senate, with the governor, being only 22 officials, may overthrow the constitutional house of representatives, and abolish 125 officials, such officials being

the members of the largest body or branch of the legislative assembly. If the action of the governor and the senate can do that now, then two years ago Gov. Humphrey and the senate, which was almost unanimously of his own political party, might have recognized a minority of the other house, and with such recognition could have re-elected Senator John J. Ingalls to the United States senate, and defeated Senator Peffer, and could have then carried on all business under the rule of recognition. If the present governor and senate may do this now, another governor and another senate may follow the example; and hereafter, for all time, with the sanction of this court, the legislature will be composed of the governor and one house, recognizing and communicating with some other body, whether lawfully elected or not. The election of the second body will then be useless, unnecessary, abortive. Undersuch a practice we would have two houses in name, but one only in fact,—the one subservient to those that recognized it, but not independent, and not representing fully all the people. Either we would have such an anomalous condition of affairs, or else, at every organization of the legislature or of either house, we would have at the capitol of the state the clash of resounding arms, and the contention of armed forces. In such a case, force, and force only, would rule, and not law. At such a condition we stand appalled; and, if a contrary doctrine than here announced be maintained, such a condition of affairs will follow. In this country, in this state, the law, not physical force, governs. Loyalty to law is the first—the paramount—duty of every citizen.

It is argued on behalf of the doctrine giving the governor and senate the arbitrary determination, beyond judicial control, as to what body is the house or de facto house of representatives, that power must be lodged somewhere; and as officials, and especially superior officials, are presumed to do their duty, it is unjust to apprehend serious consequences from unusual, fraudulent, or illegal methods which such officers might pursue. Yet this rule, so declared, is not willingly applied in the same argument to boards of canvassers, (who have been designated in contemptuous language as "returning boards merely,") although such boards of canvassers, within the decisions of this court, are subject to judicial supervision and control. If we may presume that officials will fully perform their duty, then such presumption favors boards of canvassers, as much as other officials, and therefore the certificates issued by such boards, especially by a state board of canvassers, composed of state officers, ought to be looked upon in the first instance with favor, as having been issued rightfully and lawfully. It is inconsistent and illogical, especially without proof, to suppose that a state board of canvassers, in issuing certificates to the members elected to the legislature, have not acted honestly, impartially, and legally. We commend to all suggesting that force or

men shall rule, rather than law, the acts and words of the historic Spartan. When Agesilaus, a Spartan general, renowned for all time, was, after years of desperate effort, upon the very threshold of success over his ancient enemies, the Persians, he was suddenly recalled to Sparta, to the defense of that nation against threatened assault of new enemies, but recently friends. Upon the instant, he answered, obedient to call of country, and, leaving a field of operations pregnant with victory, he returned, to meet the call of duty. He sent this message: "Agesilaus to the Ephori, greeting: We have reduced part of Asia, put the barbarians to flight, and made great preparations for the war in Ionia; but, as you order me to return, I am not far behind this letter, and would anticipate it, if possible. I received the command, not for myself, but for my country and its allies. I know that a general does not deserve or really fulfill the duties of that name but when he suffers himself to be guided by the laws and the ephori, and obeys the magistrates." And by this obedience, the historian declares, he demonstrated the truth of what was said: "That at Sparta the laws ruled men, and not men the laws."

In conclusion, speaking for myself alone, and not for my brothers on the bench, I adopt substantially the language of Chief Justice Agnew, of the supreme court of Pennsylvania, when, with a courage and firmness worthy of John Hampden, in upholding the dignity and independence of his court, he said: "On no ground of the constitution, law, public justice, state policy, or sound reason, can I discover any exemption of any officer in the state, high or low, from the common duty all citizens owe to the due administration of justice. I cannot abnegate a power intrusted to me by the people, and will return to them my commission, unsullied by any dereliction of duty, rather than abase this court, and pay obeisance at the shrine of unwarranted power or unconstitutional authority."<sup>1</sup>

The petitioner will be remanded.

JOHNSTON, J., concurs. ALLEN, J., dissents.

NOTE. Soon after this decision was rendered, the Dunsmore house recognized, under protest, the Douglass house as the constitutional house of representatives. The two rival houses thereafter acted together as one house only. This was followed by the state senate and the governor recognizing the Douglass house. After the two rival houses were united as one house, the legislature continued in session about 11 days, and passed all the usual and necessary appropriations for the two ensuing years, and also enacted other important laws.

(5 Wash. 595)

**MOSES v. PORT TOWNSEND S. R. CO.**  
(Supreme Court of Washington. Jan. 26, 1893.)  
CARRIERS—LIEN FOR FREIGHT—GOODS RECEIVED FROM CONNECTING LINE.

1. A contract by a railroad company to transport for an agreed sum, paid it in ad-

vance, chattels over its line, to a point on the line of another railroad company, with which it has no traffic agreement, does not bind the latter company, where it has no notice of the terms of such agreement; and it has a lien on such chattels for its own freight charges, and for freight charges advanced by it to a railroad company which transported the chattels from the line of the receiving company to its own.

2. Though a waybill showing prepayment of the freight would presumptively afford information to each carrier of that fact, such presumption is not conclusive.

3. In an action against a carrier for injuries sustained by horses through its alleged negligence, in keeping them on a plank floor, in its cattle pen, for several days after reaching their destination, it was error to exclude evidence that in that locality it was customary to keep horses on plank floors, and that it was impracticable to keep them on earth floors, in that, though such animals had been confined for some time in cars, the question as to whether or not their subsequent confinement on a plank floor would necessarily be injurious to them, and as to whether or not defendant was therefore negligent, were questions of fact, for the jury.

Appeal from superior court, Thurston county; Edward F. Hunter, Judge.

Action by Nancy E. Moses against the Port Townsend Southern Railroad Company to recover chattels held by defendant for freight charges alleged to be due it, and damages for their detention. Judgment for plaintiff. Defendant appeals. Reversed.

Andrew F. Burleigh, for appellant. David E. Baily and William S. Church, for respondent.

SCOTT, J. In April, 1891, the respondent made a contract with the Burlington & Missouri River Railroad Company in Nebraska for the transportation of a car loaded with household goods and horses. A memorandum of this contract, in the form of a shipping receipt or way bill, was given to the respondent by said company, which is as follows:

"No. ———. Haddam, Kansas, April 23rd, 1891. Received from N. E. Moses, in apparent good order, by the Burlington & Missouri River Railroad Company in Nebraska, to be transported to Beatrice, the following articles, as marked and described below, subject to the conditions and regulations of the published freight tariff of the said company, (see extract on back hereof;) it being expressly agreed and understood that the said Burlington & Missouri River Railroad Co. in Nebraska, in receiving the said freight to be forwarded as aforesaid, assumes no other responsibility for its safety than may be incurred on its own road.

MARKS & CON-SIGNER.	DESCRIPTION OF ARTICLES AS GIVEN BY CONSIGNOR.	WEIGHT.
N. E. Moses, Olympia, Washn.	One car Emg. Mvrs. & Stock, 6 head horses.	30,000.
Car 15,396. Q.	H. H. Gds. Rel. to val. at \$5.00 per Cwt.	B. & M. R. R. in Neb. Haddam, Kansas, April 23, 1891."
	P. P. \$20.00.	
	E. M. Henry, Agent.	

<sup>1</sup>Appeal of Hartranft, 85 Pa. St. 461.

<sup>2</sup>For dissenting opinion, see 32 Pac. Rep. 1000.

On the back of said exhibit was printed the following: "Notice to Shippers: This

company will not be responsible for any damages occasioned by delays from storm, accident, or other cause; leakage of oil or liquids; injury to, or abstraction of the hidden contents of, packages; or by decay of perishable articles, or injury by heat or frost to such articles as are affected thereby, or by reason of improper packing when received at their depots. Nor will it be responsible for any property until receipted for by a duly-authorized agent. Nor will they hold themselves liable for damages by fire, or as common carriers, for any articles, after arrival at their place of destination on this road. Grain in bulk to be loaded and unloaded by shipper. Will be at owner's risk of short weight, except when caused by collision, running off the track, or by carelessness of the agents of this company. No receipt will be given for any quantity of grain in bulk, nor any number of sacks, when loaded by shipper, except more or less; and the company will not be responsible for any discrepancy in the number of sacks when thus shipped. When freight is not taken away within 24 hours after its arrival at destination, it may be put in store, subject to charges and customary storage and commission. Special. Shippers of grain must give agents shipping directions in writing, as no errors arising from verbal directions will be recognized."

The Burlington & Missouri River Railroad Company had no through line to Olympia, nor any traffic agreement with the connecting lines running to said point. Said railroad company hauled the car to Beatrice, Neb., the point of destination on its line inserted in the waybill, and there delivered it to the Union Pacific Railroad Company, which company transported it to Portland, Or., at which point it was by said last-named company delivered to the Northern Pacific Railroad Company, and was by it transported to Tenino, in this state. The appellant received the car at Tenino from the Northern Pacific Railroad Company, and hauled it to Olympia. Upon applying for her goods at this place, the respondent was informed that there was \$89.25 due thereon for transporting the car from Portland to Tenino, which sum appellant had advanced to the Northern Pacific Railroad Company on receiving the car, and the further sum of \$10, due appellant for transporting the car from Tenino to Olympia, for which, together with \$1.50 for switching, appellant claimed a lien upon the chattels, and refused to deliver the same until such sums were paid. The respondent refused to make these payments, and brought this action to recover the property, and for damages for its detention. A trial by jury was had, which resulted in a verdict and judgment for the respondent for a return of the property, and for the sum of \$100 damages, whereupon the cause was appealed to this court.

It is not questioned but that the charges, amounting to \$100.75, for hauling the car from Portland to Olympia, and for switching, are reasonable; but the respondent contends that as she stipulated for the carriage of the goods to Olympia for the sum of \$200, and paid the same to

the Burlington & Missouri River Railroad Company, that she could not be called upon to make any further payment, and that the appellant, and all other transportation companies hauling said car, must look for payment to the aforesaid railroad company with which she contracted. At the trial appellant offered to show that, at the time the Northern Pacific Railroad Company took the car at Portland, it had no notice that respondent had made any arrangement with the Burlington & Missouri River Railroad Company for the transportation of the car to Olympia, or that any freight had been paid thereon, and that appellant had no knowledge thereof prior to the arrival of the car at Olympia. The court refused to permit this proof, to which ruling the appellant excepted, and alleges the same as error. The custom of railroad companies in assuming back charges on goods delivered to them, and paying the same, and for the last carrier to collect such amount, together with its own charges, from the consignee, is well established; also, that every railroad company has a lien for freight charges of its own, and for charges of previous carriers which it has paid or assumed. This custom is founded on commercial convenience and necessity, and is now well recognized; and the last carrier has the right to retain the goods until its own charges are paid, and all back charges due in transit, including storage charges; and the last carrier has a lien therefor, even if the charges exceed the guaranteed rate, providing it had no notice of such guaranty. When a consignor delivers goods to a carrier, to be carried over successive routes beyond the routes of the first carrier, he makes the first carrier his forwarding agent; and the first carrier, who receives the goods, and directs them over the route of the succeeding carrier, is the owner's agent, and the succeeding carriers act under the authority of the owner; and this has ordinarily been held to be the rule, even though the first carrier did not follow the instructions of the shipper, where the succeeding carriers acted innocently. 1 Jones, Liens, §§ 291, 292, 294, 297; Vaughan v. Railway Co., 13 R. I. 578; Briggs v. Railroad Co., 6 Allen, 246; Bird v. Railroad Co., 72 Ga. 655; Patten v. Railway Co., 29 Fed. Rep. 590; Wells v. Thomas, 27 Mo. 17. The contract between appellant and the Burlington & Missouri River Railroad Company was not a through contract. This company stipulated to carry the freight only to Beatrice, Neb., a point upon its own line, where it connected with the Union Pacific Railway Company, and it expressly stipulated that, in receiving said freight to be forwarded as aforesaid, it assumed no other responsibility for its safety than for such loss as might be incurred on its own road. See Schneider v. Evans, 25 Wis. 241. The authority to turn it over to a succeeding carrier is clearly implied, and was a necessary incident, under the circumstances; and upon safely delivering the freight to the next carrier, at Beatrice, its duties as to the handling of the freight were performed. It also agreed that the sum to be paid for the entire distance should not exceed \$200,

and its further liability after delivering the goods to the succeeding carrier could only arise upon this agreement. A subsequent carrier, having no knowledge thereof, or of the prepayment of the freight, would in no wise be bound thereby, unless the want of such knowledge should in some way be due to its own negligence. The authorities are not uniform upon this proposition, but the weight of them sustain it. 1 Jones, Liens, §§ 294, 295, 297, 298; Wolf v. Hough, 22 Kan. 659; White v. Vann, 6 Humph. 70. The waybill in question, showing the prepayment of the freight, would presumptively afford information to each carrier of that fact. 1 Jones, Liens, § 296. But this is not a conclusive presumption. It is possible that the succeeding carriers had no such knowledge, and without fault of theirs. The proof in relation thereto should have been admitted. If the subsequent carriers did have knowledge of the agreement made by the respondent with the Burlington & Missouri River Railroad Co., or if, not having it, the circumstances were such that they should be held bound by it, in consequence of any neglect in not seeking to inform themselves, they would have no claim against the respondent for their transportation charges.

The plaintiff claimed that the horses had been injured by the defendant, by keeping them for eight days upon a plank floor after their arrival at Olympia, and the damages were recovered upon this ground. Appellant contends that the court erred in not permitting it to show that it is customary to keep horses upon plank floors in this locality, and that it is impracticable to keep them upon earth floors. The respondent insists that, whatever may be the custom with regard to the keeping of horses generally, appellant failed to exercise due care in so keeping these particular animals, in consequence of their having been, immediately preceding then, confined for some time in the car, during transportation, and that this continued subsequent confinement upon a plank floor would necessarily result in a serious injury to them. These are questions of fact, for the jury; and, being so, testimony in relation thereto is, of course, admissible. Appellant was bound to exercise reasonable care in keeping the property, and would only be liable in case of a failure to do so. Reversed.

ANDERS, STILES, and HOYT, JJ.,  
concur.

(21 Nev. 401)

RANFT v. YOUNG. (No. 1,368.)

(Supreme Court of Nevada. March 15, 1893.)

APPEAL—VOID ORDERS—ATTACHMENT.

1. Under Gen. St. § 3160, providing that, if a defendant in attachment recover judgment against plaintiff, all property attached, remaining in the sheriff's hands, shall be delivered to the defendant, the order of attachment dissolved, and the property released therefrom, a judgment for defendant vacates the attachment, and an order of the court, refusing to vacate and dismiss such attachment, is a nullity, and is not appealable.

2. The fact that there was a new trial

pending did not tend to keep the attachment in force.

3. In such case, defendant's remedy was a proceeding against the sheriff, on his refusal to deliver the property, to recover it or its value.

Appeal from district court, Eureka county; A. L. Fitzgerald, Judge.

Suit in attachment by C. C. Ranft against George Young. There was judgment for defendant, and, from an order denying a motion to dismiss and vacate the attachment, defendant appeals. Appeal dismissed.

Peter Breen and Rives & Judge, for appellant. R. M. Beatty and Thomas Wren, for respondent.

MURPHY, C. J. We learn from the record in this case that on the 6th day of May, 1892, the respondent commenced her action, and caused a writ of attachment to be issued, under and by virtue of which the sheriff of Eureka county levied upon, and took into his possession, property of the defendant, of the value of \$1,800; that, on the 13th day of August, 1892, the said cause was tried, and judgment rendered that the plaintiff take nothing by her action, and that the defendant have judgment for his costs. On the 23d day of August, 1892, the defendant, after giving notice, moved the court to dismiss, discharge, and vacate said attachment; but this the court refused to do, holding that the said writ was a valid and subsisting writ, and still in full force and effect. From this order the defendant appeals.

Is this an appealable order? We think not. Appeals from orders dissolving or refusing to dissolve an attachment are provided for by St. 1887, p. 91; but, from the view we take of the case, there was no attachment in existence, in this case, on the 23d day of August, 1892. The attachment had been discharged by virtue of the judgment of the court in the case in which the writ issued. Section 3160, Gen. St., reads: "If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached, remaining in the sheriff's hands, shall be delivered to the defendant or his agent, the order of attachment shall be discharged, and the property released therefrom." Attachment proceedings are purely statutory, and must, throughout, conform to the statutory requirements. As we have already seen, the judgment in favor of the defendant, by operation of the statute, dissolved the attachment, without any order of court. Drake, Attachm. § 413; Wap. Attachm. p. 438; Wade, Attachm. p. 562, § 294; Brown v. Harris, 2 G. Greene, 507; O'Connor v. Blake, 29 Cal. 315; Suydam v. Huggefords, 23 Pick. 470; Clap v. Bell, 4 Mass. 100; Loveland v. Mining Co., 76 Cal. 564, 18 Pac. Rep. 682; Harrow v. Lyon, 3 G. Greene, 157; Higgins, Cobb & Co. v. Grace, 59 Md. 374; Johnson v. Edson, 2 Alken, 302; York v. Sanborn, 47 N. H. 404; Littlefield v. Davis, 62 N. H. 492; Blynn v. Smith, (Sup.) 4 N. Y. Supp. 306.

From the moment the judgment was rendered, the attachment was dissolved,

the lien created by it was vacated, and the property released from the custody of the law; and, upon the refusal of the sheriff to surrender the property, the defendant's remedy was by proceedings against the sheriff for the property, or the value thereof. When property is attached to secure the judgment which the plaintiff may recover, the sheriff acquires a special property in the chattels, defeasible by the plaintiff failing in his action. The general property remains in the defendant, and, if judgment is rendered for him in the suit, the attachment is ipso facto dissolved. The special property acquired by the sheriff ceases; and, if he detains the chattels after demand, he is answerable in an action of trover. *Anderson v. Land*, (Wash.) 32 Pac. Rep. 107; *Clap v. Bell*, *Johnson v. Edson*, *York v. Sanborn* and *Littlefield v. Davis*, *supra*; and *Drake*, *Attachm.* § 426.

The fact that there was a motion for a new trial pending did not tend to keep the attachment in force. There is no provision in our statute authorizing the sheriff to retain the property after judgment in favor of the defendant was entered. *Loveland v. Mining Co.*, 76 Cal. 564, 18 Pac. Rep. 682; *Drug Co. v. Peacock*, (Minn.) 42 N. W. Rep. 298; *McReady v. Rogers*, 1 Neb. 129; *Drake*, *Attachm.* § 426; *Brown v. Harris*, 2 G. Greene, 506; *Clap v. Bell*, 4 Mass. 100.

The suit of attachment was functus officio on the 23d day of August, 1892. Therefore, the order of the court made and entered on that day was irregular, and absolutely void, and the defendant has mistaken his remedy. The appeal is dismissed, and it is so ordered.

BIGELOW, J., concurs.

(13 Mont. 123)

#### RODONI v. LYTLE.

(Supreme Court of Montana. March 13, 1893.)

APPEAL—RECORD—FULL TRANSCRIPT OF EVIDENCE—EFFECT—CONVERSION—EVIDENCE—BILL OF SALE TO DEFENDANT.

1. Where, on appeal, it appears that the statement on motion for new trial contains the evidence, in the form of a full transcript of the stenographer's notes, by question and answer, with no attempt to reduce it to narrative form and omit immaterial matter, the evidence will be disregarded.

2. In such case, objections to the verdict for want of support in the evidence, and to the instructions of the court, cannot be considered.

3. In an action of conversion by the vendee of personal property, against a constable, for the wrongful levy of an attachment against the vendor, objections to the introduction in evidence of a bill of sale from the vendor to plaintiff, on the ground that it is not evidence of the purchase, or of the delivery and sale, of the property, are without merit.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Andrew Rodoni against Elias Lytle. From a judgment entered on the verdict of a jury in favor of plaintiff, and from an order denying his motion for a new trial, defendant appeals. Affirmed.

The other facts fully appear in the following statement by DE WITT, J.:

This action is for damages for the alleged conversion of personal property. The plaintiff claimed to own the property by purchase from Brennan & Co. The defendant was a constable, and attempted to allege and prove that he took the property lawfully, by virtue of a writ of attachment in a case in which Williams & Saville were plaintiffs, and said Brennan & Co. were defendants; that is to say, plaintiff claimed a valid sale and delivery from Brennan & Co. to him, and defendant claims that such sale was not valid, as against Williams & Saville, attaching creditors of Brennan & Co. Verdict and judgment were for plaintiff. Defendant's motion for a new trial was denied. From this order, and the judgment, defendant appeals.

Thompson Campbell, for appellant.  
Chas. O'Donnell, for respondent.

DE WITT, J., (after stating the facts.) The statement on motion for new trial contains the evidence, in the form of a full transcript of the stenographer's notes, by question and answer. There was no attempt made to reduce the evidence to narrative form, and to leave out immaterial and redundant matter. This disregard of the practice of this court has been so often passed upon that the bar are thoroughly familiar with our views. *Railroad Co. v. Warren*, 6 Mont. 275, 12 Pac. Rep. 641; *Fant v. Tandy*, 7 Mont. 443, 17 Pac. Rep. 560; *Sherman v. Higgins*, 7 Mont. 479, 17 Pac. Rep. 561; *Raymond v. Thexton*, 7 Mont. 299, 17 Pac. Rep. 258; *Bargerv. Halford*, 10 Mont. 57, 24 Pac. Rep. 699. Furthermore, the appellant, in presenting his statement for a settlement, was admonished by the district court judge as to its condition; for the judge settled the statement in the following language: "The foregoing statement on motion for new trial is correct, and is signed, settled, and allowed this 29th day of July, 1892, without approval of form. John J. McHatton, Judge." We feel that we must abide by these decisions, and, in accordance therewith, disregard the evidence. This removes from consideration appellant's contention that the verdict is not supported by the evidence. It also removes from consideration the objections to the instructions, because, without reviewing the evidence, we are not informed what application the instructions had thereto.

There are some other specifications of error, in regard to which, perhaps, the record is sufficient to present them for our consideration. One is as follows: The plaintiff offered a bill of sale from Brennan & Co. to plaintiff. The defendant objected to the bill of sale that it was not evidence of the purchase or sale of the property, or of the delivery and sale of the property. It may have been that the bill of sale alone did not fully prove the sale and delivery of the personal property; but it certainly cannot be contended that the written bill of sale, executed by the parties, was not properly a part of the evidence of the sale, tending, as far as it went, to prove the sale.

There are some other points raised in



the specifications, which we have examined, and which have even less merit than this one just noticed, and which it does not seem necessary to treat. There is also an appeal from the judgment, but the appellant has not suggested any infirmities in the judgment, apparent upon the judgment roll, and we have not been able to discover any reason why the pleadings do not sustain the judgment. Let the judgment and order denying new trial be affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

(13 Mont. 125)

FALK v. BROWN.

(Supreme Court of Montana. March 13, 1893.)

NEW TRIAL—SUFFICIENCY OF EVIDENCE—DISCRETION OF TRIAL COURT.

Where a verdict is rendered in favor of plaintiff in justice's court, and also on appeal in the district court, for a balance due on an account, and there is ample evidence to support the verdicts, it is an abuse of discretion in the trial court to set aside the latter verdict on the ground of the insufficiency of the evidence.

Appeal from district court, Deer Lodge county; David M. Durfee, Judge.

Action by Ben Falk against Sadie J. Brown. There was a verdict for plaintiff, and from an order granting defendant's motion for a new trial, plaintiff appeals. Reversed.

H. P. Whitehill, for appellant. Edward Scharnikow, for respondent.

PEMBERTON, C. J. This suit was commenced in a justice's court to recover a balance on an account alleged to be due and owing from respondent, who was defendant below, to appellant, who was plaintiff below. The appellant recovered judgment in the justice's court. The respondent appealed to the district court, where the case was tried de novo, with a jury, and a verdict rendered in favor of appellant for the full amount sued for. The respondent moved for a new trial. This motion was sustained by the court below, and from the order granting the new trial this appeal is prosecuted.

The appellant is engaged in the butcher business. The account sued on commenced on the 4th day of May, 1889, and continued to run until July, 1890, amounting to the total sum of \$488.33, on which numerous payments were made during that time, amounting in the aggregate to \$433. From the evidence it appears that the respondent, during all this time, was a sole trader, engaged in mining, ranching, stock-raising, etc. It also appears from the evidence that the meat sued for was delivered to her teamsters and servants, and was taken to her place or places of business, where it was consumed. The delivery of the meat to her employees, and its consumption by those in her employ, is not disputed, either in her answer or evidence. Nor are the numerous payments on said account disputed, except that it is shown that her husband made the payments, who appeared, from the evidence of the

case, to be acting as her agent. The respondent set up in her answer a counterclaim, in support of which proof was offered. It seems that the juries in both the justice's and district court disregarded her counterclaim, and rendered their verdict for the full amount of plaintiff's claim. The principal ground relied upon to sustain the motion for a new trial is the alleged insufficiency of the evidence to support the verdict. We are of opinion that the evidence is amply sufficient to support the verdict. From an inspection of the record, and fully considering the evidence, and all the circumstances of the case, we are driven to the conclusion that the court below, in sustaining the motion for a new trial, did not exercise that sound discretion which ought to govern trial courts in such cases. It seems rather to have been an abuse of such discretion. The order of the court below, granting a new trial, is reversed and set aside.

HARWOOD and DE WITT, JJ., concur.

(3 Colo. App. 144)

PUTNAM et al. v. LYON.

(Court of Appeals of Colorado. Feb. 13, 1893.)

ACTION FOR LAND—PENDENCY OF ANOTHER SUIT—CONSOLIDATION—DEATH OF PARTY—SUBSTITUTION OF EXECUTOR—ALLEGATIONS ADMITTED—COSTS.

1. Pending an action in the district court concerning real property, plaintiff brought another suit, on the same cause of action, in the county court, against the same defendants, in which there intervened another person, the determination of whose rights was necessary to a complete settlement of the controversy; and the second suit reached the district court by appeal, and was docketed before a trial order was entered in the first suit. Held that, if defendants did not plead in abatement to the second action the pendency of the first, it was proper to order the two actions to be tried as one.

2. Where, pending an action concerning title to land, plaintiff's death was suggested, and her executor was substituted as plaintiff, and, with no objection by defendants, the action proceeded to judgment in the executor's name, defendants cannot complain on appeal, for the first time, that the devisees of the land under the will of deceased were not brought into the litigation.

3. In an equity case, determinable on the evidence before the court, the matter of costs is largely within the discretion of the chancellor; and, in the absence of a palpable abuse, his action in that regard will not be disturbed.

4. Averments of an amended complaint which are not denied by the amended answer stand as admitted.

Appeal from district court, Boulder county.

Action by Adaline A. Lyon against Thomas Putnam and others. Pending the litigation, plaintiff died, and Edward S. Lyon, executor of said deceased, was substituted as plaintiff. Judgment for plaintiff. Defendants appeal. Affirmed.

The other facts fully appear in the following statement by BISSELL, J.:

Early in 1882, Adaline A. Lyon was the owner in fee of the southeast quarter of section 18, in township 3, in Boulder county. On the 29th day of April, 1880, while she

held title, she executed a trust deed running to one Laws, as trustee, to secure the payment of a promissory note due five years from that date. While this note was outstanding, it was determined to lay out the land as a town site. To more successfully accomplish this purpose, Mrs. Lyon deeded the premises to the Evans Town Site & Quarry Company, subject to the trust deed before mentioned. The stock was delivered to her in discharge of the expressed consideration, and the company assumed the payment of the trust deed. Mrs. Lyon contended that it was agreed by the representatives of the corporation that she should receive as a further payment a deed to lots 1 to 8, in block 32, and a lot in block 29, in the town site. The present controversy grows out of the alleged reservation, and the execution of the deed by which it is claimed the company transferred title to these reserved lots. After the organization of the company, and the delivery of Mrs. Lyon's deed, negotiations were initiated with one of the defendants, Putnam, for the sale to him of the entire property held by the town site and quarry company. The terms were agreed on, the property transferred to Putnam, who paid the entire purchase price, except what was represented by the outstanding trust deed, which he was to assume, and ultimately discharge. At the time of the sale to Putnam, the trustees who negotiated it insisted that the transfer should not cover the property antecedently sold and reserved, as the result of their dealings with the addition. The trustees kept no adequate records, by which they were able to accurately determine just what they had disposed of. An examination of the title raised doubts concerning it. To perfect this title, and relieve it from all embarrassments, it was agreed that the property should be sold by a foreclosure of the trust deed, and Putnam should buy it in at the sale. The sale was had, Putnam bought it, and ultimately paid the note. After the sale, Putnam leased some of the disputed lots to Mrs. Lyon. Afterwards a dispute arose between Putnam and Mrs. Lyon over her claim to the eight lots in block 32, and the lot in block 29. She brought the present action against the town-site company and Putnam, in the district court of Boulder county, to establish her title to this portion of the land. According to her bill and the proofs, the deed under which she claimed was executed by only two of the directors of the company. There was no seal attached, and in some other unessential particulars it was defective. It was alleged that the purchaser knew of Mrs. Lyon's claim of title, and of her unrecorded deed, and that he was not, therefore, an innocent purchaser. While this suit was pending in the district court Mrs. Lyon commenced another suit, in the county court of Boulder county, against the town-site company and Putnam, wherein she sought substantially the same relief. While that suit was pending in the county court, one Melly intervened, and set up that he was a subsequent purchaser of the property, for a valuable consideration, without no-

tice of Mrs. Lyon's claim or equities. By his petition of intervention he sought to have his title adjudged good. While this suit was undetermined in the county court, Putnam, on his own motion, was stricken out as a party, and his answer removed from the files, so that it stood as a suit against the town-site company and Melly. This suit subsequently reached the district court by appeal, and was on the docket before a trial order was entered in the present suit. The plaintiffs moved to consolidate the two suits, and try them as one, and the order was accordingly entered. On the final hearing a decree was entered reforming the plaintiff's deed, and establishing her title to the lot in block 29. It likewise established Melly's title to lots 1 to 8, in block 32, and, in distributing the costs, taxed against the plaintiff all the costs in the suit brought in the county court, and rendered judgment against Putnam and the town-site company in the suit originally brought in the district court. No objection was made to this decree, and no exception taken to its entry. The latter suit was the one first started. During the pendency of the litigation the death of Mrs. Lyon was suggested, and, on motion of the plaintiff's attorneys, Edward S. Lyon, her husband, and executor of her last will and testament, was substituted as party plaintiff. The defendants made no objection to the entry of the order, and the action proceeded in his name, although it transpired that, by the terms of Mrs. Lyon's will, Edward S. was devisee for life of the property, and the children were remainder-men in fee.

Brown & Putnam, for appellants.

BISSELL, J., (after stating the facts.) While all of the proceedings in the district court were not strictly in harmony with the practice which should prevail in this class of cases, the court committed no substantial error, of which the appellants can complain. Their first attack is on the order of the court, which consolidated the two actions for the purposes of trial. Section 20 of the Code, which they cite in support of their contention, undoubtedly provides that where two actions are pending on two different causes of action, between the same parties, which might properly, under the Code, have been joined, the court may order them consolidated and tried as one suit. The present case does not come within the purview of that statutory provision. It only relates to the joinder of different suits which have been brought on different causes of action. In the present case there were two suits, brought on the same cause of action,—the one against the town-site company and Putnam, to which Melly, as an intervener, became a party, and the other against the town-site company and Putnam alone, in a different tribunal. When the action was instituted in the county court against the town-site company and Putnam, the suit against the same parties, on the same cause of action, was still pending in the district court. In commencing the first action in the district court, the plaintiff merely exercised the right granted him by

the law, and was entitled to prosecute that suit to final judgment. His attempt to exercise the same right a second time could have no possible effect upon his first cause of action, and the only remedy open to the defendants, when vexed by two suits for the same thing, was to plead in abatement to the second action the pendency of the first. Failing to do this, it was not error for the court to direct that the two suits be tried together; for, in the exercise of its power in this direction, it simply brought into the first suit another party, — Melly, — the determination of whose rights was essential to a complete settlement of the controversy. It might, perhaps, have been more in accord with the usual practice to have restrained the plaintiff from maintaining the second action until the determination of the first, and to have ordered him to bring into that suit all persons whose interests must be ascertained in order to completely settle the dispute, and, when the final decree should have been rendered, have entered in the other suit an order of dismissal with costs against the plaintiff. Whichever practice would be the more regular, and the more exact, is of little consequence, since no harm came to the appellants from the course which the court took in the premises. When the suit was revived in the name of the executor, the defendants made no objection, but took an order substituting the executor as a defendant in the cross bill which they filed. It is quite true that under the will the title to this land passed to Edward S. Lyon as the tenant for life, and the remainder passed, in fee, to the surviving children. In an action which concerns the title to realty, the tenant for life, at least, if not also the remainder-men, are the real parties in interest, in whose names and right the suit should be prosecuted to judgment. This concession does not make the order of the court in the premises an error which can now be insisted on. It is not permitted to the appellants, for the first time, to complain in an appellate court that the proper parties were not brought into the litigation prior to the decree. If they desired Lyon, in his capacity as tenant for life, and the children, as remainder-men, to be present, it was for them to object to the substitution of Lyon as executor, and to insist on the necessity for the presence of the other parties. Consenting to the order as entered, they will not now be heard to complain that it was erroneously made.

In the final decree it was provided that the defendants should recover from the plaintiff \$300 as damages for the detention of lots 1 to 8 from the time of the sale to the time of the entry of judgment. These damages, it is insisted, are totally inadequate, and that on the record it is evident the finding should have been for a sum largely beyond this amount. This is not clear. These lots were totally unimproved, and at the time of the transaction seem to have been offered for sale at \$50 a lot, and the sum entered as damages would be the rental value, figured at 20 per

cent. of their selling price. At least, this is as nearly as may be gathered from the record on this subject. The actual value of their use was not clearly nor satisfactorily shown, and there are no data which would enable this court to say that the court's finding of the amount of damages was totally unsupported by the testimony. Since this is true, the decree cannot be disturbed because of this alleged error.

As has already been stated, the costs of this suit were adjudged against the defendants, and the costs of the suit in the county court against the plaintiff. This is made the basis of complaint by the appellants. It does not appear that Melly appealed from the decree, nor that there was any specific decree against him for costs at all. Judgment passed in his favor, establishing his title to the eight lots, with which he is apparently contented. Neither Putnam nor the town-site company can make the action of the court the basis of an assignment of error. The plaintiff recovered part of the property to which he claimed title, and in respect of these rights was entirely a successful litigant. In any event, the case being one in equity determinable by the court on the evidence before it, the matter of costs is so largely within the discretion of the chancellor that, except in a case where there has been a plain and palpable abuse of it, his action will not be disturbed. *Ratliffe v Dakan*, 16 Colo. 100, 26 Pac. Rep. 341.

The remaining ground of the appellants' complaint is that the decree restrains Putnam and the town-site company from interfering with the streets and alleys contiguous to the lot adjudged to belong to Lyon, and laid out on the plat originally filed by the town-site company. It is insisted that the absence of evidence to establish the plaintiff's right to the streets and alleys as platted, and to show the attempted interference of the defendants therewith, leaves the decree without the support of necessary proof. It is wholly unnecessary to discuss what might have been the rule concerning the necessity of proof on these subjects, had an issue been tendered which laid the burden on the plaintiff. According to the amended complaint and the amended answer, the plaintiff sufficiently averred his rights and adverse action by the defendants to entitle him to a decree in his favor in respect of these matters, if his allegation were admitted. The amended answer takes issue on none of these averments. What is said in the cross complaint on this subject need not be considered, since in no event can that be taken as a denial of the plaintiff's complaint. The admissions which follow from the failure to deny relieve the plaintiff of the necessity to make proof, and entirely justify the decree entered.

The preceding discussion disposes of all the errors discussed by counsel in their brief. The decree was justified by the proof, and is correct under the law; and, since the court committed no substantial error in the trial of the case, the judgment must be affirmed.

(3 Colo. App. 162)

**EISENHART v. ORDEAN et al.<sup>1</sup>**

(Court of Appeals of Colorado. Feb. 13, 1893.)

**LANDLORD AND TENANT — WRONGFUL EVICTION — FAILURE TO REPAIR — ACTS OF ADJOINING OWNER — COVENANTS OF LEASE — EXEMPLARY DAMAGES — EVIDENCE.**

1. In an action by tenants against their landlord for wrongful eviction, it appeared that the lease recited that plaintiffs "had received the premises in good order and condition," and contained a covenant that they would keep the premises in good repair during the lease at their own expense; that within about four months after the commencement of the term, which was for two years, plaintiffs began looking for another building because of alleged failure of defendant to make repairs demanded by them, and that about a month later they removed from the premises because of the temporary removal of a wall, caused by the excavation of an adjoining lot, by the owner thereof, and a storm which caused a portion of the wall to fall. Held, that plaintiffs were not entitled to recover, since they were bound to make repairs, and a landlord is not responsible for the acts of an adjoining lot owner on his own premises, against which he has not covenanted.

2. Where, in such action, plaintiffs claim damages in one count of the petition for failure of defendant to make repairs, and they succeed in putting in evidence in support of such claim notwithstanding the court ruled that no such evidence should be received, the case must be reversed.

3. In such action, evidence as to plaintiffs' business before and after their removal from defendant's premises is incompetent.

4. Where it appears in such case that the amount of the verdict could only have been reached by an allowance of punitive damages, and that defendant voluntarily assumed to make repairs, and immediately put in a temporary wooden wall, with as little inconvenience to plaintiffs as possible, such verdict cannot be permitted to stand, though defendant be liable for actual damages for loss of and injury to stock, and expense of moving; since, under Acts 1889, p. 64, § 1, exemplary damages are allowed only when "the injury complained of shall have been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings."

Error to district court, Arapahoe county.

Action by Ira C. Ordean and another against John H. Eisenhart for failure to repair premises leased by plaintiffs from defendant, and for a wrongful eviction. From a judgment entered on the verdict of a jury in favor of plaintiffs, defendant brings error. Reversed.

The other facts fully appear in the following statement by REED, J.:

Plaintiff in error leased to the defendants certain premises and buildings for the term of two years from November 23, 1889, at a monthly rental of \$40, payable in advance. Defendants were mechanics making and repairing wagons, blacksmithing, etc. A written lease was executed in the ordinary form, and defendants went into possession. Among other covenants contained in the lease defendants covenanted that they "had received the premises in good order and condition," and that they would keep the premises in

good repair during the lease at their own expense. In the month of April following, defendants abandoned the premises, and commenced business at another place, and instituted this suit to recover damages for alleged failure of performance of the covenants on the part of Eisenhart, and for eviction from the premises. The complaint states two counts: First. "That the defendant, before plaintiffs went into possession, agreed to make several enumerated repairs and improvements upon the building; that he failed to perform, and that by reason of such failure plaintiffs sustained damage to stock, tools, work in process of construction, patronage and business to the extent of \$2,500." Second "That at different times during the month of April, 1890, defendant entered upon said premises over the protests of plaintiffs, and tore down portions of the building thereon, to which plaintiffs' machinery and appliances were attached, and entirely removed the side wall of said building, and left plaintiffs' property and business exposed, and left the roof on said building without proper support, and, against the repeated objections of plaintiffs, and over their reiterated protests, finally dug under said building, until a portion of the same fell down, and the floor of the same became and was unsafe, and said building was by defendant's wrongful acts rendered dangerous to work in, and wholly unfit for plaintiffs' business; and plaintiffs were evicted by defendant from said premises, and were compelled to remove from the same, and did abandon the same, and give up their business thereon established on the day of April, 1890. That plaintiffs, by reason of said eviction, suffered in loss of custom and business in the sum of \$2,000, and were put to expense in removing and seeking location elsewhere in the sum of \$500, and they therefore demand damages from defendant in this cause of action in the sum of \$2,500 and costs." The case was tried to a jury on the second count, the court refusing to allow testimony on the first count, and resulted in a judgment for plaintiffs for \$1,500.

Stevens & Ward and Ethelbert Ward, for plaintiff in error. Stuart, Murray & Andrews, for defendants in error.

REED, J., (after stating the facts.) Many supposed errors are assigned, several of which I shall not find it necessary to notice. It is urged that many errors occurred in admitting and rejecting evidence. The contention appears to be well founded. The transcript from end to end bristles with the objections and exceptions of the defendant. It would be impossible, or at best impracticable, to point them all out. It must suffice to say that during the entire trial successful efforts were made to put in evidence of failure to repair and make improvements as alleged in the first count. Plaintiffs succeeded admirably in making a case in support of the first count, notwithstanding the ruling of the court that no evidence would be received. In the second count of the complaint the supposed eviction is alleged to

<sup>1</sup>Rehearing denied March 13, 1893.

have occurred in April. Upon the trial it appeared by the evidence of the plaintiff Eitel that they made no repairs, and that in February and March they were looking for other quarters with a view to moving. "Question. Did you not go to Mr. Hall, and speak to him about getting a building from him? Answer. Yes, sir; for the reason that the building was not in shape. Q. Just as soon as you got a chance, you were going to leave? A. Yes. Q. Paid \$40 a month rent? A. Yes, sir; and mighty sorry for it. Redirect examination: Q. When did you first make inquiries about a new location? A. Some time in February or March. Q. State to the jury why you made these inquiries. A. Because the building was not put in shape according to agreement. Q. What did it lack? A. It lacked shutting up the cracks in the back, and keeping the dust out, and the leaks in the front room, where it leaked in the roof. Q. Anything else? A. Had no back door so we could pull a wagon through. He had put something there, but it was worse than before, on account of the dust." To this testimony objections were made and exceptions saved. It also appears that, notwithstanding the covenants in the lease, on the 15th of February plaintiffs made a written demand of the defendant, requiring him to make different, specified repairs upon the building. Such writing was offered in evidence, and was admitted. The defendant afterwards offered proof that he had in every respect complied with the demand, and the court refused to admit it. All this irregular and inadmissible testimony, which could only have been allowed, if at all, on the first count, could not fail to influence the jury and prejudice the defendant. It also plainly appears that the plaintiffs were seeking an excuse for leaving, and an opportunity. This will become pertinent in considering the trial of the case on the second count. The alleged eviction for which judgment was obtained was caused, if at all, by the owner of the adjoining lot; not by any acts of the defendant. They were, as far as he was concerned, entirely beyond his control. The wall of the leased building was on the line of the adjoining lot, on which the owner entered and excavated to erect a building. It first became necessary to shore up the wall of the building in question, which was promptly and properly done by the defendant. It then became apparent that the wall would have to be removed. The defendant immediately put in a temporary wooden wall, with as little inconvenience as possible to the tenants, and assisted in handling and adjusting their property in the shop. While the excavation was being continued, during a severe storm, a part of a side wall of the rear building, some four feet from the line, by the caving of the bank, fell into the excavation. This damage, as shown by the evidence, was as speedily as possible repaired by the defendant. At this point the plaintiffs abandoned the premises. Upon the trial much incompetent testimony of actual damage was admitted; some of it in regard to the business before and subsequent to the re-

moval, which should not have been allowed. In regard to loss of stock, injury, expense of moving, etc., the testimony was vague and indeterminate, leaving it impossible for any jury to arrive at any satisfactory conclusion. Even if the defendant was chargeable for the same, taking the largest estimate of plaintiffs in regard to the actual damage sustained, it was but a trifle compared with the amount of the verdict, showing clearly that the jury awarded exemplary or punitive damages.

The first question to be determined is, did the acts of landlord amount to the eviction of the tenants? To render the landlord liable, the acts must either have been perpetrated by him, or be acts for which he was personally responsible, or acts against which he had expressly covenanted. He was not responsible for the acts of an adjoining lot owner on his own premises. They were entirely beyond his control, and acts against which he had not covenanted, and, if the acts of the adjoining owner resulted in the destruction of the building, compelling removal, it is very doubtful if any action could be maintained upon any covenant in the lease, except that of peaceable possession for the time the property was leased; and the damage could only have been the actual damage sustained, perhaps the cost and incidental trouble of moving, and the value of the lease for the unexpired term; in other words, the value of the use in the market, over and above the rent covenanted to be paid. See 3 *Suth. Dam.* 149, and cases cited; *Tayl. Land. & Ten.* (8th Ed.) § 317; *Green v. Williams*, 45 *Ill.* 206; *Mack v. Patchin*, 42 *N. Y.* 167; *Rhodes v. Baird*, 16 *Ohio*, 573. What were the undisputed facts in regard to the falling of the second wall? The excavation of the other party was four feet from it. There came a severe storm in the night. The earth caved, and the wall fell,—an injury resulting from no acts of the defendant, not foreseen or contemplated by him or his tenants. It was claimed that by such accident the greater part of the actual loss was sustained. The stock was injured by the elements, and proof was allowed of each item to charge the defendant. This was clearly erroneous. Such injuries were not the result of any act of his, nor through his agency, nor the result of any negligence. The evidence shows that defendant repaired the breach at the earliest practicable hour. The eviction, if there was one, to render the defendant liable, must have been caused by him. Plaintiffs covenanted that they would "keep said premises in good repair during the lease at their own expense; that they had received the premises in good order and condition; and at the expiration of the time of this lease above mentioned they will yield up the said premises to the said party of the first part in as good order and condition as when the same were entered upon; \* \* \* loss by fire, or inevitable accident or ordinary wear excepted." Under a lease containing identical covenants, in *Kramer v. Cook*, 7 *Gray*, 550, the defendants (lessees) attempted to prove that the premises had become un-

safe and untenable by reason of the undermining and settling of the partition wall by the owner of the adjoining lot, and the court held the evidence properly excluded. It is said: "The landlord is not ordinarily bound to keep the premises in repair; nor is there anything in the lease to create such duty." Then, after citing covenants identical with those contained in this lease, proceeds: "The falling of the wall by reason of not being properly shored up would not seem to be an unavoidable casualty. The duty of repair would be on the lessee and not the lessor." Also, under the covenants, it was held not only that the landlord was not chargeable, but that, "under the provisions of the lease, there would be no abatement or suspension of rent because of such injury to the premises." See, also, to same point: *Fowler v. Bott*, 6 Mass. 63; *Phillips v. Stevens*, 16 Mass. 238; *Jacques v. Gould*, 4 Cush. 384; *Bigelow v. Collamore*, 5 Cush. 228. "Under an express covenant to keep and leave the premises in repair, the lessee is bound to make good any injury from any cause not resulting from the act or neglect of the landlord." 1 Wood, Land. & Ten. (2d Ed.) 795; *Phillips v. Stevens*, supra; *Allen v. Howe*, 105 Mass. 241; *Hallett v. Wylie*, 3 Johns. 44; *Weigall v. Waters*, 6 Term R. 230; *Green v. Eales*, 2 Q. B. 225. In order to work a legal eviction, "the act complained of must proceed from the landlord himself, or some person acting under his authority, or by or through him." Wood, Land. & Ten. (2d Ed.) 1098; *DeWitt v. Pierson*, 112 Mass. 8; *Gilhooley v. Washington*, 4 N. Y. 217. "The mere fact that the premises became uninhabitable through the act of a third person, to which the landlord has not contributed, does not amount to an eviction." "The removal of a party wall by an adjoining owner, whereby the building is made untenable, does not operate as an eviction, which discharges the tenant from the payment of rent." *Barns v. Wilson*, (Pa. Sup.) 9 Atl. Rep. 487; *Carson v. Codley*, 26 Pa. St. 117; *Hazlett v. Powell*, 30 Pa. St. 233. Nor does it violate the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whart. 86; *Dobbins v. Brown*, 12 Pa. St. 75; *Moore v. Weber*, 71 Pa. St. 429; *Ramsay v. Wilkie*, (Com. Pl. N. Y.) 13 N. Y. Supp. 554. In *Morris v. Tillson*, 81 Ill. 607, it is said: "The intention is material. Acts of a landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises." See, also, *Upton v. Townend*, 17 C. B. 30.

Under the authorities cited to which, if necessary, a large number might be added, it is clear from all the evidence in the case that there was no eviction. The injuries sustained were those which lessees were bound to repair under the covenants. It is shown that the landlord voluntarily assumed the repairs for the benefit of his tenants. So far from his conduct evincing a desire to evict, it conclusively shows

his desire and efforts to retain them, and, as above shown, the tenants, long prior to the alleged eviction, were seeking other quarters, and an opportunity to abandon the premises. It at once becomes apparent that they gladly availed themselves of the first circumstances that offered any supposed justification. In 2 Wood, Landl. & Ten. (2d Ed.) 1107, it is said: "The tenant must not only abandon the premises, but it must also appear that he abandoned them on account of the acts of the landlord, which are claimed to operate as an eviction; and, if his abandonment was due to other causes, in part even, he cannot set up such acts to an action for the rent." See *Edwards v. Candy*, 14 Hun, 596; *Edgerton v. Page*, 20 N. Y. 281; *Myers v. Burns*, 35 N. Y. 269.

The verdict was so disproportionate to any damage proved, it is at once apparent that much the greater portion was allowed as exemplary or punitive damage. The statute permitting in any civil case exemplary damage is section 1, Acts 1889, p. 64, as follows: "That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." There was no evidence whatever in the case bringing it within the provisions of the statute, nothing upon which the jury could act; hence, to submit to the jury in the instructions the question, and allow it arbitrarily to evolve or assume wrongful acts and award exemplary damage, was error. "Whether there is any evidence to justify the finding of exemplary damages is a question for the court. If there is none, it is error to submit the question to the jury." 1 Sedg. Dam. (3d Ed.) § 337; *Rose v. Story*, 1 Pa. St. 190; *Amer v. Longstreth*, 10 Pa. St. 145; *Railway Co. v. Taylor*, 104 Pa. St. 306; *Selden v. Cashman*, 20 Cal. 56. "To entitle a person to punitive damages for a wrongful act there must be an element of fraud or malice or evil intent or oppression entering into and forming part of the act." *Railroad Co. v. Hoeflich*, 62 Md. 300. The same in principle is the language of our statute. See, also, *Ross v. Leggett*, 61 Mich. 445; *Mattice v. Brinkman*, 74 Mich. 705, 42 N. W. Rep. 172; *Schippe v. Norton*, 38 Kan. 567, 16 Pac. Rep. 804; *Wentworth v. Blackman*, 71 Iowa, 255, 32 N. W. Rep. 311. The jury was evidently misled as to the issues involved by the unwarranted admission of evidence in regard to repairs, or as to the law of the case by the instructions of the court, which, as shown above, were in one important particular erroneous, and to some extent contradictory and incompatible. Such being the case, the judgment must be reversed, and the cause remanded.

28 N. W. Rep. 695.

(7 N. M. 115)

**BUCHER v. THOMPSON et al.**

(Supreme Court of New Mexico. Feb. 28, 1893.)

**MECHANICS' LIENS—VERIFICATION OF BEFORE CLERK OF PROBATE COURT.**

The clerks of the probate courts of New Mexico have authority, by implication, to administer the oath required in the verification of a claim for a mechanic's lien, as the legislature, in various acts, without expressly conferring such power, assumes its existence as incident to the office, and provides compensation for its exercise. Seeds, J., dissenting.

Appeal from district court, Sierra county: John R. McFie, Judge.

Bill in equity by William H. Bucher, trustee, against Moses L. Thompson and others, to foreclose a trust deed. From an order sustaining a demurrer to the answers filed, defendants appeal. Reversed.

H. L. Pickett, for appellants. Fielder Bros. & Heflin, for appellee.

LEE, J. This is a suit in chancery, instituted in the district court for Sierra county by William H. Bucher, trustee, to foreclose a deed of trust given by Moses L. Thompson and Annie B. Thompson, his wife, upon certain mines and mining property described in the bill of complaint. At the date of the institution of this suit, there were about 30 claims of lien on record against the property involved, being for work and labor performed upon the property, and materials furnished. Complainant made all these lien claimants parties to his bill of foreclosure of his deed of trust, alleging that their claims of lien were subsequent to the lien created by the deed of trust. These lien claimants, by their respective solicitors, answered the bill of complaint, setting up their respective claims of lien, and alleging priority over the deed of trust. Complainant demurred to the answer of each lien claimant, setting up several causes of demurrer to each claim of lien. One of the grounds of demurrer set up was that the claims of lien were verified before the probate clerk, J. M. Webster; the point relied upon being that the probate clerk had no authority to administer an oath in such case. Upon the first point mentioned, namely, that the probate clerk had no authority to administer the oath required in the verification of the claim of lien, the court below sustained the demurrer. From this decision the defendants below bring the case to this court.

The case presents but one question for the consideration of this court, which is, has a clerk of a probate court in this territory power to administer oaths to persons in verification of an account to be filed with the notice to obtain mechanics' liens, in pursuance of the statute for that purpose? In the various acts of the legislature in regard to these officers, it appears to be assumed that they are possessed with power to administer oaths, but we do not find anywhere any such power expressly conferred upon them. The authority of public officers, in any given case, consists of those powers which are expressly conferred upon them, or

which are expressly annexed to the office by the law creating it, or some other law referring to it, or which are attached to the office by the common law, as incident to it. Mechem, Pub. Off. § 507. As the legislature has not, by any act, expressly conferred this power, if it exists at all it must be by implication from the various acts referring to them, or it must be from the common law, as incident to the office. As the legislature, by direct act, has provided compensation to such officers for administering oaths, it clearly implies a power or authority in them to administer such oaths, on the principle that that which is implied in a statute is as much a part of it as what is expressed. *U. S. v. Rabbit*, 1 Black, 61.

It is contended that this implication may authorize them to administer oaths directly connected with probate business, but not in other matters. It may therefore be necessary to consider the question as to whether the power exists in them as incident to their office. This could only be upon the theory that the legislature, in their various acts in regard to these courts, have constituted the probate courts courts of record, as under the common law the power to administer oaths generally was only incident to clerks of courts of record. In order to determine what the intention of the legislature was in this respect, it is necessary to consider the character of the legislation in regard to probate courts, and what constitute courts of record. The definition of a "court of record," as given by the earliest commentators on the common law, is as follows: "A court of record is a court where the acts and judicial proceedings are enrolled on parchment or paper for a perpetual memorial and testimony, and which has power to fine and imprison for contempt of its authority. 3 Bl. Comm. 24; 3 Steph. Comm. 269; Co. Litt. 117. Blackstone says: "All courts of record are the king's courts, in the right of his crown and royal dignity, and therefore no other court hath authority to fine and imprison; so that the very creation of a new jurisdiction, with the power of fine or imprisonment, makes it instantly a court of record." The definition given by Black is: "A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the common law." Some of the later decisions have held that courts of record are those that proceed according to the rules of the common law. This definition cannot, however, be universally applied. Formerly the district courts of this territory were governed by the mode of practice and rules of the civil law, and yet it could hardly be said that they were not courts of record. The same condition of affairs existed in some of the states, but we do not find any case holding that their courts were not courts of record on that account, and the definitions above given show that it was not so considered originally in all cases. Our probate courts are created by the organic act of the territory, and are to exercise the jurisdiction conferred upon them, as limited by law. The legislature of the territory, in pursuance thereof, has pro-



vided by various acts that they shall exercise jurisdiction in all probate matters; also matters pertaining to guardians and wards; master, and those bound to him; insane persons, habitual drunkards, with power to appoint guardians over their estates, and in certain cases power to sell real estate; jurisdiction over vagrants, with power to try them by jury, as well as overcontested wills. That they shall have appellate jurisdiction from justices of the peace. That all of their orders, judgments, and decrees shall be entered of record. That they shall have a seal, and that all transcripts of such records, certified to by the clerk under the seal of the court, shall have the same presumption as to jurisdictional facts as are entertained towards those of general jurisdiction. That their records shall be a verity, and can only be reviewed by appeal to the district court. That they shall have the same power to fine and imprison for contempt as that which is exercised by the district courts. By an act approved February 2, 1860, the jurisdiction of the probate courts was extended to civil suits upon open or liquidated account, replevin, debts of all nature, when the sum claimed does not exceed \$500, and concurrent jurisdiction with justices of the peace in criminal cases, and providing that the practice in the probate courts shall be the same as that in the district courts, in all its parts and provisions. We are aware that it has been thought that this act is void, as coming under the construction given to a Utah statute in *Ferris v. Higley*, 20 Wall. 375; but the statutes are so dissimilar that the questions decided in that case are not involved in this. In the Utah statute it was provided that the probate courts in their respective counties should have power to exercise general original jurisdiction, both civil and criminal, and as well in chancery as in common law. The supreme court held that congress having established the supreme and district courts, with general jurisdiction in chancery as well as common law, repelled the idea that it left it to the power of the legislature to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the territory, and therefore held that the act of the territorial legislature conferring general jurisdiction in chancery and at law on the probate courts was void. Justice Miller, in the opinion, says: "Nor are we called upon to deny that the functions and powers of the probate court may be more specifically defined by the territorial statute within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may not be imposed upon them by that legislation." The act of this territory does not contain any of the objectionable features upon which the supreme court held the Utah statute void, and we are inclined to believe there are none, either under the organic act, in law or in reason. While it might be open to judicial construction as to jurisdictional questions, there is no reason upon which any court could hold it void. By it the practice in the probate courts, in all its

parts and provisions, is to be the same as that of the district courts, which is equivalent to enacting that in its mode of proceeding it is to be governed by the rules of the common law. It would therefore appear that the legislature of the territory, by its various acts in regard to the probate courts, has conferred upon them every requirement to constitute such courts courts of record; and that such was the intention of the various legislatures that have existed since the organization of the territory is clear, from the fact that probate clerks during all of this time have exercised the power of administering oaths, which power has been clearly recognized by the legislature. They must have legislated with the understanding that the power existed in them as incident to their office, and the thing within the intention of the makers of a statute is as much within the statute as if it were within the letter. *Stowel v. Zouch*, 1 Plow. 363. We think, therefore, that the power to administer the oaths existed in the probate clerks, as incident to their offices, and the demurrer to the answers should not, on that account, have been sustained. The cause is therefore reversed, and remanded to the court below, with instructions to overrule the demurrers to the answers.

O'BRIEN, C. J., concurs.

FREEMAN, J. I concur fully in the foregoing views announced by Judge LEE, but I am not content to rest my approval of the conclusions reached by the court solely on these grounds. Independently of the question as to whether the probate court is a court of record, I think the oath taken by the lien claimant before the clerk of the court in which, by the statute, it was necessary to file the lien, was a full and complete satisfaction of the statute, which requires, simply, that the claim shall be sworn to, without designating the officer authorized to administer the oath.

SEEDS, J., dissents.

(7 N. M. 121)

GARLAND v. SPERLING et al.

(Supreme Court of New Mexico. Feb. 28, 1893.)

GARNISHMENT—MORTGAGEE WITH OPTION TO PURCHASE.

A creditor, in pursuance of a contract defining the respective rights and obligations of himself and his debtors, took possession of property of the debtors as mortgagee in possession after condition broken, with the conceded right to purchase the same for an amount less the mortgage debt, interest, and expenses, on or before a date certain, and gave his notes therefor; the debtors binding themselves to sell and convey him the property, provided they had not previously paid him the full amount of the debt due him. *Held*, that this contract fixed the relations of mortgagor and mortgagee, and until foreclosure the creditor was not a vendee in possession, legally liable for the purchase money, and therefore not subject to be charged in garnishee proceedings under Comp. Laws 1884, § 2159, requiring an officer holding an execution for collection to demand payment thereof, and, on failure to find property sufficient to satisfy the same, to garnishee "all per-

sons who may be indebted" to the debtor. 30 Pac. Rep. 923, affirmed.

On rehearing. Denied.

O'BRIEN, C. J. This case, as reported in 30 Pac. Rep. 923, has been carefully considered by this court; the judgment against the plaintiff in error, the garnishee in the court below, reversed, and the cause remanded. Defendants in error now present a motion for a rehearing, and in their brief allege the following reasons in support of their motion: "(1) The decision of the court is made entirely upon a point not presented by counsel, either in their briefs or oral arguments. (2) The court holds that the contract of October 20, 1887, did not put the plaintiff in error in the position of a debtor to the Short Horn Cattle Company. (3) The court holds that it was necessary, in order to sustain the garnishment, to show that Garland was a legal debtor of said company, at the time of the service of process upon him. (4) The court is in error in stating that the contract of October 20, 1887, gave the garnishee power to foreclose the mortgage in case the company was unable to pay the debt, or voluntarily convey the property. (5) The effect of the contract of October 20, 1887, was to entirely abrogate the mortgages or deeds of trust, and to substitute an entirely new and different set of relations between the garnishee and the Short Horn Cattle Company."

We might, for the purpose of this motion, concede that the five alleged reasons of defendants in error are true, and still maintain the correctness of the decision. The legal effect of the "reasons" forms the difference in the opinions entertained by the court and the learned counsel for defendants in error. In disposing of this motion it may be said that there are two classes of contracts, by virtue of which one of the parties thereto assumes an obligation to pay money to the other,—one absolutely, at a fixed time, without any contractual conditions; the other contingently, upon the performance or nonperformance of certain things therein stipulated. The former may be called a contract for the payment of money only; the latter, a contract for the payment of money. The party holding the position of debtor under the former contract may be garnished, but neither of the parties to the latter is subject to such process. The written contract under which it is sought to hold Garland as the debtor of the Short Horn Cattle Company does not purport to impose upon him a legal obligation to pay the company, regardless of its future action, any amount of money whatever. He does not assume liability to pay upon a condition precedent as the consideration of his liability, but upon a condition subsequent, which may happen or may not happen, according to the will or ability of the party upon whom devolves the fulfillment of such condition. Hence his contractual promise is not one for the payment of money only, but for such payment when the other party to the contract has done or has not done the things therein stipulated. The fifth and sixth paragraphs of the contract mentioned are as

follows: (5) "The said party of the second part [William Garland] agrees and binds himself, at the expiration of the nine months from and after the first day of November, A. D. 1887, to buy the property hereinbefore described at the price of one hundred thousand dollars, and, after deducting from said purchase price the full amount of the debt and interest due under the three deeds of trust hereinbefore recited, and the expenses of said party of the second part, under paragraphs two and four of this instrument, with interest thereon at the rate of twelve per cent. per annum from the time of disbursing the same until the date of the expiration of the nine months from and after the date of said possession, and to pay to the parties of the first part, their heirs or assigns, the balance in cash." (6) "The said parties of the first part hereby agree and bind themselves to sell, and by good and sufficient conveyances and other assurances of title to convey, to said party of the second part, his heirs and assigns, all of the said property hereinbefore described, at the price of one hundred thousand dollars, to be paid as provided in paragraph five of this instrument; provided, however, that the said parties of the first part shall have the right at any time before the expiration of the nine months from and after the said first day of November, 1887, [August 1, 1888,] to tender to the said party of the second part the full amount of indebtedness and interest secured to be paid by the said several promissory notes and the said three deeds of trust, together with all expenses incurred by the said party of the second part for which he is not reimbursed by sales of cattle, with interest on all such disbursements at the rate of twelve per cent. per annum from the time of making such disbursements to the date of said tender, and the actual personal expenses of the said party of the second part, incurred and expended in and about the business of the said ranch, and to demand the surrender of the possession of the said property hereinbefore described, and the cancellation of this contract." But counsel for defendants in error contends with much persistency that "there can be no doubt from any point of view that on the 1st of August, 1888, Garland's indebtedness to the company became absolute, certain, and fixed." We cannot understand what plaintiff means by employing such language, directly contradicted by the express stipulation of paragraph 6, just cited, wherein it is evident that no such liability could exist until the Short Horn Cattle Company sold and conveyed to Garland the property described in the trust deed. The liability of Garland was not absolute, nor did it arise from a legal liability to pay the company, under all circumstances, any sum of money on the 1st of August, 1888, or at any other time, on account of a precedent consideration. If the company refused to sell and convey the property to Garland in accordance with terms of the contract, the latter's remedy would be in equity, and not at law. Counsel complains that the effect of our decision in this case will be to encour-

age fraud and collusion. Where there is no legal right invaded, it is gratuitous to charge fraud. If the law cannot always protect deserving judgment creditors, or if courts find themselves unable to afford the desired relief, a part of the blame, at least, often rests with the victims of such misfortunes.

There is language used in the opinion rendered in this case that is liable to misconstruction, and which we will briefly explain. It is said that, if either of the parties to this contract were legally garnishable at the suit of the judgment creditor, the court below was correct in excluding all offers of proof as to any change made in its terms after the service of the garnishment summons. By this we are not to be understood as holding that parties, after being garnished, are deprived of any rights which they had before as to the correction of errors or mistakes arising out of the transaction creating the indebtedness. The service of the process stops or suspends the right of the debtor to liquidate his indebtedness as he could have done before such service, but does not prevent him from correcting honestly and in good faith any errors or mistakes discovered to exist between him and his creditor as to the amount of such indebtedness or the time or manner of its payment. And if the garnishee has a right to do so, he certainly, when garnished, has a right to prove it upon the hearing. In justice to counsel for plaintiff in error we must say that, though the points upon which the case was decided were not very forcibly pressed in the oral argument, they were presented in the court below, and the adverse rulings of that court are properly assigned as grounds of error in this court. The legal principles involved were at least constructively raised, and we can discover no error in their determination. For the reasons stated the motion for a rehearing must be denied.

LEE, McFIE, and SEEDS, JJ., concur.

(7 N. M. 102)

SWALLOW v. BAIN et al.

(Supreme Court of New Mexico. Feb. 28, 1893.)

CONTRACT—BREACH—VALUE OF STOCK—EVIDENCE.

1. Defendants guarantied that corporate stock owned and held by a bank was worth 40 cents on the dollar, per share, of the amount paid in. In case they should furnish to the bank within 90 days the written statement of a certain person that the stock was in fact worth the amount stated, they were to be released. The statement claimed to have been sent was lost; and defendants, in order to prove its contents, offered the person making it, who testified that the statement was to the effect that the stock had no market value; that the writer and others, who were directors of the corporation, were about to bring suit to recover assets wrongfully in the hands of other parties; that there was a contest between certain stockholders; and that when recovery was had, of which they were certain, the assets would be worth about the par value of the stock. The opposing testimony was that the statement contained only a part of the above information; that the writer hoped to succeed, and, in case of success, expected the stock to

be worth what was paid up on it, etc. *Held*, that there was no such positive statement as required; and that it was error, therefore, in an action of covenant on the contract, to refuse to direct a verdict for plaintiff.

2. Defendants had the right, under their contract, to notify the bank of the value of the stock in any other manner than by the written statement provided for. Their plea, however, put in issue the question merely as to whether the statement so provided had been furnished. *Held*, that they were not entitled to show that the bank had expressed itself as satisfied with the statement received, but which was not the statement alleged, or provided for in the contract.

Error to district court, Socorro county; W. D. Lee, Judge.

Action by George R. Swallow against William Bain and others. Judgment for defendants. Plaintiff brings error. Reversed.

The other facts fully appear in the following statement by McFIE, J.:

This was an action of covenant brought to the November term, A. D. 1888, of the district court sitting in the county of Socorro, and the cause was tried before the court and a jury at the October term, A. D. 1889, of said court. The plaintiff, in his declaration, alleged a breach of covenant contained in the following written obligation, under seal: "This agreement, made on this 5th day of May, 1886, by and between John Bain and Will Bain, of the one part, and the First National Bank of Socorro, all of Socorro, witnesseseth that, whereas the said bank has become, and now is, the owner of the following certificates of stock of the Denton Land and Cattle Company of Texas, to wit: One certificate for (175) one hundred and seventy-five shares, No. 2; one No. 71, for seventy shares; one No. 54, for fifteen and 40/100 shares,—each share of the par value of one hundred dollars each, which stock is now owned and held by said bank; Now, therefore, in consideration that John W. Terry has purchased the interest of said John Bain and Will Bain in said bank, and has assumed certain indebtedness heretofore due by the said John Bain and Will Bain to said bank, we, the said John Bain and Will Bain, do hereby guaranty to said bank that the said stock above described and hereto attached is of the value of forty cents on the dollar, per share, on the amount paid in on each share; and we agree that, if said bank is not satisfied by us within ninety days from date, that said stock is of the value of forty cents on the dollar, as above, then we agree to make the same worth that sum to said bank. If said bank or its officers, within ninety days from this date, are furnished with a statement, in writing, signed by the cashier of the Exchange National Bank at Denton, Texas, that said stock is worth and of the value of forty cents on the dollar, as above provided, then such statement, when so furnished, shall be conclusive and sufficient satisfaction to said First National Bank of the fact that said stock is of the value of forty cents on the dollar, as herein guarantied, and such statement, when so furnished, shall operate as a release and satisfaction of this guaranty, and this guaranty shall be de-

livered up and canceled; and it is agreed that, if said John Bain or Will Bain, or either of them, shall in any other manner than that above provided satisfy said bank or its officers, within the time above provided, that said stock is of the value of forty cents on the dollar, as above, then this guaranty shall be delivered up and canceled; and it is agreed that, if said John Bain and Will Bain shall fail to furnish the evidence to said bank of the value of said stock in same manner as above provided, then they, or either or both of them, shall become and are made liable under this guaranty to make said stock good to said bank to the extent of forty cents on the dollar, as above. Witness our hands and seals, this 4th day of May, 1886. John Bain. [Seal.] Will Bain. [Seal.] John W. Terry, Cash. [Seal.] W. H. Moore, Witness." In answer to the declaration, the defendants filed but one plea, which was verified, and is as follows: "And the said defendants, by Warren & Ferguson, their attorneys, come and defend the wrong and injury when, etc., and say that the plaintiff ought not to have his aforesaid action against them, the defendants, because they say that they, the defendants, did, within ninety days from the date of the written instrument on which said suit is based, satisfy the said bank that said stock was of the value of forty cents on the dollar, per share, on the amount paid in on each share, by causing, within said ninety days, the said bank and its officers to be furnished with a statement, in writing, signed by the cashier of the Exchange National Bank at Denton, Texas, that said stock was worth and of the value of forty cents on the dollar, as above, according to the form and effect of the said indenture and written instrument, and of the said covenant by the defendants in that behalf made as aforesaid, and of this the defendants put themselves upon the country," etc. The plaintiff joined issue on this plea. After the testimony was heard, the plaintiff, by his attorney, moved the court to instruct the jury to find for the plaintiff, but the motion was overruled. After the arguments of counsel were heard, and the court had instructed the jury, the jury rendered the following verdict, in favor of the defendants: "We, the jury, find for the defendants, and believe that, according to the evidence, John W. Terry did receive the letter that Mr. Ponder swore to have written on the 12th or 13th of May. We believe the contract sued on by the First National Bank of Socorro was furnished with statement in writing by Mr. Ponder, of the Exchange National Bank of Denton, Texas. We believe, according to evidence, that said stock was worth forty cents on the dollar, per share, on the amount paid in on each share thereof. N. Castillo, Foreman." Motion for new trial was filed, but the same was not disposed of until the May term, A. D. 1891, of said court. In the meantime the county of Socorro, which had been at the time of the trial a part of the second judicial district, had become attached to the fifth judicial district, and the motion for a new trial was heard by

the judge of the fifth judicial district, and by him overruled pro forma. The case is in this court on writ of error sued out by the plaintiff below, who seeks a reversal of the cause for alleged errors in the trial court, to which exceptions were taken at the time, and are preserved in the record.

W. B. Childers, for plaintiff in error.  
Warren, Ferguson & Bruner, for defendants in error.

McFIE, J., (after stating the facts.) But one issue was formed by the pleadings in the court below, and the cause was tried upon that theory. The contract provided that "if the bank or its officers, within ninety days from the date of the contract, were furnished with a statement, in writing, signed by the cashier of the Exchange National Bank of Denton, Texas, that the said stock is worth and of the value of forty cents on the dollar, as above provided, then such statement, when so furnished, shall be conclusive and sufficient satisfaction to said First National Bank of the fact that said stock is of the value of forty cents on the dollar, as herein guaranteed, and such statement, when furnished, shall operate as a release and satisfaction of this guaranty, and this guaranty shall be delivered up and canceled." The defendants plead performance in a particular manner. By their plea they say: "The defendants did within ninety days from the date of the written instrument on which said suit is based satisfy the said bank that the said stock was of the value of forty cents on the dollar, per share, on the amount paid in on each share, by causing, within said ninety days, the said bank and its officers to be furnished with a statement, in writing, signed by the cashier of the Exchange National Bank at Denton, Texas, that said stock was worth and of the value of forty cents on the dollar, as above, according to the form and effect of said indenture and written instrument." The defendants, by this plea, assumed the burden of proof. Upon the trial in the court below, the fact was developed that, while the cashier of the Exchange National Bank of Denton, Tex., had furnished John W. Terry, cashier of the First National Bank of Socorro, (or claimed to have done so,) by inclosing a statement in an envelope, and committing it to the mail, on or about the middle of May, 1886, the original statement was lost, and could not be produced in evidence upon the trial. Thereupon the court permitted secondary evidence to be introduced and go to the jury as to the contents of the statement. At the conclusion of the testimony, plaintiff, by his attorney, requested the court to instruct the jury to find for the plaintiff, upon the ground that the defendants had failed to prove a compliance with the terms of the sealed obligation by furnishing, within 90 days from the date of the instrument, a statement, in writing, signed by the cashier of the Exchange National Bank of Denton, Tex., that said stock was worth and of the value of 40 cents on the dollar, per share, of the

amount paid in on each share. The court refused to so instruct the jury, and the cause proceeded to a verdict in favor of the defendants. This action of the court in refusing to instruct the jury to find for the plaintiff is assigned for error, and we will proceed to examine that assignment.

It is clear that, if the statement in writing required by the contract was not furnished the First National Bank of Socorro or its officers within the time agreed upon, under the pleadings in this case the plaintiff would be entitled to judgment upon a mere production of the contract, inasmuch as the contract providing for the liability of the defendants was in writing, and was admitted by the defendants. This contract provided that the First National Bank of Socorro or its officers, should, within 90 days, be furnished with a statement, in writing, signed by the cashier of the Exchange National Bank of Denton, Tex., that said stock is worth and of the value of 40 cents on the dollar, per share, of the stock paid in, and the defendants' guaranty was that this should be done. There were no conditions attached to this provision of the contract. The contract required that statement to be made in writing, within 90 days from the date of the contract, and that it should positively state that the stock was worth and of the value of 40 cents on the dollar. It was to be made by a particular person,—the cashier of the Exchange National Bank of Denton, Tex.; and, if the same was furnished, it was to be conclusive, and a satisfaction to the First National Bank of Socorro, and, of course, to the plaintiff, who held under said bank, of the fact stated,—that the stock was of the value of 40 cents on the dollar; and a breach of the contract and liability under it, so far as the case made by the pleadings is concerned, could only be avoided by furnishing the required statement within the time stated. Now, let us examine the evidence to see whether the statement was or was not furnished. The defendants offered William A. Ponder, who was at the time cashier of the Exchange National Bank of Denton, Tex., as a witness to prove that he sent the statement required by the contract to John W. Terry, cashier of the First National Bank of Socorro, N. M. As to the contents of the statement forwarded by him to Mr. Terry about the middle of May, 1886, Mr. Ponder testified as follows: "1886, I wrote to John W. Terry, cashier of the First National Bank of Socorro, N. M., that there had been no sales of stock of the Denton Land & Cattle Company of late, and that there was no market value for same; that I, with others, had been duly elected officers of the Denton Land & Cattle Company, and that we were about to bring suit to recover some assets that were wrongfully in the hands of other parties; that there was a contest between the Denton stockholders and the Dallas; that the stock,—that we would recover that stock; that the assets of the company were worth about the par value of the stock; and that it was necessary that he should either be represented in person or by an attorney; and that I therefore ad-

vised that he be represented by an attorney. [Signed] Respectfully, W. A. Ponder, Cashier." Mr. Ponder was further examined as to the statement which he claimed to have sent by mail to Mr. Terry, and testified as follows: "Question. Did you not state in your letter to Mr. Terry that you were about to bring suit to recover some assets of the company? Answer. I did. Q. To recover some assets of the company's of other parties, and that you would recover in that suit, and that the assets were worth the par value of the stock,—that is what you say you wrote? A. No, sir; I said, 'About the par value;' I did not say, 'The par value.' Q. And whether or not they were worth 76% per cent. would depend upon recovery in that suit to which you referred? A. Yes, sir. Q. When you wrote to him that you would recover in that suit, you were relying upon your own judgment and advice of counsel? A. I was relying upon my counsel, and other information. Q. You say that you wrote to Mr. Terry that the assets were worth the par value of the stock if you recovered in that suit, and that you would recover, when, as a matter of fact, upon your investigation, you had only found them to be worth 76% per cent.? A. I wrote to Mr. Terry that, when we recovered, the stock would be about par, not par. Q. That it would be about par; you didn't write to him that it was par? A. No, sir. Q. I asked you about the stock. A. I wrote him that the stock based on the assets was worth about par. Q. That is, when recovery was made in that suit, if recovery was made? A. I don't think I used 'if,' when recovery was made; recovery was certain. Q. That is, when you recovered, it would be worth about par? A. Yes, sir. Did you recover within ninety days from the 4th of May, 1886? A. No, sir; we sold out on the 31st of May, and were no longer interested in the company." He further testified: "Q. The assets of this company were in the hands of these Dallas parties at the time you were talking about bringing this suit? A. No, sir. Q. Where were they? A. There was a dispute of the possession between ourselves. We both were in charge of it. Q. Both were in charge? A. Yes, sir. Q. Had there been any sale or any kind of pretended sale or mortgage or other incumbrance in the nature of a mortgage under which these people in Dallas had claimed to have bought this property in at the time? A. Yes, sir. Q. And they were claiming to hold it under that sale? A. Yes, sir. Q. And you were claiming that the sale was irregular, and that you had a right to set it aside, were you not? A. It was a fraudulent sale. Q. I am not asking you what it was. A. We claimed it was fraudulent. We claimed it was a fraudulent sale from the president of the company to himself, under a fictitious mortgage. Q. And that sale included all the assets of the company, did it not? A. I do not think it did. Q. Well, the greater portion of them? A. No, sir. Q. You figured the assets upon the basis of 76% per cent. if that suit was won,—you said this morning? A. No, sir; I said "when." Q. When it was won?

A. Yes, sir. Q. If you prefer "when" to "if," you figured it would be 76% per cent. when it was won? A. I prefer it because we were sanguine of setting the sale aside." Mr. Ponder, being the party who was to furnish the statement, was the only witness who testified as to the contents of the statement sent to Mr. Terry on behalf of the defendants. Mr. Terry was put upon the stand as a witness for the plaintiff, and he was asked if he had received a letter from Mr. Ponder containing the statements to which Mr. Ponder testified, and Mr. Terry answered: "I never received any letter containing all that information. I received a letter from Mr. Ponder containing a portion of it." Being asked as to the contents of the letter or statement received from Mr. Ponder, Mr. Terry testified as follows: "The letter which I received from Mr. Ponder was, in substance, as follows: 'John W. Terry, Cashier, Socorro, N. M.;' and, after acknowledging the receipt of the letter: 'The Denton Land & Cattle Company's stock has no present cash value. The company is in litigation. The Denton stockholders have brought suit to recover their interests, and we advise you to join them in the suit. We hope to succeed, and, in case of success, we expect the stock to be worth what was paid up on it.'" From this testimony it is clear that the statement furnished by the cashier of the Exchange National Bank of Deuton, Tex., was not such a statement as the contract required to be furnished to the First National Bank of Socorro or its officers. It is true, the statement, according to the testimony, purported to state the assets of the company to be worth more than 40 cents on the dollar, per share, of the value of the stock paid in, but the testimony shows that the value of the assets so stated was based upon the recovery of property or its value by virtue of litigation. There was no positive statement that the stock was worth or of the value of 40 cents on the dollar, as required by the contract, and the plaintiff was not required to accept a statement of value dependent upon the result of litigation. According to the testimony of the witness Ponder, the stock had no cash value, and it appears further from his testimony that there was no recovery of property within the 90 days specified, that would tend to establish a cash value of said stock. The requirements of the contract as to this statement were not met, so far as the testimony shows; but, if any statement at all was furnished, it was one dependent upon contingencies, that the contract did not provide for. This was all the evidence, substantially, in the case that was pertinent to the issue formed by the pleadings. There was evidence as to the fact that Mr. Terry had admitted that he had received a statement, and was satisfied with it. This Mr. Terry denied; but, however that may be, the contract provided that, if that statement in writing was furnished, it was to be conclusive, and a discharge of the guaranty of the defendants. Therefore it is immaterial whether Mr. Terry expressed himself satisfied or not, under defendants' plea.

The sole question put in issue by the defendants' plea was whether or not the statement provided for in the contract had been furnished. There is a provision in the contract to the effect that the defendants should have a right to satisfy the bank or its officers in any other manner than by the written statement above referred to, that the stock is of the value of 40 cents on the dollar, that the guaranty shall be delivered up and canceled; but no issue was raised by the plea as to this provision of the contract, and hence testimony referring to means used by the defendants to satisfy the bank or its officers other than by the statement alleged to have been furnished by the plea, and provided for in the contract, is not material to the issues made in this case, and cannot be considered. It follows, then, that there was no evidence upon which a verdict for the defendants could rest. That being true, it would become the duty of the court to set aside a verdict rendered for the defendants in the case, on motion being made to that effect. In such case the instructions asked for by the plaintiff should have been given by the court, and it was error to refuse it. *Candelaria v. Railroad Co.*, (N. M.) 27 Pac. Rep. 497; *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railway Co.*, 114 U. S. 619, 5 Sup. Ct. Rep. 1125; *Railroad Co. v. Jones*, 95 U. S. 439; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266. It is not necessary for us to consider other assignments of error in this case. The assignment sustained works a reversal of the case, and the judgment of the court below will be reversed, and the cause remanded to the lower court, with instructions to award plaintiff a new trial, and proceed in accordance with this opinion.

O'BRIEN, C. J., and NEEDS and FREEMAN, JJ., concur.

(7 N. M. 89)

#### CORTESY v. TERRITORY.

(Supreme Court of New Mexico. Feb. 27, 1893.)

#### INTOXICATING LIQUORS—SUNDAY SALES—AMENDMENT OF STATUTE—CONSTRUCTION.

1. Comp. Laws 1884, § 933, provided that any person found on Sunday engaged in "selling \* \* \* liquors, or any other kind of property," or "engaged in any labor, except works of necessity, charity, or mercy," should be punished. Laws 1887, c. 20, amended section 933, *inter alia*, by omitting the words "selling \* \* \* liquors, or any other kind of property," and imposed the penalty on any one found on Sunday "engaged in any labor, except works of necessity, charity, or mercy." *Held*, that a person selling liquor was, notwithstanding the omission, engaged in labor, within the meaning of the amendment. O'Brien, C. J., dissenting.

2. A statute expressed as amending a former statute so as "to read as follows," and containing a clause repealing all laws and parts of laws in conflict therewith, is not to be construed as *in pari materia* with the displaced legislation, but independently.

Motion for rehearing. Overruled.

For former report, see 30 Pac. Rep. 947.

LEE, J. The statute for the observance of the Sabbath, prior to the amendment of 1887, provided that "any person or persons who should be found on the first day of the week, called Sunday, engaged in any games, or sport, or horse racing, cock-fighting, dancing, or in any other manner disturbing any worshiping assembly or private family, or in buying or selling goods, wares, or merchandise, chattels or liquors, or any other kind of property, \* \* \* or engaged in any labor, except works of necessity, charity, or mercy, shall be," etc., which provisions were subject to a proviso that it did not apply to ferry-boats, livery stables, hotels, restaurants, and that butchers and bakers were allowed to keep their establishments open, to sell meat and bread, but not to sell liquor or other merchandise, and apothecaries to sell drugs and medicines, surgical instruments and medical apparatus, but not other articles. In 1887 the act was amended by striking out the words, "or in buying or selling any goods, wares, or merchandise, or any other kind of property," and also the proviso, and leaving the act now in force as follows: "Section 1. That section 933 of the Revised Statutes of the year 1884 be, and the same is hereby, amended to read as follows: Any person or persons who shall be found on the first day of the week, called Sunday, engaged in any sports, or in horse racing, cock-fighting, or in any other manner disturbing any worshiping assembly or private family, or attending any public meeting or public exhibition, except for religious worship or instruction, or engaged in any labor, except works of necessity, charity, or mercy, shall be punished by a fine not exceeding fifteen dollars, nor less than five dollars, or imprisonment in the county jail for not more than fifteen days, nor less than five days, in the discretion of the court, upon conviction before any district court. Sec. 2. All fines collected under this act to be applied to the school funds of the district in which the offense is committed. It shall be the duty of any sheriff collecting said fine to pay the same to the county treasurer, to the credit of the school district of the county in which the said offense was committed, within thirty days after collecting said fine, and take his receipt therefor. Sec. 3. All acts, or parts of acts, in conflict herewith are now hereby repealed. Sec. 4. This act to take effect, and, be in force, from and after its passage."

It is contended on behalf of the plaintiff in error that the legislature, by omitting and leaving out of the amendment the words, "or in buying or selling any goods, wares, or merchandise, chattels or liquors, or any other kind of property," thereby this class of business or labor is not to be included, or intended to be included, in the words, "or engaged in any labor, except works of necessity, charity, or mercy," which remain in the act as amended; and counsel rely upon the case of *Reiche v. Smythe*, 18 Wall. 162, as authority in point. That case is one which arose under the revenue laws. An act of 1861 exempted from duty animals of all kinds; birds, singing or other; and land and water fowl;

and afterwards, in 1866, an act was passed which levied a duty of 20 per cent. on all horses, mules, cattle, sheep, hogs, and other living animals; and it was held in that case that birds were not included in the term, "other living animals," used in the later act, for the reason that congress had used the term "animals" in the former and earlier act in a restricted sense, distinct from "birds;" the court holding that the later act referred to animals as a class, and therefore it was not antagonistic to the former, so far as birds were concerned, and did not repeal it by implication. Both acts remained in full force, so far as the later did not conflict with the earlier, and are in pari materia, and were so construed by the court. It was to be determined in that case how far the later act was repugnant to the earlier, and the court found that the later one only included domestic quadrupeds, and that all other animals, not ejusdem generis with horses, mules, cattle, sheep, and hogs, were exempt under the first act, which still was in force. In the case under consideration the same questions are not involved, and the principles applicable to it are entirely different. In this case the court is not called upon to reconcile the meaning of two conflicting statutes, but to construe an amendment wherein it is provided, "to read as follows," repealing all acts and parts of acts in conflict with it; and as was said in *Steamship Co. v. Joliffe*, 2 Wall. 458, the new act took effect simultaneously with the repeal of the old act. Its provisions may therefore more properly be said to be substituted in the place of, and to continue in force, with modifications, the provisions of the original act, rather than to have abrogated and annulled them. As stated in *Sutherland on Statutory Construction*: "The amendment was practically a revision of the act. A revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it, the legislature say the same thing, in effect, as when a particular section is amended by the words, 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law, as it stood, relating to the subjects within its purview. Whatever of the old law is stated in the revised act is continued in operation, as it may operate in the connection in which it is re-enacted." Section 154. It has been held in a great number of cases that where a provision in an act is amended by the form, "to read as follows," the intention is manifest to make the provision following a substitute for the old provision, and to operate exclusively in its place; that it is intended to prescribe the only rule to govern. *U. S. v. Barr*, 4 Sawy. 254; *U. S. v. Tynen*, 11 Wall. 95; *Knox v. Baldwin*, 80 N. Y. 610; *Goodno v. Oshkosh*, 81 Wis. 127; *Suth. St. Const.* §155. And it has been said the best rule by which to arrive at the meaning and intention of a law is to abide by the words which the lawmaker has used. *U.*



*S. v. Warner*, 4 McLean, 463; *U. S. v. Irwin*, 5 McLean, 178. An alteration in the phraseology, or the omission or addition of words, in the revision of a statute, does not necessarily alter the construction of an act, or imply an intention to do so. *Crowell v. Crane*, 7 Barb. 191. As expressed by Endlich on the Interpretation of Statutes, (section 378:) "The presumption of a change of intention from a change of language, of no great weight in the construction of any documents, seems entitled to less weight in the construction of statutes than in any other case; for the variation is often to be accounted for, not only by mere desire of improving the graces of style, and of avoiding the repeated use of the same words, but from the circumstance that acts are often compiled from different sources; and, further, from the alterations and additions from various hands which they undergo in their progress through parliament." Section 379. "It has been seen that the change of language in the later of two statutes on the same subject has sometimes the effect of repealing the earlier provision by implication; but in those cases the change was too significant of a changed intention to save the earlier act even from the form of a repeal, which is not favored in judicial interpretation. The change would make no difference in the sense, when the omitted words of the earlier enactment were unnecessary." It is only when "an omission in the later act of words used in the earlier one, and not supplied by any natural sense of words employed." Section 384, *Id.* Even when the omitted words were material to the sense, but might be implied, the omission would not, in itself, be considered material. It was held in the case of *Ford v. Ford*, 143 Mass. 577, 10 N. E. Rep. 474, where an act permitting divorce on the ground of desertion required that the desertion be without the consent of the party deserted, and a later act omitted those words, that they were implied in the phrase "deserted." But the second act will not operate as a repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. *Barnard v. District of Columbia*, 127 U. S. 409, 8 Sup. Ct. Rep. 1202.

Therefore, the presumption does not arise that the legislature intended to repeal the offense expressed in those words, but intended that the offense expressed by them should continue, as modified by the language used in the amended act. Nor do I think the rule contended for, that, for the purposes of ascertaining the legislative intent, repealed statutes are in *pari materia* with a statute in force. We do not think that the weight of authority ever went to that extent. We find it thus laid down: "But an act of parliament, when repealed, must be considered as if it never existed. A doubt has been felt how a subsequent statute can be taken to be incorporated with such an act, not in esse or in fuisse, and if the act, not a subsisting act, may be referred to to assist in the construction of another act upon the same subject, yet how can an act that is supposed to never have existed be said to

be in *pari materia* with any other act. The theory was denominated by Lord Mansfield as 'shocking.'" Potter, *Dwar. St.* p. 191. But, whatever the rule may have been in different cases, they have all been subject to the following, which is clearly applicable to this: "Where the last statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, as laws in *pari materia*." *Suth. St. Const.* § 286. And this rule applied where the repeal was by implication only. But where there has been an amendment to an act expressed "to read as follows," with the repealing clause of all laws and parts of laws in conflict with it, yet that the former or repealed act should be construed by the court to still be incorporated into the amended act so as to modify, limit, or restrict the plain meaning of the language used by the law-makers, so as to make it a repealing statute, I do not find supported by the authorities. On the contrary, amendatory acts should not receive a forced construction to make them repealing statutes. *Lucas Co. v. Chicago, B. & Q. Ry. Co.*, 67 Iowa, 541, 25 N. W. Rep. 769. In the case of *U. S. v. Bowen*, 100 U. S. 508, it is said: "The Revised Statutes must be treated as the legislative declaration of the statute laws on the subject which they embrace. When the meaning is plain, courts cannot look to statutes which have been revised to see whether congress erred in the revision. \* \* \* But, when it becomes necessary to construe language in the revision which leaves a substantial doubt as to its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning." Some of the law writers have referred to this decision as laying down a rule of construction peculiar to that which is to be applied to the construction of the United States Revised Statutes. But in the case of *Myer v. Car Co.*, 102 U. S. 1, that court, in an opinion by Chief Justice Waite, affirmed the rule, saying it was applicable in the construction of the statutes of Iowa. It therefore becomes a rule of construction of statutes generally by that court, which is an authority binding upon us. Therefore, the act of the legislature, as revised and amended by them, must be accepted as the law upon the subject embraced within it at the time the amended or revised act went into force; and we can only look to the repealed act to interpret anything in which there is a substantial doubt as to the meaning of the language used. If there is any doubt as to the language of the act, it is as to whether selling of liquor is intended to be included in the term of "any labor." By recurring to the original, we find it was specifically included in the act, and that intention must be carried into the amended act, without it should clearly appear that the legislature intended the contrary; the law being thus stated by Sedgwick, *St. & Const. Law*, 365: "So, upon a revision of statutes, a different interpretation is not to be given to them, without some substantial change of phraseology,—some change other than what may have been necessary to abbreviate

viate the form of the law." The supreme court of the United States has held to the same effect. *Pennock v. Dialogue*, 2 Pet. 1; *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 142. Vattel's first general maxim of interpretation is that "it is not allowable to interpret what has no need of interpretation" and continues: "When a deed is worded in clear and precise terms,—when its meaning is evident, and leads to no absurd conclusion,—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or enlarge it, is but to elude it." Vatt. Law Nat. 244; *Ruggles v. Illinois*, 108 U. S. 534, 2 Sup. Ct. Rep. 832.

The language used in the act under consideration is not obscure or uncertain. It has been literally adopted in some of the states, and substantially in many. It has received judicial construction, and a court would not be at a loss to ascertain its meaning. But, if there is a question in regard to it, courts are to gather the intention of the legislature from the entire act; and, in interpreting the section of the statute which remains in force, resort may be had to a proviso to it, although the proviso be repealed, and the clause which has been repealed may still be considered in construing provisions which remain in force. *Savings Bank v. Collector*, 3 Wall. 495; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. Rep. 396. In referring to the clause, "or in buying or selling any goods, wares, or merchandise, chattels, or liquors, or any other kind of property," which was omitted in the amendment, we find it was not subject to the exception of "necessity, charity, or mercy" clause, as was that of "or engaged in any labor" clause; the only exception being in the proviso, which in none of its provisions applies to the merchant selling general merchandise, including liquors, however great the necessity might exist for it. Courts are permitted to recur to the history of the times and condition of the country to ascertain the reasons for, and the meaning of, provisions and statutes. *U. S. v. Union Pac. R. Co.*, 91 U. S. 73; *Union Pac. R. Co. v. U. S.*, 99 U. S. 748. It is therefore proper for the court to take under consideration the vastness of the domain of the territory, and the fact that, owing to its arid condition, settlements are far removed from each other, and from central points, and that, from necessity, a large portion of the population are dependent on the country merchant for all classes and kinds of goods which they may find it necessary to buy. Yet under the provisions of the act, as it existed before the amendment, the merchant could not sell them on Sunday graveclothes to bury their dead, or a pint of brandy, if one were sick or hurt, and a life was dependent upon it, without being guilty of a violation of the letter of the statute. In this respect we find ample and sufficient reason why the act should have been amended, and this class of business put under the same exception as others. It is the language of the amended act which the court is called upon to construe; and, if the offense charged is found to be embraced in it,

then it is immaterial what connection certain words may have had with other words in the repealed act, other than they may be resorted to to interpret their meaning when it is not clearly expressed.

The words used in the amended act are, "or engaged in any labor, except of necessity, charity, or mercy." It has been claimed that the business of merchandising or selling liquor is not labor, within the meaning of the statute, and therefore does not constitute an offense, under the terms of the act. It is true that "labor," "business," and "work" are not synonyms. Yet labor may be business, but business is not always labor. It has frequently been held by different courts, both in England and America, that such business constitutes labor, within the meaning of the Sunday act. Thus, in *Bloom v. Richards*, 2 Ohio St. 402, it is held: "To wait upon customers, and receive and sell his wares, is the common labor of a merchant." In *Pattee v. Greely*, 13 Metc. (Mass.) 284, it is said: "The intention of the legislature, by this statute, was to prohibit secular business on the Sabbath; and this prohibition is not confined to work, in a sense of strict manual labor. We might refer to other authorities, but do not think it is necessary. They are sufficiently numerous to raise the presumption that the legislature acted upon the construction thus given to the words 'any labor' at the time of passing the amendment in question.

It is held that words used in a previous act have acquired, through judicial interpretation, a definite meaning, and, when used in a subsequent act, will be presumed to be used in the same sense. *The Abbotsford*, 98 U. S. 440. Therefore, the question before us is whether the omission of the words, "or buying or selling any goods, wares, merchandise, chattels, or liquors," in the amended act, and leaving in that act the words, "or engaged in any labor, except works of necessity, charity, or mercy," had the effect to repeal the act as an offense for selling of merchandise, liquors, etc., on Sunday, and leaving it in force as to all other kinds of business or labor. We think what we have said is sufficient to show that they do not work a repeal by necessary implication, even if there had been no repealing clause. A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, or inconsistent with its scope and apparent purposes, whereby the amended act may be read, construed, and interpreted according to its letter without any restricted meaning being attached to it by reason of the former act. Implied repeals are not favored, and where they exist the implication must be necessary. There must be a positive repugnance between the new and the old. *Wood v. U. S.*, 16 Pet. 342; *Davies v. Fairbairn*, 3 How. 636; *U. S. v. Tynen*, 11 Wall. 85; *State v. Stoll*, 17 Wall. 427; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. Rep. 396. In the last case here referred to it is said: "When the words relied on are general and inconclusive, and the fact that to hold that a statute repeals by implication a previous act would reverse a well-settled policy of

congress, justifies the court in requiring a clear expression of the intention of congress in the repealing act." So, in this case, if it were the intention of the legislature, by the amendment of 1887, to repeal by implication the statute making it an offense to sell goods, wares, merchandise, and liquors on Sunday, which had long been in force in the territory, and which up to the time of the amendment had not even been subject to the exception of "necessity, charity, or mercy," as other kinds of labor had, and that thereafter this kind of business was to be legalized on Sunday, and that the words, "engaged in any labor," were to have no application to that class of business, the courts are justified in requiring a clear expression of the intention of the legislature to that effect. This principle is more clearly expressed in a case which we think is directly in point on the question in controversy,—that of *Murdock v. City of Memphis*, 20 Wall. 590,—in which case one of the questions involved was whether the second section of the act of February 5, 1867, repealed all or any part of the twenty-fifth section of the act of 1789, commonly called the "Judiciary Act," and in the decision the court says: "The act of 1867 has no repealing clause, or any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely: The change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive, new enactment inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the question thus propounded for discussion. A careful comparison of these two sections can leave no doubt that it was the intention of congress, by the latter statute, to revise the entire matter to which they both had reference; to make such changes in the law as it stood as they thought best; and to substitute their will in that regard, entirely, for the old law upon the subject. We are of the opinion that it was their intention to make a new law, so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old law, omitting what was not so intended, became complete in itself, and repealed all other laws on the subject embraced within it. The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is of course the law now, and has been ever since it was first made so. What is changed or modified is the law, as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved. \* \* \* What were the precise motives which induced the omission of this clause, it is impossible to ascertain, with

any degree of satisfaction. In a legislative body like congress, it is reasonable to suppose that, among those who considered this matter at all, there were varying reasons for consenting to the change. No doubt there were those who believed that the constitution gave no right to the federal judiciary to go beyond the line marked out by the omitted clause; thought its presence or absence immaterial, and, in a revision of the statute, it was wise to leave it out, because its presence implied that such a power was within the competency of congress to bestow. There were also, no doubt, those who believed that the section standing without that clause did not confer the power which it prohibited, and that it was therefore better omitted. It may also have been within the thought of a few that all that is now claimed would follow the repeal of the clause. But, if congress and the framers of the bill had a clear purpose to enact affirmatively that the court should consider the class of errors which that clause forbid, nothing hindered that they should say so, in positive terms; and in reversing the policy of the government, from its foundation, in one of the most important subjects upon which that body could act, it is reasonable to be expected that congress would use plain and unmistakable language in giving expression to such intention. There is therefore no sufficient reason for holding that congress, by repealing or omitting this restrictive clause, intended to enact affirmatively the thing which the clause had prohibited." The conclusions thus reached in the above case are directly in point in the case under consideration. If the amended act, as changed and modified, became the law, as changed and modified, and that which was omitted ceased to have any effect from the day that the substituted act was approved, it is clear that the omitted words did not have the effect to make the amendment a repealing statute of the offense charged in the indictment, and it is equally clear, if as therein announced, that it is not sufficient reason for holding that the legislature, by omitting a clause, thereby intended to enact affirmatively the thing which the clause had prohibited. The conclusion reached by the court in its former opinion is the correct one, and therefore the motion for the rehearing will be overruled.

McFIE and SEEDS, JJ., concur in the result. O'BRIEN, C. J., dissents.

(23 Or. 548)

COVENTON et al. v. SEUFERT et al.  
(Supreme Court of Oregon. March 7, 1893.)

IRRIGATION—EASEMENT—EVIDENCE—DEED.

1. Where plaintiff, for more than 10 years, conducted water for irrigation over defendant's land, as in the exercise of a right to do so, it is no defense to an action to restrain an interference with such easement that the same was granted by parol, where it is not shown that the grant was a mere license.

2. Where a grantor possesses the right to conduct water to the land granted over the

land of another, such right passes to the grantee, under the habendum clause, as an "appurtenance thereunto belonging," without specifically mentioning such right.

Appeal from circuit court, Wasco county; Lionel R. Webster, Judge.

Suit by James H. Coventon and another against F. A. Seufert and others to restrain defendants from diverting the waters of an irrigating ditch. Plaintiffs had decree, and defendants appeal. Affirmed.

The other facts fully appear in the following statement by MOORE, J.:

This suit was brought to enjoin the defendants from diverting the waters of an irrigating ditch. The evidence establishes the following facts: That the plaintiffs, as tenants in common, are the owners of, and in the peaceable and exclusive possession of, certain real property described in the complaint; that about 1863 two Italians settled upon a tract of vacant land now owned by plaintiffs, and dug a ditch from Five Mile creek across the lands now owned by the defendants, and conducted the waters of said creek through this ditch to their land claim, for the purpose of irrigating the same; that these Italians continued to occupy this tract of land, and to use the ditch for said purpose, until November 10, 1866, when they sold their claim, and surrendered the possession thereof, to W. G. Simpson, who on June 10, 1872, secured the legal title thereto. Mr. Simpson continued to occupy this land and to use the ditch until 1873, when he died. Thereafter his widow, by consent of his heirs, occupied the place and used the ditch till 1880, when she died. The plaintiff C. Coventon is the daughter of W. G. Simpson, and she and her husband have secured the legal title from the heirs, and occupied the place and used the ditch since Mrs. Simpson's death. The plaintiffs claim to be the legal owners of the ditch, and to possess the right to divert 36 inches of water from said creek, and conduct the same to their land, as an appurtenant thereto, by reason of an alleged uninterrupted possession and use thereof by themselves and their predecessors and grantors for a period of more than 22 years, while the defendants claim that such use and possession have been by the license and indulgence of their predecessors and grantors. The cause was referred to A. R. Thompson to take and report the testimony, and upon the hearing thereof the court found that plaintiffs were the owners and possessors of said water ditch, and that they are entitled to divert 36 inches of water from Five Mile creek, and to carry the same through said ditch to their premises, from the 1st day of May until the 1st day of August of each year, and 15 inches for the remainder of the year,—said 36 inches to be calculated according to the natural flow, with a fall of 1 inch to the rod, without pressure,—and decreed that the defendants be enjoined and restrained from diverting or preventing the flow of that quantity through said ditch, but provided that defendants might use said ditch, and appropriate the excess of that amount of water for their premises, upon condition that they do not interfere with the rights of the plaintiffs as therein

decreed, from which decree the defendants appeal.

Zera Snow and Condon & Condon, for appellants. Alfred S. Bennett, for respondents.

MOORE, J., (after stating the facts) The evidence shows that the land owned by the defendants, across which the ditch runs, was selected by the state of Oregon, July 18, 1864, under the provisions of the act of congress approved September 4, 1841, and commonly known as the "Internal Improvement Grant." This selection was approved by the commissioner of the general land office and by the secretary of the interior August 12, 1868. The state of Oregon on December 16, 1872, granted this land to one J. Jackson, through whom these defendants claim title by mesne conveyances.

It may be stated, as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, in a particular way, for more than 10 years, it affords a conclusive presumption of right in the party who shall have enjoyed it. Washb. Easem. 106; Tolman v. Casey, 15 Or. 83, 13 Pac. Rep. 669. The evidence conclusively shows that from 1863 to 1885 there had been an uninterrupted use of this ditch by the plaintiffs, their predecessors and grantors; that from 1866, the date of Simpson's possession of the land, to 1885, when the defendants interfered with the ditch, the plaintiffs, their grantors and ancestors, had conducted 36 inches of water from said creek to their land during the irrigating season of each year. This use and enjoyment afford a presumption of right in them, which must prevail, unless the defendants can show that such possession was maintained by the license or indulgence of themselves, their grantors or predecessors. The evidence further shows that, when Mr. Jackson obtained a deed from the state for the land now owned by the defendants, he had some settlement with Mr. Simpson in relation to this ditch. Mrs. Coventon, one of the plaintiffs, upon her direct examination, testified upon this subject as follows: "In 1872, between Christmas and New Year, Mr. Jackson, a man that owned the place that Mr. Seufert now owns, came to me, and told me that he wanted to see my father in reference about the ditch, and left word with me for my father to meet him somewhere here in town, (I don't remember where, but I think it was at Colonel Gates' office, as Colonel Gates was my father's lawyer,) to compromise,—to see whether he could get any damage, or not, for the water running across his land, and when my father came into town to settle for the water right, and he went, and they settled it through Colonel Gates. Colonel Gates told me so. I didn't hear it. My father also told me that he had settled it." At the time of the alleged settlement, (Christmas, 1872,) the statute of limitations for the recovery of real property was 20 years; and hence the possession of Mr. Simpson, if tacked to that of the Italians, would not then toll the en-

try of Mr. Jackson, who had the legal title. Was the settlement such a recognition of Mr. Jackson's legal title as to preclude the presumption of hostility upon the part of Mr. Simpson, and of those who claim under him? An adverse right of easement cannot grow out of a mere permissive enjoyment. Washb. Easem. 124. The burden of proving that plaintiffs held possession by license or indulgence was cast upon the defendants. It was their duty to show what was embraced in this settlement. In the absence of this proof, can it be presumed that this settlement was the purchase of the right to maintain the ditch? An easement cannot be granted by parol, yet if Mr. Simpson purchased from Mr. Jackson the right to use the ditch, and used the same for 10 years, and such use was acquiesced in by Mr. Jackson and his grantees, it would be such an exercise of the easement under a claim of right as to give a prescriptive right to the same. It is no objection to granting an easement by prescription that the same was originally granted or bargained by parol. That the use began by permission does not affect the prescriptive right, if it has been used and exercised for the requisite period, under a claim of right, on the part of Mr. Simpson and his heirs, and their grantees. If the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right. Gould, Waters, § 338; Washb. Easem. 127. The plaintiffs have used the ditch as if it had been legally conveyed to them,—that is, they have exercised such acts of ownership over it as a man would over his own property; and the court must presume, in the absence of any evidence to the contrary, that the settlement was a parol consent or transfer by Mr. Jackson to Mr. Simpson of the right to use the ditch, and hence it was a use as of right. No offer to purchase after the statute has fully run will bar the claim of adverse possession, unless the relation of vendor and vendee under a contract to purchase, or of landlord and tenant, once existed between the parties.

Appellants contend that, since none of plaintiffs' deeds contain any mention of this ditch or easement, no right thereto could pass under the habendum clause, of "appurtenances thereunto belonging," and hence the possession of the plaintiffs cannot be tacked to that of their grantors and ancestor. In *Kent v. Waite*, 10 Pick. 141, objection was made to a deed upon the same ground, and the court held that the omission to describe a right of way or other easement appurtenant to the land would pass by a grant of the land without any mention being made of the easement or the appurtenance. So in *Simmons v. Winters*, 21 Or. 44, 27 Pac. Rep. 7, Lord, J., says: "When there is no express grant or sale of a ditch or water right mentioned in the deed of the land, other than may be included in the use of the word 'appurtenances,' the question is whether the interest of the grantor in such ditch, and right to the use of the water, would be conveyed or pass to the grantee by such deed. The maxim of

law is that whoever grants a thing is supposed, also, tacitly, to grant that without which the grant would be of no avail." In *Leonard v. Leonard*, 7 Allen, 280, the court says: "But it is contended that in order to create a priority of use the easement must be expressly mentioned in the deed, and conveyed by it. In support of this position it is said that until the lapse of twenty years the adverse user consists merely of a series of tortious acts, none of which have created any right, and, since no right of way is as yet legally appurtenant to the land, it will not pass as an appurtenance, and therefore the user of the purchaser is not in privity with the user of his grantor, but wholly independent of it. The principle that a disseisor of land cannot tack his possession to that of a prior disseisor, under whom he does not claim, and with whom he has no connection, is stated in [*Melvin v. Proprietors*,] 5 Metc. (Mass.) 33, and the cases there cited are said to be applicable to such a case as this. On the same ground it is contended that, upon the death of the person who has used the way for less than twenty years, the subsequent user of his heir ought not to be tacked to his user, but is independent of it, and disconnected with it, because, no right having been acquired by the ancestor, none could descend to the heir. The objection has apparently equal force in both cases; for in neither case does any title to the easement, in express terms, pass. Yet, in the case of the heir, it is settled by the authorities above referred to that his possession may be tacked to that of his ancestor. His user is regarded as a continuation of the user of his ancestor, on account of his privity of title to the land to which the easement has been claimed by both to be appurtenant. By the same course of reasoning, the user of an easement by a grantee should be tacked to that of his grantor. It is a continuity of user under the same claim of title, though without any real transfer of title." It would appear from the evidence that plaintiffs' possession, and that of their grantors and predecessors, had been open, notorious, peaceable, continuous, and adverse for the full period of more than 10 years.

Appellants contend that the decree practically gives to plaintiffs all the waters of the creek in dry seasons. The right of plaintiffs to divert the waters of the creek is based upon their adverse user, and the acquiescence of the riparian proprietors below the point where the ditch enters the same. If no more water is diverted by the decree than they have been using for a period of more than 10 years, then their right to continue the diversion must prevail. The quantity of water to be appropriated is to be measured by the capacity of the ditch at its smallest part; that is, at the point where the least water can be carried through it. Pom. Rip. Rights, § 80. The evidence shows that the water from this ditch has to be carried in a pipe below the grade of a railroad, and thence up to the level again, and for this purpose an iron pipe 7 inches in diameter had been used, which would carry about  $3\frac{1}{2}$  inches, but

that this pipe had been taken out, and its place supplied by a wooden box 6 inches square, with a carrying capacity of 36 inches of water, which amount was awarded plaintiffs by the decree of the court below, which is affirmed.

(23 Or. 545)

**MARX v. GOODNOUGH et al.**

(Supreme Court of Oregon. March 7, 1893.)

**PARTNERSHIP — RIGHTS OF PARTNERS INTER SESE — ACCOUNTING.**

The purchaser of a partner's interest in the firm may maintain a suit in equity for an accounting and settlement, though there are no outstanding accounts due to or from the concern, and he has an inventory, showing the amount and value of the partnership property.

Appeal from circuit court, Union county; M. D. Clifford, Judge.

Suit in equity by Dan Marx against Charles Goodnough and others for an accounting and settlement of a copartnership. Plaintiff had decree, and defendants appeal. Affirmed.

For former report, see 16 Pac. Rep. 918.

W. H. Winfree and W. H. Holmes, for appellants. C. H. Finn, Chas. H. Carter, and D'Arcy & Bingham, for respondent.

**BEAN, J.** This is a suit for an accounting and dissolution of the partnership composed of W. S. Wines and H. B. Glover, formerly doing business as partners at Island City, Union county, under the firm name of W. S. Wines & Co. A demurrer to the complaint was sustained by the court below, and on appeal to this court the decree was reversed, (*Marx v. Goodnough*, 16 Or. 26, 16 Pac. Rep. 918,) after which an answer was filed, and the cause referred to a referee to report the law and the facts. The referee reported in favor of the plaintiff, and his report was confirmed by the trial court, from which defendants appeal.

The facts, as disclosed by the evidence and the report of the referee, and about which there is no dispute, are that in 1884 Wines and Glover formed a partnership for carrying on a harness and saddlery business in Island City in the name of W. S. Wines & Co. This business was continued, as agreed, until January 24, 1885, when Glover sold his half interest in the business to the plaintiff, but Wines refused, upon demand, to let him into possession of the property, and on the 26th day of the same month Wines sold his half interest in the stock of goods to defendants, who thereupon took possession thereof, but not of any books or choses in action, and refused to admit or recognize any right in Marx to the property, but, on his request for an inventory, gave him a copy of the one they had taken, and on the 27th of January they sold and disposed of their entire stock of goods, which was of the value of \$2,600. The argument for defendants is that under these facts plaintiff had an adequate and complete remedy at law, and for that reason this suit should have been dismissed. This question was substantially decided adversely to defendants' contention on the former appeal in this

case. The only material difference between the allegations of the complaint then before the court and the evidence is that in the complaint it was averred that defendants refused to permit or allow the plaintiff to look at or examine the accounts of the firm, or in any manner learn the financial condition thereof, and that an accounting of the entire partnership business was necessary in order to ascertain the value of plaintiff's interest, while from the evidence it appears that defendants did not have possession of or claim any interest in or to the books of the firm, and that there were no outstanding accounts or obligations due or payable to the partnership, and it was not indebted in any sum, but all the property it owned or possessed was the stock of goods in question, of which plaintiff had a full and complete inventory prior to the commencement of this suit. But it is not perceived how this fact would oust a court of equity of jurisdiction. The suit still remained one for dissolution and settlement of a partnership, in which the remedy administered by a court of equity is far more comprehensive and complete than can be administered in a court of law, and is consequently one of the well-recognized heads of equity jurisprudence. The plaintiff, by his purchase from Glover, did not obtain any separate interest in the property or effects of the firm, but only Glover's interest or share of what remained after an accounting and the payment of debts, if any. By this purchase he stands in the place of Glover, and has the right to call for an accounting and settlement of the partnership concern, and take his share, if any surplus remains, in severalty. *Pars. Partn.* \*359; 2 *Bates, Partn.* § 927. The fact that plaintiff knew the condition of the accounts of the firm, and the amount and value of the stock of goods, before he commenced his suit, manifestly did not prevent him from having recourse to equity, (*Personette v. Pryme*, 34 N. J. Eq. 26,) for he could obtain a final settlement and adjustment of the partnership affairs and distribution of the partnership property in a court of equity only. Had he commenced an action at law for the conversion of the property by the defendant, it is probable a plea of partnership would have been a complete defense. In *Miller v. Brigham*, 50 Cal. 615, it appeared that the property in controversy ately belonged to a copartnership firm, composed of the defendant and one Crossin, and that before the commencement of the action the latter had sold and conveyed to the plaintiff his undivided one-half interest in the property. Upon these facts, and the further fact that the defendant had, upon demand made by the plaintiff, refused to let the latter into possession of the chattels, the court below gave judgment for the plaintiff; but on an appeal it was held that upon the facts thus disclosed the action could not be maintained. "The effect of the assignment by Crossin to the plaintiff," says the court, "was to dissolve the copartnership, and to vest the plaintiff with a right to insist upon an account of the joint concern,

and to have whatever his assignor would have been entitled to upon a settlement of the affairs of the copartnership; and in the mean time the defendant, Brigham is entitled to the possession of the property for the purpose of winding up the affairs of the dissolved copartnership. It is unnecessary to go over the authorities which support this proposition. Some of them will be found collated in *Pars. Partn.* (2d Ed.) p. 160, note c." From these premises we conclude the decree of the court below must be affirmed, and it is so ordered.

(97 Cal. 468)

**BENICIA AGRICULTURAL WORKS v. GERMANIA INS. CO.** (No. 18,076.)

(Supreme Court of California. March 7, 1893.)

**INSURANCE—CONSTRUCTION OF POLICY.**

Where a fire insurance policy on a harvesting machine, though running in terms for a year, contains a clause stating that it only insures the machine while operating in the grain fields, and in transit from place to place in connection with harvesting, the insurance company is not liable for a loss of the machine by fire within the year if at the time of such loss it was not actually in operation or in transit, as provided by such clause.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Benicia Agricultural Works against the Germania Insurance Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Edward Lynch and Geo. B. Graham, for appellant. T. C. Van Ness, for respondent.

**McFARLAND, J.** This is an action to recover for the loss of a certain harvesting machine and outfit insured by defendant against loss from fire. The court below granted a nonsuit, and rendered judgment for defendant. From the judgment, and from an order denying a new trial, the plaintiff appealed.

The policy ran, in terms, for a period of one year from June 12, 1890, to June 12, 1891; but, after reciting the character of the property, it contained the following clause: "All while owned by assured, and known as the 'Harvest King harvesting machine and outfit,' and operating in the grain fields, and in transit from place to place in connection with harvesting in Fresno county, of California." It appeared that the harvesting season in Fresno county usually ends about the 1st of September; that in 1890 it was somewhat longer than usual; that the insured, appellant's assignor, finished harvesting that year in September, or about the 1st of October; that he then took the machine home to his ranch, having entirely finished using it in the business of harvesting for that year; that he separated the header from the balance of the machine, so that the whole machinery could be more readily placed in his shed; that he was prevented by other work from putting it in his shed; and that it remained near the shed until the 18th of the following November, at which time it was

destroyed by fire. It is clear, therefore, that it was not burned while "operating in the grain fields, or in transit from place to place in connection with harvesting in Fresno county." But appellant now contends—and, indeed, that is nearly its whole contention—that because the policy runs, in terms, for a year, respondent is responsible for the loss, whether the fire occurred during the harvesting season, or at any other time during the year. But to maintain that contention would be to hold that the most prominent part of the policy could be ignored entirely. The plain, clear meaning of the language used is that the respondent would be responsible if the property, at any time between June, 1890, and June, 1891, should be destroyed by fire, while operating in the grain fields, or in transit from place to place in connection with harvesting. This provision is in the body of the policy, and not in the long memoranda printed on the back of it, and made a part thereof, and must be considered as a leading clause in the contract, to which the attention of the parties was clearly called; and it is clear that respondent was not to be liable for any loss by fire unless it occurred while the said machine was operating, or in transit in connection with harvesting, as before stated. Indeed, this contention which appellant now makes is barely consistent with the complaint, which alleges that the loss occurred while the machine was operating in the grain fields or in transit, or with the specifications of error, which include the proposition that it was so operating, or so in transit.

The appellant took exceptions to the rulings of the court excluding certain offered evidence, by which appellant sought to show that the risk or hazard was not increased by the fact that the machine was not employed in the fields, or in transit, at the time of the fire; but those objections and the testimony were immaterial, under the view which we have taken of the contract itself. Judgment and order affirmed.

We concur: **DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; PATERSON, J.**

(97 Cal. 472)

**DE BAKER v. BATCHELLER et al.** (No. 10,962.)

(Supreme Court of California. March 7, 1893.)

**LEVEE DISTRICTS—PETITION FOR ORGANIZATION—PUBLICATION.**

1. Act March 10, 1891, (St. p. 30, § 1.) provides for the organization of levee districts for the protection of lands, when desired by "a majority of freeholders owning land injuriously affected, or liable to be injuriously affected, by overflow from any innavigable running stream." For such organization, section 2 provides that a petition shall be presented to the board of supervisors, "signed by the required number of freeholders of such proposed district." *Held*, that such petition need not be signed by a majority of the landowners liable to be affected by the overflow of the stream, but only those within a proposed levee district.

2. Under Act March 10, 1891, (St. p. 30, § 2.) which provides for the publication of the petition for the organization of a levee dis-



trict to protect lands from the overflow of a stream, where the petition described the land within the proposed district, and referred to a plat of such district, the publication is not void because such plat, submitted with the petition, was not also published.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Arcadia B. De Baker against J. W. Batcheller and others to restrain the issuance and sale of certain bonds. Judgment for defendants, and plaintiff appeals. Affirmed.

Wells, Monroe & Lee, for appellant. Wilson & Lamme and Chas. L. Batcheller, for respondents.

McFARLAND, J. April 6, 1891, certain persons presented to the board of supervisors of Los Angeles county a petition for the formation of a levee district under the act of March 10, 1891, entitled "An act to provide for the organization and government of levee districts created for the protection of lands from overflow of innavigable running streams of water," etc., (St. 1891, p. 30,) to be called the "Fruitland Levee District." Such proceedings were afterwards had that the board of supervisors declared such district organized; and, after other steps provided for by the act had been taken, the defendants were elected as the board of directors of said district; and they were about to issue and sell certain bonds of said district when the plaintiff commenced this action to restrain them from so doing. A portion of plaintiff's complaint was stricken out, against her objection, and, the defendants having answered, the case was heard by the trial court, and judgment rendered for defendants. From the judgment, and from an order denying a new trial, plaintiff appeals.

1. The lands included in the district lie along the Los Angeles river, and the main contention of appellant is that the petition failed to give the supervisors jurisdiction because it was signed only by a majority of freeholders owning lands within the proposed district, whereas it is contended by appellant that it should have been signed by a majority of freeholders owning land injuriously affected by overflow from said Los Angeles river, throughout its entire course. If the contention of appellant be true, then no levee district under the act could be legally created along any of the rivers of the state,—not even along the San Joaquin or Sacramento,—except upon a petition signed by a majority of all the freeholders of lands liable to be injuriously affected by overflow, from the foothills to the bay. We do not think that appellant's position is tenable. The whole contention rests upon the language of the first few lines of the bill, to wit, "a majority of freeholders owning land injuriously affected, or liable to be injuriously affected, by overflow from any innavigable running stream," etc.; and it is contended that this language necessarily means a majority of all the freeholders who own land at any point on the stream which might be injuriously affected by overflow. But, when the entire act

is looked at, it clearly means a majority of such freeholders within the proposed district. The second section expressly provides that the petition shall be "signed by the required number of freeholders of such proposed district." It also provides that the board of supervisors "may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries;" also "that no lands already embraced in \* \* \* levee \* \* \* district shall be included in such boundaries;" and that the board of supervisors shall not "allow another district to be formed, including any of the lands in such district, without the consent of the board of directors thereof." From these and other provisions of the act, it is apparent that the legislature contemplated the possible creation of several districts along the same stream, and that, when the act speaks of a "majority of freeholders," it means a majority of the freeholders of the proposed district. Appellant admits that there may be a district created which does not include all the lands subject to overflow along the river,—indeed, she says that it may be as small as "two acres;" but she contends that in order to organize a district, however small, there must be a petition signed by a majority of all the freeholders owning lands subject to overflow along the entire course of the stream, and that such a petition, so signed, is requisite to establish the first district, or any subsequent district. Such a construction is unreasonable, and destructive of the respective rights of districts and freeholders along the stream. We think, therefore, that the court below was right in holding that the petition in the case at bar was sufficient, independent of the question whether or not the action of the board of supervisors in determining the boundaries of a district is final, and beyond review.

2. The act<sup>1</sup> provides that "said petition shall be published" in a certain prescribed way, and appellant contends that the board of supervisors did not acquire jurisdiction because in this case the petition was not so published. It is admitted that the body of the petition itself was published as required by the act, but it contains this provision: "The said proposed boundaries of said district are shown, approximately, by the plat thereof hereto annexed." And, as no plat was published with the petition, it is claimed that the publication was defective. But we do not think so. In the body of the petition the boundaries of the proposed district are fully stated, with minute detail. The plat referred to is not expressly made a part of the petition, purports to show the boundaries only approximately, and is not at all a necessary part of the petition. If the petitioners had been unusually wise or cautious, they would have avoided the possibility of the point now under review being made, by either leaving out any reference to the plat, or by publishing it after having made such reference; but we think that the publication of the body of the petition in this instance was a sub-

<sup>1</sup>Section 2.

stantial compliance with the provision of the act on the subject.

Judgment and order affirmed.

We concur: DE HAVEN, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.

(3 Cal. Unrep. 811)

HOOPER v. PATTERSON et al. (No. 14,394.)

(Supreme Court of California. Feb. 25, 1893.)

ACTION ON INJUNCTION BOND—MEASURE OF DAMAGES—ATTORNEYS' FEES PAID—RECOVERY BY ADMINISTRATOR.

1. An appeal from a judgment should be dismissed, where it is not taken until more than two years after the entry thereof.

2. In an action by an administrator on an injunction bond, the amount of attorneys' fees paid by the intestate in procuring a dissolution of the injunction cannot be recovered, when such fees have not been paid, and no claim for them had been filed against the estate, at the time of filing the complaint.

3. In such action, it is error to allow interest on the damages from the date of filing the complaint, as such damages are unliquidated and uncertain until settled by process of law, or by the parties.

Commissioners' decision. Department

1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

(Not to be published in California Reports.)

Action by W. N. Hooper, as administrator of Terence Burke, deceased, against James Patterson and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Appeal from the judgment dismissed. Order denying a new trial reversed.

Wm. H. H. Hart, for appellants. T. V. O'Brien, O'Brien & Morrison, and O'Brien & Dangerfield, for respondent.

VANCLIEF, C. Action upon two injunction bonds to recover \$5,000 damages alleged to have been sustained by plaintiff's intestate, by reason of the injunctions. The plaintiff had judgment for \$500, with interest thereon from February 29, 1884, (the date of filing original complaint,) until the date of judgment, May 4, 1889, and costs, taxed at \$188.20. The defendants appeal from the judgment, and from an order denying their motion for a new trial. The appeal from the judgment should be dismissed, as it was not taken until September 23, 1891,—more than two years after the entry of the judgment.

The two injunction bonds were given in the same action. The first injunction having been dissolved on demurrer to the complaint, the second, to the same effect, was granted upon an amended complaint and a second bond. A demurrer to the amended complaint, upon which the second injunction was issued, was also sustained, and thereupon final judgment, dismissing the complaint and dissolving the injunction, was rendered. From this judgment an appeal was taken, whereupon the judgment and order dissolving the injunction were affirmed. See 61 Cal. 525, 527. The injunction restrained plaintiff's

intestate and the sheriff of El Dorado county, pendente lite, from selling, on execution in favor of the former, certain mining claims, and improvements thereon. The findings of the court negative all alleged damages by reason of the injunction, except as follows: (1) "That said Burke (plaintiff's intestate) was necessarily put to costs and expenses, in the amount of \$500, for attorneys' fees in procuring the dissolution of said injunctions, and expended said sum." (2) "That said Burke was necessarily put to cost and expense, in the amount of \$200, for attorneys' fees in the supreme court of the state of California, in procuring an affirmation of said judgment dissolving said injunctions."

1. It is contended for appellant that neither of these findings is justified by the evidence. I think this point should be sustained. The evidence not only fails to show that Burke or his administrator ever paid any attorneys' fees for services in procuring a dissolution of either injunction, but positively shows that no such fees were ever paid, and, furthermore, shows that the estate of Burke was not liable for any such fees at the time the amended complaint, on which the case was tried, was filed, for the reason that no claim for any such fees was ever presented for allowance to the administrator of Burke, or to the probate judge. The plaintiff was appointed and qualified as administrator of Burke more than four months prior to the filing of the original complaint herein, and nearly two years before the filing of the last amended complaint; and it appears that notice to the creditors had been duly published by the administrator. Substantially all this appears from the testimony of Thomas V. O'Brien, a witness for plaintiff, who appears to have been the leading attorney for Burke in the action in which the injunctions were issued, and also in this action; and there was no other evidence on the trial, touching attorneys' fees for services in procuring a dissolution of the injunctions, than this testimony. In the late case of *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. Rep. 833, this court said: "The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional; and it should not be carried beyond the point to which former decisions have taken it." By former decisions in this state, it seems to have been well settled that in cases of this kind attorneys' fees cannot be recovered as damages sustained by reason of the injunction, unless they have been paid. The principal former decisions to this effect are to be found in the following cases: *Wilson v. McEvoy*, 25 Cal. 170; *Prader v. Grimm*, 28 Cal. 11; *Roussin v. Stewart*, 33 Cal. 208; *Bustamante v. Stewart*, 55 Cal. 115.

2. Appellant also makes the point that the court erred in allowing interest on the damages, and I think this point is well taken. The liability of the defendants, if any, arose from a contract; but the amount of the damages could not have been estimated or ascertained by means of the contract; nor does the contract furnish any data useful as a factor in es-

timating the damages. Therefore, the damages were unliquidated and uncertain, and could only be made certain by proof and adjudication on the trial, or by a settlement between the parties. *Coburn v. Goodall*, 72 Cal. 509, 14 Pac. Rep. 190; *Heald v. Hendy*, 89 Cal. 632, 27 Pac. Rep. 67.

I think the appeal from the judgment should be dismissed; but that the order denying a new trial should be reversed, and a new trial granted. But inasmuch as it appears that the attorneys for defendants refused to accept an offer of plaintiff's attorneys to consent to an order granting a new trial made at the time notice of defendants' motion for a new trial was served, I think the appellant should pay the costs of the appeal.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order denying a new trial is reversed, and a new trial granted. Costs of appeal to be paid by appellant.

(97 Cal. 422)

MARSHALL v. TAYLOR. (No. 19,073.)  
(Supreme Court of California. Feb. 27, 1893.)

ENTRY OF JUDGMENT—FAILURE OF CLERK TO MAKE—EFFECT—MOTION TO DISMISS.

1. Where judgment was rendered for plaintiff, and on the same day she gave to the clerk a form thereof, and paid costs of the action, and he neglected to enter the judgment, a motion by defendant to dismiss the action because the judgment was not entered within six months after rendition, as provided by Code Civil Proc. § 581, providing that an action may be dismissed where, after verdict, the successful party neglects to demand entry of judgment thereon for more than six months, was properly denied, the provisions of such section not being mandatory. *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. Rep. 121.

2. Even if such statute were mandatory, such motion could not be sustained, since there was no "neglect" on the part of plaintiff, she having a right to assume that the clerk would perform his duty as required by Code Civil Proc. § 664, providing that judgment must be entered by the clerk in conformity with the verdict within 24 hours thereafter, unless the court order the case reserved for argument or further consideration, or grant a stay of proceedings.

3. A certificate by the clerk that no judgment had ever been entered, attached to the transcript on appeal served on plaintiff, did not affect her with notice that such judgment had not been entered.

4. If such certificate were evidence of notice, under any circumstance, defendant could not use it for such purpose when he stated in his bill of exceptions that, immediately after the rendition of the verdict, "judgment was rendered and entered in said case in accordance with said verdict," and he also stated in his notice of appeal that the appeal was from the judgment entered in favor of plaintiff.

5. Where the court has actually rendered a judgment, but it has not been entered on the record, through neglect of the clerk, an order may be made that it be entered nunc pro tunc, though the six months allowed for entering judgment have elapsed.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Jessie N. Marshall against Jacob S. Taylor. There was judgment for plaintiff, and from an order overruling a motion by defendant to dismiss the action because the judgment was not entered within six months after rendition thereof, and from an order directing the clerk to enter the judgment nunc pro tunc, defendant appeals. Affirmed.

C. C. Stephens, for appellant. W. W. Holcomb, W. T. Williams, and J. W. Cochran, for respondent.

PATERSON, J. Plaintiff recovered a judgment against the defendant in the court below, for the sum of \$25,000 damages, on December 18, 1890. On that day her counsel gave to the clerk the form of judgment, and paid him the costs of the action. The verdict was duly recorded, and the judgment was filed, but was not entered. In due time the defendant moved for a new trial. The motion was denied, and the defendant appealed on June 26, 1891. The notice of appeal served upon the plaintiff states that the defendant appeals to the supreme court from the final judgment given, made, rendered, and entered in the cause on December 18, 1890, and also from the order of June 12, 1891, denying defendant's motion for a new trial therein. The transcript on appeal was served upon respondent on August 25, 1891, and contains a certificate of the clerk which states that no judgment has ever been rendered or entered in the action. On December 9, 1891, the appellant served upon respondent a notice of motion to dismiss the action upon the ground that the plaintiff had neglected for more than six months after the rendition of the verdict to demand, or have entered, a judgment thereon. About the same time, plaintiff served the defendant with notice of motion to have judgment entered "as of the date, the 18th day of January, 1890." The motions were heard together. The motion of the defendant, for a dismissal of the action, was denied; and the motion of plaintiff, "for an order directing the clerk to enter judgment nunc pro tunc as of January 18, 1890, was granted. From these orders the defendant has appealed.

We think the court properly denied the motion to dismiss the action. The application was based upon section 581, Code Civil Proc., which provides that "an action may be dismissed \* \* \* in the following cases: \* \* \* (6) By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months." This section is not mandatory. (*Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. Rep. 121.) and, if it were, would not authorize a dismissal of the action, under the circumstances shown in this case, because there was no "neglect" on the part of the plaintiff. When plaintiff paid to the clerk the costs of the action after verdict, and presented him with a form of the judgment which she desired to have entered, she had a right to rely upon the assumption that the clerk would perform the duty required of him by the statute. Section 664, Code Civil Proc., provides that

"When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."

It is claimed that the clerk's certificate to the transcript was notice to the respondent that no judgment had ever been entered, and she having neglected thereafter, until the notice of motion to dismiss as served, to take any steps to have the judgment entered, it was an abuse of discretion in the court below to refuse to dismiss the action. But the certificate of the clerk cannot be used, and never was intended to be used, for any such purpose. If it were evidence of notice, under any circumstance, the appellant ought not be allowed to use it for such a purpose after having incorporated into his bill of exceptions a statement that immediately after the rendition of the verdict, "on the 18th day of December, 1890, judgment was rendered and entered in said case in accordance with said verdict," and also a certificate of the judge to the effect that on the hearing of the motion for a new trial, among other documents introduced in evidence, was the judgment, and having also stated in his notice of appeal served upon respondent that the appeal was from the judgment entered on the 18th day of December, 1890, in favor of plaintiff, and against the defendant.

It is contended that a judgment nunc pro tunc can be entered only when the delay has arisen from the act of the court, and that there is nothing in the record upon which to base an order of entry nunc pro tunc. Neither of these contentions is sound. The pleadings, the minutes of the court, and the verdict were sufficient record evidence to sustain the action of the court. The verdict is equivalent to findings of fact and conclusions of law; and section 664, supra, is equivalent to an express direction by the court to the clerk to enter judgment in accordance with the verdict. The rights of the parties were fully determined, there was no question as to the form or substance of the judgment, and nothing remained to be done but the mere ministerial duty, to be performed by the clerk, of entering the judgment as required by the statute. *Casement v. Ringgold*, 28 Cal. 339; *Gray v. Palmer*, Id. 416. The rule is that where the court has actually rendered a judgment, but the same has not been entered on the record, whether in consequence of the neglect of the court, or neglect or misprision of the clerk, an order may be made that the judgment rendered be entered nunc pro tunc, and this may be done after the expiration of the term—in this state, after the expiration of six months. Such an order was made in a case, although nearly eight years had elapsed, it appearing that third persons would not be injured thereby. In such a case the effect of the order is simply to supply matters of evidence. The record is merely amended by inserting in the memorial of the proceedings that which has been improperly omitted therefrom. 1 Black, Judgm. §§ 128-133. The

appellant's rights on appeal will not be affected by the action of the court below, because the order relates back to the time the proceedings of the court actually took place, and the nunc pro tunc entry of the judgment becomes a part of the entry of that date, the same as if it had actually been entered then. "There can be no doubt that such an entry may operate so as to save proceedings which have been had before it is made." 1 Black, Judgm. § 136.

To protect the rights of the parties, however, it is necessary that the order of the court granting the plaintiff's motion should be corrected in one respect. It directs the clerk "to enter a judgment nunc pro tunc as of January 18, 1890." The word "January" is a palpable mistake as to the month. The action was not commenced until March 22, 1890, and the record shows beyond question that the judgment ought to have been entered December 18, 1890. The order denying the defendant's motion to dismiss the action is affirmed, and the court below is directed to amend the order granting the plaintiff's motion by striking out the word "January," and inserting in lieu thereof the word "December." As so modified, the last-named order will stand affirmed; and, there being no merit in the appeal, the appellant will not recover the costs thereof.

We concur: HARRISON, J.; GAROUTTE, J.

(97 Cal. 428)

In re WOODS' ESTATE. (No. 18,051.)

(Supreme Court of California. Feb. 27, 1893.)

LETTERS OF ADMINISTRATION—TO WHOM GRANTED—MINOR CHILDREN OF DECEASED—GUARDIAN'S RIGHT TO NAME ADMINISTRATOR.

Code Civil Proc. § 1365, names the persons to whom letters of administration shall be granted, but does not name the guardian of a minor. Section 1369 declares that a minor is not competent to serve as administrator. Section 1379 provides that administration may be granted to one or more competent persons, though not otherwise entitled to the same, at the written request of the person entitled. Section 1308 provides that, if any person entitled to administer is a minor, letters must be granted to his or her guardian, or to any other person entitled to letters of administration, in the discretion of the court. *Held*, that a written request by a guardian of the minor children of deceased that letters be granted to appellant did not confer on the latter the right to administer.

Department 2. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge.

C. M. West and George F. Bronner, public administrator, were contestants for letters of administration on the estate of James A. Woods, deceased. From an order denying the application of West, and granting letters to Bronner, the former appeals. Affirmed.

Hall & Dunn, for appellant. Johnson, Johnson & Johnson, for respondent.

PER CURIAM. C. M. West and George F. Bronner, public administrator, were contestants for letters of administration of the estate of James A. Woods, deceased.

The court made an order denying the application of West, and granting letters to Bronner, and West appeals from the order. The only heirs of said Woods, deceased, were three minor children, and appellant offered to prove that Susan Sherwood was their only appointed guardian, and that said guardian had made a written request for the appointment of said West as administrator. An objection to this evidence was sustained by the court, and appellant excepted. West founded his claim to be appointed administrator solely upon said request of said guardian. We think that the court was right in its ruling. Section 1365, Code Civil Proc., declares that administration upon estates shall be granted to some person belonging to one of ten specified classes, who shall be entitled in the order named, and the guardian of a minor is not one of the persons therein named. Section 1369 declares that a minor is not competent, or entitled, to serve as administrator. Section 1379 provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled." Section 1368 provides: "If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." No doubt these sections are somewhat confusing as to the point whether a minor is a "person entitled," and therefore as to whether the guardian of a minor may be granted letters. But assuming, for the purposes of this case, that the guardian herself had some right to letters, still she had such right merely as representative, or in place, of the minor. She does not come within any one of the classes of persons enumerated in section 1365 as persons to whom administration must be granted, and therefore her written request could not confer upon appellant the right to administer. The order appealed from is affirmed.

(97 Cal. 438)

**SAN DIEGO SCHOOL DIST. OF SAN DIEGO COUNTY v. BOARD OF SUP'RS OF SAN DIEGO COUNTY.** (No. 19,173.)

(Supreme Court of California. March 2, 1893.)

**APPEAL—WHEN LIES—SATISFACTION OF JUDGMENT.**

Where, in a proceeding by a school district against county supervisors to compel defendants to levy a tax for the use of plaintiff, the court gave judgment for plaintiff, and ordered defendants to levy the tax, and they thereupon complied and made the levy, defendants cannot thereafter appeal from such judgment, as it was satisfied, and its force exhausted, by defendants' compliance, and a reversal could not set aside the levy; Code Civil Proc. § 957, providing that in case of reversal the appellate court may make restitution of all rights and property lost by the erroneous judgment, so far as consistent with certain rights acquired thereunder.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the San Diego school district

of San Diego county against the board of supervisors of San Diego county. Judgment for plaintiff. Defendant appeals. Appeal dismissed.

Wm. F. Herrin, Johnson & Jones, J. E. Deakin, and Mr. Kelly, for appellant. Parrish, Mossholder & Lewis, A. G. Watson, and J. O. W. Paine, for respondent.

**HARRISON, J.** Motion to dismiss the appeal. The board of education of the city of San Diego presented an estimate to the board of supervisors of the county of San Diego of the amount of money needed to be raised by taxation for school purposes of the school district of the city of San Diego, and requested said board of supervisors to levy a tax upon all the taxable property in the city sufficient to raise the amount of said estimate. Thereafter the board of supervisors notified the board of education in writing that it would not levy such tax, whereupon the plaintiff herein brought this action to compel its levy. Upon the hearing the court rendered its judgment, September 26, 1892, directing the supervisors that at the time of levying the county tax of the county they levy a tax upon all the taxable property in said San Diego school district, sufficient to raise the amount required by said school district for school purposes during the year next ensuing after the first Monday in January, 1893. Upon the service of this judgment upon the board of supervisors they on the same day complied therewith, and levied the tax, as directed by the mandate of the court. On the 6th of October, 1892, the board of supervisors took an appeal to this court from the judgment that had been entered against them, and the respondent now moves to dismiss the appeal upon the ground that the judgment was satisfied before the appeal was taken, by a compliance therewith, and a levy of the tax directed by the judgment.

We are of the opinion that the motion must be granted. The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied, and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved. A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant by its compliance with the judgment lose any property or rights of which restitution could be made in case of a reversal. Code Civil Proc. § 957.<sup>1</sup> The proceeding was for the purpose of compelling the defendant to perform an official duty, and not one in which it had any personal rights to be affected. By reason of

<sup>1</sup>Code Civil Proc. § 957: "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed."

its levy of the tax in obedience to the judgment, rights and interests of other parties have supervened, and it would be unjust to those who have acquired or lost such rights by reason of its compliance with the judgment if the appellant should now be permitted to seek a reversal of the judgment under which, by reason of its own acts, those rights and interests have been acquired. The appeal is dismissed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 440)

CITY OF CORONADO et al. v. CITY OF SAN DIEGO et al. (No. 19,115.)

(Supreme Court of California. March 2, 1893.)

TAXATION—LEVY—WRIT OF PROHIBITION.

A writ of prohibition will not lie, on the petition of one city, to restrain the levy of taxes for the municipal purposes of another city, from which the former has been severed, since the levy of a tax is not a judicial act.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Petition by the city of Coronado and others against the city of San Diego and others for a writ of prohibition to prevent the levy by the latter city, within the limits of the former city, of certain taxes. From an order sustaining a demurrer to the petition, petitioners appeal. Affirmed.

O. A. McConoughey and A. M. McConoughey, for appellants. William H. Fuller, for respondents.

GAROUTTE, J. This is an application for a writ of prohibition to prevent respondents from levying a tax for municipal purposes upon property situated within the corporate limits of petitioner. A general demurrer to the petition was sustained by the trial court, and the legal sufficiency of the petition is the only matter before us. After alleging the corporate existence of the city of San Diego; that the territory forming the city of Coronado was originally a portion of the city of San Diego, but had been set off, and the city of Coronado created therefrom in accordance with the requirements of the law,—the petitioner further alleged "that the city of San Diego, ever since said exclusion of said territory from its corporate limits, has without warrant of law, charter, or grant exercised the franchise of assessing, levying, and collecting taxes on and from all the territory within said city of Coronado, so excluded, for the municipal uses of the city of San Diego, and has finished the assessment for the year 1892 on the property in the said city of Coronado, and is threatening and has expressed its intention to levy taxes thereon for the municipal uses of said city of San Diego, which franchise is not conferred upon it by statute, charter, or grant; and there is no plain, speedy, or adequate remedy in the ordinary course of law," etc. The foregoing facts form no basis for the issuance of a writ of prohibition. Prohibition is essentially jurisdictional, and therefore judicial; mandamus is purely

ly ministerial; and when the Code of Civil Procedure declares that the writ of prohibition is the counterpart of the writ of mandate, the declaration cannot be true in its broadest sense, and to that extent it is misleading. These two writs are the counterpart of each other to the extent that one is prohibitory and the other mandatory; one acts upon the person, the other acts upon the tribunal; but beyond that they have nothing in common. *Maurer v. Mitchell*, 53 Cal. 289. It is recognized as a universal rule that the writ of mandate will issue to compel the levy of a tax, and it will issue for the reason that the act of making the levy is purely ministerial. If mandamus will issue to compel a levy because the act is ministerial, it must be conceded that prohibition will not run to restrain the levy, for it can only be invoked to restrain threatened acts which are judicial in their character. It was held in *Maurer v. Mitchell*, supra, that the writ of prohibition to which reference is made in the constitution and the statute is the common-law writ, and that it would not run to prohibit the tax collector from selling property under an alleged void assessment. In *Le Conte v. Town of Berkeley*, 57 Cal. 269, a writ was refused to restrain the collection of a street assessment upon the ground that it was not the proper remedy. In *People v. Election Commissioners*, 54 Cal. 404, it was declared that the writ would not lie to restrain a board of election commissioners from calling an election, their action not being judicial in its nature, the court further saying that whether it was legislative or ministerial was not necessary to determine. There are numerous other authorities in this state to the same effect. The levy of the tax is not a judicial act, and for the foregoing reasons the judgment is affirmed.

We concur: HARRISON, J.; PATERSON, J.

(97 Cal. 445)

HAAREN v. HIGH. (No. 19,041.)

(Supreme Court of California. March 2, 1893.)

TAX SALE—VALIDITY—TIME FOR REDEMPTION—NOTICE OF EXPIRATION—DEED—EFFECT AS EVIDENCE—REGULARITY OF PROCEEDINGS.

1. In an action for land, the court found that plaintiff's land was sold for delinquent taxes for 1883, but the proceedings did not show that defendant, the purchaser, 30 days before the year for redemption expired, served on plaintiff a notice that the land had been sold for taxes, the amount due, and the time when the right of redemption would expire, as required by Pol. Code, § 3785, as amended by Act March 12, 1885. Held, that the findings showed that the right of redemption expired before the amendment requiring the notice took effect, 60 days after its passage, since the taxes referred to must be taxes payable in 1883, and since, under Pol. Code, §§ 3763-3765, 3772, requiring the first publication of the delinquent tax list to be made on or before the first Monday of February, and the sale to be completed within three weeks from the beginning of the sale, and within 28 days of the first publication, the land could not have been sold later than March, 1884.

2. In such case it was not necessary for

defendant to give the notice required by the law as amended.

3. Where, in such case, the tax collector filed with the county recorder and county clerk the affidavit of the publication of the tax list as required by Pol. Code, § 3769, it is immaterial whether the affidavit was signed by the tax collector, or by the printer of the newspaper, as required by Code Civil Proc. § 2010, since, under Pol. Code, § 3787, the deed of the tax collector is conclusive evidence of the regularity of all proceedings from the assessment to the execution of the deed.

**Commissioners' decision.** Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

**Action by Claus Haaren against J. E. High.** Judgment for plaintiff, and defendant appeals. Reversed.

Works, Gibson & Titus, for appellant. Sylvester Kipp, for respondent.

**TEMPLE, C.** Defendant appeals upon the judgment roll. The action was brought to recover possession of land. Defendant denies plaintiff's title, claims title and right of possession in himself, and pleads the statute of limitations. The case was tried without a jury, and the court found, as facts, that plaintiff acquired title to the demanded premises in June, 1882; that on the 7th day of July, 1885, the tax collector of San Diego county, where said property is situated, executed to defendant four tax deeds, being one for each lot described in the complaint. The deeds were executed in the proceedings for the collection of delinquent state and county taxes for the year 1883, under the provisions of the Political Code, but did not show that any notice of redemption was given, as required by section 3785 of the Political Code,<sup>1</sup> as amended in 1885. The deeds were recorded by defendant on the day of their execution, and defendant has ever since claimed to be the owner of the lots, has paid all taxes levied upon them, and in 1886 inclosed the entire property by a fence.

It is contended by plaintiff and respondent that the deeds are void because no notice was given as required by the section above cited. To this it is replied that the time for redemption had expired before section 3785 was amended so as to require notice. Therefore, no such notice was required in this case. *Rollins v. Wright*, 98 Cal. 395, 29 Pac. Rep. 58.

But it is again contended that it does not appear that the full year allowed for redemption had expired, for the reason that the finding does not state when the sale was made for taxes. Admitting that in such case the burden would be on defendant to show that such notice was not required, I think the fact is made to appear by unavoidable inference from the

facts which are stated. The amendment was made to the Political Code, so as to require that such notice be given, March 12, 1885. The property was sold by the tax collector in the proceedings for the collection of the taxes for 1883. There is no such fiscal year, but the finding must be understood as referring to the taxes levied, for which assessment is made and which are payable in that year, and which became a lien upon property on the first Monday of March, 1883. The tax collector was required to publish the delinquent tax list on or before the first Monday in February. Sections 3764, 3765, Pol. Code. The sale of property delinquent for taxes must commence not later than 28 days after the first publication, (section 3764, Pol. Code,) and be completed within three weeks after the day first named for the commencement of the sale, (section 3772, Pol. Code.) The sale, therefore, as is shown by the facts found, could not have been later than March, 1884. Section 3785 was amended so as to require the notice March 12, 1885, and took effect 60 days thereafter, to wit, April 15th. The time of redemption, therefore, had fully expired before the law took effect as amended.

It is claimed that the deed is void because the tax collector did not file with the clerk and recorder of the county the affidavit required by section 3769 of the Political Code. The findings show that an affidavit in full accord with the provisions of that section was filed, but it was the affidavit of the tax collector. This is objected to because section 2010, Code Civil Proc., provides that evidence of the publication of a notice required by law to be published in a newspaper may be furnished by the affidavit of the publisher, or his principal clerk. It is not necessary to determine which is the proper mode of proving the publication, for the reason that the deed is conclusive that the proper proof was made. Section 3787, Pol. Code; *Rollins v. Wright*, supra. I think the judgment should be reversed, and the lower court directed to set aside the judgment entered, and to enter judgment for the defendant on the findings.

We concur: **BELCHER, C.; VAN-CLIEF, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to set aside the judgment entered, and to enter judgment for the defendant on the findings.

(97 Cal. 454)

**OWENS et al. v. COLGAN**, Comptroller, et al. (No. 18,055.)

(Supreme Court of California. March 6, 1893.)

**ISSUANCE OF MANDAMUS — SUBSEQUENT APPLICATION FOR LEAVE TO INTERVENE.**

Where, on petition, a writ of mandate has issued compelling the state comptroller to draw a warrant on the state treasurer in favor of petitioners for a sum of money, which has been done, and the amount paid, a motion subsequently made by a third person to set aside the judgment and allow a complaint of intervention to be filed will be denied, because as a

<sup>1</sup>This section provides that the purchaser of a tax title shall, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve on the owner or occupant of the land a written notice that the land has been sold for taxes, the amount due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and providing, further, that till such notice is given the owner shall have the right of redemption, indefinitely.



rule interventions cannot be allowed after final judgment, and also because, after the money has been paid, an intervention could not benefit the intervenor.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Petition by one Owens and others against one Colgan, comptroller, for a writ of mandate. The writ was issued and the money paid, and afterwards J. M. Wood moved to set aside the judgment, and for leave to file a complaint of intervention. From an order denying his motion, said Wood appeals. Affirmed.

Clinton L. White, for appellant. Johnson, Johnson & Johnson, for petitioners. W. H. H. Hart, Atty. Gen., for respondent.

PER CURIAM. Owens Bros. filed a petition in the superior court for a writ of mandate to compel Colgan, as state comptroller, to draw a warrant in their favor upon the state treasurer for a certain sum of money. An alternative writ was issued, and on the return day, July 31, 1891, Colgan filed a demurrer to the petition, which having been overruled, the court made its findings, and ordered judgment for petitioners as prayed for. On the next day, August 1, 1891, judgment was entered, and a peremptory writ was issued, and on that day the amount of the warrant was paid to petitioners by the state treasurer. Afterwards, on August 29, 1891, Wood served on petitioners and respondent a notice of motion to set aside the judgment, and for leave to file a complaint of intervention. The motion was afterwards heard, and the court made an order denying it, and from that order Wood appeals.

Appellant complains that he was seduced into delaying his application to intervene in the mandamus proceeding by the representation of Hart, attorney for respondent, that it would not be heard as soon as it was; and it is difficult to see how the petitioners for the writ of mandate could be bound in any way by the representations of the attorney of respondent. But, however that may be, the order must be affirmed. In the first place, the general rule is that an intervention cannot be allowed after final judgment. Section 887, Code Civil Proc.; *Carey v. Brown*, 58 Cal. 180; *Laugenour v. Shanklin*, 57 Cal. 70. In the second place, since the comptroller has obeyed the writ, and the warrant issued by him has been paid, it would be a vain thing to vacate the judgment, or allow appellant now to intervene; and such a proceeding would not benefit him in the least. The order appealed from is affirmed.

(97 Cal. 448)

PEOPLE v. SAMONSET. (No. 20,932.)  
(Supreme Court of California. March 6, 1893.)  
SEDUCTION—CRIMINAL PROSECUTION—CHARACTER OF PROSECUTRIX—EVIDENCE—PROMISE OF MARRIAGE—INSTRUCTIONS.

1. In a prosecution for seduction, testimony of a witness that the prosecutrix had lived with her for two years, and during that time was a woman of good character and good repute,

was admissible as tending to establish the previous chaste character of the prosecutrix.

2. In a prosecution under Pen. Code, § 268, providing for the punishment of "every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character," defendant's good faith in making the promise of marriage at the time of committing the offense is immaterial.

3. On the cross-examination of defendant it was proper to read in evidence an affidavit made by him in support of a motion for a new trial in a civil action formerly brought against him by prosecutrix, when such affidavit tends to contradict his testimony on his examination in chief.

4. Defendant asked the court to instruct the jury that, if they found that prior to the alleged seduction the prosecutrix committed lewd and immodest acts, and did not deport herself as a virtuous woman should, she was not at the time of the alleged seduction a female of previous chaste character, even though it should appear that she did not actually have illicit intercourse. *Held*, that this was properly refused, as being a charge on matters of fact, which the judges are forbidden to give by Const. art. 6, § 19.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Miguel Samonset was convicted of seduction, and appeals. Affirmed.

Stephen M. White and F. H. Howard, for appellant. W. H. H. Hart, Atty. Gen., for the People.

BELCHER, C. The defendant was charged with the crime of seducing an unmarried female of previous chaste character under promise of marriage. He was tried and convicted, and the judgment was that he pay a fine of \$1,000, and, if not paid, that he be imprisoned in the county jail one day for every \$2 thereof until it is satisfied. The appeal is from this judgment and an order denying defendant's motion for a new trial. It is argued for appellant that the court below committed several prejudicial errors in its rulings upon the admission of evidence, and also in its refusal to give to the jury certain instructions asked, and hence that the judgment should be reversed.

The prosecutrix testified, in substance, that she first became acquainted with defendant in March, 1890, and that on the 16th of October following he promised to marry her, and to have the marriage ceremony performed on the 5th of November; that immediately after the engagement he went to the church, and spoke to the priest about it, and had the bans published three times, the first publication being on the 19th of October; that, on the 22d of October, defendant called to see her, and then told her that he was like her husband and she was like his wife, and that he loved her and no one else, and was certainly going to marry her on the 5th of November, and had a right to do everything he wanted with her; that she loved him, and believed everything he said, and then allowed him to have sexual intercourse with her, and that but for his promises and persuasions she would not have done so; that on the 5th of November he postponed the marriage until the 15th of the same month, and then failed to appear, and

went off to France, and was gone till August of the next year. She also testified that she had never been married, and had never had sexual intercourse with any other man, and never with the defendant except upon the one occasion above mentioned. One Slatrli was next called as a witness by the prosecution, and testified that he had known the prosecutrix for one or two years, and had roomed in the house where she was employed, and had never known of any improper conduct on her part. This evidence was objected to by the defendant as immaterial and irrelevant, and it is urged that it did not appear that the witness had had opportunities for observation sufficient to qualify him to testify. The objection was overruled, and, we think, properly. The prosecution next offered to prove by a Mrs. Maxwell that the prosecutrix had lived with her for two years, and during all that time was a woman of good character and good repute. This evidence was objected to by the defendant, so far as it related to the prosecutrix's good reputation, upon the ground that it did not tend to establish her "previous chaste character." The objection was overruled, and in this ruling we see no prejudicial error. It was incumbent upon the prosecution to prove that the prosecutrix was a woman of previous chaste character, and the offered evidence, in connection with her own testimony, seems clearly to tend in that direction.

In making his defense, the defendant claimed and offered to prove that at the time of his engagement to marry the prosecutrix he was sick and suffering from chronic liver complaint, and in such a condition as to inhibit him from marrying with safety; that he was advised by his physicians to take a sea voyage, and in pursuance of their advice he left and went to France, his native country; that the prosecutrix knew of his condition, and that all his actions with her were in good faith; and hence his failure to carry out his engagement was excusable. And in support of this theory he asked the court to instruct the jury as follows: "If you find from the evidence that the defendant had sexual intercourse with the prosecutrix, as testified by her, and that at the time he had such intercourse he intended to marry her, and stated to her in good faith what he believed to be true, and made no representations of any kind, directly or indirectly, to her which he did not then and there in good faith believe to be true, and did not in any way deceive her, and intended at such time to fully carry out all his promises, then the court charges you that no offense was committed." The court refused to admit most of the offered evidence, and refused to give the instruction asked, and these rulings are assigned as error. The promise to marry, and the intercourse, at the time and under the circumstances stated by the prosecutrix, were practically admitted by the defendant, and he simply sought to escape the consequences by proving that when he made the promise he intended in good faith to carry it out. The offense charged is defined in section 268 of the

Penal Code as follows: "Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable," etc. And the next section provides: "The intermarriage of the parties subsequent to the commission of the offense is a bar to a prosecution for a violation of the last section: provided, such marriage take place prior to the finding of an indictment or the filing of an information charging such offense." Under these sections we do not think that defendant's good faith was a matter of any consequence in determining as to his guilt or innocence. If under and by means of his promise of marriage he induced the prosecutrix to surrender her chastity to him, and then refused to fulfill his promise, the offense was committed, whatever his intentions may have been when such promise was made; and a subsequent marriage would not have prevented a conviction, unless it took place before the information was filed. There was no error, therefore, in the rulings complained of under this head.

In connection with the cross-examination of defendant, the prosecution read in evidence an affidavit made and used by him upon a motion for new trial in a civil action instituted against him by the prosecutrix. This affidavit referred to accompanying affidavits made by Patrick O'Neal and Web Smith. The defendant objected to his affidavit being read, and the objection was overruled. He then offered to read the affidavits of O'Neal and Smith, but, on objection by the prosecution, they were excluded. It is argued that both of these rulings were erroneous, but we think them proper. The affidavit of defendant tended to contradict in some respects his statements on his examination in chief, and the affidavits of O'Neal and Smith were clearly inadmissible for any purpose. But, if otherwise, the makers of them were both in court, and were called and examined by defendant as witnesses.

To prove that the prosecutrix was not a woman of previous chaste character, the defendant testified that he had sexual intercourse with her several times prior to his engagement to marry her, and he also called other witnesses to testify that in the summer and fall of 1890 she lived in a house of bad repute, and to which prostitutes resorted at night, and that she had on several occasions committed immodest acts, and deported herself as a lewd woman. This testimony was all objected to by the prosecution, so far as it related to acts subsequent to the alleged seduction, and excluded; and in rebuttal the prosecutrix positively denied that she ever had sexual intercourse with the defendant prior to October 22d, and also denied most of the statements of the other witnesses as to her immodest acts. In support of his theory upon this point the defendant asked the court to instruct the jury as follows: "If you find from the evidence that immediately before and up to the time of the alleged seduction the prosecutrix resided in a house of bad character, and which was then habitually resorted to by lewd and lascivious people, you

have a right to take such facts into consideration, as tending in some degree to show that the prosecutrix was not at such time a person of chaste character."

"If you find from the evidence that prior to the alleged seduction the prosecutrix committed lewd and immodest acts, and did not deport herself as a virtuous woman should, then the court instructs you that, in that event, she was not at the time of the alleged seduction a female of previous chaste character, even though it should appear that she did not actually have illicit sexual intercourse; and if you so find, the defendant must be acquitted." The first of these instructions was given, and the last refused, and this refusal is assigned as error. The constitution declares that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Article 6, § 19. The instruction refused was clearly upon matters of fact, and, if given, it would have been in contravention of this provision of the constitution. Courts have no right to instruct juries on controverted facts, nor on the weight of evidence. The refusal was, therefore, not error.

The defendant also asked the court to give this instruction: "You should remember that all presumptions in this case are in favor of the innocence of the defendant, and that there are no presumptions in favor of the innocence of the prosecutrix." The instruction was refused, but the court had already in another instruction, asked by defendant, stated to the jury very clearly and fully the law upon this subject. There was no error, therefore, in refusing to state it a second time.

Some other minor points are made, but they do not, in our opinion, require special notice. After carefully going over the record, we find no prejudicial error calling for a reversal, and therefore advise that the judgment and order be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 814)

WILEY v. CALIFORNIA HOSIERY CO.  
(No. 14,386.)

(Supreme Court of California. March 6, 1893.)

CONTRACT OF EMPLOYMENT—EVIDENCE—TRAVELING SALESMAN—DISCHARGE—MEASURE OF DAMAGES—JUSTIFICATION—CUTTING PRICES—USAGE.

1. A written proposition by defendant to plaintiff recited that "we will pay you a commission of 7½ per cent. on all orders taken by you and shipped by us between this date and October 31, 1887. You are not to pay out any money or contract any obligation of whatever nature for us, nor represent us in any legal proceeding of any kind or in any place, unless specially authorized in writing so to do. Your duty to us is to take orders for our goods. We reserve the right to decline such orders as we may not want to fill;" and the same was orally accepted by plaintiff. *Held*, in an action by plaintiff for a wrongful discharge, that oral evidence was inadmissible to change or enlarge the terms of the contract thus made, except as to matters necessarily implied in it or necessary to its performance.

2. In such action plaintiff is not entitled to recover the specified commission on the amount of goods sold by other salesmen for defendant in territory in which plaintiff claimed the exclusive right to sell for it, since he had not such privilege under the contract.

3. The fact that plaintiff, for three years preceding such contract, had solicited orders for defendant in such territory, would not entitle him to such privilege, and evidence of such fact is inadmissible.

4. In such action plaintiff admitted that he took orders at prices below those given to him by defendant, and without its express permission, and that, when he told defendant's secretary that he could not get such prices of certain persons, he said, "You have got to get these prices for the goods, or else not sell them, and the goods have to bring that price this year." The evidence showed that defendant wrote plaintiff several times protesting against his taking orders at cut prices, and finally wrote him that "we will have no man working for us in any manner who will not take our instructions. Because you have been with us a long time, we again give you your choice of doing as we want you to do, or return our samples and reference book;" and that plaintiff replied that "you have been the only violators of the contract, and I defy you to show a point wherein I have not fulfilled it to the letter. In your letter of July 7th, you state I may consider myself no longer in the employ of your company. I consider a full discharge." *Held*, that plaintiff voluntarily quit defendant's employ, rather than comply with reasonable instructions, and the evidence did not support a verdict for plaintiff.

5. An instruction in such case that, if the jury found for plaintiff, they should find the amount of defendant's goods plaintiff would have sold during the remainder of his term of employment, and allow 7½ per cent. thereon, is erroneous, since it fails to take into account plaintiff's expenses, which should be deducted therefrom.

6. In such action plaintiff testified that he told defendant's secretary that he could not sell their goods alone for less than 10 per cent., and the former promised him a side line of flannels; that "I said that is just what I wanted, and on the strength of that we entered into this contract. I told him I was to have a line of gloves in connection with defendant's goods." *Held*, that plaintiff was not entitled to recover for commissions that he would have made on the sale of gloves during the remainder of his term of employment, in the absence of any other evidence of a contract with defendant in relation thereto.

7. In such action evidence of a usage by which plaintiff was allowed, in his discretion, to make reductions within certain limits from the list price, in so far as the same was inconsistent with the written agreement and positive instructions of defendant, was inadmissible.

8. In such case the rule for estimating the amount of sales plaintiff would have made during the remainder of his term of employment should be based on the sales made during the part of the term which had expired at the time of the discharge, modified by the facts as to whether the sales would be greater or less during the early or later period.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Eugene Garber, Judge.

(Not to be published in California Reports.)

Action by Thomas Wiley against the California Hosiery Company to recover damages for a wrongful discharge of plaintiff as defendant's traveling salesman.

From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

P. Reddy and W. H. Metson, for appellant. S. H. Regensburger and P. F. Dunne, for respondent.

HAYNES, C. Action to recover damages for an alleged breach of contract. A jury trial was had, and the plaintiff obtained a verdict and judgment for \$1,000 damages. The appeal is from this judgment and an order denying defendant's motion for a new trial. The complaint alleged that on February 10, 1887, plaintiff and the defendant (a corporation) mutually agreed that plaintiff should serve the defendant from that date until October 31, 1887, as a traveling salesman to sell and take orders for defendant's goods, for which plaintiff was to receive a commission of 7½ per centum, and pay his own expenses; that, as a further inducement, defendant was to give plaintiff the exclusive right to sell its goods in Utah, Colorado, Nebraska, Wyoming, New Mexico, and Kansas; and, as breaches of this agreement, plaintiff alleged that in May, 1887, defendant, while plaintiff was faithfully discharging his duties, sent another salesman to Salt Lake City and Ogden, in Utah, who made sales in those places amounting to \$2,500, and that on July 1, 1887, the defendant wrongfully discharged plaintiff; that thereby he was prevented from selling at least \$20,000 of defendant's goods; and, as another element of damage, plaintiff alleged that, as part of his said agreement and of the consideration thereof, defendant agreed that plaintiff should have the privilege of carrying for sale a line of gloves manufactured by another house, upon which he was to receive 10 per centum commission, he paying his own expenses, but that he could not carry the gloves alone to make a profit or cover expenses; and that by his discharge he was prevented from selling gloves to the amount of \$3,000, and demanded judgment for his commission on the \$2,500 sold by another in Utah, and upon the \$20,000 of defendant's goods he could have sold during the remainder of his term of service, at 7½ per centum, and upon the prospective sale of gloves, at 10 per centum,—in all \$1,987.50. The answer of defendant specifically denied each material averment of the complaint, and for a further answer set out the written proposal of defendant to plaintiff for his employment, and under which he entered defendant's service, and which is as follows: "Oakland, California, Feb. 10, 1887. Thomas Wiley: We will pay you a commission of 7½ per cent. on all orders taken by you and shipped by us between this date and October 31, 1887. You are not to pay out any money or contract any obligations of whatever nature for us, nor represent us in any legal proceeding of any kind or in any place, unless specially authorized in writing so to do. Your duty to us is to take orders for our goods. We reserve the right to decline such orders as we may not want to fill. California Hosiery Co. John Williams, Secretary."

The answer further alleged that plaintiff accepted the proposal and entered upon said employment the same day, and was furnished by defendant with samples and a list of the prices at which he should sell defendant's goods; that in May and June, 1887, plaintiff took orders at reduced prices, whereupon defendant notified him that, unless he would promise in writing to be governed by the price lists, he should quit defendant's service; that he did not inform defendant that he would be governed by such price lists, but, on the contrary, notified defendant that he would quit its service; and that the contract between them was ended July 17, 1887. A great many exceptions were taken by defendant to adverse rulings upon the admission of testimony, and to instructions to the jury given and refused; and it is also specified that the verdict is not justified by the evidence in several particulars. It is not necessary to notice these specifications in detail. The discussion of some of the controlling questions must suffice.

The verdict in favor of plaintiff must have been based on a finding that plaintiff was wrongfully discharged. It is true that it is alleged in the complaint that defendant violated the agreement by sending another man into his territory, and taking orders to the amount of \$2,500. This occurred in May, and plaintiff's letter to defendant dated May 21st showed that he then had knowledge of the sales made by Deane in Utah, but plaintiff continued in the service of defendant after the knowledge of this alleged violation of the agreement until July. Besides, this violation of the agreement, if it were such, was capable of exact compensation; and, as it was not alleged or claimed that such violation was continued or threatened to be continued, it could form no just excuse for the abandonment of the contract by plaintiff. But we do not find in the record any evidence which would justify a finding that plaintiff was to have the exclusive right to sell in the states and territories named. It is conceded by plaintiff that nothing was said upon that subject at the time the agreement was made, but it is said that, for three years preceding, plaintiff had solicited orders in those states and territories for defendant, and it seems to have been assumed by plaintiff that he was to have the exclusive right in those states and territories in 1887. The evidence, however, in relation to this matter could only be material as tending to support the charge that defendant had violated its agreement. As this agreement was in writing, we think no oral testimony could be received to change or enlarge its terms, at least in matters not necessarily implied in it, or necessary to its performance by either party. The verdict of the jury must therefore be sustained, if at all, upon the assumption that plaintiff was wrongfully discharged by defendant; and upon this point it is clear the verdict of the jury cannot be sustained. It is admitted by plaintiff that he took orders at prices below those given to him, and without express permission from the defendant. He claims, however, that the reductions made upon certain orders were

made under and in accordance with a usage of defendant by which he was allowed to use his discretion, within certain limits, to make reductions from the list prices upon certain orders for more than a specified quantity of particular kinds of goods. He testified that he knew, as matter of fact, in 1887, when A 1, six of the same kind in a box, were sold, the course of business was to give the buyer 50 cents reduction; but he testified that at the time of the agreement of February 10th he said to Williams, "I won't be able to sell these goods in Wyoming to B. Hellman & Co. at the advanced figures." Mr. Williams said: "You have got to get these prices for the goods, or else not sell them, and the goods have to bring that price this year." He further testified "that it meant the price of every article to be sold by him,—for which he should sell it only as modified in writing or some way in a proper communication." The witness further testified that all he had stated concerning usage was based upon a memorandum in writing, written by Mr. Williams in a little book which he received in 1885. Shortly after plaintiff entered upon defendant's employment he was expressly authorized, in writing, to cut prices within certain specified limits on two classes of goods; but plaintiff conceded that he had no instructions to cut on other goods. The instruction was: "When strictly necessary, you may cut A 1 and 1,995 to \$18.00; but the twenty gauge must be held where they are, at \$16.50." He admitted that he cut A 1 to \$18, 2-12 in a box, and to \$17.50, 6-12 in a box, (six of one size in a box;) that the writing was in English, and that he understood it to cut to \$18, and regarded it as the positive instruction of his employer to cut to \$18, and no more; that he had no instructions to cut on 1,995, but that he cut that number from \$16.50 to \$18, 6-12 in a box, but admitted he did not know of 1,995 ever being out in 6-12 boxes. We can see from the testimony of plaintiff no evidence of usage justifying a departure from the list prices given him by defendant. Indeed, his own testimony showed that he was never at any time authorized to make changes in prices because of any usage. The very fact upon which he relies to establish a usage was based upon a written instruction in 1885. This instruction was not renewed in 1887, but, on the contrary, he admits that he was informed at the time of his employment that the goods that year must bring the prices marked, and these instructions he admits were positive and clearly understood. We therefore conclude that there was no evidence of usage or otherwise which justified the defendant in cutting prices upon any of these goods, except as to the two classes named in defendant's letter of March 24th, which specified distinctly the extent to which, as well as the circumstances under which, such reductions might be made.

On June 11th defendant wrote plaintiff, among other things saying: "Where is your authority for cutting prices? We have written to B. Hellman that we will not fill his order except at regular prices. You are the only salesman who finds it

necessary to cut. If you cannot get an order without cutting, do not hurt yourself and us by cutting the price, and then having us to reject the orders for that reason. \* \* \* You must get full prices, or else you must give up. We will not send you any more samples until you notify us that you will not cut prices without authority. If you do not do that, please send us our samples by freight at once." In another letter, written the same day by defendant to plaintiff, it was said: "You cut prices again to J. E. Miller and to Myers & Nessley, of Lincoln, Nebraska. We will not fill the orders except at the regular prices given you. We must reiterate, prices must not be cut. Our goods can be sold in your territory without cutting. If you do not sell them we will do it ourselves, but we will do nothing until you have had an opportunity to decide whether you will return the samples or not. July 1st will be the end of our limit." On July 7th defendant wrote plaintiff acknowledging receipt of five orders, and calling plaintiff's attention to the fact that he had not answered defendant's letters of June 11th, and added: "We wrote you then that you would have until July 1st to decide whether you would return our samples, or promise to stop cutting prices. You have neither returned the samples nor written a line in answer to the letters. We do not, therefore, consider that you are now in any manner in our service." Following these letters we find in the record a letter from plaintiff to defendant, bearing date Salt Lake City, July 11, 1887, but evidently written at a much later date, saying: "Your letters of June 11th and also letters of July 7th were received, and contents noted. To answer them fully and satisfactorily to you and myself, it would, according to my judgment, require a personal interview, which I trust will take place on early date. \* \* \* I shall not, in opposition to your wishes, take any orders here until I fully hear from you." On July 15th defendant wrote plaintiff, in reply to plaintiff's letter above mentioned, advising him that it was not necessary to have a personal interview, and again saying that he had been cutting prices without authority, and that, when written to about it, had not said a word one way or the other, and added: "For such an offense as this, we would discharge any man working on a salary. It is something that we cannot permit, and we know that it is not necessary. \* \* \* We do not like this uncertainty, and it puts us to a great deal of trouble to make new arrangements. We will have no man working for us in any manner who will not take our instructions. Because you have been with us a long time, we again give you your choice of either doing as we want you to do, or return our samples and reference book." To this letter plaintiff replied under date of August 2nd, and, after discussing the matter of cutting prices, and the sales made by Deane at Salt Lake City and Ogden, said: "You have been the only violators of the contract, and I defy you to show a point wherein I have not fulfilled it to the letter. In your letter of July 7th

you state I may consider myself no longer in the employ of your company. I consider a full discharge." It is perhaps immaterial, so far as the merits of the case are concerned, whether plaintiff was discharged by defendant, or he preferred to quit defendant's employment, rather than to give any assurance that he would not disobey their positive instructions. We think it is clear, however, that the circumstances fully justified the defendant in discharging plaintiff; but that, notwithstanding the defendant's language in its letter of July 7th, that "defendant did not consider himself longer in their employ," the subsequent letter again renewed the offer to continue in their service upon his complying with their request. That request being reasonable, under the circumstances, we are led to conclude that the plaintiff voluntarily, and without sufficient reason, quit the defendant's employment. We conclude that the evidence is not sufficient to justify the verdict, and that the motion for a new trial should have been granted. We also think the verdict was against the instructions of the court, as given in the 3d, 4th, 6th, 8th, and 9th instructions given at defendant's request.

As we cannot assume that upon a new trial the evidence will be the same upon the question of defendant's liability, it is necessary to notice briefly the question of damages. The court instructed the jury as to the measure of damages substantially that, if they found for the plaintiff, they should find the amount of the defendant's goods plaintiff would have sold during the remainder of his term of employment, and also the amount of gloves he would have sold during the same time, and allow  $7\frac{1}{2}$  per centum on the former and 10 per centum on the latter. These instructions, as given, were clearly erroneous. Under the terms of his employment, plaintiff was to pay his own expenses. What he would have earned, therefore, would have been the amount of his commission upon the sale of defendant's goods effected by him, so far as the same were accepted and shipped by defendant, less the amount of his expenses incurred in securing orders. No reference is made anywhere in the charge of the court to these expenses. If the plaintiff voluntarily quit the defendant's employ, under circumstances justifying such course, or was wrongfully discharged, he would have been entitled to the same compensation for the remainder of his term of employment that he would have realized if he had continued in their employment, and no more. We cannot assume that he continued to incur expenses, and charge the defendant therewith, after he had quit soliciting orders. To do so would virtually change the terms of the employment to a commission of  $7\frac{1}{2}$  per centum and all expenses paid by the defendant.

In relation to the commission charged upon the prospective sale of gloves during the remainder of his term of employment, we do not think defendant can be charged therewith. Plaintiff agreed to sell defendant's goods for the commission named in the memorandum of agree-

ment. There is no stipulation that he should represent others, nor that plaintiff made that a condition of entering the service of defendant. Plaintiff testified: "I told him [Williams] that I could not sell his goods for less than ten per centum,—not his goods alone; but, if he would give me a side line of flannels, I could perhaps do it for seven and one half per centum. He would not give me ten per centum, and he promised me a side line of flannels, besides their knit goods, for that territory, which I carried the year previous. Mr. Williams replied, 'We are going to sell California flannels in Colorado this year.' I said that is just what I wanted, and on the strength of that we entered into this contract. I told him I was to have a line of gloves in connection with defendant's goods." This last remark is all that appears to have been said by either party in relation to gloves, and it clearly appears that, as defendant agreed to furnish him with a side line of flannels, which they had not theretofore sold, he was satisfied with the amount of commission to be paid to plaintiff. That it was to plaintiff's advantage to carry this additional line of gloves there is no question; but, clearly, the defendant is not liable to the plaintiff for profits the plaintiff might have realized in serving others, when such extra service did not enter into the contract between the parties. We think the testimony in relation to the gloves, as well as that in relation to the amount of sales made in former years, and as to usage, so far as such usage was inconsistent with the written agreement and positive instructions given plaintiff by defendant was improperly received. We further think that the true rule for estimating the amount of sales which would have been made of defendant's goods during the remainder of the term of employment should be based upon the sales made during that portion of the period of employment prior to the termination of it, modified, if the facts justified it, by evidence as to whether ordinarily the sales would be greater or less during the early or later period of employment. We think the judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELCHER, C.; VANCLIEF, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

DE HAVEN, J. I concur in the judgment.

(3 Cal. Unrep. 824)

WEYERS v. ESPITTALIER et al. (No. 19,010.)

(Supreme Court of California. March 6, 1893.)

APPEAL—WEIGHT OF EVIDENCE.

A verdict will not be disturbed on appeal where the evidence is conflicting.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

(Not to be published in California Reports.)

Action by Wilhelmine Weyers against Joseph Espittaller and Martin G. Aguirre to enjoin a sale under execution. From a judgment for plaintiff, and from an order refusing a new trial, defendants appeal. Affirmed.

W. T. Williams, for appellants. Guthrie & Guthrie, for respondent.

TEMPLE, C. Appeal from the judgment, and an order refusing a new trial. This action was brought to enjoin a sale under an execution against one Elise Deste, the daughter and grantor of the plaintiff. Espittaller, the judgment creditor, is made defendant with the sheriff. The answer justifies the attempted sale on the ground that the deed to plaintiff was without consideration, and was made to hinder, delay, and defraud the creditors of Elise Deste, and particularly the defendant Espittaller. The case was tried with a jury, which rendered a verdict in favor of the plaintiff. The question raised on the motion for a new trial is as to the sufficiency of the evidence to sustain the verdict. There was evidence which plainly tended to sustain it in every respect. Appellants contend that the evidence shows a state of things which would either make the plaintiff, her son-in-law, and her daughter partners in the transactions in which the indebtedness of Elise Deste was incurred, or that Elise Deste transacted the business for and as the general agent of plaintiff; and therefore plaintiff is herself directly responsible for the indebtedness. Conceding that such an issue is tendered in the answer, and that such facts would constitute a defense to this action, the most that can be claimed for it is that there is much evidence which tends to support such defense. But there is also much which tends to support the other theory, that a large portion of the money invested by Elise Deste was received from her mother as a loan, and that the investments were made by the daughter in her own name and on her own account. The jury found in favor of the latter hypothesis, and we cannot disturb the verdict. A careful examination of the alleged errors occurring at the trial discloses none injurious to appellant. The judgment and order should be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 825)

PEOPLE v. HAMILTON. (No. 14,636.)

(Supreme Court of California. March 6, 1898.)

PUBLIC OFFICER—REFUSAL TO PAY OVER MONEY TO SUCCESSOR—INDICTMENT—SUFFICIENCY.

1. Pen. Code, § 950, provides that an information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." *Held*, that an information, which alleged that defendant, "having theretofore" been a county clerk, and "charged with the receipt, safe-keeping, transfer, and disbursement of public moneys, in his

official capacity as such clerk and officer, and his official term . . . having expired, . . . and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity as such clerk," he willfully omitted to pay them over to his successor, the demand therefor "having then and there been made of" defendant by his successor, sufficiently charged that defendant, as county clerk, received money as such officer, and failed to pay it over to his successor; and the use of the participle instead of the past tense of the verb did not make the allegations mere recitals.

2. Pen. Code, § 426, declares that the phrase "public moneys" includes all money received or held by county officers in their official capacity. *Held*, that an allegation that moneys were received by defendant "in his official capacity" was the allegation of a fact which fixed their character as "public moneys."

3. The allegation that defendant received the money in his official capacity was sufficient, without referring to the statute under which the information was drawn, or to any statute which created a duty, the antecedent existence of which constituted a factor connected with the offense; the general conclusion of the information, "contra formam statuti," being sufficient.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

(Not to be published in California Reports.)

M. D. Hamilton was convicted of omitting and refusing to pay over to his successor in office moneys received by him as county clerk. From an order arresting the judgment, the people appeal. Reversed.

Wm. H. H. Hart, Atty. Gen., for the People. Johnstone Jones, Dist. Atty., E. W. Hendricks, and Copeland & Daney, for respondent.

HAYNES, C. The respondent was tried and found guilty of omitting and refusing to pay over to his successor in office moneys received by him as county clerk. On the day fixed for passing sentence, the defendant moved for a new trial, and also in arrest of judgment. The motion for a new trial was heard, but not disposed of, and the court granted an order arresting the judgment; and from this order the people appeal.

The information was drawn under subdivision 10 of section 424 of the Penal Code, which provides: "Each officer of this state, or of any county, . . . and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law to pay over the same, is punishable," etc. The information, omitting the title and conclusion, is as follows: "M. D. Hamilton is accused by the district attorney of the said county, by this information, of the crime of omitting and refusing to pay over money received by him under duty imposed by law to pay over the same. Committed as follows: The said M. D. Hamilton, on the 5th day of January, A. D. 1891, at the said county of San Diego, and before the filing of this information, having theretofore, for the two years immediately preceding, been an offi-



cer of said county, to wit, the clerk of the county of San Diego, and an officer charged with the receipt, safe-keeping, transfer, and disbursement of public moneys in his official capacity as such clerk and officer, and his official term as such clerk and officer having expired by limitation of law, and there then and there remaining in his hands certain public moneys theretofore received by him in his official capacity, as such clerk, during the said official term as aforesaid, the sum of four thousand four hundred and twenty-two and thirty-six one hundredths dollars, money of the United States of America, and it being his duty imposed by law to transfer and pay over to his successor in office in the office of county clerk of said county, one W. M. Gassaway, he, the said M. D. Hamilton, did willfully, unlawfully, fraudulently, and feloniously omit and refuse, neglect, and fail to pay over the said sum of money to the said W. M. Gassaway, he, the said Gassaway, being then and there the clerk of said county as aforesaid, and being the officer and person authorized by law to demand and receive the same as the successor in the office of said county clerk to said M. D. Hamilton; the demand for the transfer and payment of the said sum of money having then and there been made of the said M. D. Hamilton by the said W. M. Gassaway, clerk of said county and successor in the said office as aforesaid; the said omitting and refusing, neglecting, and failing to transfer and pay over the said money and moneys being contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." The ground relied upon by the defendant, and upon which the court arrested the judgment, is that the information does not substantially conform to the requirements of sections 950-952 of the Penal Code. It is contended that the information is not "direct and certain, as it regards the party charged, the offense charged, and the particular circumstances of the offense charged;" this being, it is argued, one of the cases where the particular circumstances of the offense must be set forth by allegations that are direct and certain. The points urged are that there is no definite or certain allegation that the defendant was county clerk during the time named, nor that moneys remained in his hands, nor that the moneys were public moneys; that these matters are not allegations of fact, but mere recitals.

It may be conceded that the mode adopted by the pleader in stating these facts is not the best that could have been devised, but that is not required by the Code, nor is there any standard by which the degree of certainty in criminal pleading is to be measured, save that provided by the Code. Section 950 of the Penal Code provides that the information must contain: "(2) A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." We think that no one of common understanding

could fail to know what was intended by the language used, and, besides, it would seem to be the natural and ordinary mode of expressing the fact intended. No better illustration of this can be given than that furnished by the learned counsel for respondent in the opening sentence of their brief, in giving a statement of the case for the information of this court. It is as follows: "The respondent having been the county clerk of the county of San Diego, and his term of office having expired, and he having failed to turn over certain moneys," etc. Besides, the fact that he was clerk of the county, and had received money which it was his duty to turn over to his successor, was not an offense, nor any part of the offense. The offense consisted of the omission or refusal to turn it over to his successor; and though without the pre-existence of the fact that he was such clerk, and had received such money, he could not commit the offense, such pre-existing facts are matters of inducement, which, though required to be distinctly stated, need not be charged with the directness of the specific act which converts the innocent person into a criminal one.

The objections to the information upon which the learned judge sustained the motion in arrest of judgment were that the facts that the defendant was an officer, and had received and had in his hands the moneys mentioned, were not positively alleged, but were merely recitals, and that the statement that the money so in his hands were "public moneys," was a conclusion of law. The first of these objections seems to have been based upon the use of the past participle instead of the past tense of the verb. Bishop, on Criminal Procedure, (volume 1, § 556,) says: "Where the direct averment is required, as in laying the main charge, it is usually made with the verb. But any other part of speech which reasonably conveys the idea is adequate, as the participle, and even the adverb." An illustration given by the same author is, in substance, as follows: Lawley, being found guilty of attempting to persuade one not to appear as a witness against Crooke, moved in arrest of judgment because it was not positively averred that Crooke was indicted. It was only said that "she, knowing that Crooke had been indicted, and was to be tried," did so and so; but the court held that it was sufficient. So, in an indictment, under an English statute which made punishable any one "above the age of fourteen" who should steal an heiress, charging that the defendant, "being above the age of fourteen years," did the act, was held to contain a sufficient averment of his age. Id. § 557. The Code requirement clearly permits, if it does not enjoin, the use of "ordinary" language in charging offenses; and the test of the sufficiency is that a person of common understanding shall be enabled to know what is intended. If, therefore, criminal pleading must be framed in the technical language which formerly prevailed, these Code provisions are vain and useless; for it would require us to resort to the same technical system of pleading abolished or rendered

unnecessary by the Code, in order to determine whether a fact is so alleged as to enable "a person of common understanding to know what is intended." We think it is sufficiently charged that the defendant was county clerk during the time named; that he received the money specified as such officer, and failed to pay it over to his successor.

It was further held by the learned judge that the allegation that there was remaining in his hands certain public moneys theretofore received by him in his official capacity is a conclusion of law; that the facts should have been stated which would show that they were in fact public moneys.

The fact is clearly alleged that these moneys were received by the defendant "in his official capacity." Section 426 of the Penal Code is as follows: "The phrase 'public moneys,' as used in the two preceding sections, includes all bonds and evidences of indebtedness, and all moneys, belonging to the state, or any city, county, or town, or district therein, and all moneys, bonds, and evidences of indebtedness, received or held by state, county, district, city, or town officers, in their official capacity." The allegation that these moneys were received by the defendant "in his official capacity" is the allegation of a fact which conclusively fixes their character as "public moneys." It is the official character in which the moneys are received, and not the ultimate ownership of the money, which, under the last clause of the section, makes them public moneys. The words "public moneys" might have been omitted without affecting the sufficiency of the information; but there is no inconsistency in the averment, since the kind or character of the public moneys charged to have been withheld is defined by the accompanying statement. At the most, it was surplusage, which does not vitiate. Nor could there be any difficulty in pleading an acquittal or conviction under this information in bar of a subsequent prosecution. The defendant is charged with all moneys remaining in his hands, which were received by him as clerk during his incumbency of that office. The offense is single, whether the amount be great or small; and a conviction or acquittal of that single offense must, of necessity, bar a second prosecution, even though it be afterwards ascertained that the amount in his hands was larger than that alleged in the first information.

Respondent further contends that, if the facts hereinbefore referred to were sufficiently pleaded, still the information does not state sufficient facts, because there was no law authorizing the clerk to receive deposits from litigants, and that, therefore, deposits received by him were illegally collected, and belonged to the depositors. But this question is not before us. This appeal involves only the sufficiency of the information, and the jurisdiction of the court, while this contention assumes facts which may have been given in evidence, but which could not properly be considered upon this appeal, if they were. The allegation that defendant received these moneys in his official capacity was sufficient, without referring, by title

or otherwise, either to the statute under which the information was drawn, or to any statute which created a right, duty, or obligation, the antecedent existence of which may constitute a factor more or less intimately connected with the offense. As to all these, the general conclusion of the information, "contra formam statuti," is sufficient. We therefore conclude that the information is sufficient, and that the court below erred in arresting the judgment, and advise that the order arresting the judgment in said cause be reversed, and the court be directed to vacate its order directing the district attorney to prepare and file a new information in said cause, and to take such further proceedings therein as the law requires.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order arresting the judgment is reversed, and the court below is directed to vacate its order directing the district attorney to prepare and file a new information in said cause, and to take such further proceedings therein as the law requires.

(97 Cal. 464)

HEALY v. WOODRUFF et al. (No. 18,042.)

(Supreme Court of California. March 7, 1893.)

IRRIGATION—APPROPRIATION OF WATER—RIPARIAN OWNERS.

The fact that one who has appropriated, for irrigation purposes, a certain quantity of water, is a riparian owner on the stream from which the water is taken, cannot be urged against his right afterwards to take a greater quantity, where no other rights were in existence at the time, or for years afterwards.

Department 2. Appeal from superior court, Lassen county; G. G. Clough, Judge.

Action by Mathew Healy against B. C. Woodruff and others to quiet title to certain water. From a judgment quieting title to a less amount than claimed, plaintiff appeals. Reversed.

Spencer & Raker, for appellant. A. L. Shinn and R. L. Shinn, for respondents.

McFARLAND, J. This is an action to quiet plaintiff's title to certain waters of a stream called "Cedar Creek," and to a ditch leading therefrom, and for an injunction, etc. The court rendered judgment for plaintiff against the defendants Harrison Smith and Edward Bonyman as prayed for in the complaint; but, as against the defendants James and John A. Smith and B. C. Woodruff, the judgment quieted plaintiff's title to only 180 inches of water, measured under a 4-inch pressure. Plaintiff appealed from the judgment, and contends that the court's conclusions of law were erroneous, and that, upon the findings of fact, his title should have been quieted to 360 inches.

The court finds, in brief, these facts: In April, 1873, plaintiff's grantor, Frank Thomas, entered upon said Cedar creek, and constructed the ditch described in the complaint. He completed it before the 4th of November, 1873, and diverted 180

inches of water, and used it for irrigating certain lands described in the findings, for watering stock, and for domestic purposes to the amount of 180 inches; that being then the capacity of the ditch. In the winter of 1873-74, the ditch became so enlarged "through the action of water running to the head thereof, and into the same," that it was afterwards capable of carrying 360 inches. "Ever since said ditch was so enlarged, and up to the time of the commencement of this action, plaintiff and his grantors did divert and use from said Cedar creek the waters of said creek to the full capacity of said ditch, as so enlarged, whenever sufficient water came down to the same, and that said waters have been used during all said time for irrigating the lands described in finding 5, as well as other lands of plaintiff described in the complaint herein, and for watering stock, and for general household purposes." Plaintiff's lands require for irrigating at least 360 inches of water. Plaintiff acquired from said Thomas the said ditch and water rights and certain lands in September, 1874, and has ever since been the owner of the same. Many years afterwards the various defendants began to assert rights to the waters of said creek as riparian owners, or as appropriators, and to divert the same from plaintiff's ditch; but none of such rights had any origin within five years after the said enlargement of the said ditch. Most of them originated 10 or 15 years afterwards. Between the time when the ditch was first constructed, with the capacity of 180 inches, and the winter of 1873-74, when it was enlarged to 360 inches, the said Frank Thomas, plaintiff's grantor, acquired title from the United States to a piece of land, through a small portion of which the said Cedar creek runs. Before that the entire stream ran through public lands, and it continued afterwards to run through public lands for many years, throughout its course, except where it ran through said land acquired by said Thomas in 1873, as aforesaid.

Upon these findings of fact the court below made the conclusion of law that plaintiff should have his title quieted to only 180 inches. The record does not show upon its face upon what theory this conclusion was reached, but we discover the theory from the brief of respondents. It appeared that the court held that because the plaintiff's grantor acquired the title to some land on the stream, and thus became a riparian owner, he could not afterwards acquire any more water by appropriation, and that, therefore, his enlargement of the ditch in the winter of 1873-74 did not give him any right to an increased flow of water in his ditch as against any one who years afterwards might assert riparian rights on the stream above the ditch. But this position is clearly untenable. The fact that plaintiff or his grantor was a riparian owner does not warrant the conclusion that he could not be an appropriator. There is, as is said in a play, "no consonancy in the sequel." The notion seems to be that becoming a riparian owner estops one, in some sort of a way, from being an appropriator of

water, although there be no one in existence in whose favor the estoppel can be invoked. When the ditch was enlarged, there was no person having any rights on the stream, except plaintiff's grantor himself, and therefore the enlargement of the ditch encroached upon nobody's vested or prior rights. Respondents argue that if appellant's position be correct the first riparian owner could monopolize all the waters of the stream. But they admit that an appropriator who is not a riparian owner can take all the water of a stream on the public lands, if he be the prior or first appropriator; and it would certainly be strange if the first comer to a stream, who acquired title to some land upon it, has less rights in the water of the stream than one who owns no land there at all. At the time of the enlargement of the ditch, there was no riparian owner on the stream, except plaintiff's grantor. If some other person had been the riparian owner instead of plaintiff's grantor, the latter, with the consent of such riparian owner, or by adverse user, could have diverted the waters of the stream, and held them against all subsequent comers; and certainly his own consent to the appropriation was equal, at least, to the consent of another person, who might have occupied his position. Counsel for respondents seem to think that because plaintiff's grantor, as a riparian owner, could have prevented subsequent appropriators from diverting the water above his land, and away from it, therefore he could not divert the water himself; but that is a confusion of the distinction between *meum* and *tuum*. Counsel complain that this view gives great advantage to the first possessor and appropriator of the water of a stream. This is no doubt true; but it is the advantage which the law gives, and which necessarily follows prior occupancy and appropriation. We think, therefore, that the third and fourth conclusions of law made by the court below, to the effect that plaintiff has the first right, by prior appropriation, to 180 inches of the waters of said Cedar creek, are erroneous, and that the court should have found, as a conclusion of law, that plaintiff has such right to 360 inches of said water; and, as the facts found show what the judgment should have been, there is no necessity for another trial.

The judgment, as to respondents and defendants B. C. Woodruff, John A. Smith, and James M. Smith is reversed, with directions to the superior court to amend its conclusions of law as indicated in this opinion, and to enter judgment in due form quieting plaintiff's title as against said respondents to said ditch, and to said waters of Cedar creek, to the extent and in the amount of 360 inches of water, measured under a 4-inch pressure, and enjoining said respondents from diverting water from said ditch or interfering therewith, while there are not more than such 360 inches running in said ditch, with costs, etc., as in the former judgment.

We concur: DE HAVEN, J.; FITZGERALD, J.

(97 Cal. 461)

NYE v. MARYSVILLE & Y. C. ST. R. CO.  
(No. 18,000.)

(Supreme Court of California. March 7, 1893.)

NEW TRIAL — SUFFICIENCY OF APPLICATION —  
STREET-CAR COMPANIES — EJECTMENT OF PAS-  
SENGER — REFUSAL TO PAY FARE.

1. Where the notice of intention to move for a new trial "on a statement of the case," in which the errors were specified, was not incorporated into the statement, the motion was properly denied, as Code Civil Proc. § 659, provides that, "if no such specifications be made, the statement shall be disregarded on the hearing of the motion."

2. In an action against a street-car company for ejecting a passenger it appeared that defendant's rules required passengers to pay their fare on entering the car; that, after plaintiff had ridden about one and one half blocks without paying fare, his attention was called to the rule, and he was requested by the driver to pay; that plaintiff answered that the driver "was in too much of a hurry," and that he (plaintiff) "would take a little time on that;" that plaintiff was then ordered to get off of the car; that the driver undertook to eject plaintiff, but was himself put out by plaintiff; that the driver then seized an iron bar, and again ordered plaintiff to leave the car, which he did, without being struck or injured in any way. *Held*, that plaintiff could not recover, as his conduct amounted to a refusal to comply with a reasonable rule of defendant, and justified his removal.

3. Under Civil Code, § 2187, providing that a "common carrier may demand the fare of passengers either at starting or at any subsequent time," a rule of a street-car company, requiring passengers to deposit their fare on entering the car, is reasonable.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; John C. Gray, Judge.

Action by George Nye against the Marysville & Yuba City Street-Railroad Company. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

M. C. Barney and Mr. Donohoe, for appellant. M. E. Sanborn, for respondent.

HAYNES, C. This action was brought to recover damages for an alleged wrongful eviction from one of defendant's street cars. At the conclusion of the evidence offered by plaintiff defendant moved for a nonsuit, which was granted, and judgment was entered against the plaintiff, who thereafter gave notice of his intention to move for a new trial upon a statement of the case. The statement was thereafter prepared and settled, and upon the hearing the motion for a new trial was denied. This appeal is from the judgment and the order denying said motion.

Respondent makes the point that the judgment and order must be affirmed; the first, because no error appears upon the judgment roll; and the second, because there are no specifications of error of any kind, either of law or fact, in the statement on motion for a new trial. Appellant's notice of intention to move for a new trial forms no part of the judgment roll, nor is it incorporated in the statement. It is inserted in the record after the statement, but, as its insertion was improper, it is no part of the record.

Pico v. Cohn, 78 Cal. 384, 20 Pac. Rep. 706; Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. Rep. 102; Bohnert v. Bohnert, 95 Cal. 445, 30 Pac. Rep. 590, and cases there cited. The statement contains no specifications of error whatever. Section 659, Code Civil Proc., provides: "If no such specifications be made, the statement shall be disregarded on the hearing of the motion." It was therefore impossible for the court below to grant the motion without violating the above provision, and, that being true, it follows that the court did not err in denying appellant's motion for a new trial. Dawson v. Schloss, 93 Cal. 194, 29 Pac. Rep. 31. Waiving the question whether a statement which cannot be used on motion for a new trial, because it does not comply with the requirements of the Code, may nevertheless be used upon an appeal from the judgment, an examination of the record makes it clear that the court did not err in granting the nonsuit.

Among the rules of the respondent posted in the car was one requiring passengers to deposit their fare upon entering the car. This rule was reasonable, and necessary to prevent fraud upon the company. Plaintiff was not ignorant of the rule, as shown by his testimony; and after he had seated himself in the car, and had ample time to comply with this rule, his attention was called to it, and he was requested to pay his fare. Instead of complying, plaintiff said that he was going to Yuba City, and had plenty of time to pay. The driver insisted that he must pay then, to which plaintiff retorted that he, the driver, "was in too much of a hurry," and that he, the plaintiff, "would take a little time on that." He was then told to get off the car or he would be put off. Not complying with this request, the driver attempted to remove him from the car, but was unsuccessful; and a second attempt resulted in the driver being put out on the front platform, plaintiff remarking, "If you have any business out there on the platform, you had better attend to it." The driver then removed an iron used to open and shut the door, and went into the car, and again ordered plaintiff to leave the car, which he then did. Appellant was not struck or injured in any way. He had ridden about a block and a half before his attention was called to the payment of his fare. He had ample time and opportunity to pay, and, while not expressly refusing to pay his fare, his language and conduct amounted to a refusal to comply with a reasonable rule and proper request made by respondent, and justified respondent in removing him from the car. Civil Code, § 2188. Nor was any more force, or appearance of force, resorted to than was necessary to secure his removal. That the regulation of respondent, and the demand of payment of the fare at the time it was demanded, were reasonable and proper, see Civil Code, §§ 2186, 2187.<sup>1</sup> The judgment and order appealed from should be affirmed.

<sup>1</sup>Section 2187 provides that a common carrier may demand the fare of passengers either at starting or at any subsequent time.

We concur: SEARLS, C.; VANCLIEF, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

**DE HAVEN, J.** I concur in the judgment.

**VON SCHMIDT v. WIDBER, Treasurer.**  
(No. 15,160.)

(Supreme Court of California. March 8, 1893.)

**PRACTICE ON APPEAL—BOND.**

An appeal from an order denying a new trial will be dismissed, where no undertaking is filed.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by A. W. Von Schmidt against James H. Widber, treasurer of the city and county of San Francisco. Judgment for plaintiff. Defendant appeals. Dismissed.

John H. Durst, for appellant. Tilden & Tilden, for respondent.

**PER CURIAM.** Upon motion of respondent, the appeal from the order denying a motion for a new trial in the above-entitled action is dismissed, upon the ground that no undertaking upon appeal has been filed.

(8 Cal. Unrep. 836)

**GREGORY et al. v. GREGORY et al.** (No. 18,080.)

(Supreme Court of California. March 9, 1893.)

**APPEALABLE ORDERS.**

Where a judgment is itself appealable, and no motion is made for a new trial, an appeal from a subsequent order refusing to set the judgment aside will not lie. *Goyhinech v. Goyhinech*, 22 Pac. Rep. 175, 80 Cal. 409, followed.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

(Not to be published in California Reports.)

Action by James W. Gregory and others against John H. Gregory and others. Judgment for defendants. Plaintiffs appeal from an order refusing to set the judgment aside. Dismissed.

James Gartlan, for appellants. E. P. Tuttle and C. Tuttle, for respondents.

**BELCHER, C.** This case was submitted to the court below for decision upon an agreed statement of the facts, signed by the attorneys of the parties thereto, and on February 25, 1892, judgment was given and entered by the court in favor of the defendants. Thereafter, on April 6th, the plaintiffs served notice on the defendants that on the 20th of that month they would move the court to vacate the judgment, and restore the cause to the calendar for trial, upon the ground that there were no findings to support the judgment. In due time the motion was heard, and submitted upon the papers and record in the case, and upon an affidavit made by

plaintiffs' attorney, in which, among other things, he stated: "No stipulation was made that said statement should constitute a part of the judgment roll in the action. Findings were not waived. No findings of fact have been signed or filed." On April 29th the court denied the motion, "for the reason that all the facts in the case had been agreed upon, and submitted to the court, and consequently that there was no issue of fact before the court to be determined, and nothing requiring, or upon which to base, separate findings of fact; the court being of the opinion that the findings of fact were, in effect, thereby waived, and no other or further findings of fact were necessary or permissible, beyond the said agreed statement." From this order denying their motion the plaintiffs appealed, and have brought the case here on a bill of exceptions.

The defendants move to dismiss the appeal, and in support of their motion cite, among other cases, *Goyhinech v. Goyhinech*, 80 Cal. 409, 22 Pac. Rep. 175. In that case the appeal was from an order like that involved here, and on motion the appeal was dismissed. The court said: "The motion was not for a new trial, and the judgment was itself appealable. It is settled that, when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside. [Citing cases.] The plaintiff should have appealed from the judgment, with a bill of exceptions upon that appeal." Upon the authority of that case, we advise that the appeal in this case be dismissed.

We concur: **TEMPLE, C.; HAYNES, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion, the appeal herein is dismissed.

(97 Cal. 459)

**PEOPLE v. FICE.** (No. 20,970.)

(Supreme Court of California. March 7, 1893.)

**CRIMINAL LAW — REQUEST FOR INSTRUCTIONS — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE — ADDITIONAL AFFIDAVITS.**

1. Failure to instruct on any proposition deemed essential by defendant in a criminal case is not error, unless such an instruction was requested.

2. Where defendant's affidavits in support of a motion for a new trial for newly-discovered evidence are fully contradicted by affidavits of the prosecution, a new trial is properly denied.

3. A motion to be allowed to file additional affidavits is also properly denied when made after the new trial has been denied, and without production of the affidavits.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Conviction of one Fice for robbery, from which, and the denial of a motion for a new trial, he appeals. Affirmed.

D. A. O'Connell, for appellant. Atty. Gen. Hart, for the People.

**HARRISON, J.** The defendant was convicted in the superior court of robbery,

writing, signed, sealed, and delivered by the parties, and that, if any change has been made in the instrument, it is not the instrument which the parties made, and that if it is given to another party after execution, to be delivered upon certain conditions being performed, it is simply in escrow. But, as we have above said, this ignores the doctrine of agency in cases of this kind, and does not really conflict with the principle that these confidential conditions, to be made effective, must be brought to the notice of the party who is to be affected by them; and the great weight of modern authority sustains the rule laid down by the supreme court of the United States in *Dair v. U. S.*, 16 Wall. 1, that a bond perfect upon its face, apparently duly executed by all whose names appear thereon, purporting to be signed and delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons, who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced, upon the faith of such bond, to act to his own prejudice. Many cases have gone beyond this in holding sureties responsible, but few, if any, of the modern cases have relaxed the rule for the purpose of exonerating them. The rule laid down in *Dair v. U. S.*, supra, was affirmed by the supreme court of the United States in *Potter v. U. S.*, 107 U.S. 128, 1 Sup. Ct. Rep. 524, the court there holding that the surety relied upon the good faith of the principal; that he clothed him with apparent power; and that he is, in equity, estopped from claiming, as against the government, the benefit of his private instructions to his agent. The case of *State v. Peck*, 53 Me. 284, may be said to be the leading American case on this interesting question, and a case the reasoning of which has since been closely followed and adopted by the supreme court of the United States. The authorities are reviewed with discrimination, and the result announced is in harmony with the quotation from Chancellor Kent, that "whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power, though if he pursues his power, as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power." In fact, this is now the almost universal American holding; the later cases, in many instances, directly abrogating their early decisions. Thus the doctrine announced in *People v. Organ*, 27 Ill. 29, which is a case generally cited to support the theory contended for by appellants, was substantially overruled, or, at least, the principles upon which it was based were overruled, in *Smith v. Board*, 59 Ill. 412; *Bartlett v. Board*, Id., 364; *Comstock v. Gage*, 91 Ill. 328; and in *City of Chicago v. Gage*, 95 Ill. 593. In an opinion reviewing all the authorities, the case of *People v. Organ* was specially mentioned, and the doctrine on which it was based was condemned, and the rule an-

nounced as enunciated in *State v. Peck*, 53 Me. 284. All these later cases are based upon the doctrine of *Texira v. Evans*, referred to in 1 Anstr. 228,—a case which to-day is pretty generally conceded to sustain principles in harmony with public policy, and the application of which compels the burden of loss to fall upon the party who, by his actions, and by the apparent authority with which he clothed his agent, has made the loss possible. The following, among other cases which we have examined, sustain this contention: *Brandt*, Sur. § 603; *Inhabitants*, etc., v. *Huntress*, 53 Me. 59; *Cooper v. De Mainville*, (Colo. App.) 27 Pac. Rep. 86; *White v. Duggan*, 140 Mass. 18, 2 N. E. Rep. 110; *Mathis v. Morgan*, 72 Ga. 517; *Tidball v. Halley*, 48 Cal. 610; *Jordan v. Jordan*, 10 Lea, 124; *Taylor Co. v. King*, 73 Iowa, 153, 34 N. W. Rep. 774; *Hall v. Smith*, 14 Bush, 605; *Ordinary v. Thatcher*, 41 N. J. Law, 403; *Cutler v. Roberts*, 7 Neb. 4; *State v. Pepper*, 31 Ind. 76; *Butler v. U. S.*, 21 Wall. 272; *Nash v. Fugate*, 24 Grat. 202; *Trustees v. Shelk*, 119 Ill. 579, 8 N. E. Rep. 189; *Harvey v. State*, 94 Ind. 161; *Lucas v. Owens*, (Ind. Sup.) 16 N. E. Rep. 196; *Carroll Co. v. Ruggles*, 69 Iowa, 269, 28 N. W. Rep. 590; *Beiloni v. Freeborn*, 63 N. Y. 383; *Fullerton v. Sturges*, 4 Ohio St. 535; *Insurance Co. v. Clinton*, 66 N. Y. 326; Section 279, *Mechem*, Pub. Off., and authorities there cited. In fact, the rule not only rests securely upon the law of agency, which makes the principal responsible for the acts of his agent, regardless of private understandings, when he has held the agent out to the world as possessing general powers over the matter in hand; but it also rests on the equitable doctrine that, where two innocent parties suffer, the injury must be sustained by the one who put it in the power of another to do the injury; and for these reasons it ought to be, and is, almost universally, sustained.

But there is another proposition raised in this case that is vastly more troublesome. Under the law existing at the time Hill was elected, and at the time the bond was executed, the treasurer's term of office expired on the first Monday in January, 1887; but on February 4, 1886, by legislative enactment, his term of office, in common with the other county officers in the county, was extended to the first Monday in March, 1887. It appears from the testimony, and is so found by the court, that \$22,064.34 of the amount of delinquency came into his hands after the first Monday of January, 1887; and the contention of the appellants is that the sureties, in any event, are not responsible for that amount; that the sureties of an officer who is chosen periodically, and to hold an office until his successor is chosen and qualified, are bound for the period only for which the officer was chosen. The importance of this case, not only as it affects the rights of the sureties, but as affecting the public in the administration of the different departments of the government, and the necessity of guarding the public funds as far as is consistent with private rights, has led us to an extended investigation of the authorities bearing on the subject; and we have examined them

both with reference to number, and cogency of reasoning. The authorities cannot be reconciled, some courts holding that the bond is made in contemplation of the law, and must be construed with reference to the law governing the office, and where the law provides that the term of office shall continue until the successor is elected and qualified, which is the law governing this case, that the bond is given, not only for the statutory term, but for the further time which may elapse between the end of the expressed statutory term and the time when the successor is elected and qualified; that the law becomes incorporated into the bond; that the sureties are bound to know that his right to the office may extend beyond the year; and that this possible extension is taken into consideration and provided for in the bond. Such is the doctrine of *State v. Berg*, 50 Ind. 502; *Commonwealth v. Drewry*, 15 Grat. 1; *Pickering v. Day*, 3 Houst. 474; *State v. Kurtzborn*, 78 Mo. 98; *Thompson v. State*, 37 Miss. 518; *McAfee v. Russell*, 29 Miss. 84; *Hughes v. Smith*, 5 Johns. 168; *People v. Beach*, 77 Ill. 52; *Kindle v. State*, 7 Blackf. 589; *Bank v. Rogers*, 7 N. H. 21; *State v. Daniel*, 6 Jones, (N. C.) 444. Some of these are cases arising on official bonds, and some of them on bonds of corporation officers, and there have been attempts by some courts holding the opposite doctrine to discriminate between them. But, while there may be discriminating circumstances in some of them, they are all decided on the same general principles enunciated above, and generally rely on the same early cases to sustain them, and must, therefore, be conceded to logically sustain respondent's position. But after a great deal of deliberation, and, we must admit, some hesitation, we are constrained to adopt the opposite view, which is amply sustained by the authority, and we think by better reasoning. No consideration of the interests of the public will justify a court in extending by construction the obligation of a citizen under his contract, beyond the scope of its natural import. The contract which embodies this obligation, like any other contract, must be construed to give effect to the intention of the parties; and that intention is to be gathered from the language employed, and the circumstances surrounding the execution of the instrument. Now, what were the circumstances surrounding the execution of this bond, and what length of time would these bondsmen naturally think they were contracting with reference to? The correct answer to the last question determines their liability. There need be no artificial rules of law applied. It is a simple question of intention, gathered from the language of the contract, read in the light of the surrounding circumstances. At the time this bond was given, the term of office of the treasurer, as provided by law, was two years. It is argued that the bondsmen entered into their obligation in view of the possible modification of their liability by the legislative assembly, and with notice that the legislature would have a right to continue the incumbent in office beyond the term for which he was elected. So far as the first proposi-

tion is concerned, the legislature would not have any right to pass a law that would change the terms of the contract, or in any way impair its obligation; and, so far as the second proposition is concerned, while the sureties might be held to take notice that the legislature could extend the term, they would not be required to take notice that the legislature, in such an event, would make no provision for the giving of a bond by the treasurer for the extended term. The sureties had a right to take notice of the law as it existed, and to contract with reference to the law as it existed; that is, the law which would naturally be in their minds when they entered into the contract. And the idea that they would at such a time enter into a speculative calculation of what the law might be in the future, and shape their contract with reference to such possible change, is a strained one. The law at that time made the office one of a definite term. That term was two years. And the sureties had a right to, and no doubt did, take that law into consideration, and that was the law that was imported into their contract. There is no doubt that the central idea was that the term was for two years. This was the law. This was the ordinary state of affairs, and the ordinary time for which bonds for county officers were given. A man might willingly go on a bond for two years who would hesitate, or absolutely refuse, to go on for a longer period. So far as the term, "until his successor is elected and qualified," is concerned, while it might have great significance when applied to the officers of private corporations, it can have none here: for the law provides when the officer elect shall qualify, and, if he does not qualify within the time prescribed, the commissioners can declare his office forfeited, and appoint another officer. Many of the courts hold that the bond will remain in force for a reasonable time,—a sufficient time in case of accident, surprise, or emergency to permit the authorities to provide for other security; but there is no question of reasonable time in this case. In this instance, when the term of office for which the bond was given had expired, another bond should have been required; and if the authorities have neglected their duty, or the legislature has inadvertently failed to make provisions for a proper bond, it is inequitable and unjust to make the sureties for the original term responsible for such neglect and inadvertence. It is well said in many of the cases that, if the sureties can be held responsible for two months longer than the stated term, they can be held for two years, or for any indefinite term; and no such construction can be placed upon this bond without doing violence, not only to the language of the bond itself, but to the spirit of the law which provides for it. But it is stated that the language of this bond is peculiar. Inasmuch as the bond stated when the term of office commenced, but does not state when it ends, and further provides that it shall remain in effect "while he shall act as such county treasurer under such election," we do not think there is any sub-



art himself, and he only testified that "for a distance of a quarter to one third of a mile" the ditch was 27 feet wide "from the top of one embankment to the top of the other," that for the next half mile it was only 16 feet wide, and beyond that still smaller. Now, the general rule is that (making due allowance for evaporation, seepage, etc.) the capacity of a ditch is measured by the amount of water which it will carry from the point of diversion to the point of use, and the point of least carrying capacity fixes the general capacity of the ditch. It is true, if a ditch is intended to supply, and does supply, water for use at various points along its course, the latter part of the ditch need not be so large as the first part; but in the case at bar it does not appear that the water was intended to be used before it reached the point at which the size of the ditch was decreased, the intention apparently being to supply first the land of the homestead of Standart, which was beyond the point of contraction. We think, therefore, that Standart, under the evidence, did not acquire a prior right to the amount of water which a ditch of the dimensions described in the findings would carry. But if we assume that he did construct a ditch in 1885, which along its entire course was of the size and grade found by the court, still, under the evidence, it could not possibly have carried 427 cubic feet per second. The only definite evidence as to what amount of water a ditch of a given size and grade will carry is found in the testimony of respondent's witness Hughey, who is a civil engineer and surveyor. He testified upon the subject as follows: "Taking the width at 30 feet, the bottom at 20 feet, the depth at 3 feet, and the grade at 10½ feet to the mile, the discharge would be in cubic feet flowing per second 426.75." A ditch with a width of 27 feet across the top, 20 feet on the bottom, with a depth of 3 feet, and a grade of 10½ feet to the mile, the discharge of cubic feet flowing per second would be 400.44. From this testimony it is clear that such a ditch as that found by the court, to wit, 27 feet at the top, 20 feet on the bottom, 30 inches in depth, and with a grade of only 7 feet to the mile, could not possibly carry as much as 427 cubic feet of water per second. The finding of the court, therefore, as to the amount of water to which respondents had a right prior and superior to that of appellant is clearly erroneous, and for this reason the judgment must be reversed.

Counsel for respondents suggest that if the amount of water found by the court to be embraced by the prior right of respondents be too large, this court might modify the judgment by reducing that amount. But by that course this court would be making a finding for the court below, which it cannot do. And the different rights and contentions of the parties are so mixed and interlaced in the findings and judgment that we do not see how there could be a partial approval of the findings or affirmance of the judgment. The entire rights of the parties can be better readjusted and established by a retrial of the whole case. The judgment

and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGERALD, J.

(5 Wash. 606)

### LYTS v. KEEVEY.

(Supreme Court of Washington. Jan. 31, 1893.)

NOTES—ILLEGAL CONSIDERATION—PLEADING AND PROOF—WAIVER OF OBJECTIONS—INSTRUCTIONS—CREDIBILITY OF WITNESS.

1. Where a party asks and obtains an instruction directing the jury to disregard certain testimony improperly admitted over his objection, relative to a distinct cause of action, and there is no indication that the jury were influenced by such testimony in their finding on the other causes, the error in admitting the testimony cannot be made the subject of complaint.

2. An illegal consideration for a note cannot be shown under an allegation of no consideration.

3. Plaintiff testified that his wife had deserted him, and that defendant sometimes visited her under circumstances tending to show improper relations, and that a note set up as a counterclaim by defendant was given by him to defendant in consideration of the latter's promise to induce plaintiff's wife to return to him. Plaintiff was then asked by his counsel whether he supposed the relations between his wife and defendant were criminal, for the purpose of showing the consideration for the note illegal. Held, that the question was improper, except as preliminary to evidence showing the reasons for his supposition.

4. An instruction telling the jury that they are to determine the weight of the testimony, and that they must be careful and slow to reject any testimony, has no improper bearing on the weight or value of the testimony.

5. In declaring the rule to a jury that, where a witness is found to have testified falsely in a material matter, his testimony may be disregarded in toto unless corroborated, it is well to say that the corroboration may be that of any credible evidence, or of facts and circumstances, rather than to confine it to other unimpeached "testimony," though in a case where there is no corroboration outside of the testimony, such an instruction is not substantially erroneous.

Hoyt, J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by W. D. Lyts against Munroe Keevey. Judgment for defendant. Plaintiff appeals. Affirmed.

Stratton, Lewis & Gilman, for appellant. W. R. Andrews, for respondent.

SCOTT, J. The appellant brought an action against the respondent to recover the balance due upon an account, amounting to \$289. The respondent denied the account, and pleaded several causes of action by way of a counterclaim; one being for the amount due on a certain alleged promissory note for \$500, executed by the appellant to respondent. A trial was had, which resulted in a verdict for the defendant in the sum of \$605.82.

Appellant alleges three grounds of error. Certain testimony was admitted upon the trial against the objections of the plaintiff, and this testimony was subsequently excluded from the consideration of the jury in an instruction which the court gave at

the plaintiff's request. Notwithstanding this instruction, appellant claims that this evidence prejudiced the jury, and that by reason thereof he did not get a fair trial, and that the verdict should have been set aside. The testimony complained of was in reference to rents for certain lands which the defendant had conveyed to the plaintiff some time previously. The defendant claimed that he had conveyed these lands to the plaintiff in order to prevent their being seized by his creditors; that he did this upon the advice and at the request of the plaintiff, and he sought to recover of him for the use and occupation of this land after it had been so conveyed. When the cause was submitted to the jury the court properly instructed them that the defendant was not entitled to recover from the plaintiff anything for the use and occupation of this land while the plaintiff held the same under and by virtue of the deed which the defendant had given him. We are not disposed to adopt the rule that evidence improperly admitted cannot be counteracted in the subsequent course of the trial, and that the same should entitle the objecting party to a new trial in all cases. Evidently the plaintiff thought an instruction directing the jury to disregard this testimony would prevent its having any prejudicial effect, or he would not have asked it, but would have relied upon his objection and exception. But he saw fit to ask for the instruction, and, the court being then satisfied that the testimony had been wrongfully admitted, gave it; and we think the plaintiff should be bound by the course he adopted, there being nothing to indicate that it did influence the jury in finding a verdict against him on the other causes. It was in relation to a cause of action distinct in itself, which was entirely withdrawn from the consideration of the jury by the instruction. If during the trial the defendant, who introduced the testimony, had asked to have it excluded, a different case would have been presented, and the plaintiff would have been in a position to ask a suspension and setting aside of the trial, and the calling of another jury for a retrial, if he thought the present jury was disqualified to try the case in consequence of such testimony; or possibly it would have been ground for setting aside a verdict against him had he continued. But generally a party should ask for relief at the first opportunity. Many authorities hold that an error in the admission of testimony will be cured by an instruction withdrawing it from the case. 2 Thomp. Trials, § 2415; *Smith v. Whitman*, 6 Allen, 562; *Anthony v. Travis*, (Mass.) 19 N. E. Rep. 8; *Shepard v. Railway Co.*, (Iowa,) 41 N. W. Rep. 564; *U. S. v. Kuntze*, (Idaho,) 21 Pac. Rep. 407; *Durrant v. Mining Co.*, (Mo. Sup.) 10 S. W. Rep. 484.

The next ground of error claimed is with reference to the note upon which the defendant sought to recover from the plaintiff. The plaintiff, in his reply, admitted the execution of the note, but alleged that for the making and delivery of the same there was no consideration. At the trial, he testified, in substance, that long prior to the making of the note his wife had de-

serted him without cause, and continued to live apart from him. That the defendant sometimes visited her at improper hours, and under circumstances justifying a belief upon his part of improper relations between them while she was living apart from him. That the defendant had told him that he knew why his wife had left him, and that it was on his, the defendant's, account, and that he could persuade her to return to the plaintiff, and that nobody else could do so; and that, if plaintiff would give him money to get out of the country with, he would go away, and induce plaintiff's wife to return; and that, in consideration of said promise on the part of defendant, and for no other consideration, he executed and delivered to him said note; whereupon he was asked by his attorney whether he supposed the relations of Mrs. Lyts and Mr. Keevey were criminal, and whether he had reason so to suppose. This was objected to by the defendant as immaterial. The objection was sustained, and the plaintiff excepted. Appellant contends that the question was proper and material, on the ground that, if such relations did exist, and the note was given to induce the defendant to forego the same, it would have been given for a consideration which the law would not recognize, and that the defendant could not recover thereon. The respondent contends that the testimony sought was inadmissible under the pleadings; that the plaintiff had alleged a want of consideration, while he undertook by this testimony to show an illegal consideration, which is not permissible. In support of the proposition that an illegal consideration cannot be shown under an allegation of no consideration, and that it is necessary to allege the facts, see *Bliss*, Code Pl. § 330; *Gashee v. Leavitt*, 5 Cal. 160; *Finley v. Quirk*, 9 Minn. 194, (Gil. 179.) This position seems to be well taken, and, while this objection was not properly raised at the trial,—the objection there being that it was immaterial only,—yet, under the rule that the action of the court will generally be sustained where any good reason therefor exists, although it may not have been the one which moved the court to act, and although the one relied upon by the court may have been insufficient, we think the objection is available here in this instance, and that the ruling excluding the testimony should be sustained. Of course, the question as it stood was otherwise objectionable, except as preliminary to other proof showing what his reasons were for so believing. If admissible at all, it was necessary to show the facts, so that the jury might draw conclusions therefrom, and not from the belief or suppositions of the witness. The record does not show that the question was supplemented by any offer of further proof in this respect. All of the testimony in relation to the consideration for which the note was given is not before us, the record being properly limited to enough of it to present the point raised. The consideration, while a novel one, was not necessarily unlawful. The jury may not have believed the statement of the plaintiff that the defendant visited Mrs. Lyts

at improper hours, and may not have found that he held any improper relations with her, and, if so, the consideration shown by the testimony was otherwise lawful, and would support an action upon the note. No question was raised as to its performance by the defendant. Among other instructions bearing upon this subject the court gave the following, which sufficiently presented the issue: "The jury are instructed that if the note set up in the defendant's counterclaim was given by the plaintiff in consideration of the defendant's promise to persuade Mrs. Lyts to return to her husband, that he (Keevey) would go away, and that only—go away out of the territory—and that only, then there was a good consideration therefor, and your verdict, so far as the note is concerned, should be for defendant. But if the jury should further believe from the testimony in this case that the defendant was responsible for the separation of plaintiff's wife from him, and was, by influence or otherwise, keeping his (plaintiff's) wife from returning to the plaintiff, and that plaintiff believed that to be a fact, and that the main and principal consideration to the plaintiff was in fact that defendant should desist from his attention to the wife of plaintiff, and that the promise to persuade plaintiff's wife to return to her husband and defendant would leave the country was collateral or a part of the main consideration of desisting from further attention to or improper relation with the plaintiff's wife, then, in such case, if you so believe from the evidence, the defendant cannot recover on the note in evidence against the plaintiff." The other instructions thereon were more favorable to the plaintiff.

The third ground of error complained of is with reference to an instruction which the court gave the jury relating to the rule to be observed by them in the consideration of the testimony of witnesses. Said instruction was as follows: "You are the exclusive judges of the weight of the testimony and the credibility of witnesses. You are to determine what weight you will give to the testimony of any witness, and you will be slow to reject the testimony of any witness, and be careful; and if you can reconcile any statement and all the testimony, or any of the testimony of any witness, with the facts, and with the probable motives, it will be your duty to do so; but if you should be satisfied that any witness has knowingly testified falsely in any material matter in this cause, you have a right to reject the whole of the testimony of such witness, unless, on any point, such testimony was corroborated by other unimpeached testimony." Appellant insists that this instruction was erroneous: (1) As an instruction upon the value of the testimony; and (2) in the statement that, if the testimony of the witness be found false in any material matter, it might be rejected, unless corroborated by other unimpeached testimony. (3) The instruction assumes that there are repugnant statements in the testimony, which the jury must reconcile if they can. As to the first point we see no ground for any claim that the instruction

had any improper bearing upon the weight or value of the testimony, and the last point is untenable, for the record shows that the testimony was contradictory. The second objection presents some difficulty, as it involves a point upon which the authorities are conflicting. We would not desire to sanction the instruction as an appropriate one in all cases, for such a witness might be corroborated by facts in the cause made to appear otherwise than by testimony as it is popularly understood, viz. the statements of witnesses under oath. "Unless corroborated by other credible evidence, or by the facts and circumstances proved," would generally be a better qualification. It is not claimed, however, in this case that any facts and circumstances were made to appear in any other way than by the testimony of the witnesses. While the instruction may not have been couched in the most apt language, we think the objections urged against it are not well founded, and that there was no substantial error. *State v. Ormiston*, 66 Iowa, 143-152, 23 N. W. Rep. 370; *Haymond v. Saucer*, 84 Ind. 8-12; *Harperv. State*, 101 Ind. 109-113; 2 *Thomp. Trials*, §§ 2418, 2420, 2426; *Crabtree v. Hagenbaugh*, 25 Ill. 233-240.

Judgment affirmed.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

HOYT, J., dissents.

(5 Wash. 537)

TOMPSON v. HURON LUMBER CO., (GARRETSON, WOODRUFF, PRATT CO. et al., Interveners.)

(Supreme Court of Washington. Jan. 18, 1893.)

APPEALABLE ORDERS — FIXING COMPENSATION OF RECEIVER — PRACTICE ON APPEAL — NOTICE OF APPLICATION TO SETTLE STATEMENT — SUFFICIENCY.

1. Notice of application to settle a statement of facts on appeal, served May 20, 1892, for a hearing on May 31st, where May 30th was a legal holiday, allows 10 full days, and is sufficient; the statute providing that the time shall be computed by excluding the first and including the last day, and, if the last is a holiday, then it is also excluded.

2. A notice of application to settle a statement of facts on appeal by plaintiff from a judgment fixing the compensation of a receiver appointed for defendant company pending litigation was entitled in the style of the suit as originally brought, and was addressed to the parties to the action, and not to the receiver, but was served on the receiver's attorney, who joined without objection in stipulations in connection with the statement of facts, both before and after the settlement. *Held*, that the notice to the receiver to settle the statement of facts was sufficient.

3. A certificate on appeal that the statement contains all the material facts in a cause is sufficient when it does not appear that any material matter has been omitted from the statement.

4. An order fixing the compensation of a receiver appointed by the court in an action pending, while it is a proceeding in the original action, is distinct in itself, and final in so far as the amount allowed is involved, and appealable. Hoyt, J., dissenting.

5. Though a receivership occupied the en-

time of the receiver, was complicated, involved the settlement of accounts, the operating of a sawmill for several months, the selling of lumber and a stock of merchandise, and looking after certain litigation, and the receiver gave a bond for \$25,000, and discharged his duties faithfully, \$300 a month is a sufficient allowance.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by Stanley P. Tompson, trustee, against the Huron Lumber Company. The Garretson, Woodruff, Pratt Company et al. intervened. Pending the action, F. A. Alexander was appointed receiver of the Huron Lumber Company. From a judgment entered on the report of a referee fixing the receiver's compensation, plaintiff appeals, and the receiver moves to strike out the statement of facts, and to dismiss the appeal. Motions denied. Judgment reversed.

John P. Gale, John P. Fay, C. H. Gest, and J. Park Henderson, for appellant. Preston, Albertson & Donworth, for appellee.

SCOTT, J. In January, 1891, the respondent Alexander was appointed receiver of all the property of the Huron Lumber Company in an action in which appellant was plaintiff and the Huron Lumber Company defendant. Respondent qualified, and entered upon his duties as such receiver, and has continued in the exercise thereof. In January, 1892, he petitioned the superior court of King county to settle and determine his compensation for services rendered up to that time. A referee was appointed by the court for the purpose of taking testimony, and finding therefrom the compensation to be paid, and reporting his findings of fact and conclusions of law to the court. In accordance therewith testimony was taken, and findings made and reported, to which appellant excepted. The exceptions were overruled, and judgment entered in favor of the respondent for the amount found to be just compensation. It was fixed at the rate of \$450 a month for the first month, \$400 a month for the next five months, and \$300 a month thereafter to the time of the referee's report. The respondent moves to strike the statement of facts upon the following grounds: First, because the notice of the application to settle the statement was made returnable in a shorter time than that prescribed by the statute, the notice having been served on May 20, 1892, and the time specified for the hearing being on May 31st. Respondent claims that he was not allowed 10 days, as the tenth day, May 30, 1892, was a legal holiday, and that he should have been allowed all of the 31st, and that the statement of facts could not be legally certified until June 1st. Second. Because no notice was given to the receiver of the application to settle said statement, the notice served being addressed to the parties to the action, and not to the receiver. Third. Because the judge's certificate does not state that the statement contains all the material facts in the cause. The certificate says it contains all the material facts in the proceed-

ing to determine the compensation of the receiver. Fourth. Because the purported statement of facts does not contain all matters required by the statute in cases of equitable cognizance, and that it does not contain, or purport to contain, the exceptions taken to the reception or rejection of testimony.

As to the first objection, we are of the opinion that the notice was sufficient. The statute provides that the time shall be computed by excluding the first and including the last day, and that, if the last day is a holiday, then this is also excluded. This would allow 10 full days, excluding May 30th.

The fact that the notice was entitled in the original action seems to us unimportant. Respondent's attorneys were served, and it also appears that they joined without objection in certain stipulations entered into in connection with the statement of facts before and after the settlement of the statement. There was, in reality, no cause pending in the court to which the receiver was a party. The matter to be determined—the amount of his compensation—was a proceeding in the original action.

The third ground is embraced in a subsequent motion, wherein respondent moves to dismiss the appeal, and will be discussed there.

As to the fourth ground, the certificate that the statement contains all the material facts in a cause is sufficient when it does not appear that any material matter has been omitted from the statement.

The motion to dismiss the appeal is based upon the ground that this court has no jurisdiction of the matter appealed from, because the order fixing the compensation of the receiver in said action is not a final judgment, order, or decree from which an appeal lies to this court, and because the fixing of the compensation of the receiver is a matter entirely within the discretion of the court by which he was appointed. While this is a proceeding in the original action, yet we are of the opinion that it is a distinct proceeding in itself, and that the order made with reference to the compensation of the receiver is a final one in so far as the amount allowed is involved. This precise point was decided in the case of *Trustees v. Greenough*, 105 U. S. 527, in which such an allowance was held a final determination of a particular matter, and, though it was incidental to the cause, that the inquiry was a collateral one, having a distinct and independent character, and was held to be appealable. It seems to us that such a practice would better subserve the interests of both parties. There is nothing to be gained in postponing the matter until the original action is finally determined, and then requiring an appeal of the whole cause, which would involve the bringing up of all of the testimony and proceedings, perhaps, to determine the simple question of the compensation of the receiver. If this practice were to obtain, the receiver should not be allowed anything prior to the determination of his receivership, and the disposition and settlement of the estate coming into his hands. But, as the original cause may re-

main in court for a long time, and the services of the receiver may be required during its pendency, it seems to us but just that the court may make an order during the pendency of the proceedings authorizing the payment of a sum to the receiver for services rendered in whole or in part.

As to the further question, such allowances, in the absence of statutory regulations, have usually been treated as resting largely in the discretion of the court making the appointment, in the sense that great weight is attached to the findings of the appointing court, but they have generally been held appealable. *Beach*, Rec. § 774. The motions are denied.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HOYT, J. I dissent. I think the order purely interlocutory, and in no sense final. Under the above ruling, a receiver could present weekly or daily accounts, and the action of the court in passing upon any or all of them be reviewed here. Besides, the receiver may so badly manage the business as to be entitled to no pay, and as to such management no proper decision can be had until his final accounting.

#### On the Merits.

SCOTT, J. The only remaining question is whether the allowance was a just and reasonable one. It seems the business occupied the entire time of the respondent, and that it was somewhat complicated, and required the services of a fairly competent man. It involved the settlement and collection of accounts, the operating of a sawmill for two or three months, and the selling of a quantity of lumber, and a stock of merchandise contained in a store previously conducted by the company; also looking after certain litigation. The respondent gave a bond in the sum of \$25,000, and no claim is made here that his duties were not well and faithfully discharged. The appellant claims that the compensation allowed was excessive, and contends that, as there is no statute fixing the compensation of receivers, the allowance should be made upon the basis of the compensation which the statute fixes for executors and administrators. But we do not think that such should be the rule, except, perhaps, in instances where the services rendered by the receiver are analogous to those rendered by executors and administrators. In such cases it would be proper for the court to be governed to some extent by the compensation allowed to administrators and executors. In arriving at the compensation to be paid the respondent, the responsibilities assumed, and the skill and labor expended, should be taken into consideration, and the remuneration fixed upon the prices usually paid for similar services. The compensation should be fair, in view of the facts of each case, and no positive rule can be laid down to govern in arriving at its determination. Under the circumstances of this case, however, after an examination of all the testimony, we are of the opinion that the amount allowed in this case is excessive. Although the position was a respon-

sible one, and required careful and able management, yet, when considered with reference to prices that had been paid theretofore for carrying on the business, and the prices paid for similar work, we think the sum should be reduced to an average of \$300 a month for the time the receiver had served up to the time of such hearing. This amount is larger than we would have originally found, and in placing it at this figure we have done so somewhat in deference to the findings of the lower court in the premises. The judgment is reversed, and the matter is remanded to the superior court, with instructions to proceed in accordance with this opinion.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

STILES, J. I concur in the decision reducing the compensation of the receiver, but do not wish to be understood as yielding my sanction to the payment of receivers of insolvents' estates by a monthly compensation. They should be allowed a gross sum commensurate with the services, whether the time employed be long or short. Monthly allowances will necessarily tend to make receivers drag out the management of the estates intrusted to them for the sake of the money each month will bring to them, thus defeating the purpose of their employment, and delaying creditors in the receipt of the pitance which may be left.

(5 Wash. 536)

#### KING COUNTY v. FERRY et al.

(Supreme Court of Washington. Jan. 20, 1893.)

ACTION ON COUNTY TREASURER'S BOND—ALTERATION IN INSTRUMENT—EXTENSION OF TERM OF OFFICE—EFFECT.

1. In an action on the official bond of a county treasurer, it appeared that, when five of the sureties had signed the bond, the name of one Y. was in the body thereof, and that they had signed it with the understanding that he was to be one of the bondsmen, but, before delivery to the county commissioners, Y.'s name was erased, and another name substituted; that the erasure could not be detected without a close inspection; and that the county commissioners accepted and approved the bond without knowledge of any of the conditions in its execution, or of the erasure. *Held*, that the sureties were liable on the bond, as they made the principal their agent to deliver the bond to the commissioners, and if he exceeded his authority, and some one had to suffer, it should be the sureties.

2. Where a county treasurer's term of office was for two years when his bond was given, and the latter recited when the term of office began, and provided that it should remain in effect "while he shall act as such county treasurer under such election," the sureties thereon are not liable for a default made after the two years expired, though made before the expiration of the treasurer's term of office, as extended for two additional months by a subsequent act of the legislature, since it must be presumed that the sureties contracted with reference to the laws in force at the date of the bond.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by the county of King against

Elisha P. Ferry, Eben Smith, and David Kellogg, executors of the last will and testament of George D. Hill, deceased; John Leary, Joseph F. McNaught, George W. Harris, Elisha P. Ferry, Sutcliffe Baxter, and Guy C. Phinney, on the official bond of George D. Hill, as treasurer of King county, to recover money converted while acting as such officer. From a judgment for plaintiff, defendants appeal. Reversed.

Hughes, Hastings & Stedman, for appellants. Ronald & Piles, for respondent.

DUNBAR, C. J. The complaint alleges that George D. Hill, at a general election held in November, 1884, was duly elected county treasurer of King county for the term of two years from and after the first Monday of January next ensuing, and that on the 12th day of November, 1884, said George D. Hill, as principal, with John Leary, Joseph F. McNaught, George W. Harris, Elisha P. Ferry, Sutcliffe Baxter, and Guy C. Phinney, as sureties, executed his bond to the county of King in the sum of \$60,000, conditioned that he would pay over all moneys received by him, and for the further discharge of his duties as such treasurer; that in January, 1885, Hill took the oath of office, and entered upon the performance of his duties as such treasurer, and continued to act as such for the full term to which he was elected, and until the 7th day of March, A. D. 1887; that, while he was so acting as county treasurer, he neglected and refused to account for, and pay over to his successor, the sum of \$29,750.86; and that he converted the same to his own use. To the allegation of the execution of the bond, the sureties, with the exception of Phinney, pleaded "non est factum." They also denied failure on the part of Hill to duly account for all sums of money which came into his hands, and to pay over to his successor all sums which he ought properly to pay. There is quite a history attached to the case, which it is not necessary, for the purposes of this opinion, to repeat here. During the pendency of the action, Hill died, and certain executors were substituted; and upon the final trial of the case below a judgment was rendered against the executors, and against the sureties on the bond, above mentioned, for the sum of \$29,143.60, with interest from March 7, 1887, which was the date of the expiration of Hill's term of office, as continued by act of the legislature of 1886. Before answering, demurrers had been interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were overruled.

We will first dispose of the merits of the case by saying that, from as thorough an examination of the testimony as it has been possible for us to make, we do not feel justified in disturbing the conclusions reached by the lower court on questions of fact. Upon the trial of the case it was claimed by the sureties that when they signed the bond the name of Henry L. Yesler was in the body of the bond, and that they signed with the understanding that

Yesler was to be one of the bondsmen. It appears that after the signing by the parties, but before the delivery to the custodian of the county, the name of Yesler was erased, and the name of Guy C. Phinney substituted. On this state of facts appearing, it is contended by the appellants that the sureties are not responsible, and that the bond, as to them, is void. The finding of the court is that the name that was erased from the body of the bond was carefully and neatly erased, and the name of Phinney placed thereon, over the name erased, and that when said bond was delivered, approved, and accepted by the commissioners, the bond was in all respects regular upon its face, and that without a close inspection the erasure could not be detected; that the commissioners had no notice sufficient to have put them, as reasonably prudent men, upon inquiry, either from the face of the bond, or from any other source whatever. An inspection of the bond, which is an exhibit in the case, fully justifies the finding. The name of Guy C. Phinney is written smoothly, and in regular order, after the word "and." It occupies the full space after the name of the preceding surety. It is in the same handwriting with the rest of the bond, evidently written with the same ink, and apparently at the same time, and with the same pen. Without one were specially looking for an erasure, it would not be noticed; and, even when attention is called to it, it is difficult to say that any other name ever occupied the space now occupied by the name of Guy C. Phinney. So that it must be considered as a change before delivery, without notice to the obligee, and as such we will discuss it.

On the question of the responsibility of the sureties in a case of this kind, there is some conflict of authority, and the case of Walla Walla Co. v. Ping, 1 Wash. T. 343, is cited, and largely relied upon to sustain appellants' views. It does not definitely appear from the opinion in that case whether the blank had been filled before or after the delivery of the bond, but it can be pretty clearly ascertained from a review of the authorities by the court, and its criticisms and arguments, that it sustained appellants' contention. But we are unable to agree with the reasoning of the court in that case. It is conceded in that case that, if the alteration had been succeeded by the delivery by the sureties, the law is well settled that the instrument signed must be considered their bond. But the contention is that it is not enough to constitute a delivery that the bond has been signed and sealed, and put out of the possession of the signer, and that, where such bond has been changed contrary to the understanding at the time it was signed, the delivery to an agent or a co-obligor ought not to be construed the true technical delivery. But it seems to us that the pertinent question is, is the party who makes the final delivery to the obligee the agent of the surety, or is he the agent of the obligee? If he is the agent of the surety, then the surety, under the familiar principle that the act of the agent is the act of the principal, is bound; for the al-

teration has been succeeded by the delivery by the sureties, and the law in that case, as is said by the court in *Walla Walla Co. v. Ping*, supra, "is so unquestionably settled, that the instrument sued must be considered their bond, that it is idle to cite authorities." Why should not a principal in a bond be held to be the agent of the sureties, instead of the county, in this case? He can in no sense be held to be the agent of the county in furnishing his own bond. It would be against the policy of the law, and would defeat the very object which the law has in view in providing for the bond. He is clothed with no authority by the county, but, on the other hand, other officers are especially authorized to pass upon the sufficiency of his bond in every particular, and are made the agents of the county for that purpose. His interest, as far as the bond is concerned, might be said to be antagonistic to the interests of the county. There is no confidence between the treasurer and the county in this respect. But the sureties, on the other hand, by their very act of delivering to the principal their executed bond, to be filed with the proper authorities, establish a relation of confidence and trust,—the relation of agency. They have certainly made him an agent for the purpose of delivering the bond that they executed. They have held him out as an agent to the county, and if he has exceeded his authority, and some one has to suffer, it should be the ones who intrusted him with their business, and who said, by their acts, that he could be relied upon to carry out their intentions, and not the county, which is not in any way responsible for him. The law provides no way by which the county can summon the sureties to appear, and make an examination of the bond, for the purpose of ascertaining whether all the private understandings between the principal and the sureties have been carried out; and yet, without some such investigation is made, under the appellants' theory, there would be so many pretexts for avoiding bonds that the taking of such obligations would be little less than a farce. On the other hand, the sureties have it in their power, by the observance of the ordinary rules of prudence, to see that their agreement with the principal is expressed in the bond that is filed. Of course, if there is anything on the face of the bond, when it is delivered, to excite the suspicion of the obligee that the bond has been tampered with, or sufficient to put a prudent person on his guard, he ought to be held bound to make an investigation before accepting the bond. But to hold the obligee responsible where the bond is good on its face, and where he has no notice until after the default has occurred, is, in our judgment, not only wrong in principle, but is also opposed to the great weight of authority; and a brief review of the authorities cited by the appellants will show that, on principle, they nearly all sustain this view.

Section 44 of *Murfrees on Official Bonds* is as follows: "If a surety executes a bond, and delivers it to the principal obligor, upon conditions agreed upon between

them, and with instructions to fill blanks or procure other sureties, he makes the principal obligee his agent, and is bound by his acts, done within the scope of his apparent authority. Unless the obligee has notice of the conditions and instructions, he cannot be bound by them. The surety confides in the principal. The obligee does not." Section 53 of the same book is but a repetition of the doctrine announced in section 43, viz. that, where the obligee has notice of the condition, it cannot recover on the bond, and that it is the duty of officers intrusted with the authority to take and approve official bonds to use ordinary care and prudence to protect the security, as well as to see, in the interests of the public, that the bond is valid, and the security sufficient. Section 756 states the English rule as being that "the alteration is fatal to the validity of the instrument if made after execution, and while in possession or under control of the party seeking to enforce it," which does not affect the case under consideration. Section 760 cites cases sustaining the rule that the validity of the bond would be abrogated if, after its execution, one of the signatures is erased; but an investigation of the cases cited by the authority, which are also the cases cited by appellants, reveals the discriminating fact that there was sufficient notice given to charge the obligee with the duty of investigation. Thus, in *Smith v. U. S.*, 2 Wall. 219, the court, while holding the surety harmless, also, in the argument, distinguished it from cases where no notice of the alteration had been given to the obligee. It says, in stating the case: "Materiality of the alteration is not denied, and the plaintiffs admit that it is apparent on the face of the instrument." The instrument showed on its face that it had been signed by one Hoyne as surety, but that his name had been erased after the execution by the other surety. The instrument showed this on its face, and the judge who had approved the bond testified that it had presented the same appearance when it was presented to him for approval. The court also says: "It is claimed by the plaintiffs that it left the liability of all concerned precisely as it would have stood if the person whose name was erased had only promised to sign, and had not fulfilled his agreement," which is the case at bar, and which condition of things the court in that case, at least inferentially, holds would not release the sureties. In *State v. Graig*, 58 Iowa, 238, 12 N. W. Rep. 301, the surety whose name was afterwards erased had actually signed the bond, and the signature itself was erased by the drawing of two lines through it with purple ink; differing from this case in the two essentials of being actually signed, and in the notice given to the obligee. *McCramer v. Thompson*, 21 Iowa, 244, was a case where a promissory note had been changed. The signing had been actually done, and the payee had notice. The distinguishing feature of notice was commented upon by the court, for it said: "When presented to the payee, one of the names was obliterated or erased. This could be seen; was seen, and



talked about. \* \* \* The note then being in this condition, he was put upon inquiry. Thus situated, did he manifest the diligence required by law? Thus it will be seen that the decision was based squarely on the ground of want of proper inquiry after notice. *Hessell v. Johnson*, (Mich.) 30 N. W. Rep. 209, was decided on the express ground that sufficient notice had been given to the obligees to put them on inquiry. In *Sharp v. U. S.*, 4 Watts, 21, the act of congress authorized a bond with two or more sureties. This act was recited in the bond, and the court held that the sureties had a right to believe that it was the intention of all the parties that the bond was to be taken in strict conformity with the act, and that the other surety, whose name was on the bond when he signed, would also execute the bond. In this case, also, the government had notice that the bond had not been executed by all the sureties mentioned in the bond. *Allen v. Marney*, 65 Ind. 399, cited by appellants, as we read the case, squarely sustains the rule laid down by us above. There the court decides that, where the surety on the appeal bond trusted the bond to the principal, the principal becomes the agent of the surety, and the officer approving the bond becomes the agent of the other party. The sureties were discharged, but upon the ground that sufficient notice had been given, by the appearance of the instrument itself, to put the obligee upon inquiry. The court quotes approvingly a comment by Judge Redfield, on *Insurance Co. v. Brooks*, reported in 3 Amer. Law Reg. (N. S.) 402, where that author, in a review of this subject, among other things, says: "That one who signs a bond, as surety, upon the assurance of his principal that he shall also have other responsible co-sureties, which are never procured, and the bond, nevertheless, delivered, is deceived, and defrauded of his indemnity, no one can question. But whether he shall himself bear the loss, or visit it upon the obligee, is quite a different question. And it seems to us, upon principle, that where there is nothing upon the face of the paper indicating that other co-sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest to any extent upon the obligee." In *Ward v. Churn*, 18 Grat. 801, the same distinction as to notice was maintained, the court saying: "It is not necessary to consider this question in respect to instruments which are apparently, on their face, complete and perfect, according to the intention of the parties. It is only necessary to consider it in reference to instruments such as that in the present case, which indicate on their face that they are not complete, and that it was intended that other signatures should be affixed." *Fletcher v. Austin*, 34 Amer. Dec. 698, was a case where the names of obligors appeared in

the body of the bond who did not execute the same; and the court held that sufficient to put the obligee on inquiry, to ascertain if those who did sign had consented to its being delivered without the signatures of the others. In *Hagler v. State*, (Neb.) 47 N. W. Rep. 692, the surety Moffitt had signed the bond before the defendant signed and executed it. Moffitt's name was afterwards erased by drawing a pencil line through it. The court said that the alteration of the bond was such as to attract the attention of the reader, and that it was the duty of the officer who approved it to decline to accept it in its altered condition. The court, in concluding, says: "The principle established by the adjudicated cases is that where an official bond is altered after the same has been signed, but before its delivery and approval, by the erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released, who had no knowledge of, or did not consent to, the alteration, nor ratify it;" citing the cases we have reviewed above. In *Pawling v. U. S.*, 4 Cranch, 219, the obligee had notice of the fact that the additional securities who did not sign were named in the body of the bond. *Linn Co. v. Farris*, 52 Mo. 75, is a very meager case; and it does not appear from the opinion whether or not the bond was regular on its face, and the question of notice is not discussed. But that case is criticised in *State v. Potter*, 63 Mo. 212, a well-considered case, where it is held that the agreement of a surety with his principal that the latter shall not deliver a bond till the signature of another be secured as a co-surety will not relieve the surety of his liability on the bond, although the co-surety is not obtained, where the obligee takes the bond without notice; and such is now the well-established rule in Missouri. *Linn Co. v. Farris*, supra, is the only case cited by appellants where it does not appear that the obligee had sufficient notice to warn him that the agent of the sureties had exceeded his authority, by changing the conditions agreed upon between him and the sureties, sufficient to put him upon inquiry; and this, we think, is the only logical ground upon which the sureties can be exonerated at all. The obligee, in such a case having notice of the fraud perpetrated upon the sureties, should be estopped from recovering the benefit of it. But, if no such notice is given to the obligee, then the sureties should be estopped from transferring the burdens resulting from loose methods of business, and their misplaced confidence in unworthy agents, to the shoulders of others, who are in no way to be blamed, and who have been in no way instrumental in bringing about the loss.

We have especially reviewed all the cases cited by appellants, on the theory that they have presented the most favorable cases that can be found tending to sustain their contention. Some of the old English authorities sustain the doctrine contended for by appellants on the ground, which cannot be disputed as an abstract proposition of law, that a deed or instrument under seal, to be binding, must be in

writing, signed, sealed, and delivered by the parties, and that, if any change has been made in the instrument, it is not the instrument which the parties made, and that if it is given to another party after execution, to be delivered upon certain conditions being performed, it is simply in escrow. But, as we have above said, this ignores the doctrine of agency in cases of this kind, and does not really conflict with the principle that these confidential conditions, to be made effective, must be brought to the notice of the party who is to be affected by them; and the great weight of modern authority sustains the rule laid down by the supreme court of the United States in *Dair v. U. S.*, 16 Wall. 1, that a bond perfect upon its face, apparently duly executed by all whose names appear there-to, purporting to be signed and delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons, who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced, upon the faith of such bond, to act to his own prejudice. Many cases have gone beyond this in holding sureties responsible, but few, if any, of the modern cases have relaxed the rule for the purpose of exonerating them. The rule laid down in *Dair v. U. S.*, supra, was affirmed by the supreme court of the United States in *Potter v. U. S.*, 107 U. S. 126, 1 Sup. Ct. Rep. 524, the court there holding that the surety relied upon the good faith of the principal; that he clothed him with apparent power; and that he is, in equity, estopped from claiming, as against the government, the benefit of his private instructions to his agent. The case of *State v. Peck*, 53 Me. 284, may be said to be the leading American case on this interesting question, and a case the reasoning of which has since been closely followed and adopted by the supreme court of the United States. The authorities are reviewed with discrimination, and the result announced is in harmony with the quotation from Chancellor Kent, that "whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power, though if he pursues his power, as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power." In fact, this is now the almost universal American holding; the later cases, in many instances, directly abrogating their early decisions. Thus the doctrine announced in *People v. Organ*, 27 Ill. 29, which is a case generally cited to support the theory contended for by appellants, was substantially overruled, or, at least, the principles upon which it was based were overruled, in *Smith v. Board*, 59 Ill. 412; *Bartlett v. Board*, Id., 364; *Comstock v. Gage*, 91 Ill. 328; and in *City of Chicago v. Gage*, 95 Ill. 593. In an opinion reviewing all the authorities, the case of *People v. Organ* was specially mentioned, and the doctrine on which it was based was condemned, and the rule an-

nounced as enunciated in *State v. Peck*, 53 Me. 284. All these later cases are based upon the doctrine of *Taxira v. Evans*, referred to in 1 Anstr. 228,—a case which to-day is pretty generally conceded to sustain principles in harmony with public policy, and the application of which compels the burden of loss to fall upon the party who, by his actions, and by the apparent authority with which he clothed his agent, has made the loss possible. The following, among other cases which we have examined, sustain this contention: *Brandt*, Sur. § 603; *Inhabitants, etc., v. Huntress*, 53 Me. 59; *Cooper v. De Mainville*, (Colo. App.) 27 Pac. Rep. 86; *White v. Duggan*, 140 Mass. 18, 2 N. E. Rep. 110; *Mathis v. Morgan*, 72 Ga. 517; *Tidball v. Halley*, 48 Cal. 610; *Jordan v. Jordan*, 10 Lea, 124; *Taylor Co. v. King*, 73 Iowa, 153, 34 N. W. Rep. 774; *Hall v. Smith*, 14 Bush, 605; *Ordinary v. Thatcher*, 41 N. J. Law, 403; *Cutler v. Roberts*, 7 Neb. 4; *State v. Pepper*, 31 Ind. 76; *Butler v. U. S.*, 21 Wall. 272; *Nash v. Fugate*, 24 Grat. 202; *Trustees v. Shelk*, 119 Ill. 579, 8 N. E. Rep. 189; *Harvey v. State*, 94 Ind. 161; *Lucas v. Owens*, (Ind. Sup.) 16 N. E. Rep. 196; *Carroll Co. v. Ruggles*, 69 Iowa, 269, 28 N. W. Rep. 590; *Belloni v. Freeborn*, 63 N. Y. 383; *Fullerton v. Sturges*, 4 Ohio St. 535; *Insurance Co. v. Clinton*, 66 N. Y. 326; Section 279, *Mechem, Pub. Off.*, and authorities there cited. In fact, the rule not only rests securely upon the law of agency, which makes the principal responsible for the acts of his agent, regardless of private understandings, when he has held the agent out to the world as possessing general powers over the matter in hand; but it also rests on the equitable doctrine that, where two innocent parties suffer, the injury must be sustained by the one who put it in the power of another to do the injury; and for these reasons it ought to be, and is, almost universally, sustained.

But there is another proposition raised in this case that is vastly more troublesome. Under the law existing at the time Hill was elected, and at the time the bond was executed, the treasurer's term of office expired on the first Monday in January, 1887; but on February 4, 1886, by legislative enactment, his term of office, in common with the other county officers in the county, was extended to the first Monday in March, 1887. It appears from the testimony, and is so found by the court, that \$22,064.34 of the amount of delinquency came into his hands after the first Monday of January, 1887; and the contention of the appellants is that the sureties, in any event, are not responsible for that amount; that the sureties of an officer who is chosen periodically, and to hold an office until his successor is chosen and qualified, are bound for the period only for which the officer was chosen. The importance of this case, not only as it affects the rights of the sureties, but as affecting the public in the administration of the different departments of the government, and the necessity of guarding the public funds as far as is consistent with private rights, has led us to an extended investigation of the authorities bearing on the subject; and we have examined them

both with reference to number, and cogency of reasoning. The authorities cannot be reconciled, some courts holding that the bond is made in contemplation of the law, and must be construed with reference to the law governing the office, and where the law provides that the term of office shall continue until the successor is elected and qualified, which is the law governing this case, that the bond is given, not only for the statutory term, but for the further time which may elapse between the end of the expressed statutory term and the time when the successor is elected and qualified; that the law becomes incorporated into the bond; that the sureties are bound to know that his right to the office may extend beyond the year; and that this possible extension is taken into consideration and provided for in the bond. Such is the doctrine of *State v. Berg*, 50 Ind. 502; *Commonwealth v. Drewry*, 15 Grat. 1; *Pickering v. Day*, 3 Houst. 474; *State v. Kurtzborn*, 78 Mo. 98; *Thompson v. State*, 37 Miss. 518; *McAfee v. Russell*, 29 Miss. 84; *Hughes v. Smith*, 5 Johns. 168; *People v. Beach*, 77 Ill. 52; *Kindley v. State*, 7 Blackf. 589; *Bank v. Rogers*, 7 N. H. 21; *State v. Daniel*, 6 Jones, (N. C.) 444. Some of these are cases arising on official bonds, and some of them on bonds of corporation officers, and there have been attempts by some courts holding the opposite doctrine to discriminate between them. But, while there may be discriminating circumstances in some of them, they are all decided on the same general principles enunciated above, and generally rely on the same early cases to sustain them, and must, therefore, be conceded to logically sustain respondent's position. But after a great deal of deliberation, and, we must admit, some hesitation, we are constrained to adopt the opposite view, which is amply sustained by the authority, and we think by better reasoning. No consideration of the interests of the public will justify a court in extending by construction the obligation of a citizen under his contract, beyond the scope of its natural import. The contract which embodies this obligation, like any other contract, must be construed to give effect to the intention of the parties; and that intention is to be gathered from the language employed, and the circumstances surrounding the execution of the instrument. Now, what were the circumstances surrounding the execution of this bond, and what length of time would these bondsmen naturally think they were contracting with reference to? The correct answer to the last question determines their liability. There need be no artificial rules of law applied. It is a simple question of intention, gathered from the language of the contract, read in the light of the surrounding circumstances. At the time this bond was given, the term of office of the treasurer, as provided by law, was two years. It is argued that the bondsmen entered into their obligation in view of the possible modification of their liability by the legislative assembly, and with notice that the legislature would have a right to continue the incumbent in office beyond the term for which he was elected. So far as the first proposi-

tion is concerned, the legislature would not have any right to pass a law that would change the terms of the contract, or in any way impair its obligation; and, so far as the second proposition is concerned, while the sureties might be held to take notice that the legislature could extend the term, they would not be required to take notice that the legislature, in such an event, would make no provision for the giving of a bond by the treasurer for the extended term. The sureties had a right to take notice of the law as it existed, and to contract with reference to the law as it existed; that is, the law which would naturally be in their minds when they entered into the contract. And the idea that they would at such a time enter into a speculative calculation of what the law might be in the future, and shape their contract with reference to such possible change, is a strained one. The law at that time made the office one of a definite term. That term was two years. And the sureties had a right to, and no doubt did, take that law into consideration, and that was the law that was imported into their contract. There is no doubt that the central idea was that the term was for two years. This was the law. This was the ordinary state of affairs, and the ordinary time for which bonds for county officers were given. A man might willingly go on a bond for two years who would hesitate, or absolutely refuse, to go on for a longer period. So far as the term, "until his successor is elected and qualified," is concerned, while it might have great significance when applied to the officers of private corporations, it can have none here: for the law provides when the officer elect shall qualify, and, if he does not qualify within the time prescribed, the commissioners can declare his office forfeited, and appoint another officer. Many of the courts hold that the bond will remain in force for a reasonable time,—a sufficient time in case of accident, surprise, or emergency to permit the authorities to provide for other security; but there is no question of reasonable time in this case. In this instance, when the term of office for which the bond was given had expired, another bond should have been required; and if the authorities have neglected their duty, or the legislature has inadvertently failed to make provisions for a proper bond, it is inequitable and unjust to make the sureties for the original term responsible for such neglect and inadvertence. It is well said in many of the cases that, if the sureties can be held responsible for two months longer than the stated term, they can be held for two years, or for any indefinite term; and no such construction can be placed upon this bond without doing violence, not only to the language of the bond itself, but to the spirit of the law which provides for it. But it is stated that the language of this bond is peculiar. Inasmuch as the bond stated when the term of office commenced, but does not state when it ends, and further provides that it shall remain in effect "while he shall act as such county treasurer under such election," we do not think there is any sub-

stantial difference between this and the ordinary bond. At the time the bond was given, the treasurer's term of office expired on the first Monday in January, and the sureties must be presumed to have contracted with reference to the law at that time, and that they had that time in mind when they used the words "under such election," and not the time that he was acting under the subsequent act of the legislature. In other words, they are presumed to have contracted with reference to laws passed antecedent to the date of the bond; and it is almost universally held that expressions of this kind in bonds will not be construed beyond the liability imposed by the law, unless it is clearly and explicitly made manifest that the sureties intended that their obligation should reach beyond the term prescribed by the law, where the term is definite.

In *Peppin v. Cooper*, reported in 2 Barn. & Ald. \*431, where the office of collector under the act of parliament was an annual office, and the bond, after reciting the appointment of H. W. to be collector under the act, was continued "for the due collection by H. W. of the rates and duties at all times thereafter," it was held that the due collection of the rates for one year was a compliance with the conditions of the bond. So, in *Lord Arlington v. Merriicke*, 2 Saund. 411, the general terms were construed to be restricted by the recital stating an appointment for a specified time. In the case of *Waterworks Co. v. Atkinson*, 6 East, 507, the subsequent stipulation of the bond was, "during the continuance of his employment and so long as he should continue to be employed." These words were held not to extend the responsibility beyond the term. And as sustaining the proposition that when the office is in fact for a specified term, although not so recited in the bond, still the bond only covers the term specified; we cite *Wardens of St. Saviour's v. Bostock*, 2 Bos. & P. (N. R.) 175, and *Hassell v. Long*, 2 Maule & S. 363, and such, we think, is the universal English holding; and while this bond does not recite the ending of the term, it recites the commencement of the term, and is as much a reference to the term that existed as if it had been more minutely described. One of the earliest cases decided in the United States was *Bigelow v. Bridge*, 8 Mass. 274. The bond in that case was as follows: "The condition of this obligation is such that whereas the above-bounden Ebenezer Bridge is chosen treasurer of the said county of Middlesex, and hath taken upon him that trust; now, therefore, if the said Ebenezer Bridge shall faithfully discharge the duties of the office of treasurer of said county, and account for all sums of money which he shall receive for the use of the said county, then this obligation shall be void; otherwise, to remain in full force." The provision of the statute of Massachusetts at that time was substantially like ours, viz. that "the county treasurer shall continue in the said office for the term of one year, and until some other person shall be chosen and qualified," with a provision for an annual election. It will be observed that the bond was absolutely with-

out limit as to time, and, if literally construed, its obligatory force would have been indefinitely extended; but the court held the bond good only for the year, and in rendering the opinion, after referring to the statute, said: "But, the choice of county treasurer being by that statute annual, it is apparent that the bond required by it was intended for the protection of the public so long only as the person chosen should continue in office by virtue of such election." The securities of an officer appointed for a limited time are only liable for his official acts during the term for which he was appointed. *Moss v. State*, 10 Mo. 338. The same doctrine is announced in *State Treasurer v. Mann*, 34 Vt. 371; *Welch v. Seymour*, 28 Conn. 387; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *County of Wapello Co. v. Bigham*, 10 Iowa, 39; *Dover v. Twombly*, 42 N. H. 59; *Insurance Co. v. Clark*, 33 Barb. 196; *Patterson v. Freehold*, 88 N. J. Law, 255; *Miller v. Stewart*, 9 Wheat. 680,—and many other cases, too numerous to enumerate, and all based upon the doctrine announced in the English cases we have cited, and the case of *Bigelow v. Bridge*, supra.

There is some contention in this case as to what the rule is in California. In *People v. Alkenhead*, 5 Cal. 106, it was decided that the sureties on the bond of an officer for one term should not be liable for any act done by him after election to a second term. *Brown v. Lattimore*, 17 Cal. 83, was on a dead level with the case at bar. *Brown* was elected for two years, and gave a bond for the performance of his duties for the period for which he was elected, and until the election and qualification of his successor. Under the law in force at the time his bond was given, his term would have expired on the first Monday in October, 1859, but the legislature extended his term to the first Monday in January, 1860. It was held that the sureties were not responsible for the official conduct of the treasurer during the time for which the term was extended; that the legislature had no power to extend their liabilities beyond the prescribed term of the contract. Says the court: "They are bound, it is true, until the qualification of their successors; but, if the legislature had not interposed, the period of liability would have been terminated by such qualification on the first Monday in October, 1859. So far as they are concerned, the effect of the extension was to create a new term, to commence at that time, and continue until the first Monday in January, 1860. For the conduct of the treasurer during this term, they did not undertake to be responsible, and cannot, therefore, be held." And the decision was based on the principles enunciated in *State v. Alkenhead*, supra. But it is contended by appellants that *Brown v. Lattimore* has been overruled in *Placer Co. v. Dickerson*, 45 Cal. 12, and *Enterprise Co. v. Allen*, 67 Cal. 505, 8 Pac. Rep. 59. *Brown v. Lattimore* was not referred to in *Placer Co. v. Dickerson*, and we do not think it was the intention of the court to overrule it, or to overrule any principles announced in it. The latter case was not a

case where a new term was created by the legislature, which was the point decided in *Brown v. Lattimore*, but it was a case where the incumbent refused for one day to turn the office over to his successor. It was by the unlawful act of the principal that he held the additional day, and the court said that the responsibility of the defendants for the official acts of the treasurer, under the circumstances, was the same as though the latter had, by the expiration of his term, continued in the office pending proceedings by quo warranto to oust him from it, and in that case their liability would be unquestionable. *Enterprise Co. v. Allen* decided that the obligations of the bond in that case, which was a private corporation, could not be extended; and it based its decision on *Bigelow v. Bridge*, and *Hubert v. Mendheim*, 64 Cal. 213, 30 Pac. Rep. 633. By referring to *Hubert v. Mendheim*, it will be found that the court decided that an official bond is given for, and has reference to, a particular official term, and the demurrer to the complaint in that case was sustained because it did not state that the breach occurred during such term; and the doctrine announced in *State v. Alkenhead* and *Brown v. Lattimore* was approved and reaffirmed. The case of *Priet v. De La Montanya*, (Cal.) 22 Pac. Rep. 171, does not undertake to change the rule, so that *Brown v. Lattimore* must be considered the settled law in California. We think there is nothing in the bond in this case to take it out of the rule announced in the cases we have cited; and, as said by the supreme court of California, quoted above, that, as to these sureties, the extended term was a new term, for which they are in no way responsible.

We have examined the cases cited by respondent which hold that, where additional duties are imposed upon the officer,—as, for instance, where additional funds are made by law to come into his hands, the sureties were held responsible for the safe keeping of such funds. But an entirely different principle is involved in such cases, and they can have no bearing on the case at bar. Neither can the position of the respondent be controverted, that the legislature has constitutional authority to change the statutory term of office; but that authority does not carry with it the right to extend the operations of a contract, or change its liabilities.

Whether or not the respondent's contention be correct, that the plea of non est factum does not put in issue the question of the alteration of the bond, is not now necessary to determine. But we are of the opinion that, even under the Code practice, the answer in this case is sufficient to raise the question of defendants' liability during the extension of the term.

Some strong cases are cited by respondent from Indiana, but those decisions are based on a sweeping statute, which provides that "all defenses, except the mere denial of the fact alleged by the plaintiff, shall be pleaded specially."

The extreme length of this opinion renders impracticable an extended review and analysis of the authorities on this ques-

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tion; but, when once we recognize the legal proposition that the obligations of the bond do not reach to the extended term, the court will take notice of the statutory law, which is a general one, and would not allow, on its own motion, a judgment for the defalcation occurring during that time, even if the defendant did not answer at all, any more than it would allow judgment for defalcation during two terms of the officer, when the complaint showed on its face that the action was on a bond given for one term. In other words, the plaintiff could not take judgment for more than its complaint showed it was entitled to under the law.

The respondent argues that, even if the court should hold that these matters could be admitted under this plea, they are bad pleas, because they are joint pleas, and are no defense to some of the defendants, and being joint pleas, and bad as to some, they are bad as to all. That principle has no application to this case, for we hold that none of the defendants can be held responsible in this action for defalcations occurring during the extended term. The principal is no doubt responsible, in a proper action, but this is an action on a joint bond; and the liability of all the parties to the bond, so far as the bond itself is concerned, terminates at the same time. We have examined the other errors alleged by the appellants, but do not sustain them.

Considering the time that has been devoted to this case, both in this court and the court below, and the great amount of costs which a new trial would necessarily involve, we deem it advisable, under the authority conferred on this court by section 1429 of the Code of Procedure, to decree that if the respondent, within 30 days from the filing of this opinion, shall file with the clerk of this court its agreement to remit the sum of \$22,064.34 from the judgment of \$29,143.60 obtained by it in the court below, the remainder will be allowed to stand; but, upon its failure so to agree, the judgment will be reversed, and the cause remanded for a new trial. The appellants will, in any event, recover their costs of this appeal.

ANDERS, STILES, and SCOTT, JJ., concur. HOYT, J., did not sit.

(23 Or. 556)

#### STATE v. SHAFFER.

(Supreme Court of Oregon. March 7, 1893.)

CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY—CONSTITUTIONAL LAW—HOMICIDE—DYING DECLARATIONS—INSTRUCTIONS.

1. Hill's Code, § 206, authorizing the court to discharge a jury when there is no probability of their agreement, is not in conflict with Const. art. 1, § 12, providing that no person shall be twice put in jeopardy for the same offense, and is valid.

2. The court, in its discretion, under Hill's Code, § 198, may keep the jury together, or permit them to separate, before the submission of the cause to them.

3. It is discretionary with the court whether or not the preliminary inquiry necessary to the admission of dying declarations of the in-

jured person, in a trial for murder, shall be conducted in the presence of the jury.

4. Where the dying declarations admitted in evidence were made at 9 o'clock in the morning, evidence of declarations made at 3 o'clock in the afternoon of the same day, expressing a hope of recovery, are inadmissible, as immaterial.

5. Where the court has admitted a statement as the dying declaration of deceased, there is no error in referring to it as such in his charge.

Appeal from circuit court, Josephine county; Lionel R. Webster, Judge.

Cyrus Shaffer was indicted for murder in the first degree. He was convicted of murder in the second degree, and appeals. Affirmed.

Smith & Colvig, for appellant. Henry L. Benson, for the State.

LORD, C. J. The defendant was indicted for murder, in the first degree, of one Jacob Moll, to which, upon his arraignment, he pleaded not guilty. A trial was had before a jury, which, being unable to agree upon a verdict, was discharged by the trial court. A second jury was ordered impaneled, and, when the defendant was arraigned before them for trial, his counsel filed a motion to discharge the defendant, on the ground that he had once been in jeopardy for the same offense. The court overruled the motion. Upon the trial the jury found the defendant guilty of murder in the second degree, and the court sentenced him to the penitentiary for life. The first error assigned is the overruling of said motion. The record properly discloses the inability of the first jury to agree upon a verdict before they were discharged by the court. The contention is that the trial court had no authority to discharge the first jury sworn in the case, without the consent of the defendant, because of their inability to agree upon a verdict. It is conceded that the court, under section 206, Hill's Code, is authorized to discharge a jury when it satisfactorily appears that there is no probability of their agreement; but it is claimed that, in so far as this section confers such power on the court, it is in conflict with section 12, art. 1, of the constitution, which provides that "no person shall be put in jeopardy twice for the same offense." There is some diversity of opinion and practice in the courts upon this subject. In *Com. v. Cook*, 6 Serg. & R. 577, it was held that the court, without the consent of the prisoner, had no power to discharge the jury because they had not agreed, and said they could not agree, upon a verdict; and the doctrine of this case was expressly approved in the subsequent case of *Com. v. Clue*, 3 Rawle, 498. There are some other cases sustaining the same view. But the inability of the jury to agree is now generally regarded as such a necessity as will warrant the discharge of the jury, and such discharge will be no impediment to a second trial for the same offense. Mr. Bishop says that "in England and Ireland, at present, and in the greater part of our states, when a reasonable period for discussion and reflection has been given to the jury, and they have,

in open court, declared themselves unable to come to an agreement, and the judge is satisfied of the truth of the declaration, they may be discharged, and the prisoner held to be tried anew." Bishop, *Crim. Law*, § 1033; *Ex parte McLaughlin*, 41 Cal. 216. We think the authority conferred by our statute upon courts of justice to discharge a jury from giving a verdict whenever it shall satisfactorily appear, in their opinion, that there is no probability of their agreement, is valid, and sustained by the weight of authority and practice. But "the power," as Mr. Justice Story says, "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases, especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of their discretion rests in this, as in other cases, upon the responsibility of the judges, upon their oaths of office." *U. S. v. Perez*, 9 Wheat. 581.

The next objection is that the court allowed the jury to separate during the trial of the defendant. This is a matter within the discretion of the court, who may permit the jury to separate pending the trial upon properly admonishing them touching their duties. It is expressly provided by our Code that the jury may be kept together, in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; but in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion therein until the case is finally submitted to them. Section 198, Hill's Code; *Stephens v. People*, 19 N. Y. 549.

The next assignment of error is, that the court erred in overruling the objection of the defendant to the dying declarations of the deceased. The ground of the objection is that no sufficient foundation had been laid for their introduction. The rule is well settled that, to render dying declarations admissible evidence, it must appear that they were made by the person injured, under a sense of impending death, and without any expectation or hope of recovery. 1 Greenl. Ev. § 158; *Rose. Crim. Ev.* 25. The admissibility of dying declarations is always a question for the court, as a preliminary inquiry, to ascertain whether the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery. But the courts are strict in requiring that, before admitting them, it shall be made clearly to appear that the declarant was in fact at the time under the sense of impending dissolution, and entertained no hope of recovery. *Swisher's Case*, 26 Grat. 970; *State v. Kilgore*, 70 Mo. 553. The circumstances proven in this case before the court come within this rule, and, therefore, the proper foundation was laid for the introduction of the dying declarations.

In the case at bar it appears that the trial court conducted such preliminary inquiry out of the presence and hearing of the jury. At the argument some question was raised whether this was the proper practice. In some jurisdictions it is considered good practice to have such preliminary examinations conducted out of the hearing of the jury, while in others it rests in the discretion of the court whether such examinations shall be conducted in or out of the hearing of the jury. In *Swisher v. Com.*, *supra*, the witnesses were examined by the judge in the absence of the jury. In *Johnson v. State*, 47 Ala. 10, the evidence was heard by the judge in the presence of the jury, who were cautioned not to regard it in forming their verdict. In *People v. Smith*, 104 N. Y. 493, 10 N. E. Rep. 873, it was held that such preliminary examination may, in the discretion of the court, be conducted in the presence of the jury, Finch, J., saying that "during the trial of the preliminary issue the jury stood merely in the attitude of spectators. They had no concern with it, and knew from the statements of the court that they had not. They understood that out of its result something might come before them as evidence, or nothing, and that, until the judge ruled, the facts developed were for his consideration, and not for theirs." In *Doles v. State*, 97 Ind. 555, it was held that it is within the discretion of the trial court whether it will allow the state to introduce such preliminary proof in the presence and hearing of the jury, or will send the jury out during the introduction of such proof. We think this is a matter addressed to the discretion of the trial judge, who, being cognizant of all the circumstances, is better able to decide it.

The next error assigned is the refusal of the court to allow the witness R. T. Armstrong to answer a certain question propounded to him by counsel for the defendant. The record discloses that R. T. Armstrong, a witness for the defendant, testified that he was present, with W. F. Horton and Dr. Flannigan, at the bedside of Jacob Moll, about 3 o'clock Monday afternoon,—the day before Moll died; that he heard a conversation between Moll and Dr. Flannigan about the result of Moll's wound, and his hope of recovery; when the counsel for the defendant asked the witness, "Please state what that conversation was," to which question the prosecuting attorney objected, on the ground that it was irrelevant and immaterial, which objection was sustained by the court, whereupon the defendant, by his counsel, stated to the court that he proposed to show by this question "that the deceased expressed a belief that he was going to recover at that time, and immediately after the statement related by Dr. Flannigan was made." The ground of objection, therefore, to the ruling of the trial court is that the answer to the question would have shown, at the time the declarant made the dying declarations to which Dr. Flannigan testified, that he entertained hope of recovery. But the record discloses that the dying declarations which were admitted in evidence

were made between 9 and 10 o'clock Monday morning, while the conversation by which it is offered to prove that the deceased expressed a belief that he was going to recover occurred between 3 and 4 o'clock Monday afternoon. There is nothing to show that the witness Armstrong was present in the morning when the dying declarations were made by Moll to his physician, Dr. Flannigan, nor any evidence tending to show that he entertained at that time any expectation or hope of recovery. Manifestly, the facts upon which this objection is based are not supported by the record; and, unless there is some other reason for the exclusion of the testimony, there was no error. The rule of law undoubtedly is that the credibility of dying declarations is to be determined by the jury, in view of all the circumstances under which they were made; but expressions of the injured party, indicating hope of recovery, made several hours after the dying declarations, or upon some subsequent and different occasion, do not relate to, or form part of, the circumstances under which the dying declarations were made, unless they are in some way shown to be connected therewith. The fact that the declarant, at some time subsequent to the making of the dying declarations, may have expressed some hope of recovery, in no way tends to show that he entertained any hope or expectation of recovery when the dying declarations were made. The later circumstance is a separate and distinct fact or occurrence, which, standing alone, does not impeach or contradict the dying declarations or show, when the declarant made them, that he entertained hope of recovery. It is no doubt true that, when dying declarations have been admitted in evidence, it is competent to show that the deceased made statements concerning the transaction conflicting with such dying declarations. The accused has the right to impeach the credit of the deceased by showing that he made contradictory statements as to the homicide, and its cause. "Statements by the defendant," says Mr. Bishop, "contradictory of dying declarations, and contradictions in the latter, may be shown, to detract from their weight with the jury." 1 *Bish. Crim. Proc.* § 1209. But, for the reason suggested, it is not perceived how the fact sought to be proved tends to impeach or contradict the dying declarations. For similar reasons, there was no error in allowing Dr. Flannigan to answer the other question propounded to him. It was not connected with any of the circumstances under which the dying declarations were made, so as to indicate the declarant's state of mind, or to impeach the fairness of Dr. Flannigan's statement of such declarations.

It is further objected that the court, in one of its instructions, refers to the statement of the deceased, detailed by the witness Dr. Flannigan, as dying declarations. By this instruction it is claimed that the trial court invaded the province of the jury, by taking from them the right to determine whether the statement was made under a sense of impending death. The court merely referred to the statement as



"the dying declaration of Jacob Moll, deceased." It is not perceived, after the court admitted the statement as the dying declaration of the deceased, that there was, or could be, any error in referring to it as such.

Upon the whole, we are unable to discover that there was any error.

The judgment must be affirmed.

(23 Or. 541)

**BROWN et al. v. FARMERS' SUPPLY DEPOT CO. et al.**

(Supreme Court of Oregon. March 7, 1893.)

**CORPORATIONS—EQUITABLE MORTGAGE.**

Where a written instrument which recites that a corporation has mortgaged certain property, but which does not state the names of the officers of the corporation, nor that it has authorized the execution of such an instrument, is executed by one B., president, and one C., secretary and treasurer, sealed with their seals, and acknowledged by them as their act, such instrument will not be held to be an equitable mortgage, in the absence of allegations and proof that it was attempted to be executed by the corporation, or its authorized agents, as security for an obligation of the corporation.

Appeal from circuit court, Polk county; Reuben P. Boise, Judge.

Action by Jacob Brown and another against the Farmers' Supply Depot Company and J. L. Hartman to foreclose a mortgage. From a judgment for defendant Hartman, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by BEAN, J.:

This is a suit against the Farmers' Supply Depot Company and one J. L. Hartman to foreclose a mortgage. The complaint, in substance, alleges that the Farmers' Supply Depot Company is a corporation organized and existing under the laws of Oregon, and on the 31st day of December, 1888, it made, executed, and delivered to the plaintiffs' assignor its promissory note for \$1,500, due one year after date, the formal parts of which, as set out in the complaint, are: "We, the Farmers' Supply Depot Company, promise to pay," etc., and is signed: "F. S. Barzee, Pres. E. S. Catron, Sec. and Treas." That at the same time, in order to secure the payment of the note, the corporation executed and delivered to the payee thereof a mortgage, the formal parts of which are: "This indenture witnesseth that the Farmers' Supply Depot Company, of Monmouth, Oregon, for and in consideration of the sum of \$1,500 to us in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, and conveyed," etc., and is signed and executed as follows: "Witness our hands and seals this 31st day of December, 1888. F. S. Barzee, Pres. [Seal.] E. S. Catron, Sec. & Treas. [Seal.]" The certificate of acknowledgment states that "the within-named F. S. Barzee, Pres. of the Farmers' Supply Depot Company, and E. S. Catron, Sec'y of the Farmers' Supply Depot Company," personally appeared before the officer taking the acknowledgment, and acknowledged to him "that he executed the same freely, for the uses and purposes therein named." The complaint also avers that by mistake the

corporation seal was not affixed to the mortgage. To this complaint a demurrer was filed, which being overruled, defendant Hartman answered, denying the allegations of the complaint, and setting up some new matter, not material to be noticed here. A trial resulted in favor of the defendant Hartman, and plaintiffs appeal.

A. M. Hurley, for appellants. O. P. Paxton, for respondents.

BEAN, J., (after stating the facts.) The evidence in this case is directed entirely to proving, or attempting to prove, the existence of the Farmers' Supply Depot Company as a corporation de facto; but as we are of the opinion that the instrument sued on, and introduced in evidence, is not the mortgage of a corporation, nor, under the allegations of the complaint, or facts disclosed by the evidence, can it be treated or enforced as an agreement for a mortgage, we shall pass—and without deciding—the question as to the corporate capacity of the Farmers' Supply Depot Company.

It is essential to the proper execution of a deed or mortgage by a corporation that it be done in the name and in behalf of the corporation, and under its corporate seal. Devl. Deeds, § 334; Mills Co. v. Monteith, 2 Or. 285; In re St. Helen Mill Co., 3 Sawy. 88; Brinley v. Mann, 2 Cush. 337. The mortgage in this case is not executed, nor does it purport to be executed, by or in behalf of the Farmers' Supply Depot Company. It is executed by F. S. Barzee and E. S. Catron in their own names, sealed with their seals, and acknowledged by them as their act and deed. It is not even stated in the mortgage that Barzee was the president, and Catron the secretary and treasurer, of the corporation, or that they were acting, or attempting to act, for the corporation, in the execution of the instrument, or that the corporation had in any way authorized such a mortgage to be executed. Indeed, counsel for plaintiffs practically admits that this instrument is not the deed of the corporation, and therefore not a legal mortgage; but he insists that it should be treated as an agreement for a mortgage, and enforced as an equitable mortgage. It is not doubted that a mortgage defectively executed, or an imperfect attempt to create a mortgage, when done in pursuance of a contract between the parties, will, in a proper case, be enforced in equity as a mortgage, or a specific lien upon the property intended to be mortgaged, upon the principle that equity will consider that as done which is agreed to be done. Jones, Mortg. §§ 168, 169; Love v. Mining Co., 32 Cal. 639. But it is not perceived how this principle can aid plaintiffs in this case, because there is neither allegation nor proof that the instrument in question is the contract of the corporation, or was executed, or attempted to be executed, by its authority. It does not appear that the note and mortgage were executed for a debt of the corporation, or that it received the consideration therefor, or was in any way liable to plaintiffs' assignor at the time the note and mortgage

were executed. So far as the facts appear, the instrument may have been executed to secure the individual obligation of Barzee and Catron, or of some other person, without the knowledge or consent of the corporation. The fact that Barzee and Catron may have been officers of the corporation did not authorize them to create a lien upon the corporate property by the execution of a mortgage, unless authorized by the corporation. *Luse v. Railway Co.*, 6 Or. 125. In order that a lien may arise by reason of a defectively executed mortgage, it must appear that the instrument was attempted to be executed by the mortgagor, or his duly-authorized agent, in pursuance of an agreement indicating an intent that the property described, or rendered capable of identification, is to be held, given, or transferred as security for an obligation or debt of the mortgagor. No such fact appearing in this case, it follows that a court of equity cannot, on this record, decree this instrument to be an equitable mortgage, and the suit must be dismissed; but, as this conclusion is reached on account of a failure of allegation and proof, such decree will be made without prejudice to another suit by plaintiff for the same cause, if he shall be so advised.

(18 Colo. 272)

#### In re COMPENSATION OF COUNTY JUDGES.

(Supreme Court of Colorado. Feb. 21, 1893.)

#### COUNTY JUDGE—SALARY—PAYMENT FROM FEES—CONSTITUTIONAL PROVISION.

A county judge is a county officer, within the meaning of Const. art. 14, § 15, providing that, where salaries are provided for county officers, they shall be payable only out of the fees actually collected; and county judges are not excepted from the operation of this general provision by Const. art. 6, § 22, providing for the election of a county judge in each county of the state, "whose compensation shall be as provided by law."

In re compensation of county judges. The senate requested the opinion of the court on the following questions:

"Can the legislature provide by law for fixed salaries for county judges, to be paid otherwise than by the statutory fees of their respective offices?"

"Does section 490, art. 14, Const., (page 347, *Mills' Ann. St.*,) so qualify section 394, art. 6, Const., (page 272, *Mills' Ann. St.*,) as to prevent the legislature from providing by law for the payment of salaries of county judges as provided by said last-named section?"

"Section 394, art. 6, Const., falling under the head of the 'Judicial Department,' may not that section be construed and considered as singling out county judges, and providing that their compensation may be as provided by law, independently of said section 490, art. 14, Const.?"

"Does section 490, art. 14, Const., relating to county and precinct officers, under the distinct head of 'County Officers,' necessarily, or by intentment, include county judges; they being already mentioned and provided for in said section 394, art. 6, Const.?"

"In substance, does the constitution permit a salary to be paid to county judges, except out of fees?"

PER CURIAM. Section 22, art. 6, provides for the election of a county judge in each county of this state, "whose compensation shall be as may be provided by law." By section 15, art. 14, of the constitution, the legislature is required to classify counties for the purpose of providing for and regulating the compensation of county and precinct officers; and it is provided that "such law shall establish scales of fees to be charged and collected by such of the county and precinct officers as may be designated therein, for services to be performed by them, respectively, and where salaries are provided the same shall be payable only out of the fees actually collected. In all cases where fees are prescribed." Is the county judge a county officer? At the time of the adoption of the constitution the probate judge was classed as a county officer. *Rev. St. 1868*, p. 174. And, by sections 8 and 9 of the schedule of the constitution, county judges and county courts are made successors to probate judges and probate courts throughout the state. In case of a vacancy in the office of county judge, the vacancy is filled by the board of county commissioners, as in case of other county officers. Const. art. 6, § 29; Id. art. 14, § 9. The first state legislature speaks of county judges as county officers. *Gen. Laws*, p. 386, § 95. They are elected by the electors of the county, and have jurisdiction within their respective counties, and should, we think, be considered county officers. In our opinion, the two sections of the constitution referred to in your question should be construed in pari materia, and, when so construed, do not permit salaries to be paid county judges, except from fees actually collected.

(3 Colo. App. 74)

#### ESTES PARK TOLL-ROAD CO. v. EDWARDS, County Treasurer.<sup>1</sup>

(Court of Appeals of Colorado. Jan. 9, 1893.)  
TAXATION—"PROPERTY"—TOLL ROAD OVER GOVERNMENT LAND—CONTROL BY COUNTY COMMISSIONERS.

1. *Rev. St. U. S. § 2477*, provides that "the right of way for the construction of highways over public lands not reserved to public uses is hereby granted." *Held*, that where such right of way is accepted by a toll-road company, which constructs and maintains a toll road on the public domain of the United States, such road, including roadbed and right of way, is "property" of such company, within the meaning of the laws relating to taxation, and is taxable in the county within which it is located.

2. The fact that the county commissioners have supervisory control to regulate tolls over such road does not affect the right to tax the same.

Error to district court, Larimer county.

Action by Alfred A. Edwards, county treasurer, against the Estes Park Toll-Road Company, to recover certain taxes levied on defendant's toll road. There

<sup>1</sup>Approved on rehearing, March 13, 1893.

was a judgment for plaintiff, and defendant brings error. Affirmed.

The facts in the case appear by stipulation of the parties, as follows: "First. That the plaintiff is the duly elected and qualified treasurer of Larimer county, and as such is authorized to collect the taxes in and for said county. Second. That the defendant is a corporation organized under the laws of Colorado for the purpose of constructing toll roads, and prior to the 1st day of May, A. D. 1888, it had constructed, and was and ever since has been in possession of, a certain road in said county, extending from Little Elk park, in said county, to Estes park, in said county, a distance of about fourteen miles, and then and there was, and ever since has been, collecting tolls of persons traveling over said road, according to rates prescribed by the county commissioners of said county of Larimer. Third. That the said toll road was constructed by the defendant about the year 1876, and was situated for the whole distance upon the public domain of the United States. Fourth. That on the said 1st day of May, A. D. 1888, and at all times, the defendant had no property in said county of Larimer save and except said toll road, and that the same is, and at all times has been, a highway over which the public has had right to travel upon the payment of toll, and that the only interest of the defendant therein is the right to collect tolls thereon as hereinbefore stated, and such rights, if any, as inured to it by reason of its constructing, operating, and maintaining its said road as aforesaid. Fifth. That the principal office of the said defendant is kept in Longmont, in the county of Boulder, in the state aforesaid, and all of the stockholders of said corporation are residents of the said county of Boulder. Sixth. That the assessor of the said county of Larimer for the year 1888, in making the assessment roll of said county, made and carried upon said roll a list in substance as follows: 'The Estes Park Toll-Road Company, its road, including roadbed and right of way in Larimer county; value \$1,000,—by the assessor;' and that said assessment roll, with the list so included, was delivered to the county clerk of said county at the time and in the manner required by law. Seventh. That the taxes for said county were levied by the county commissioners at the time and in the manner required by law. Eighth. That the tax list of said county was made out by the county clerk of said county at the time and in the manner required by law, and the amount of the tax assessed upon the said list as so returned by said assessor against the defendant was \$21. Ninth. That said tax list was made out and delivered to the treasurer of said county at the time and in the manner required by law, and is now in his hands for collection; and that no part of said tax has been paid by the defendant. The point in controversy between the parties and upon which the decision of the court is asked, is: Is the said 'road, including roadbed and right of way,' properly subject to taxation in said county? It is agreed that, should said point in controversy be an-

swered in the affirmative, judgment may be entered against the defendant for the said amount of \$21, the amount of said tax, and interest thereon at 2 per cent. per month from January 1, 1889; otherwise the defendant shall go hence without day." There was a finding and judgment in favor of the county for \$24.75.

Carr & Secor, for plaintiff in error. Robinson & Love and Sanford Darrah, for defendant in error.

REED, J. It is contended that the court erred; that plaintiff in error had no property in the road; that such road was under the absolute control of the public,—was a public highway, and as such was not taxable. It is said: "The road is constructed across the public lands of the United States, and the right of way therefor is granted by congress to the public." Again: "The title to the ground occupied by said roadbed is in the United States; the right to use it is in the traveling public. The only right the company has is to collect tolls at rates prescribed by the county commissioners, sufficient, presumably, to compensate for the first outlay and for repairing the road." This theory seems to be predicated upon a very pardonable misconception of the law giving the right of way. Section 2477, Rev. St. U. S., is: "The right of way for the construction of highways over public lands not reserved to public uses is hereby granted." By section 2339, "the right of way for the construction of ditches and canals for the purposes herein specified [mining, agricultural, manufacturing, and other purposes] is acknowledged and confirmed." Section 2340: "All patents granted, or pre-emption or homestead allowed, shall be subject to any vested and accrued water rights," etc. The language used in regard to the right of way for highways is "is hereby granted." The word "grant," in such connection, is very significant; in fact, seems to be a key for the solution of the question involved. "Grant:" "An act evidenced by letters patent under the great seal, granting something from the king to a subject." Cruise, Dig. tit. 33, 34. "A transfer by deed of that which cannot be passed by livery." Muckleston v. Thomas, Willes, 147, 149. "A generic term, applicable to all transfers of real property." 3 Washb. Real Prop. 181, 353. "A technical term, made use of in deeds of conveyance of lands to import a transfer." Id. 378, 380. "Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government." See Washb. Real Prop. 181, 208; 2 Kent, Comm. 450, 494; Johnson v. M'Intosh, 8 Wheat. 543; Martin v. Waddell, 16 Pet. 367. It is stipulated that in the year 1876 the grant was accepted, the road constructed, and has since been maintained. This grant and the acceptance were all that was necessary to pass the government title to the right of way, and vest it in the grantee permanently, subject to defeasance in case of abandonment. See Railroad Co. v. Gordon, 41 Mich. 420, 2 N. W. Rep. 648. After entry and appropriation of the right of way granted,

and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it; and the lands through which it passed were disposed of subject to the right of the road company, such right being reserved in the grant. The road company, as shown, became the owner of the right of way. By the use of its money it improved this right of way, making a highway over which the public could pass by the payment of tolls. Although the public became entitled to use the road, such right was only by compliance with the fixed regulations recognizing the ownership. The statutes also provide remedies for any interference, and it is clear that the road company could maintain trespass or other actions for any unwarranted interference with its possession and rights. The fact that the public could pass over the road at pleasure does not detract from the position here taken as long as such right was dependent upon the payment of tolls, which was a constant recognition of ownership and property. It is also clear that the company had such title as could be sold and transferred, and the successor invested with the right of possession. "Property" is defined to be "the right and interest which a man has in lands and chattels to the exclusion of others." Bouv. Law Dict. "Applied to lands, comprehends every species of title, inchoate or incomplete. Embraces rights which lie in contract, those which are executory as well as those which are executed." And. Law Dict.; *Soulard v. U. S.*, 4 Pet. \*512; *Delassus v. U. S.*, 9 Pet. 133; *Smith v. U. S.*, 10 Pet. 329. Tested by these well-settled principles, it will readily be seen that the contention of plaintiff that it had no tangible, taxable property in the road cannot be sustained. It had its granted right of way, together with its road, for the use of which it exacted dues. A toll road is very analogous to a railway to which congress grants the right of way over the public domain. The right of the state to tax a railway, including roadbed, track, and all betterments upon its right of way, has never been seriously questioned. It is true, a railway is not technically a public highway, but the analogy between it and a toll road, for the purposes of taxation, is so marked that they should evidently be regarded alike. See *Railway Co. v. Gordon*, 41 Mich. 429, 2 N. W. Rep. 648; *Rogers v. Burlington*, 8 Wall. 664; *Railroad Co. v. County of Oteo*, 16 Wall. 667. The fact that the county commissioners had supervisory control to regulate tolls can have no bearing whatever. It in no way interferes with the ownership or control; only fixes the price the public shall pay for the use of the property. The right to so regulate by virtue of the police power of the state, to prevent extortion, whether by toll roads or railways, is so well settled that discussion is unnecessary; it neither divests, defines, nor modifies ownership. Section 2847, Gen. St.: "The property of corporations and companies constructing canals, ditches, flumes, plank roads, gravel roads, turnpike roads, and similar improvements, shall be assessed to the company or corporation in

the respective counties in which said improvement is situated." This, if necessary, might almost be regarded as an authoritative declaration by the legislature of ownership and property in constructions of this kind, and of the duty of officials to assess and collect taxes. By sections 3-6 (both inclusive) of article 10 of the state constitution all property not therein exempted is subject to taxation, and by section 2814, Gen. St., it is declared: "All property, both real and personal, within the state, not expressly exempt by law, shall be subject to taxation," etc. We conclude that the plaintiff was the owner of property subject to appraisal and taxation, and, not having been by law exempted, the judgment must be affirmed.

(3 Colo. A. 37)

MARTIN v. McCARTHY, Sheriff.

(Court of Appeals of Colorado. Nov. 28, 1892.)

ACTION AGAINST SHERIFF—UNLAWFUL SEIZURE—ESTOPPEL.

The filing of a plea of intervention, and a voluntary dismissal thereof, by an assignee for the benefit of creditors, in an action by a third person against his assignor and a sheriff who has seized under an attachment a stock of goods belonging to the assignor, is no bar to the assignee's right to maintain an action against the sheriff for the value of the goods seized.

Error to district court, Pueblo county.

Action by Edmund H. Martin, assignee of Frank C. Taft, against T. G. McCarthy, sheriff, to recover the value of goods belonging to his assignor, alleged to have been wrongfully seized under an attachment by defendant. On appeal from a judgment for plaintiff in the county court, the action was dismissed on defendant's motion, and plaintiff brings error. Reversed.

Dixon & Dixon and Urmey & Crane, for plaintiff in error.

Rogers, Cuthbert & Ellis, for defendant in error.

The filing of a plea of intervention by plaintiff in error in the action by Belfeld & Co. against Taft and the sheriff was a bar to an action by plaintiff in error against the sheriff. *Terry v. Munger*, (N. Y. App.) 24 N. E. Rep. 272; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. Rep. 346; *Fowler v. Bank*, 118 N. Y. 450, 21 N. E. Rep. 172; *Morris v. Rexford*, 18 N. Y. 552; *Butler v. Hildreth*, 5 Metc. (Mass.) 49; *Bukley v. Morgan*, 46 Conn. 393.

RICHMOND, P. J. November 26, 1890, Frank C. Taft made an assignment for the benefit of his creditors to Edmund H. Martin, plaintiff in error. Prior to the assignment, the sheriff of Pueblo county, T. G. McCarthy, pursuant to a writ of attachment sued out, seized a stock of merchandise, and had the same in custody at the time of the assignment. The assignee demanded possession of the stock, which was refused. Thereafter Belfeld & Co. instituted an attachment proceeding in the district court of Arapahoe county against Taft and the sheriff of Pueblo

county, and levied upon the property covered by the assignment and former attachment writ. Subsequently Martin filed a plea of intervention, which Belfeld & Co. answered. Before the trial of the plea of intervention either on the pleadings or the merits, and after the order of sale had been entered, Martin voluntarily dismissed his intervention proceeding, with the consent of the court, and subsequently commenced an action for damages against the sheriff. Trial was had in the county court, and judgment rendered in favor of Martin for the sum of \$1,542.23. An appeal was taken to the district court where, after the evidence offered by plaintiff had been received, defendant moved the court to dismiss the action, on the ground that Martin had two remedies, and, having elected to claim the property as intervener in the original attachment suit, he thereby defeated his right to institute an action for the value of the goods. The motion to dismiss was sustained. The only question involved in this appeal is, did the action of Martin in instituting the intervention proceedings, and subsequently dismissing, defeat his right to institute another action?

The Code<sup>1</sup> provides that any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. We do not think that this or any other provision of the Code makes it obligatory upon a party to intervene in proceedings where the title to property or the possession thereof is involved, although he may know of the proceedings, be the owner, or entitled to the possession. It is clearly a right that he may exercise, and one he could not have exercised unless conferred by statute. By the Code it is also provided that an action may be dismissed or a judgment of nonsuit entered in the following cases: "First. By the plaintiff himself at any time before trial upon the payment of costs if a counterclaim has not been made. \* \* \* " *Seas. Laws, 1887, p. 149.* By the record in this case we learn that this action of dismissal was voluntarily made by the attorneys for the intervener. It was not the result of an agreement between the parties, nor did it amount to a retraxit. It was nothing more than a discontinuance, and, after a most thorough examination of all the authorities at our command, we have reached the conclusion that the dismissal, under the circumstances, did not defeat his right to institute another action. In *Freas v. Engelbrecht*, 3 Colo. 377, this language is used: "It was never heard that judgment of non pros at law, or the dismissal of a bill in equity, expressly for default of prosecution, would bar another suit at law or a new bill in equity for the same cause. The judgment or decree it is said is but 'the blowing out of a candle, which a man may light again at his pleasure.'" In the case of *Parks v. Dunlap*, 86 Cal. 189, 25 Pac. Rep. 917, Works, J., in commenting upon a similar proposition, says: "The contention of the appellant

is that the dismissal as to him, in the former action, was a retraxit, amounted to an adjudication in his favor, as to the validity of his mortgage, and is a bar against the respondents to any defense against it. Conceding, however, that the question in litigation in the former action was the same now presented, it is well settled that the voluntary dismissal of an action, without any agreement of the parties, or other circumstances tending to show that such a dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action." *Merritt v. Campbell*, 47 Cal. 542; *Crossman v. Davis*, 79 Cal. 603, 21 Pac. Rep. 963. In the case of *Bank v. Haire*, 36 Iowa, 443, it was held that "where a plaintiff, by his counsel, enters a dismissal of his cause in writing on the back of the petition, with the manifest intent of dismissing it, and both parties act accordingly, the action will be deemed dismissed, and its pendency cannot be relied upon to defeat a subsequent action for the same cause. Where a suit is discontinued after judgment, the adjudication concludes no one, and is not an estoppel or bar in any sense. *Loeb v. Willis*, 100 N. Y. 231, 3 N. E. Rep. 177. In *National Waterworks Co. v. School Dist.*, 23 Mo. App. 227, it was held that a "nonsuit is, in effect, a dismissal of the action, and this may be done at any time before the final submission for the verdict of the jury. A voluntary nonsuit, taken by the plaintiff at any time before the judgment, will not estop him to bring a new action. Much more so should this rule apply where the nonsuit is enforced by an adverse conclusive ruling of the court." The plaintiff, by entering a nonsuit, retains the advantage of bringing another action, and this he can doubtless do when the nonsuit is ordered by the court. *Mason v. Lewis*, 1 G. Greene, 496; *See, also, Smith v. Ferris*, 1 Daly, 18; *Lambert v. Sandford*, 2 Blackf. 137. A decree dismissing a bill is no bar to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is res adjudicata. *Chase's Case*, 1 Bland, Ch. 206. "It is conceded that a previous suit against one or more is no bar to a new suit against others, even though the first suit be pending or have proceeded to judgment when the second is brought. The second or even a subsequent suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction, or to have elected to rely upon one proceeding for his remedy, to the abandonment of the others. \* \* \* " *Cooley, Torts*, p. 157. We could multiply authorities in support of our position, but we deem it unnecessary to do so. There was no judgment upon the merits in the controversy between the attaching creditor and intervener; no agreement entered into nor personal appearance on the part of the intervener which would amount to a retraxit.

The contention of defendant in error that the parties, having elected to file a petition in intervention, whereby they claimed the possession of the property in

<sup>1</sup>Code Civil Proc. 1883, § 16.

controversy as against all the parties, are estopped from bringing this action, we cannot sanction. All of the cases cited in support of their contention do not present the question as in the case at bar. There is no doubt that there are certain acts or omissions of a party by which another is injured, from which a liability results to make compensation in damages. In such cases the law implies a promise to pay the damages, and the injured party may treat the action as arising from the tort, or, by waiving the tort, sue upon an implied contract, by setting forth the facts from which the law infers a promise. This right extends for the wrongful taking or conversion of chattels, things in action, or money; the wrongful use of lands; appropriation of rents and profits; fraud of purchaser in obtaining goods on credit. Thus, when goods and chattels have been wrongfully taken or detained, and have been sold or disposed of by the wrongdoer, the owner may sue in tort for the damages, or he may waive the tort, and bring his action on the implied promise. *Maxw. Code Pl. p. 581.* By the intervention proceedings, Martin did not waive the tort, nor was it a complaint based upon an implied promise. In neither of the proceedings—the one now under consideration, or the intervention—was or is there a waiver of the wrongful taking. The single principle upon which the entire doctrine of election rests is very simple, and is formulated by Mr. Pomeroy as follows: "From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults; or may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law. \* \* \* *Pom. Rem. & Rem. Rights, § 568.* The New York cases cited are in keeping with this principle, and in no sense militate against our conclusion. We think the court erred in sustaining the motion to dismiss the action. The judgment must be reversed, and the cause remanded for further proceedings.

On Rehearing.

(March 13, 1893.)

PER CURIAM. We have carefully examined the authorities submitted on the rehearing in this case. At the time of writing the opinion our attention had not been called to cases wherein the exact proposition now under consideration had been discussed. In the case of *Perrin v. Clafin*, 11 Mo. 13, it is held that "where the goods of one are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass." The general doctrine is

that "when one who is the owner of property attached as that of another may either intervene in the suit to claim his property, or he may sue the sheriff or the purchaser without making himself a party to the attachment suit, when he has been adjudged the owner, he has his action against the sheriff for wrongful seizure. \* \* \* *Wap. Attachm. p. 483.* The supreme court of Missouri, in the case of *Clark v. Brott*, 71 Mo. 478,—a case similar to the one now under consideration,—say: "It is contended with plausibility, by defendants' counsel, that Clark, on the seizure of the goods by the sheriff, had his election to sue in trespass or replevin, or to interplead under the statute; and that, having elected to proceed under the statute, and obtained a judgment in his favor, he is precluded from resorting to any other remedy. The judgment rendered was for the recovery of the property which had been sold under the order of the court, and the proceeds of sale were considerably less than the invoice price of the goods." Held, that "the recovery of judgment by an interpleader in attachment proceedings will be no bar to an action by the interpleader against the attaching officer for the wrongful seizure. These authorities, and others furnished by the plaintiff in error, conclusively satisfy us that we should adhere to our opinion.

(5 Wash. 639)

STATE ex rel. PETERSON v. SUPERIOR COURT OF PIERCE COUNTY et al.

(Supreme Court of Washington. Jan. 31, 1893.)

LEVY OF ATTACHMENT — PROPERTY IN ANOTHER COUNTY — TRIAL OF RIGHTS OF CLAIMANT — VENUE.

When property is seized under a writ of attachment issued in a suit brought in another county, and a third person, claiming the property, files with the sheriff the affidavit and bond required in such case by Code 1881, c. 33, the statute provides that such officer shall return these papers to the clerk of the county where the property was seized, and that such clerk shall place the cause for the determination of the rights of the parties as to the property on the trial docket of the court of his county at the next term; the person claiming the property being the plaintiff, and the sheriff and the plaintiff in attachment, defendants. *Held*, that the provision requiring the trial of the rights of the parties in the county in which the property was seized is mandatory, and a writ of prohibition will issue if the court of another county attempts to proceed with the trial.

Petition by the state of Washington, on the relation of J. S. Peterson, against the superior court of Pierce county and others, for a writ to prohibit defendant court from proceeding with the trial of a certain cause. Granted.

Fred H. Peterson and John H. Elder, for relator.

STILES, J. The relator's petition shows that about June 1, 1890, one H. T. Wright commenced an action in the superior court of King county against one Thomas Johnson, which cause was docketed in that court as cause No. 3,904, and a writ of attachment was issued in the action, and directed to the sheriff of Mason

county; and on June 15, 1890, the sheriff levied upon personal property at Detroit, in Mason county, as the property of the attachment debtor, and made his return accordingly. A few days later the relator, J. S. Peterson, made the affidavit and bond required of third persons claiming property seized by an officer under attachment, in compliance with chapter 33 of the Code of 1881. Relator appeared before the superior court of Mason county at the next succeeding session, in October, 1890, to make good his title to the property claimed by him; but the case made by the affidavit was not upon the docket of that court, nor could the affidavit or bond be found among the records of the court. The next that was heard of the matter was in May, 1892, when relator was notified by counsel for the attachment plaintiff that the action based upon said affidavit and bond would be called up for final disposition in the superior court of Pierce county on the 28th day of that month. Relator thereupon appeared in the superior court of Pierce county, and interposed a plea to the jurisdiction of that court, on the ground that under the statute it had no authority to take cognizance of the issues raised by the affidavit. The court overruled the plea, and set the cause for trial, and this proceeding is brought to prohibit that court from trying the cause.

Upon the return to the alternative writ which was heretofore issued, we find no material matter presented, in addition to that contained in the relator's petition. It seems that after the plea to the jurisdiction had been overruled the case was set for trial, and the relator made a motion for continuance, which was granted; and it is claimed that this should be taken as a yielding, on the part of the relator, to the jurisdiction of the court. It is also maintained that it was the duty of the relator to move for a transfer of the cause to Mason county, but, in the view we take of the matter, neither of these points should be allowed any force. Under the statute, when the relator filed his affidavit and bond with the sheriff, it was the duty of the officer to return these papers to the clerk of the county in which the property was seized, and not elsewhere. The further provisions of the statute are that the clerk is to place the cause upon the trial docket of the court of his county at the next term. The person claiming the property is to be plaintiff, and the sheriff and the plaintiff in attachment are to be defendants. This is a new and independent action, and the provision of the statute requiring the papers to be filed in the county where the property was seized is equivalent to that clause of section 47 of the Code of 1881 which requires that all questions involving the right to the possession of, or title to, any specific article of personal property shall be commenced in the county in which the subject of the action is situated. It was held in *McLeod v. Ellis*, 2 Wash. St. 117, 28 Pac. Rep. 76, that the commencement of such actions in the county where the property is situated is mandatory, and that if not commenced in the proper county the court acquires no

jurisdiction. So in this case we hold that the superior court had no jurisdiction of the subject-matter of this action, and is therefore without power to try and determine it. It follows that the writ must be made peremptory, and it is so ordered.

ANDERS, HOYT, and SCOTT, JJ., concur.

(5 Wash. 521)

#### KELLEY v. KITSAP COUNTY et al.

(Supreme Court of Washington. Jan. 17, 1893.)

MARRIAGE—WHAT CONSTITUTES—COHABITATION WITH INDIAN WOMAN—APPEAL BY COUNTY—BOND.

1. Laws 1854, p. 404, declared that no marriage should be void or voidable for want of any legal formality, "if either of the parties thereto believed it to be a legal marriage at the time." Laws 1855, p. 33, as amended by Laws 1859, p. 24, declared all subsequent marriages between a white person and an Indian void. *Held* that, where an Indian woman cohabited for a short time in 1866 with a white man, on payment of a few dollars by him to her relatives, and no marriage ceremony was ever performed, there was no legal marriage, and a child born of such couple was not a lawful heir of its father. *In re McLaughlin's Estate*, 30 Pac. Rep. 651, 4 Wash. 570, followed.

2. In an action against an individual and a county, where both give notice of appeal, the fact that the individual gives no appeal bond is not ground for a dismissal of the appeal by the county.

Appeal from superior court, Kitsap county; John C. Denney, Judge.

Action by Charles Kelley against the county of Kitsap and Theodore Williams, administrator of the estate of Michael Kelley, deceased. Judgment for plaintiff. Defendants appeal. Reversed.

F. D. Fuller, William S. Church, and Struve & McMicken, for appellants. James Hamilton Lewis and J. B. Yakey, for respondent.

SCOTT, J. The respondent moves to strike the statement and to dismiss the appeal, because no bond upon the appeal was given, and for other reasons stated. The county and said Williams both gave a notice of appeal, but he failed to give a bond. None is required upon the part of the county. The notices of appeal were sufficient to give this court jurisdiction of the cause for the county, and its rights could not be affected by the failure of the respondent Williams to perfect the appeal upon his part. In all other respects the cause was regularly appealed, and the motions are denied.

In the year 1870 one Michael Kelley died in the county of Kitsap, territory (now state) of Washington, and the defendant, Theodore Williams, administered his estate. Williams after holding the estate for about 18 months, and searching for but finding no heirs, rendered a final account of his trust, which was approved by the probate court of said county, and in 1871 he turned over to said county the sum of \$1,850, the proceeds of said estate remaining after the payment of its debts. The plaintiff seeks to recover this money from the defendants upon the ground of



his being an heir to said Michael Kelley, deceased. The county of Kitsap admits the possession of the money, but by its pleading puts upon the plaintiff the burden of establishing his right to the same; that is, to show himself to be the child of Michael Kelley, deceased, and his lawful heir. Plaintiff contends that his mother, an Indian woman, who was at some time known as Julia, or Julia Descartes, was the wife of said Michael Kelley, and that said Michael Kelley was his father; and that he was born at Port Orchard, in said county, about the month of March, 1867, while the relation of husband and wife existed between said Kelley and said Indian woman, claiming that his mother and said Kelley were married on or about the 15th day of January, 1865, in said county, by duly consenting to be husband and wife, and that, after so consenting, they did cohabit and live together as such agreed husband and wife. There is no claim that any marriage ceremony was ever performed for the parties. It is admitted that said Indian woman died at Port Madison, in said county, on or about May 1, 1887. There is no claim that plaintiff was the illegitimate child of said Kelley, and that Kelley ever acknowledged himself in writing, signed in the presence of a competent witness, to be the father of the plaintiff. A trial by jury was had, which resulted in a verdict and judgment for the plaintiff.

In *Re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. Rep. 651, this court, in considering the legislative enactments there involved, held that marriages as at the common law were not valid here; and the statutes in force when it is claimed the marriage here in question took place are sufficiently similar to the statutes considered in the *McLaughlin* case to bring this action within the holding there. See Sp. Laws 1854, p. 404; Sp. Laws 1855, p. 33; Sp. Laws 1859, p. 24.<sup>1</sup> No proof was made as to what ceremonies were resorted to by the tribe of Indians to which this woman belonged in marriages among themselves, and there is no question here of recognizing or repudiating a marriage which, according to their customs, they recognized as valid. A good deal of testimony was introduced as to the way Indian women were procured by white men, in which there was no substantial conflict. In such instances a payment of money was usually made to her relatives, varying in prices from a very few to several hundred dollars in some cases. If she

left him without cause, the Indians would return the money. If he sent her away, or left her, they would not return it, unless he could show a satisfactory reason therefor. As to what were considered sufficient reasons we are not informed by the testimony; but it is clearly apparent that white men had no difficulty in obtaining Indian women to live with them by paying money to her relatives, and that the practice was a somewhat common one in the earlier history of the territory. The relation thus instituted could be abandoned by either at pleasure, and in most cases it was sooner or later abrogated by the act of the parties. In some instances, however, the parties continued to live together, and were subsequently formally married to each other. The testimony in this instance shows that said Michael Kelley obtained this woman by paying two or three dollars in silver to her sisters; that they lived together a short time, and that she left him, she being at the time pregnant, and that the plaintiff was the issue. All of the testimony in relation to these parties agreeing to live together, and their cohabitation, was objected to by the defendants, and it should have been ruled out under the circumstances. Such arrangements could hardly amount to marriages under any law. Reversed and remanded, with instructions to dismiss the action.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

(5 Wash. 589)

### GRIPPIN v. BENHAM.<sup>1</sup>

(Supreme Court of Washington. Jan. 24, 1893.)

ASSIGNMENT—UNDIVIDED INTEREST IN CONTRACT—COMMUNITY PROPERTY—ESTOPPEL—ALLEGATIONS IN FORMER SUIT.

1. Objections to an assignment by a joint creditor of his undivided interest in an entire contract for the payment of money can be made only by the debtor.

2. In an action on a note defendant alleged that she had paid the note by orally assigning to plaintiff her equity in certain land, and what was due under a sale she had made to M. of the equity. It appeared that after the alleged assignment defendant commenced an action against M. to foreclose the contract of sale to him. *Held*, that defendant could explain her allegations of title in the former suit, and show that it was really brought at the instigation of plaintiff.

3. The fact that the real estate represented in a contract of sale is community property does not render invalid an assignment by the wife of a claim relative thereto.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Suit by Frank L. Grippin against Melinda C. Benham to recover \$1,200 loaned by plaintiff to defendant. Defendant pleaded payment, saying that at the time the debt became due there was owing her from one Otto Myers on a certain contract for the purchase of land \$1,157.81, which demand, and all her interest in said land, being an equity by virtue of a contract to purchase the same of one Kingman, she sold, assigned, and transferred to plaintiff, together with \$55.50 in cash, in full

<sup>1</sup>Laws 1854, p. 404, declares certain marriages void, and provide that all children born of such void marriages, "and all children born of persons \* \* \* cohabiting together as man and wife, and all children born out of wedlock, whose parents shall intermarry, shall for all purposes be legitimate." Clergymen and certain officials are empowered to perform the marriage ceremony, and parties may also marry under the rules of the Society of Friends, no marriage to be void or voidable for want of any legal formality "if either of the parties thereto believed it to be a legal marriage at the time." Laws 1855, p. 33, as amended by Laws 1859, p. 24, declared all subsequent marriages between a white person and an Indian void.

<sup>1</sup> Rehearing denied.

satisfaction and discharge of her indebtedness. Judgment for plaintiff. Defendant appeals. Reversed.

Prather & Dawson and Turner, Graves & McKinstry, for appellant. Feighan, Wells & Herman, for respondent.

DUNBAR, C. J. The questions involved in this case are: First. Can a joint creditor assign his undivided interest in an entire contract for the payment of money? Second. Can appellant's claim in this case be assigned excepting in writing? Third. Are the allegations of title in the former suit against Myers conclusive? Fourth. Does the fact that real estate represented in the contract is community property render the assignment of a claim by the wife void?

As to the first proposition, the reason of the rule that there cannot be a partial assignment of an entire contract, or, in other words, an assignment of an undivided interest, is that the debtor shall not be harassed with a multiplicity of settlements, and that he has a right to stand on his contract as an entirety; and, as said in *Gibson v. Cooke*, 20 Pick. 15: "The debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract is one and entire." Of course, if a creditor cannot divide the contract, by parity of reasoning, he cannot by assignment enable others to do so against the debtor's will; but none of the cases hold that the debtor cannot consent to the assignment. It is simply a right that he has to stand upon his contract; and, under the rule laid down in *Marzlou v. Ploche*, 8 Cal. 522, the objection can only be made by the debtor. The court in that case, on page 536, says: "The creditor has not the right to assign the debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated. But when the debtor himself does not object, no other party can object for him." But in this case, under no circumstances can it be held void. The debtor has not objected. Under the testimony attempted to be introduced the respondent did not object, but, on the other hand, ratified the assignment. And in fact there is no question of divisibility the debtor could have objected to, because the parties to the contract had assigned their interest to the respondent, and she was the owner of the entire interest.

Statutes of fraud do not figure in the case, for it was an executed contract, and all the transactions had been fully ratified by respondent, if the testimony offered was true. The testimony tending to show execution and ratification ought to have been submitted to the jury, so that they could have passed upon those questions. And if the testimony had shown that the contract was executed, it would also have disposed of the second objection that the contract fell within the statute of frauds, because it was not in writing.

The court also erred, we think, in not

allowing appellant to explain how she became a party to the former suit. If this had been a suit between the same parties, of course, under the general rule, she would have been bound by her declarations in the former suit, but such is not the case here. She had a right to show, if such was the fact, that the suit was really brought in the interest and at the instigation of the respondent, and, if that fact were established, it would estop the respondent instead of the appellant.

So far as the last proposition is concerned, viz. the question of community interest, this court disposed of that objection adversely to the respondent's contention in *Colcord v. Leddy*, (Wash.) 31 Pac. Rep. 320, and in *Hunt v. Stearns*, Id. 468.

The testimony concerning the payment of this note by assignment of the Myers contract, which was withdrawn from the jury by the instructions of the court, ought to have been admitted, and if the jury believed from the testimony that the appellant offered and respondent accepted such contract in part or whole payment of the note, and that the note was delivered up to appellant with the understanding between the parties that it was paid, then, in the absence of any fraud on the part of the appellant which would vitiate the settlement, the appellant would be entitled to a verdict at the hands of the jury. The whole testimony should have been submitted to the jury for their determination. The judgment must be reversed, and the cause remanded to the lower court, with instructions to grant a new trial.

HOYT, SCOTT, STILES, and ANDERS, JJ., concur.

(97 Cal. 496)

GRANT v. BERONIO. (No. 19,078.)

(Supreme Court of California. March 9, 1893.)

SPECIFIC PERFORMANCE—DECREE—CONSTRUCTION OF CONTRACT.

1. Where defendant agrees to convey to plaintiff certain land, free of incumbrances, upon payment of the price, and, upon tender of such price, refuses to execute a conveyance, the court, in an action for specific performance, upon ascertaining the amount of such incumbrances, and that they can be discharged by mere payment thereof, may order defendant to execute a conveyance to plaintiff, may cause the purchase money to be brought into court, and may direct its payment to the holders of the incumbrances, instead of to defendant, even though such holders are not before the court; it appearing that the incumbrances cover the whole amount of the purchase money.

2. Where defendant agreed to convey to plaintiff certain land upon the payment of the balance of the purchase price, a provision in the agreement that, in case of failure to make the conveyance, the money paid at the making of the agreement was to be returned to plaintiff, does not give defendant the option of conveying or not.

3. Where defendant agrees to convey to plaintiff certain land, which agreement recites the receipt of \$1,000, the acceptance by defendant of \$750 in lieu of the \$1,000 is not inconsistent with or contradictory to the acknowledgment of the receipt of the \$1,000, it appearing that the difference between the sums was for commissions for the sale of the premises

agreed upon between defendant and the broker who effected the sale.

4. Where defendant agrees to convey to plaintiff certain lands free of incumbrances, and plaintiff, in part payment, gives defendant an order payable at the delivery of the deed, the court, in an action for specific performance, may direct the payment of this order to the discharge of the incumbrances upon the land.

Department 1. Appeal from superior court, Ventura county; W. B. Cope, Judge.

Action by one Grant against one Beronio for the specific performance of an agreement to convey land: From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Wilde, for appellant. E. S. Hall and J. Hamer, for respondent.

HARRISON, J. Action for specific performance. The plaintiff had judgment in the court below, and the defendant has appealed upon the judgment roll alone, without any bill of exceptions. The court finds that the defendant made an agreement with the plaintiff for the sale and conveyance to him of a parcel of land, of which he was the owner, in the town of San Buenaventura, for the sum of \$5,500, of which he acknowledged in the agreement that he had received \$1,000, and the remaining \$4,500 was to be paid on delivery of a deed free of incumbrances within 60 days thereafter; and the defendant agreed that, upon receiving such payment, he would execute to the plaintiff a good and sufficient deed conveying the title to said premises. The agreement contained the clause: "In case failure to make deed, money paid to be returned." On the same day with the execution of the agreement, the plaintiff gave to the defendant an order upon certain bankers in San Buenaventura for the sum of \$725, to be paid when he should deliver the deed for said premises, which the court finds was accepted by him in lieu of the cash payment of \$1,000 provided by the agreement, the difference between the two sums being for certain commissions for the sale of the premises agreed upon between the defendant and the broker who had effected the sale. At the date of the execution of the agreement there were two mortgages upon the property that had been executed by the defendant, but the debts secured thereby were mature and payable. The court finds that the provision in the agreement giving 60 days to complete the transaction was to enable the defendant to procure a release of the premises from the mortgage liens, and that although those liens exceeded in amount the purchase price of the property, yet there was more than enough to satisfy the first mortgage, and that the holder of the second mortgage was willing to accept the sum that would remain out of the purchase money after deducting certain items therefrom to which the plaintiff is entitled, and to release the property therefrom; and that prior to the expiration of the 60 days, and ever since, the defendant had been able out of said purchase money to procure said releases, and convey the premises in accordance with the terms of the sale. On the day before the expiration of the 60

days the plaintiff tendered to the defendant the said sum of \$4,500, together with a deed for the premises prepared for execution, and demanded of him that he accept the money and execute the deed, and, upon the defendant's refusing to comply with said demand, this action was brought. The court rendered judgment that plaintiff should pay the \$4,500 to a commissioner appointed by it for that purpose; and that the defendant should deliver to the said commissioner his deed to the plaintiff conveying the premises; and that the said commissioner, out of the moneys received by him, should pay off the first mortgage lien thereon, and certain other charges in favor of the plaintiff, and pay the remaining moneys to the holder of the second mortgage, and cause the said mortgage to be discharged of record.

In an action for the specific performance of an agreement to convey land, a court of equity has power by its decree, as against the parties who are before it, to enforce all the terms of the agreement. If the vendor's agreement is that his conveyance shall transfer the title free of incumbrances, the court can direct the application of the purchase money to the satisfaction of those incumbrances, and for that purpose can cause the money to be brought into court and disbursed under its direction. If the holders of those incumbrances are before the court, they will be bound by the direction of the court, and their claims would be satisfied by a satisfaction of the judgment. If the amount of the incumbrances is ascertained, and the court finds that the liens therefor can be discharged by mere payment thereof, it can direct that the payment be made directly to the holders of the incumbrances, even though they be not before the court, instead of to the vendor. So long as the vendor incurs no liability, and is freed from any personal claim for the amount of the incumbrances, he will not be heard to object to the application of the purchase money for the purpose of making good his agreement with the vendee. The agreement between the parties hereto was an unconditional contract on the part of the defendant to convey the land to the plaintiff upon his complying with its terms. The provision therein that, in case of failure to make the deed, the money was to be returned, was for the benefit of the purchaser alone, and did not give to the vendor the option of conveying the lot or not, as he might choose. He could not refuse to make the deed, and thus, by his own act, against the will of the purchaser, relieve himself of his obligation to convey. *Newton v. Hull*, 90 Cal. 487, 27 Pac. Rep. 429. Nor was the right to receive the money that he had paid the only right which the purchaser acquired by the contract. He had also the right to an enforcement of the vendor's agreement to make him a conveyance of the land, and, if he was willing to accept a conveyance in satisfaction of that obligation, it was not for the vendor to object that there were incumbrances upon the land or defects in the title.

The acceptance by the defendant of the order for \$725, in lieu of the cash payment of \$1,000, may be regarded as a contemporaneous agreement between the parties in modification of the price to be received for the conveyance, and it is not inconsistent with or contradictory to the acknowledgment in the agreement that \$1,000 of the purchase price had been received by the defendant. See *McCroskey v. Ladd*, 96 Cal. 458, 31 Pac. Rep. 558. The defendant cannot object to the application of the money to be obtained upon this order in satisfaction of the liens upon the land which he had created. He accepted the order in lieu of the cash payment of \$1,000, and is bound by its terms. As the order is in terms made payable when he should deliver a deed which should convey the land free of all incumbrances, he cannot now object to the direction of the court that it be so applied that the deed which he makes shall be in compliance with his agreement. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(97 Cal. 429)

KENNEDY, City Treasurer, v. MILLER,  
County Treasurer, et al. (No. 19,032.)

(Supreme Court of California. March 2, 1893.)

#### SCHOOL FUND—CUSTODY—CITY DISTRICTS.

Const. art. 9, directs the establishment by the legislature of a common-school system, and a fund to be inviolably appropriated to its support. Pol. Code, § 1576, declares that every city forms a school district, unless subdivided, etc. Section 1616 declares that boards of education shall be elected in cities under the provisions of the laws governing such cities, and that their powers and duties shall be as prescribed in such laws, except as otherwise provided. Section 1617 confers substantially the same powers and duties on boards of education as on the trustees of districts, among which is the duty to pay all moneys collected for school purposes into the county treasury, to be placed to the credit of the special fund of their district. Section 1532 requires the state superintendent to apportion the school money to the several counties, and to draw his order on the comptroller, in favor of each county treasurer, for the moneys appropriated to the county. Section 1543 requires the county superintendent to apportion the school moneys of the county to each district, and, on the order of the board of trustees or board of education, to draw his requisition on the county auditor for all necessary expenses against the school fund of any city or district, and on the receipt of such requisition the auditor shall draw his warrant on the county treasurer. Sections 1817-1820, for the purpose of raising money additional to that provided by the state fund, directs the county superintendent to furnish the supervisors, each year, an estimate of the amount needed, which is to be levied uniformly on all property in the county, and paid out of the county treasury. *Held*, that all moneys apportioned from the school fund, as well as those raised by a levy on the taxable property of a city, are to remain in the county treasury until withdrawn under requisition of the county superintendent, and are not subject to call by the city for deposit in the city treasury.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Kennedy, city treasurer of the city of San Diego, against Miller and another, as county treasurer and auditor, to obtain custody of funds apportioned for school purposes. Judgment for defendants. Plaintiff appeals. Affirmed.

William H. Fuller, for appellant. Johnston & Jones and Parrish, Mossholder & Lewis, (J. E. Deakin, of counsel,) for respondents.

HARRISON, J. The charter of the city of San Diego was framed by a board of freeholders chosen therefor, and having been adopted by the electors of the city, and approved by both houses of the legislature, (St. 1889, p. 643,) went into effect on the first Monday of May, 1889. Article 7 of the charter is entitled "Educational Department," and provides for a board of education, with certain designated powers and duties. Section 6 of this article provides for a public school fund of the city, to consist of "all moneys received from the city, county, and state school funds, of all moneys arising from taxes which shall be levied by the common council for school purposes," and certain other moneys; and further provides that "all moneys of this fund shall be deposited with the city treasurer, and the same shall be drawn only by a warrant signed by the president and clerk of the board, and duly audited by the auditor." Section 16 requires that the board of education "shall report to the common council, before the annual tax levy be made, the amount necessary to carry on the public schools for the next school year, and thereupon the common council shall levy a rate of tax for school purposes, \* \* \* and such tax shall be in addition to all other amounts levied for city purposes." The plaintiff herein is the city treasurer of the city of San Diego, and alleges that certain moneys in the custody of the county treasurer have been apportioned by the county superintendent of schools to the school district of the city of San Diego, a portion of which were derived from the public school fund, and a portion from a tax upon the taxable property of the city of San Diego levied by the board of supervisors, in pursuance of an estimate made by the city board of education; and he seeks by this proceeding to compel the defendants, as auditor and treasurer of the county of San Diego, to deposit these moneys with him, as the treasurer of the city of San Diego.

Article 9 of the constitution makes education, and the management and control of the public schools, a matter of state care and supervision. The election of a state superintendent of public instruction, and of a county superintendent of schools for each county, is therein authorized; and a public fund for the support of schools is provided, which, it is declared in section 4, "shall be inviolably appropriated to the support of common schools throughout the state," and, in section 6, that the revenue from this fund, as well as from the state school tax, "shall be applied exclusively to the support of primary and grammar schools;" and in section 8 it is further declared that no public money

"shall ever be appropriated for the support of any school not under the exclusive control of the officers of the public schools." The legislature is directed, in section 5, to provide for "a system of common schools;" and section 6 declares that "the public school system shall include primary and grammar schools, and such other [of certain designated] schools as may be established by the legislature, or by municipal or district authority." The term "system," itself, imports a unity of purpose, as well as an entirety of operation; and the direction to the legislature to provide "a" system of common schools means one system, which shall be applicable to all the common schools within the state. In pursuance of this direction the legislature has enacted chapter 3, tit. 3, pt. 3, of the Political Code, wherein the system outlined in the constitution is amplified, and provision made for the organization of school districts, and the election of the officers thereof, as well as of the officers authorized by the constitution, and defining their powers and duties, and also providing for the proper application of the revenue from the state school fund, and for the raising of additional money, by taxation, for the support of the common schools.

Section 1576 of the Political Code declares that "every county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district." By virtue of this legislative authority, each school district becomes a public corporation. (*Estate of Bulmer*, 59 Cal. 131; *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. Rep. 1067;) and its functions and powers as such corporation are those which are given to it by the act under which it is created. The legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has, by virtue of the Political Code. The city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized; and, even though the charter may purport to define the powers and duties of its municipal officers in reference to the public schools in the same language as has the legislature in the Political Code, yet these powers and duties are referable to the legislative authority, and not to the charter. The constitution and laws of this state recognize three classes of cities: Those which are organized under the provisions of the general law authorizing municipal incorporations; those whose charters have been framed by a board of freeholders chosen for that purpose by the city itself; and those which were organized prior to the adoption of the constitution, but have not chosen to change their form of organization. The legislature is, by the constitution, not only prohibited

from creating a municipal corporation by special law, but it has also been prohibited from passing any local or special laws with reference to the powers or duties of municipal officers, or of any matter relating to municipal government. In all matters, however, which may affect the state at large, or whenever any legislation is, in its judgment, appropriate for all parts of the state, it possesses all the legislative power of the state that has not been specifically denied to it; and, upon whatever subjects its power to pass a general law exists, such general law must be the controlling rule of action in all parts of the state, and over all its citizens. The constitution does not purport, of itself, to affect the organization of any city which had been previously incorporated, or to give to the legislature any power to affect its organization, except with its consent; but it gives to the legislature the right to pass general laws which shall be applicable to all cities within the state, by declaring (article 11, § 6) that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to, and controlled by, general laws."

Section 1616 of the Political Code declares that "boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided;" and, in the municipal government act, provision has been made for boards of education in cities that may be organized under that act. By the expression, "the laws governing such cities," is meant the charter of the city, or the power under which the city acts and exercises its authority, whether such power be such as was originally conferred by special charter prior to the adoption of the present constitution, or such as has been conferred by the general law providing for the organization of cities, and accepted by the city, or such as is embraced in a charter framed by freeholders of its own selection, and ratified by the legislature. The "boards of education" thus provided for in cities is but another term for the "boards of trustees," to which the control of school districts has been given; and by section 1617 the same powers are conferred upon each, except in certain enumerated instances. It is unnecessary to determine whether it is competent for the legislature to delegate to these boards of education any of the powers which the constitution has authorized it to exercise in providing for a system of common schools, as the rights of neither party herein depend upon the exercise of such power; but conceding that, by virtue of this section of the Political Code, the charter under which a city is organized may prescribe the powers and duties of a board of education, yet the "powers and duties" authorized by section 1616 are powers and duties of the same general character as those which are enumerated in section 1617, and which, except in certain enumerated particular, are conferred alike upon boards of education and boards of trustees. The powers

and duties of the board of education in a city cannot trench upon the system that the legislature has provided for the entire state, since the charter is limited in its operation by any general law that may be passed by the legislature, and in addition thereto such powers and duties are, by the terms of the section in which they are authorized to be given, limited by the provisions of the Political Code. One of these is found in the second subdivision of section 1617, by which it is made the duty, not only of the trustees of school districts, but also of boards of education in cities, "to pay all moneys collected by them, from any source whatever, for school purposes, into the county treasury, to be placed to the credit of the special fund of their district." These powers and duties relate to the management and control of the schools, for the purposes of education, and do not pertain to the custody or disbursement of the school moneys. Section 1532 of the Political Code requires the state superintendent of public instruction to apportion the school money to the several counties, and, when he has so apportioned it, to draw his order on the comptroller, "in favor of each county treasurer," for the moneys appropriated to that county; and section 1543 requires the county superintendent of schools to apportion the school moneys of the county to each school district within the county, and, on the order of the board of trustees or board of education, "to draw his requisition upon the county auditor for all necessary expenses against the school fund of any city, town, or district," and "upon the receipt of such requisition the auditor shall draw his warrant upon the county treasurer, in favor of the parties, for the amount stated in such requisition." The money is to remain with the county treasurer until it is paid out by him upon the receipt of such requisition. The school moneys never lose their character of public moneys belonging to the state, and are to remain under the control of its officers for the purposes for which they have been appropriated. The fact that they have been apportioned to the several school districts does not give to those districts any proprietary right therein, or any right to their custody; but the districts, through their authorized agents, have the right merely to contract for their proper disbursement within the purposes authorized by law. If any portion of the moneys thus apportioned is not used during the school year, it is made, by section 1621, the duty of the county superintendent to reapportion the balance as other moneys are apportioned.

Section 1617 makes it the duty of the boards of education in cities to pay all moneys collected by them, from any source whatever, for school purposes, into the county treasury. As these boards do not collect the money which the superintendent apportions to the district, this provision must have reference to other moneys; but, as it requires them to pay all moneys collected from any source into the county treasury, it is corroborative of the proposition that, as a school district, the city is not an independent organization, but

is correlated to the other school districts in the county, as a part of the system of public schools provided for by the legislature. For the purpose of raising money additional to that provided for from the state school fund, section 1817 directs the county superintendent to furnish to the supervisors, each year, an estimate of the amount needed for the ensuing year; and section 1818 requires the supervisors of each county having less than 100,000 inhabitants to levy a tax known as the "County School Tax," which, as all other county school taxes, must, by section 3714, be at a uniform rate, upon all taxable property within the county, and, by section 1820, must be paid into the county treasury. For certain special purposes, the supervisors are authorized to levy an additional tax within a school district, if the district has voted therefor; but, with this exception, the school tax must be uniform throughout the county. A board of education within a city has only the same right to make a requisition upon the board of supervisors to levy a tax for school purposes upon the taxable property within the city that has the board of trustees within any other school district in the county; and with the exception of a tax authorized by a vote of the district under the provisions of sections 1830-1837 of the Political Code, for the expenditure of certain moneys within that district, the supervisors are not authorized to levy any tax for school purposes that shall not be uniform upon all the taxable property within the county. Section 1837 requires that this money, when collected, shall be paid into the county treasury for the use of the district in which the tax was voted, and there is no provision of law authorizing the county treasurer to pay out any of the moneys held by him for the account or to the credit of a school district, except in the manner provided by section 1543.

The provision in the charter of the city of San Diego that all moneys belonging to the school fund of the city shall be deposited with the city treasurer cannot, as we have seen, supersede the requirements of the Political Code, that all moneys pertaining to the public school system shall be paid into the county treasury. Aside from the fact that this provision in the charter purports, in terms, to apply only to those taxes levied by the common council, and not to those levied by the board of supervisors, a consideration of the functions of the city government relative to the county government will show that the provisions of the charter cannot have the effect contended for by the appellant. The constitution has authorized the city to frame this charter "for its own government," and this limitation implies that its authority is restricted to its own officers, and the inhabitants within its territory, and that it cannot extend the authority of its officers to matters outside of its territory, or to subjects that have been placed by the constitution exclusively within the control of the legislature, or that have been confided by the legislature to the management of other officials. The county treasurer and the

county auditor are elected by the county at large, and constitute a portion of the political government of the state, with duties and powers prescribed by the legislature, and, in their official positions, act for the welfare of the state; but if it should be held that the inhabitants of a city can, by means of a charter framed by themselves, prescribe the powers and duties of these officers, the charter of that city would cease to be a charter "for its own government," and we might have the spectacle of different cities within the same county prescribing different, and perhaps contradictory, duties for officers who had not been chosen by them, but had been elected by different constituencies under the general law of the state, and who were accountable for their acts to the citizens by whom they had been elected. We hold, therefore, that the appellant is not entitled to the custody of the moneys referred to in his petition, and the judgment of the superior court is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 442)

**CITY OF SAN DIEGO v. DAUER et al.**  
(No. 19,063.)

(Supreme Court of California. March 2, 1893.)

**SCHOOLS—AUTHORITY OF CITY BOARD—SALARY OF SUPERINTENDENT.**

A city cannot enjoin the payment of a warrant drawn on account of the city school district against the county treasurer for an amount fixed by the board of education as salary of the city superintendent, since the city and city school district are distinct corporations, and since, under Pol. Code, § 1793, as amended, (St. 1891, p. 164,) authorizing the board of education to elect a superintendent, and to fix the salary of its employee, the matter of the superintendent's salary is under the control of the board.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action for injunction by the city of San Diego against C. R. Dauer and others. Order dissolving a preliminary injunction. Plaintiff appeals. Affirmed.

William H. Fuller, for appellant. Parrish, Mossholder & Lewis and Johnstone Jones, (J. E. Deakin, of counsel,) for respondents.

**HARRISON, J.** The appellant sought by this action to enjoin the respondent Dauer, as treasurer of the county of San Diego, from paying a warrant drawn upon him in favor of the respondent De Burn for his salary as superintendent of public schools of the city of San Diego. By the charter of the city of San Diego, the salary of the superintendent of schools was originally fixed at \$1,500 a year; and chapter 9 of the charter directs the common council to readjust and fix anew, in the month of January, 1891, and every four years thereafter, the amount of all official salaries provided for in the chapter. In pursuance of this direction, the common council, on the 31st day of January, 1891,

passed an ordinance fixing the salary of the superintendent of schools at \$900 a year. The respondent De Burn was elected superintendent of the public schools of the city of San Diego on the 4th day of May, 1891, and on December 17, 1891, the board of education of that city passed a resolution fixing his salary at \$125 per month, to take effect January 1, 1892. Thereafter the president and clerk of the board of education gave an order on the county superintendent of schools, directing him to draw a requisition on the county auditor, against the county school fund, in favor of De Burn, for \$125, as his salary for the month of January, 1892; and, upon the presentation thereof to the county superintendent, he gave to De Burn his requisition upon the county auditor, and upon its receipt the county auditor drew his warrant upon the county treasurer, in favor of De Burn, for its payment. This action was brought by the plaintiff to restrain the county treasurer from paying the warrant, and also to restrain the president and clerk of the board of education from thereafter drawing any similar orders. A preliminary injunction, that had been granted by the judge upon the complaint of the plaintiff, was dissolved, upon the motion of the defendants, and the plaintiff has appealed from the order dissolving that injunction.

In *Kennedy v. Miller*, (Cal., No. 19,032,) 32 Pac. Rep. 559, we have held that the city of San Diego is a corporation distinct from the corporation known as the "School District of the City of San Diego," and that the rights and obligations of the school-district corporation are to be determined by the provisions of the Political Code, and not by those of the charter of the city of San Diego, and also that the powers and duties of boards of education in cities are the same as those of boards of trustees in other school districts. We also held in that case that all the moneys which are apportioned from the school fund, as well as those which are raised by means of a tax for school purposes, levied by the board of supervisors, are to be paid into the county treasury, and to remain there until they are paid out upon a warrant drawn by the county auditor under a requisition from the county superintendent of schools. Section 1793 of the Political Code, as amended in 1891, (St. 1891, p. 164,) authorizes the board of education of a city to elect a city superintendent of schools, and also to fix the salary of its employee. Assuming, therefore, that the superintendent of schools of the city of San Diego is an employee of the board of education of that city, whose functions pertain to the management of the public schools organized within the school district of the city of San Diego under the system established by the legislature, the fixing of his salary would pertain to the board of education, and not to the common council, and such salary would be payable out of the moneys held in the county treasury for the account of the school district of the city of San Diego. These moneys are in the treasury to the credit of the school district, and the city of San Diego, as a municipal corporation,



has no interest therein. It therefore appeared upon the face of the complaint that the plaintiff was not entitled to the injunction sought for, and the order dissolving the same is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(97 Cal. 456)

THOMAS v. PARKER et al. (No. 14,890.)

(Supreme Court of California. March 6, 1893.)

MORTGAGE BY ADMINISTRATOR—RECITALS—ORDER TO SHOW CAUSE—GUARDIAN FOR MINORS.

1. Where a mortgage by an administrator of his intestate's land, after referring to the order of the court authorizing its execution, recited that "now, therefore, the said mortgagor, pursuant to the order last aforesaid, \* \* \* mortgages to the mortgagee, \* \* \*" such recital, with other similar recitals, sufficiently showed that the mortgage was executed by the mortgagor as administrator in pursuance of law and the court's order, and not in a personal capacity; Code Civil Proc. §§ 1577, 1578, authorizing the execution of mortgages by administrators under proper order of court.

2. Code Civil Proc. § 1578, subd. 3, provides that the order to show cause required to be issued before an administrator can mortgage his decedent's real estate must be served on all parties interested either in person or by publication. *Held*, where the order was properly served by publication, that it was sufficient even though it appeared from the order that there were certain infant defendants under the age of 14 years.

3. Code Civil Proc. §§ 1577, 1578, under which administrators are authorized to mortgage an intestate's real estate, does not require the appointment of a guardian ad litem for infants, and provides that no irregularity in the proceedings shall invalidate the mortgage given in pursuance thereof. *Held*, where the court had jurisdiction to make the order for the execution of a mortgage by an administrator, that the nonappointment of a guardian for minors was an "irregularity," and did not invalidate the mortgage.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Henry Thomas against J. L. Parker, administrator, and others, to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Affirmed.

R. W. Ready and A. W. Blair, for appellants. James A. Thomas and D. P. Hatch, for respondent.

PERCURIAM. This action was brought to foreclose a mortgage executed in favor of the plaintiff by the administrator of Mary E. Parker, deceased. The purpose for which the mortgage was given seems to have been to borrow money with which to pay certain debts of the decedent contracted in her lifetime, and to pay expenses of administration, family allowance, etc. The defendants are the husband, who is also the administrator of Mrs. Parker's estate, and her minor children. Demurrers were filed to the complaint, and overruled. The defendants then answered the complaint, and upon evidence given in the premises, findings being waived, the trial court entered a decree of foreclosure in accordance with the

prayer of the complaint. From the judgment thus made, this appeal is taken on the judgment roll and bill of exceptions.

One of the grounds upon which a reversal of the judgment is demanded is that the petition which was filed by the administrator when seeking to obtain the order of the probate court to mortgage the real estate of his decedent was insufficient, and did not therefore give that court jurisdiction to make the order. The law under which this proceeding can be had is to be found in the Code of Civil Procedure, §§ 1577, 1578. A critical examination of the petition and of the language of the statute makes it clear that the petition is sufficient.

The further contention of appellants that the mortgage sought to be foreclosed was not executed by J. L. Parker in his character as administrator of the estate of Mary E. Parker, and is therefore only a personal mortgage of said Parker, is clearly without merit. The mortgage, after referring to the order of the superior court authorizing its execution, proceeds to recite: "Now, therefore, the said mortgagor, pursuant to the order last aforesaid, \* \* \* mortgages to the mortgagee," etc. This, with the other recitals, is sufficient to show that the mortgage was intended as a mortgage of property belonging to the estate of which the mortgagor was administrator, and was executed by him in his character as administrator, in pursuance of law and the order of the superior court directing its execution.

It is further argued that the order to show cause required by the second subdivision of section 1578 of the Code of Civil Procedure is insufficient, because it does not comply with the provisions of that subdivision, and for the further reason "that the same does not direct or require the personal services thereof to be made upon the infant defendants herein and minor heirs in said proceedings, it appearing therein that each and all of them were under the age of fourteen years." The court refused, on the objection of the defendants, to rule out the order above adverted to and offered in evidence. The objection as made is general, with the exception of the matter last specified, with reference to the want of personal service on the minors, and therefore the trial court had only that matter called to its attention in a proper way. In relation to this objection it is sufficient to say that subdivision 3 of section 1578 of the Code of Civil Procedure, under which the order to show cause was made, provides that service of such order may be made personally, "or it may be published for five successive weeks in a newspaper of general circulation published in the county;" and the order was so published, and in accordance with the directions contained in such order. There is therefore nothing in the exception taken. The appellant further claims that, in order to validate the proceedings, it was necessary for a guardian ad litem to be appointed to represent the minors. The act under which this proceeding is taken does not require any guardian ad litem to be appointed, and

provides that, if the court has jurisdiction to administer the estate of the decedent, (about which there is no question here,) it has jurisdiction to make the order for the mortgage; and it further provides that "no irregularity in the proceedings shall impair or invalidate the same or the mortgage given in pursuance thereof," etc. Code Civil Proc. § 1578, subd. 6. The non-appointment of the guardian ad litem is an irregularity, (*Emerie v. Alvarado*, 64 Cal. 600, 2 Pac. Rep. 418;) hence there is no merit in the point last made.

Judgment affirmed.

(97 Cal. 490)

ELDER v. KUTNER et al. (No. 18,027.)

(Supreme Court of California. March 9, 1893.)

WRONGFUL ATTACHMENT—DAMAGES—LIABILITY OF SURETIES—ACTION ON BOND—PLEADING.

1. Under Civil Code, § 3300, providing that for the breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all detriment "proximately" caused thereby, or which, in the ordinary course of things, would be likely to result therefrom, sureties on an attachment bond are not liable in damages to the person whose land is attached by reason of the impairment of his credit and his inability to sell such land because of the attachment lien thereon, in that such damages are not the "proximate," but the "remote," result of the attachment.

2. The fact that an attachment was sued out maliciously does not affect the liability for damages of the sureties on the bond, since in an action against them the questions of "motive" and "probable cause" are immaterial.

3. A complaint in an action against the sureties on an undertaking in attachment to recover attorney's fees paid out in the attachment, which fails to state that plaintiff has actually paid such fees, is demurrable.

4. Where, on striking out one paragraph of a complaint, sufficient facts remain to constitute a cause of action, a demurrer will not lie thereto.

Commissioners' decision. Department

2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by John Elder against A. Kutner and another. There was judgment for defendants on demurrer to the complaint, and plaintiff appeals. Reversed.

J. P. Meux, for appellant. E. S. Heller and G. W. Jones, for respondents.

SEARLS, C. This action was brought in the superior court of the county of Fresno to recover damages against the respondents, as sureties upon an undertaking in an attachment suit against the plaintiff and appellant here, which attachment suit was dismissed. The complaint contains two counts. In the first, plaintiff, after the usual averments in reference to the suing out and levy of the attachment upon his land at Fresno, as a predicate for the recovery of damages, alleges as follows, in paragraph 9: "That between the 21st day of January, 1891, and the 27th day of August, 1891, the plaintiff had need of a large sum of money for his immediate use; desired, had an opportunity, and was able to mortgage his said premises for the purpose of raising money

for his immediate use and great pressing needs; and had opportunity of selling his said premises, but was not able to mortgage or sell the same on account of said attachment having been levied and remaining unsatisfied as aforesaid, and creating a cloud upon plaintiff's title to his said premises. That the plaintiff had to sacrifice other property—horses, mules, and stock—on his said premises, at greatly reduced and inadequate prices, for the purposes of meeting his immediate necessities and raising money. That by reason of his not being able to mortgage or sell his said premises and having to sell the horses, mules, and stock on his said premises, the plaintiff has been greatly damaged, to wit, in the sum of four hundred (\$400) dollars, the amount of said undertaking." It is further averred that the attachment was "wrongfully and unlawfully and maliciously sued out," and that the plaintiff herein "did not owe any portion of the indebtedness sued on in said action." The second count of the complaint is based upon plaintiff's supposed right to recover attorneys' fees in the attachment suit; and the only portion thereof necessary to the points made is to the effect that plaintiff was put to great expense in defending that action, "and engaged an attorney to represent him therein, and incurred attorneys' fees, to wit, the sum of one hundred dollars." Defendants' attorneys demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action; and moved to strike out that portion of the first count quoted herein in reference to damages sustained by reason of the lien of the attachment upon the land. The motion to strike out was granted, and the demurrer to the complaint sustained, with leave for plaintiff to amend, upon a failure to do which, final judgment for costs was entered against him. The appeal is from such judgment.

The first question presented for determination is as to the propriety of the action of the court below in striking out paragraph 9 of plaintiff's complaint, hereinbefore quoted. An undertaking given upon the issuing of a writ of attachment, under our statute, is a contract,—a contract to indemnify the defendant for all costs that may be awarded to him, and all damages which he may sustain by reason of the attachment in the event of his recovering judgment. An action upon such undertaking being upon contract, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civil Code, § 3300. The liability of the defendants arises under their contract, and is limited by its terms and conditions. *McDonald v. Fett*, 49 Cal. 354. By that contract they did not undertake to become liable for the remote and possible consequences which in some contingency might follow, but for the proximate consequences naturally and ordinarily resulting from the effect of the writ. The impairment of plaintiff's credit, his inability to sell the land levied upon or to contract a loan up-

on the security of such land, was not a proximate, but a remote, consequence of the attachment. The attaching creditor did not deprive plaintiff of the possession or use of his land, did not commit waste thereon, or do or cause any act to be done beyond levying upon the land in the manner prescribed by the statute for the levy of attachments upon real property. In *Miller v. Stewart*, 9 Wheat. 702, it was said: "Nothing can be clearer, both on principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract." *Roe v. Thomas*, 19 Mo. 613. The plaintiff, it is true, avers that his property was maliciously attached. If this was true, he could maintain an action on the case against his attaching creditors, in which the injury he complains of here could be redressed, provided, always, there was no probable cause for issuing the writ. *Reidhar v. Berger*, 8 B. Mon. 160. In an action against the sureties on the undertaking, however, the questions of motive and probable cause cut no figure. In *Heath v. Lent*, 1 Cal. 410, it was held, in an action on a bond given upon suing out an attachment against the property of a debtor who was a merchant, where the sheriff had levied upon no property except real estate, and the debtor had never been disturbed or molested in his possession, (1) that evidence as to the effect of an attachment upon the credit and reputation of merchants ought not to have been admitted, on the ground that damages resulting therefrom were too remote and contingent; (2) that evidence of depreciation of value of the real estate attached was not admissible. The case of *Ah Thae v. Quan*, 3 Cal. 216, overrules the case of *Heath v. Lent* to the extent of holding that fees paid to counsel to procure the dissolution of an injunction was a direct loss, consequent upon the wrongful issuing of an injunction, for which a recovery could be had upon the bond. *Prader v. Grim*, 13 Cal. 586, and later cases are to the same effect. There is a marked distinction between cases in which personal property is attached and taken into possession by the sheriff, as it must be to constitute a valid lien, and those in which real estate is taken under a like writ; and, when we say the damages sought to be recovered in that portion of the complaint stricken out are too remote for recovery on the bond, we must be understood as applying the remark to cases involving real estate only. We think there was no error in the order of the court striking out the portion of the complaint in question.

2. As to the order sustaining the demurrer. The second count of the complaint failed to state a cause of action. It has been repeatedly held by this court that counsel fees in a proper case for their recovery cannot be recovered until they have been actually paid. *Willson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11. The fact of payment, being essential to a recovery, should be averred. We search the complaint in vain for any such allegation. The averment is that plaintiff "engaged an attorney to represent him therein, and incurred attorneys' fees, to

wit, the sum of one hundred dollars." This, at most, is but an assertion that he incurred a liability. The damage accrues from the payment, and not from incurring the liability so to do. The demurrer to the first count of the complaint should have been overruled. Strike out the ninth paragraph, and we still have a consecutive and orderly statement of a set of facts which entitles the plaintiff to recover nominal damages. For this reason we recommend that the judgment be reversed, and the court below directed to overrule the demurrer to the first cause of action in plaintiff's complaint, with leave to defendants to answer the same.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to overrule the demurrer to the first cause of action in plaintiff's complaint, with leave to defendants to answer the same.

(97 Cal. 432)

BLACK v CLASBY, Constable, et al. (No. 18,066.)

(Supreme Court of California. March 9, 1893.)

CONVERSION—NECESSITY OF DEMAND.

Where a constable, under a writ of attachment against one person, seizes the goods of another, which at the time of the seizure are in the custody of a person other than the defendant in the writ, he becomes a trespasser ab initio, and no previous demand is necessary to authorize a recovery therefor; and if this rule is changed by the amendments taking effect May 2, 1891, to sections 549 and 689 of the Code of Civil Procedure, so that a written claim is necessary, this does not apply where the property was seized by the officer April 16, 1891, on which day the right of action for the conversion was complete.

Department 1. Appeal from superior court, Colusa county; A. E. Bridgford, Judge.

Action by Mary B. Black against John Clasby, constable, and others, for the alleged conversion of personal property. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

H. M. Albery and K. Albery, for appellants. B. F. Howard, for respondent.

HARRISON, J. The defendant Clasby was the constable of the first judicial township in the county of Colusa, and as such officer seized and took into his possession, under a writ of attachment issued out of the justice's court for that township, in the action of W. W. Ludy vs. Henry B. Black, certain personal property belonging to the plaintiff. At the time of its seizure a portion of the property was in the possession of the plaintiff, and another portion in the possession of one Spencer, who was holding it as bailee for the plaintiff, but none of it was in possession of the defendant in the writ. A few days after its seizure, the plaintiff orally demanded the property of the constable, and, upon his refusal to surrender it, brought this action for the value of the property alleged to have been converted, against him and

the two other defendants, who were sureties upon his official bond. Judgment was rendered in her favor, and the defendants have appealed therefrom.

When the sheriff, under a writ of attachment or of execution against one person, seizes the goods of another, which at the time of seizure are in the custody either of the owner or of a person other than the defendant in the writ, he is a trespasser ab initio, and no previous demand is necessary to authorize a recovery therefor. *Boulware v. Craddock*, 30 Cal. 180; *Murfree, Sher.* §§ 270, 270a. The appellant claims that by the amendments of 1891 to sections 549 and 689 of the Code of Civil Procedure (St. 1891, p. 20) this rule has been changed, and that under the present provisions of these sections the judgment herein cannot be sustained, for the reason that the plaintiff did not present to the constable a written claim for the property in the form therein designated. We do not find it necessary, however, to pass upon the effect of these amendments, or to construe the sections as amended, as the present case must be determined without regard to them. The property of the plaintiff herein was seized by the officer on the 16th of April, 1891, and the plaintiff's right of action for its conversion was complete on that day, and was not taken away or impaired by the foregoing amendments, as these did not take effect till May 2, 1891. The judgment is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

(3 Cal. Unrep. 838)

CONLON v. GARDNER et al. (No. 18,008.)  
(Supreme Court of California. March 9, 1893.)

#### CHANGE OF VENUE—REVIEW.

Where the evidence on the hearing of a motion for change of venue on the ground of change of residence is conflicting as to whether the residence had actually been changed when the action was commenced, the discretion of the trial court in denying the motion will not be reviewed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, Amador county; C. B. Armstrong, Judge.

(Not to be published in California Reports.)

Action by Thomas Conlon against Eli Gardner and Eleanor T. Gardner. From an order denying their motion for a change of venue, defendants appeal. Affirmed.

Eagon & Rust, for appellants. Caminetti & McGee, for respondent.

BELCHER, C. The plaintiff commenced this action to recover from the defendants the sum of \$3,000, alleged to be due him from them as commissions for the sale of certain mining property situate in the county of Amador. The complaint was filed in the superior court of Amador county on September 5, 1891, and the summons was duly served on defendants in that county on the 15th of the same month. In due time defendants demurred to the complaint, filed an affidavit of merits, and an affidavit that they were at the time of the commencement of the action, and were then, and had been ever since the — day

of June, 1891, residents of and actually residing in the county of Alameda, and demanded that the place of trial of the action be changed to the county of Alameda. The plaintiff contested the application for a change of venue, and, when the motion came on to be heard, a large number of additional affidavits were filed and read on both sides. The court below denied the motion, and the defendants appeal from the order.

The plaintiff's affidavits were positive to the effect that defendants had resided in Amador county for a good many years, and continued to reside there until September 25, 1891. The defendants' affidavits, on the other hand, were positive to the effect that defendants left Amador county and became permanent residents of Alameda county on July 18, 1891, and that they thereafter had only gone back to the former county two or three times on business. It was, however, admitted that their household furniture and some of their children remained in their old home until September 25th. The question, then, presented for decision by the trial court was one of fact, viz. where did defendants actually reside on September 5th, the date of the commencement of the action? The evidence upon this question was clearly and squarely conflicting, and it has been held that in such a case an order like that appealed from here will not be disturbed on appeal. *Creditors v. Welch*, 55 Cal. 469; *Hastings v. Keller*, 69 Cal. 606, 11 Pac. Rep. 218. And if, as said in *Tuller v. Arnold*, 93 Cal. 168, 28 Pac. Rep. 863, this rule does not apply where the evidence is all documentary, still "this court will not interfere with the discretion of the trial court, except where it can plainly see that there has been an abuse of such discretion." Here we do not think it can be said that the court plainly abused its discretion in denying the defendants' motion.

The order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(3 Cal. Unrep. 843)

WOLTERS v. THOMAS. (No. 18,007.)

(Supreme Court of California. March 10, 1893.)

#### NOVATION—LIMITATIONS—PLEADING.

1. S., being indebted to plaintiff, gave him a written order on defendant, who was indebted to S.; and plaintiff presented the order to defendant's foreman, who accepted it. Defendant afterwards denied the foreman's authority to accept it, but, on being shown it, and told the circumstances, agreed to pay plaintiff whatever should be due S. from him. Held to constitute a novation.

2. Under Code Civil Proc. § 458, providing that, "in pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated, generally, that the cause of action is barred by the provisions of section, (giving the number of the section and subdivision thereof, if it is so divided, relied upon.)" a plea of the statute of limitations, alleging that a cause of action is barred by Code Civil Proc. § 339, is insufficient, since such statute contains several subdivisions.

3. The objection to the answer need not be taken by special demurrer for uncertainty.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; G. G. Clough, Judge.

(Not to be published in California Reports.)

Action by J. C. Wolters against J. H. Thomas to recover a claim against defendant, alleged to have been assigned to him. From a judgment for plaintiff, defendant appeals. Affirmed.

Goodwin & Goodwin, for appellant. C. E. McLaughlin, for respondent.

TEMPLE, C. This appeal is from a judgment, and was taken within 60 days after its rendition. The question presented is whether the trial court erred in overruling defendant's motion for nonsuit. It does not appear that any further evidence was introduced after the motion was made. The complaint shows, by proper averment, that on the 19th day of July, 1887, the defendant was indebted to Sing Lee Co in the sum of \$432.37, and that Sing Lee Co was indebted to plaintiff in the same amount; that plaintiff agreed with Sing Lee Co to release him from such indebtedness if he would give an order upon defendant for that amount, provided defendant would accept such order; that thereupon Sing Lee Co gave him an order upon defendant, in writing, whereby he requested defendant to pay the amount to plaintiff; that the order was presented to defendant's foreman, who accepted the same, in writing, and thereupon plaintiff gave Sing Lee Co credit for that sum on his books; that, shortly afterwards, plaintiff met defendant, and showed him the order, and explained to him all the facts; that defendant said that his foreman had no authority to accept the order, but that it was all right, for whatever sum he owed Sing Lee Co; that subsequently, upon a settlement between defendant and Sing Lee Co, it was found that defendant was indebted to Sing Lee Co in the full amount of the order, and that sum was charged up against Sing Lee Co on account of the order, and is retained by defendant, who has never paid any part of it to Sing Lee Co or to plaintiff, though plaintiff has often demanded the same. The complaint contains many other averments not essential to the determination of this appeal. On the trial the evidence failed to show that the foreman had any authority to accept the order for defendant, and did show that the amount of defendant's indebtedness to Sing Lee Co was only \$371.25, instead of \$432.37 as alleged. In other respects, the allegations of the complaint were substantially proven, so far as set out above. It also appeared that, before receiving the order from Sing Lee Co, plaintiff called upon defendant's foreman, to ascertain the amount due Sing Lee Co, and was informed that the sum was \$432.37, and therefore the order was drawn for that sum. The intent was to include whatever was due from defendant to Sing Lee Co. Two points are made by the appellant: The first is that the cause of action alleged is upon a written order,

and the evidence does not sustain the allegation. The cause of action proved, if any, is upon an assignment of an open account. The second, that the action is barred by the statute of limitations.

1. While the complaint sets out a written order, and avers that it was duly accepted by the defendant, it also shows that defendant was at the time indebted to Sing Lee Co, and, upon being shown the order, and told the circumstances, agreed to pay plaintiff whatever should be found due Sing Lee Co. I think a cause of action is stated, aside from the alleged acceptance. The facts would certainly show a contract of novation, if not a cause of action upon the order. See *Joyce v. Wing Yet Lung*, 87 Cal. 424, 25 Pac. Rep. 545.

2. The plea of the statute of limitations is in the following words: "And, as further defense to said action, alleges that the same is barred by the provisions of section 339, Code of Civil Procedure of the State of California." That section reads as follows: "Within two years: (1) An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state. (2) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape. (3) An action to recover damages for the death of one, caused by the wrongful act or neglect of another." Section 458, Code Civil Proc., provides: "In pleading the statute of limitations, is not necessary to state the facts showing the defense, but it may be stated, generally, that the cause of action is barred by the provisions of section, (giving the number of the section and subdivision thereof, if it is so divided, relied upon,)" etc. It is manifest that the answer does not comply with this section. Counsel say that the answer is equivalent to saying that the cause of action is barred by each of the subdivisions contained in the section referred to. But, if this is the effect, it clearly is not a compliance with the statute. Tested by ordinary rules of pleading, the absurdity of this claim is very obvious. It would be an averment, not only in the same defense, but in the same sentence, that the cause of action is founded upon a contract not in writing, upon a liability incurred by an officer, and that it is an action to recover damages for the death of one, caused by the wrongful act of another. The substituted mode of pleading was allowed to avoid useless prolixity, but was so conditioned as to secure all necessary definiteness in pleading. The rule contended for would nullify these conditions.

Counsel further contend that the objection should have been made by special demurrer, on the ground of uncertainty or ambiguity. But the objection is not that there is uncertainty in the statement of facts, but that no facts are stated. It is only by a compliance with the statute that such a defense can be made without

stating facts. That there must be strict compliance, in such cases, has often been held. *Manning v. Dallas*, 73 Cal. 421, 15 Pac. Rep. 34; *Young v. Wright*, 52 Cal. 407; *Judah v. Fredericks*, 57 Cal. 389.

Counsel say that there are numerous cases in which such pleas have passed here without challenge. The only case cited is *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. Rep. 545. That case discloses no such plea, nor does it contain any language to justify such assertion. An examination of the record in that case shows that the section and subdivision thereof were pleaded. I think the judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(3 Cal. Unrep. 332)

In re HARVEY.

Appeal of CHAMPLIN. (No. 18,004.)

(Supreme Court of California. March 7, 1893.)

INSOLVENCY—SECURED CLAIMS—ALLOWANCE—COSTS—WRONGFUL ATTACHMENT.

1. On a contest of a claim against an insolvent's estate, it appeared that the insolvent had become indebted to claimant's assignor, B., for the price of certain land and merchandise, and gave him the notes constituting the claim in question. As part of the same transaction, B. gave a bond conditioned to convey the land to the insolvent on payment of the amount of the notes. *Held*, that the title to the land was reserved to secure the entire debt, and that the claim was properly rejected where claimant attempted to prove the full amount of the notes, without either deducting the value of the land, as required by section 44 of the insolvency act, or conveying his interest in it to the assignee.

2. Costs incurred in wrongful attachment against the estate of an insolvent cannot be recovered, under section 65 of the insolvency act, as said section applies only to costs which would have been a legal charge.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county; G. G. Clough, Judge.

(Not to be published in California Reports.)

Proceedings in the matter of the insolvency of T. M. Harvey. Certain orders were made refusing claims presented by George Champlin, and settling the assignee's account, from which Champlin appeals. Affirmed.

M. P. Chipman and D. W. Jenks, for appellant. W. Rigby and J. J. May, for assignee. E. E. Copeland, for insolvent.

TEMPLE, C. This appeal is from two orders made in the proceedings in the matter of the insolvency of T. M. Harvey. By one order the court refused to allow two claims presented by the appellant against the estate of the insolvent. By the order it settled the final account of the assignee, and distributed the proceeds of the estate, without considering the objections of appellant to the account or the proposed order. As appellant had no interest in the insolvent's estate after his two claims were rejected, it is obvious that, if the first order was correctly made,

appellant was not injured by the second. It does not appear when the proceedings in insolvency were commenced, but the adjudication was made at the instance of the creditors of T. M. Harvey, September 19, 1890. On the 2d of November, 1890, Champlin filed his claims, verified by his affidavit, as required by the insolvency act. Upon notice given by the assignee that he would contest the claims, the matter was submitted upon affidavits, and the claims were held not provable against the insolvent and rejected. Among others, the affidavit of T. M. Harvey, the insolvent, was read, from which it appeared that the insolvent and J. L. Harvey became indebted to one J. H. Beecher on the 27th day of September, 1889, in the sum of \$4,110, for certain merchandise and for a lot in the town of Adin, county of Modoc. For this sum the debtors gave three notes, each payable to the order of the makers, and then indorsed by them and delivered to said Beecher. They were all payable one day after date. At the same time, and as part of the same transaction, and as part consideration for the notes, Beecher executed and delivered to them his bond, conditioned "that, if the above bounden obligor shall on or before the 1st day of August, 1891, make, execute, and deliver unto said T. M. Harvey and James L. Harvey (provided that the said T. M. Harvey and James L. Harvey shall on or before that day have paid to the said obligor the sum of four thousand one hundred and ten dollars gold coin of the United States of America) a good and sufficient conveyance," etc. Beecher, of course, retained the title to the land, and, so far as shown, still retains it. In June, 1890, affiant states, Beecher transferred the notes to Champlin, who is his brother-in-law, and who took the notes with full notice of all the facts. On the 18th of July, 1890, Champlin commenced a suit upon the notes in the superior court of Tehama county, and caused an attachment to be issued, which was levied upon the property of the insolvent in the county of Modoc. Just two months afterwards T. M. Harvey was adjudged an insolvent. A motion was made in the court in which the attachment suit was pending to dissolve the attachment on three grounds: (1) The indebtedness was secured; (2) was not due; and (3) T. M. Harvey had been adjudged an insolvent. When the motion was made does not appear, but it must have been after the adjudication. It was granted November 12, 1890. The order dissolving the attachment does not state upon what ground it was dissolved, but it is evident that the attachment was improperly sued out, for the land was held in trust as security for the debt even in the hands of Beecher's assignee. *Gessner v. Palmateer*, 89 Cal. 39, 24 Pac. Rep. 608, and 26 Pac. Rep. 789. Besides, if the insolvency proceedings had been commenced within one month after the attachment, the adjudication would have ipso facto operated as a dissolution, and no such motion would have been required.

Appellant's affidavit denies that appellant knew of the existence of the supposed security when he purchased the notes, and

he contends that the value of the lot is much less than the debt, and that the purchase price of the land formed an inconsiderable part of the consideration for the notes. By the terms of the bond, however, which may be considered a declaration of a trust by Beecher, it is evident that the Harveys would be compelled to pay the entire debt before they could demand a deed. If, therefore, the bond constituted security for the payment of the notes, in the hands of the assignee, at all, it was for the full amount. Appellant did not attempt to prove his claim for the balance of the debt after deducting the value of the security, as provided in section 44 of the insolvent act. Indeed, he could not do this unless he could agree with the assignee as to the value of the security. But he made no effort in that direction, for he claimed that he had no security, and was entitled to prove his full debt. Of course, for the same reason, he did not convey his claim upon the property to the assignee, and permit the property to be sold under the order of the court. The claim, therefore, was properly rejected by the court.

The second claim presented by Champlin against the estate of the insolvent was for \$713.33, being the costs incurred in the attachment proceedings. It is evident that the attachment was wrongfully sued out. Under such circumstances appellant could not have recovered such costs from the defendant if he had not been adjudged an insolvent. As the proceedings in insolvency are for the purpose of appropriating the property of the insolvent to the payment of his debts, it must follow that such costs could not be allowed against his estate. The provisions of section 65 of the insolvency act can only apply to costs which would have been a legal charge against the insolvent. I think the order should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders are affirmed.

(97 Cal. 527)

In re MULHOLLAND. (No. 21,000.)  
(Supreme Court of California. March 16, 1893.)

#### FINES—IMPRISONMENT UNTIL PAYMENT.

1. Pen. Code, § 1446, relating to proceedings in police courts, provides that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine. Section 1205, which was a similar provision, till amended by St. 1891, p. 52, provides that the imprisonment "must not exceed one day for every two dollars of the fine." *Held*, that section 1446 was not affected by the amendment to section 1205, which is a limitation on the powers of superior courts.

2. The fact that the law provides different degrees of punishment by different courts for the same offense does not render it invalid.

At chambers.

Petition by one Mulholland for a writ of habeas corpus. Denied.

N. S. Wirt, for petitioner.

PATERSON, J. The petitioner was convicted in the police court of the city and county of San Francisco, January 16, 1893, of the crime of battery, and sentenced to pay a fine of \$100, or, in default of the payment thereof, to be imprisoned at the rate of one day for each dollar of said fine remaining unpaid. The petitioner claims that the court below had no authority to imprison him for more than 50 days; that the sentence ought to have been no greater than one day for each two dollars of the fine. In support of this contention he relies upon section 1205 of the Penal Code, as amended March 10, 1891, (St. 1891, p. 52.) that section, as originally incorporated into the Code, provided that the judgment should specify the extent of imprisonment, "which could not exceed one day for every two dollars of the fine." Section 1446, Pen. Code, relating to proceedings in justices' and police courts, provided that a judgment that the defendant pay a fine might also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every two dollars of the fine. Both of these sections were amended in 1874 by inserting the words "one dollar" in lieu of the words "two dollars," as used in each section. Section 1446 has remained the same as thus amended. The amendment to section 1205, approved March 10, 1891, provides that the imprisonment "must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted." In my judgment, the recent amendment to section 1205 in no way affected the operation of section 1446. I think that the legislature intended that the justices' and police courts should remain clothed with the discretion which they have exercised under section 1446 ever since its adoption. The amendment to section 1205 is a limitation upon the powers of the superior courts, which alone have jurisdiction of misdemeanors, with one or two exceptions, (section 115, Code Civil Proc.,) for which the punishment may be greater than six months' imprisonment or \$500 fine, or both. In certain cases the superior court may impose as a penalty for a misdemeanor several years' imprisonment in the county jail, or \$5,000, or both such fine and imprisonment. It is altogether likely that the members of the legislature had observed in some instances an abuse of discretion in the exercise of this authority by the superior courts under the provisions of the statute, and desired to limit their power in that regard.

I do not think there is any merit in the point made by counsel for petitioner that the "punishment must be the same in all courts for the same offense." As was said in *Ex parte Soto*, 88 Cal. 627, 26 Pac. Rep. 531: "Section 1446 of the Penal Code does not imperatively require that the direction for imprisonment in case of nonpayment of a fine shall be at the rate or in the proportion of one day for one dollar. It is in terms permissive. The discretion of the magistrate is absolute whether or not to impose any imprisonment whatever." The justices' and police courts having this dis-



cretion, and the court being limited in the exercise thereof to the maximum term of imprisonment prescribed as a penalty or part of the penalty, there is very little danger of petty offenders being subjected to a harsher or more burdensome rule than the one which is applied to more serious offenders. It is true, a person charged with a felony may be convicted of a misdemeanor of which the justices' and police courts have jurisdiction, and be sentenced by the superior court to a greater term of imprisonment than he would have received if he had been tried before a justice of the peace for the same offense, (such a thing is possible,) but that fact does not invalidate the law. The various superior and justices' courts throughout the state are constantly trying criminal cases of the same nature and imposing different sentences. It is impossible to lay down any fixed rule by which the judges may determine the exact penalty to be imposed in each case, and the fact that criminals are subjected to different degrees of punishment for the same offense in different courts does not affect the validity of the law. *Scriuegrou v. State*, 1 Chand. 51. The petitioner is remanded to the custody of the sheriff.

(97 Cal. 510)

BOYD v. ODDOUS. (No. 19,024.)

(Supreme Court of California. March 10, 1893.)

## NEGLIGENCE—PLEADING—INSTRUCTIONS.

1. A complaint in an action to recover for personal injuries sustained through the negligence of another is not demurrable by reason of its failure to allege absence of contributory negligence on the part of plaintiff.

2. Where a party requests numerous instructions, and the court gives a general charge, purporting to cover the instructions asked, an objection to the refusal of the court to give the instructions on the ground that they were proper, and that they were not covered by the charge of the court, is too general to be noticed.

Commissioners' decision. Department

1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by W. M. Boyd against Jacques Oddous. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. V. Biscailuz and Gould & Stanford, for appellant. Burnett & Gibbon, for respondent.

VANCLIEF, C. Action for damages alleged to have been suffered by plaintiff from the bite of a dog owned and kept by defendant; it being alleged that the dog was vicious and accustomed to bite mankind, of which defendant had notice, and that plaintiff was bitten in consequence of the negligent manner in which defendant kept the dog. The answer admits that defendant owned and kept the dog, but denies all other material averments of the complaint; and, as an affirmative defense, alleges "that, if the plaintiff had used ordinary caution," he could have avoided coming in contact with the dog. This seems to have been intended as an averment of contributory negligence on the part of the plaintiff. The verdict of the jury was in favor of the plaintiff, as-

sessing the damages at \$450, according to which judgment was rendered. Defendant appeals from the judgment and from an order denying his motion for new trial.

1. The first and principal point urged here by counsel for appellant is that the complaint fails to state a cause of action, because it does not negative contributory negligence on the part of the plaintiff; and, therefore, that defendant's demurrer to the complaint and his motion for nonsuit should have been sustained. No authorities are cited which tend to support this point; but the contrary doctrine seems to be firmly established in this state. *Robinson v. Railroad Co.*, 48 Cal. 409; *Yik Hon v. Waterworks*, 65 Cal. 619; *Mages v. Railroad Co.*, 78 Cal. 430, 21 Pac. Rep. 114.

2. There is no foundation in the record for the point that the court permitted evidence of special damages not pleaded, as no such evidence appears; nor does it appear that any evidence of damage was objected to on the ground that the damage was not specially pleaded.

3. It is contended that the evidence does not justify a verdict of negligence on the part of the defendant, and, if it does, that the jury should have found contributory negligence of the plaintiff. Upon both of these issues the evidence was conflicting, and therefore the verdict as to neither should be disturbed.

4. Some very indefinite objections are made to the instructions given to the jury. Counsel for defendant requested the giving of seven distinct instructions, which appear in the record. The plaintiff also asked instructions which do not appear. As to the instructions asked, the court said: "I have been requested, by both plaintiff and defendant, to give certain instructions, and have concluded to give the instructions entire by the court, covering the points that are made in these instructions as far as possible. You can save your exceptions on both sides to the refusal of the instructions asked for, and I will charge the jury orally." The instructions orally given cover about 4½ pages of the transcript; and, as often happens in cases of oral instructions, they are not so perspicuous as they probably would have been had they been deliberately written; but, considering them together, they seem to be free from error prejudicial to the defendant. As to the refusal of the court to give the seven instructions requested by defendant, counsel for appellant only say: "Here it will be seen, we think, that instructions asked by appellant were proper, and that they were not covered by the court's charge to the jury." This is too general. The proper instructions said to have been asked, and not substantially given, should have been specified by counsel. Upon an ordinarily careful reading, I have discovered none such. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 500)

**ROGERS v. DUHART.** (No. 19,095.)

(Supreme Court of California. March 10, 1893.)

**TRESPASS ON LAND—ACTION BY LESSEE NOT IN POSSESSION—PLEADING.**

A complaint stated that the executors of a certain estate let to plaintiff certain land of the estate for eight months from a date stated, "and thereupon plaintiff took possession of and has ever since held the same;" that defendant entered upon the described property, and drove into and kept cattle and sheep thereon, and destroyed all the grass thereon, and so kept them there for nearly four months, without plaintiff's consent. All the facts alleged were true, except that plaintiff was not in possession during the time mentioned. *Held*, that plaintiff was entitled to recover, though he could not maintain trespass *quare clausum*, for want of possession; since, under the Code, technical forms of action are discarded, and the allegation of possession was immaterial, and may be treated as surplusage.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Rogers against Duhart to recover damages caused by defendant by pasturing stock on certain land. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Wells, Monroe & Lee, for appellant. J. L. Murphy, for respondent.

**PATERSON, J.** The complaint alleges that the executors of the estate of Miguel Leonis let and demised unto the plaintiff certain lands belonging to the estate for the term of eight months from and after February 1, 1891, and thereupon plaintiff took possession of and has ever since held the same; that on February 1, 1891, the defendant "entered upon the plaintiff's said described property, and drove into and kept upon the said land about 400 head of cattle, and about 3,000 head of sheep, and trod down and depastured and destroyed all the grass and herbage thereon, and so kept the said cattle and sheep upon the same continually thereafter and until on or about the 17th day of April, 1891, without the consent of plaintiff, and to his damage in the sum of \$2,000." The facts of the case are not disputed. They show that defendant had the right to pasture 400 head of cattle upon the lands until the 1st day of September, 1890; that, after his right expired, the executors gave him "permission to pasture upon the said lands his gentle band of cattle, consisting of 50 or 60 head, until the 31st day of December, 1890, in consideration of the said defendant watching over the place and keeping the cattle of all other parties off;" that at the time of giving said permission the executors notified the defendant "that he must remove his cattle on the 31st day of December, 1890, and that under no consideration was the defendant, Duhart, to keep or allow any sheep to run upon the said ranch, and that was the only permission given defendant, by either of the executors, to be or have his cattle upon said ranch after the 1st day of September, 1890;" that a few days after September 1st one of the executors told the defendant to remove his

cattle from the ranch, and that he gave said executor "to understand that he had removed them, though he did not state so in so many words, (he stated that he had sold them, or was about to sell them;)" that the defendant permitted 2,000 head of sheep, 300 head of cattle, and 25 head of horses belonging to him to graze upon the land in question from January 1, 1891, until April 17, 1891; that neither the plaintiff nor the executors had knowledge of the fact that plaintiff's sheep, cattle, and horses were upon the lands subsequent to December 31, 1890, but supposed that he had removed them from the premises, in accordance with his instructions, and that they did not know that he had abused the privilege granted to him on or about September 1, 1890; that the lands described in the complaint were uninclosed pasture lands, and neither plaintiff nor any one on his behalf took possession of the land or any part thereof until about the 12th day of April, 1891; that plaintiff has sustained damages in the sum of \$900 by reason of the wrongful act of the defendant, as charged in the complaint.

The briefs are devoted chiefly to a discussion of the question whether an action trespass *quare clausum fregit* can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners,—where the title draws to it the possession for the purpose of redressing injuries to the estate. It would be a useless thing to attempt to reconcile the cases on this subject. Decisions adhering to the common-law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the Code, and sometimes lead to serious departures from its letter and spirit. With us mere forms of action are cast aside. Every action is now in effect a special action on the case, (*Jones v. Cortes*, 17 Cal. 487; *Goulet v. Asseler*, 22 N. Y. 225; *Matthews v. McPherson*, 65 N. C. 189; *Brown v. Bridges*, 31 Iowa, 145;) and the rigid formalism and subtle distinctions found in the rules governing the common-law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and symbolic gestures of the formulæ prescribed for the five forms of civil actions by the decemvirs of ancient Rome. Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum*, trespass *vi et armis*, or any other technical form of action, *ex delicto* or *ex contractu*. The common-law rule is that, if plaintiff declare in trespass *quare clausum* where the action should be case, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of re-

lied, whatever it may be. The bill of exceptions herein states facts which would entitle plaintiff to relief in an action on the case, which includes torts not committed with force, actual or implied, injuries committed to property of which plaintiff has the reversion only, and in fact all injuries not provided for in other forms of action. The fact that the plaintiff alleges he was in possession is immaterial. The allegation may be treated as surplusage. "Superfluity does not vitiate." "The nature of the right of action has not been changed, nor has the amount of damages recoverable been affected; but the special and technical rules which govern the use of the two common-law actions mentioned [trespass and case] have certainly been abrogated." Pom. Rem. & Rem. Rights, § 232. The damages recoverable in the common-law action of trespass *quare clausum* are for the wrong done to the plaintiff's possession as well as to the inheritance, and, where the entry is with actual force, treble damages are frequently allowed. While the plaintiff is not permitted to recover such damages under the facts proved in the case, he is certainly entitled to recover such damages as would have been recoverable if the action were the common-law "action of case." To hold that the plaintiff could not recover would be to restore the old distinctions between these technical actions. Section 232, *supra*, note 2. There is nothing decided in any of the cases upon which the appellant relied opposed to the views which we have expressed. The statements upon this subject in *Holman v. Taylor*, 31 Cal. 340, and *Pollock v. Cummings*, 38 Cal. 685, are dicta. In *Uttendorfer v. Saegers*, 50 Cal. 497, it was alleged that the defendant forcibly entered upon the premises, and tore down the buildings, etc. It was claimed by the appellant that the action was trespass *quare clausum*. Respondent denied this, asserting that it was an action by the owner for damages done to the inheritance. The court held with the appellant, but did not hold that the action could not be maintained unless the plaintiff was in possession. The case simply holds that evidence of the possession of the tenant was material on the question of damages. The question of the sufficiency of the complaint or of the facts found to constitute a cause of action in case was not considered in any of the cases referred to. In *Heilbron v. Heinlen*, 72 Cal. 371, 14 Pac. Rep. 22, the court held that the defendants were entitled to show that at the time of the acts charged in the complaint they were in quiet and peaceable possession of the land, claiming the same under certificates of purchase and patents, and had continuously used and occupied it for 10 or 11 years prior to the commencement of the action. The decision followed the doctrine announced in *Page v. Fowler*, 37 Cal. 100, viz. that a personal action cannot be made the means of litigating and determining the rights to the possession of real property, as between conflicting claimants. In *Bank v. Turman*, (Cal.) 30 Pac. Rep. 966, it appeared that the plaintiff did not have title, and he neither had possession nor the

right of possession. In the case at bar there is no pretense that the defendant was claiming adversely to any one. He vacated the premises promptly upon receiving a written notice on behalf of plaintiff demanding possession, and so states in his answer. He was never at any time after September 1, 1890, a tenant. Admitting that, when a tenancy is shown, the presumption from his continued possession is that he holds in the same capacity, there is here shown an express agreement by the terms of which he was simply to have the privilege of pasturing 50 or 60 head of cattle on the land, in consideration of his services in caring for the property, and seeing that other stock did not trespass on the land. The presumption is therefore overcome. *Bertie v. Beaumont*, 16 East, 33. Defendant contends that he was a tenant at sufferance after December 31, 1891, but this is a mistake. He was a mere servant. *Haywood v. Miller*, 3 Hill, 90; *Robertson v. Georgia*, 7 N. H. 308. His possession was the possession of his employer. He could not have maintained an action against any one for trespass, nor would he have been a necessary party plaintiff with the owner in a suit to recover damages for injury to the property. *Ogden v. Gibbons*, 5 N. J. Law, 599. Whether he be regarded as a servant or licensee, the result is the same. He was there for a particular purpose, and the moment he abused the privilege, or committed any act hostile to the interests of his employer or licensor, he became a trespasser. *Lyford v. Putnam*, 35 N. H. 563; *Loom v. Burlingame*, 16 La. Ann. 199; *People v. Fields*, 1 Lans. 222; *Haskin v. Record*, 32 Vt. 575.

Judgment and order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(97 Cal. 518)

— SIVERS v. SIVERS et al. (No. 15,145.)  
(Supreme Court of California. March 11, 1893.)

CONTRACT—CONSTRUCTION—TIME OF PERFORMANCE—PAROL EVIDENCE—RES JUDICATA.

1. A contract recited that defendants, husband and wife, jointly and severally agree to pay plaintiff a certain sum "advanced or loaned to us, or any further sum of money which he may loan to us at such time as circumstances may occur,—that is to say, that, if in any event either of us should die, then the survivor shall assume the debt, and pay it as if both were living; and we further agree that if the money \* \* \* is not paid before the expiration of five years from the first day of January, 1889, last past, then we jointly or severally agree to give a mortgage to" plaintiff on land described. Held, that no time of payment was fixed by the contract.

2. In an action on such contract it was competent for plaintiff to show by oral testimony when such contract was agreed to be performed.

3. Where the evidence shows that the money was agreed to be paid when defendants sold the land described in the contract, and that the land was sold prior to plaintiff's demand and the commencement of the action, a finding that the money became payable on demand was proper.

4. In such case it appeared that plaintiff sued on such contract in justice's court, and

that a demurrer to the complaint was sustained by the justice, whereupon plaintiff dismissed the action. *Held*, that such action was no bar to the subsequent action in the superior court.

Department 1. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by John H. Sivers against John A. Sivers and Eliza Sivers on a contract for the payment of money. From a judgment for plaintiff, defendants appeal. Affirmed.

Rogers & Chilstrom, for appellants. F. D. Brandon, for respondent.

HARRISON, J. The defendants executed to the plaintiff the following instrument, in consideration of the loan to them by the plaintiff of the sum of \$300: "San Francisco, January 26, 1889. The undersigned agreement entered into between J. H. Sivers, of San Francisco, and John Sivers and Eliza Sivers, his wife, that the said John Sivers and Eliza Sivers do jointly and severally agree to pay to the said John H. Sivers the sum of three hundred (\$300) dollars advanced or loaned to us, or any further sum of money which he may loan to us at such time as circumstances may occur,—that is to say, that, if in any event either of us should die, then the survivor shall assume the debt, and pay it as if both were living; and we further agree that if the money or loan or moneys so advanced is not paid before the expiration of five years from the first day of January, 1889, last past, then we jointly or severally agree to give a mortgage to the said J. H. Sivers upon the land or property which we own or occupy, described as follows: Southeast quarter of section 4 in township 27 north, of range 6 west, Tehama county, California. [Signed] John Sivers, Eliza Sivers." The court finds as a conclusion of law "that, no time of payment being specified in the obligation herein sued upon, the same became payable immediately upon the demand made by plaintiff for the payment thereof," and rendered judgment in favor of the plaintiff.

It is also alleged in the complaint and found by the court that at the time of the execution of the instrument it was agreed between the parties that the defendants should pay the sum named in the instrument whenever they should sell the real estate therein described, and that such sale had been made prior to the plaintiff's demand and the commencement of the action. This finding of the court was made upon oral testimony thereof, and the appellants contend that it was incompetent to show such agreement by such testimony, for the reason that the written instrument must be held to embrace all the terms of the agreement between the parties. The instrument executed by the parties does not by any specific terms designate the time for its performance. That the provision for payment by the survivor in case one of the makers should die did not postpone the time for payment until that event is shown by the clause providing that in that event it is to be paid "as if both were

living," thus indicating that at some time both were liable to pay it; and the agreement for a mortgage, if it was not paid within five years, did not give to the makers five years in which to make payment, but created an additional obligation in favor of the plaintiff, which ceased to be operative upon their sale of the property to be mortgaged. The instrument, therefore, being silent in respect to the time for the payment of the money, it was competent for the plaintiff to show that a period or event had been agreed upon between the parties thereto at which the payment should be made, and such agreement could be shown by oral testimony. This evidence did not contradict or vary any of the terms contained in the instrument. The rule which excludes evidence affecting the terms of a written instrument does not apply when the parties have not incorporated into the instrument all of the terms of their agreement, and when the evidence offered or the agreement sought to be proved is not inconsistent with the terms embodied in the instrument. Evidence of a contemporaneous oral agreement as to any matter upon which the instrument is silent, and which is not inconsistent with its terms, cannot be said to contradict or vary the terms of the written instrument. *Whart. Ev. §§ 1015, 1026; Guildery v. Green, 95 Cal. 630, 30 Pac. Rep. 786.* Inasmuch, however, as the instrument does not specify any time for its performance, the finding of the court that the money therein named became payable immediately upon the demand therefor was correct, (Civil Code, § 1657;) and the further findings respecting the foregoing oral agreement did not prejudice the appellants. If the money was payable immediately upon demand, they were not prejudiced by the fact that the demand was not made until after they had sold the property, or by the fact that it had been agreed that a demand should not be made until after such sale.

The proceedings in the justice's court did not constitute a bar to this action. After the plaintiff had brought his action in the justice's court upon the foregoing instrument, the defendants demurred thereto, and in sustaining their demurrer the justice "filed" his decision in the action as follows: "The case came on to be heard before me on the 20th day of October, 1891, on defendants' demurrer to the amended complaint, and submitted to the court without argument, and was taken under advisement until the 21st inst., at which time the court rendered judgment sustaining defendants' demurrer to the amended complaint. Stay two days." And thereafter, November 10, 1891, the plaintiff filed a dismissal of the action in that court. This action of the justice did not constitute a judgment of the court. There had been no trial upon the merits, and his action in sustaining the demurrer was but an order in regard to the sufficiency of the complaint, and not a judgment. A judgment is the final determination of the rights of the parties in an action or proceeding, whereas an order upon a demurrer is only a decision upon the correctness or sufficiency of practice in seeking to ob-

tain a judgment. It may form the basis for rendering a judgment, but it is not itself a judgment. If a judgment had thereafter been entered upon that order, it must have been that the action be dismissed without prejudice to a new action. Code Civil Proc. § 880, subd. 8.

The position of the appellants that the suit in the justice's court is still pending, for the reason that no judgment of dismissal was entered therein, cannot be considered, since this defense was not presented in the court below.

The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(97 Cal. 530)

DAMMON v. BEECHER et al. (No. 18,021.)  
(Supreme Court of California. March 18, 1893.)

#### LIABILITIES OF PARTNERSHIP.

Where money is deposited with the managing member of a partnership, a receipt given therefor in the partnership name, and the money is used in purchasing for partnership purposes, the firm will be liable therefor though one of the partners was absent at the time of the deposit, and was not informed of such transaction.

Department 1. Appeal from superior court, Shasta county; Edward Sweeny, Judge.

Action by S. D. Dammon against J. S. Beecher and Peter Crumbaugh for money had and received. From a judgment for plaintiff, and an order denying a new trial, defendant Crumbaugh appeals. Affirmed.

L. V. Hitchcock, for appellant. C. P. Sprague, for respondent.

GAROUTTE, J. The defendants were partners doing a general merchandise business. Beecher was the general manager thereof, Crumbaugh living at a distance, and being seldom at the place of business. While defendants were so engaged as partners, on the 31st of July, 1893, plaintiff deposited with the firm the sum of \$1,050. The defendant Crumbaugh was absent, as he usually was, from his place of business at the time the deposit was made. The money was handed to defendant Beecher as a member of the firm, who deposited it with the firm funds, giving a receipt therefor in the name of the firm, and it was thereupon used in the business of Beecher & Crumbaugh, Beecher failing to inform Crumbaugh of the transaction. This action was brought to recover from the partnership the amount of money so deposited. The only question involved in this appeal is as to the liability of the appellant, Crumbaugh, upon the foregoing state of facts. If Beecher had used the money for his individual purposes, with some reason it might be urged that no liability was created against Crumbaugh, for the transaction of the receipt of the money was outside of the regular business of the partnership. But here the money was used for the purchase of partnership goods and the payment of partnership debts. It was directly applied to the satisfaction of Crumbaugh's liabilities, and

this was all done by the partner who received the money in the name of the partnership, and who had the entire charge and control of the business. Beecher had full power to borrow money for the use of the firm, and sign notes in the name of the firm, and thus bind his partner. Looking at this transaction in its most favorable light for the appellant, he should not be placed in a better position towards the plaintiff than if Beecher had given a firm note for the money, rather than a firm receipt. Beecher and the plaintiff, Dammon, both testified that the money was left with the firm, and the receipt so indicates. The fact that one partner was not present at the moment the money passed from plaintiff into the safe of the firm is immaterial. Under all the circumstances of the case, we are bound to hold that when the managing partner used this money for the benefit of the partnership, the partnership was liable for money had and received. It may be conceded that the act of a partner, who, being a trustee, improperly employs the money of his cestui que trust in the partnership business, does not of itself create a liability in favor of the beneficiary against the firm; but the present case is much broader in its facts. This entire question is exhaustively discussed in the case of *In re Ketchum*, 1 Fed. Rep. 815, and the doctrine there declared goes to much greater length than is necessary to support the plaintiff's claims in the present case. For the foregoing reasons let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(97 Cal. 513)

SCOTT v. GLENN. (No. 18,094.)  
(Supreme Court of California. March 11, 1893.)

#### RENDITION OF JUDGMENT—NOTICE.

In an action wherein defendant has filed a cross complaint, making plaintiff and others parties defendant thereto, a notice reciting "that the court has rendered its decision and findings and judgment" therein, directed "to the plaintiff" and his attorneys of record, service of which is accepted by one of the attorneys, who indorses the acknowledgment of service as "attorney for plaintiff and defendants to cross complaint," is a notice of the rendition of the decision to all of the losing parties. *Stonesifer v. Kilburn*, 29 Pac. Rep. 532, 94 Cal. 33, distinguished.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. E. D. Scott against G. R. G. Glenn for money had and received. Defendant filed a cross complaint, making plaintiff and others parties defendants. There was a judgment for defendant. From an order denying a motion for a new trial, defendants in the cross complaint appeal. Affirmed.

Geo. B. Graham, for appellants. J. P. Meux, for respondent.

BELCHER, C. This action was commenced to recover a sum of money alleged to have been received by the defendant for the use and benefit of certain parties, who

had sold and assigned the indebtedness to the plaintiff. The defendant answered, and also filed a cross complaint, making the plaintiff and his alleged assignors parties defendant and asking for affirmative relief against them. The defendants named in the cross complaint answered thereto, denying most of its averments. The case was tried by the court upon the issues raised by the pleadings, and the findings and judgment were that the plaintiff take nothing by his action, and that the defendant have and recover the relief demanded in his cross complaint. The findings and judgment were filed on September 17, 1891, and on the next day the attorney for defendant served upon the attorneys for the plaintiff and defendants to the cross complaint a notice reading as follows: "[Title of Court and Cause.] To the plaintiff, and Messrs. T. P. Ryan and G. B. Graham, attorneys of record: You will take notice that the court has rendered its decision and findings and judgment, and defendant's memorandum of costs have been this day filed in the above-entitled action. Dated September 17, 1891. J. P. Meux, Attorney for G. R. G. Glenn." On this notice was indorsed an acknowledgment of service, as follows: "Service of the within notice is hereby admitted, this 18th day of September, 1891. Geo. B. Graham, attorney for plaintiff and defendants to cross complaint." On March 21, 1892, the defendants in the cross complaint served upon Glenn and filed in the court a notice of their intention to move for a new trial of the action, stating that the motion would be made upon a statement of the case to be settled and allowed by the court. Subsequently the moving parties presented to the court their statement of the case, and asked that it be settled and allowed; but the defendant Glenn appeared by his attorney, and objected to the settlement and allowance, upon the sole ground that the notice of intention to move for a new trial was not served in time. The motion was submitted upon the above-mentioned notices, and the court, after hearing the arguments of counsel, "found that the said statement of the case and bill of exceptions was in all respects true and correct, but that the notice of intention to move for a new trial was not served in time, and thereupon and for that reason denied the motion of said defendants to said cross complaint." From the order thus entered, this appeal is prosecuted by all of the defendants to the cross complaint.

The Code provides that the party intending to move for a new trial must, within 10 days after notice of the decision of the court, file with the clerk and serve upon the adverse party a notice of his intention. Section 659, Code Civil Proc. It is, however, argued for the appellant—and this is the only point made—that the notice of decision served here, when properly construed, was a notice to the plaintiff and his attorney alone, and that "no notice of the rendition of the decision was ever given to the defendants in the cross complaint." We do not think the notice can be thus limited, particularly in view of the acceptance of service which was in-

dorsed upon it. In our opinion, it must be treated as a notice to and accepted by all of the losing parties. The case does not fall within the rule declared in *Stonecipher v. Kilburn*, 94 Cal. 33, 29 Pac. Rep. 332. There it was held that the settlement of a bill of exceptions was a "proceeding" in an action, within the meaning of section 473 of the Code of Civil Procedure, and that the court had power to relieve against the objection that the bill was not served in time, when it appeared that the default in the service resulted solely from excusable mistake or neglect. Here no claim for relief, under the section of the Code cited in that case, was made, and we fail to see how any such claim could be made. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(97 Cal. 516)

FOLEY v. BULLARD et al. (No. 15,305.)  
(Supreme Court of California. March 11, 1893.)

#### NOTICE OF APPEAL—PARTIES.

In an action to foreclose a street assessment on land of several defendants, wherein judgment is rendered for plaintiff, from which some of the defendants appeal, the nonappealing defendants need not be served with notice of appeal, as they are not adverse parties, within Code Civil Proc. § 940, since there is no personal liability, but the judgment must be satisfied out of the land. *Millikin v. Houghton*, 17 Pac. Rep. 641, 75 Cal. 539, distinguished.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by John Foley against James A. Bullard and others on a street assessment. There was a judgment for plaintiff, and some of the defendants appeal. Plaintiff moved to dismiss the appeal because notice thereof was not served on the nonappealing defendants. Motion denied.

Geo. D. Collins, for appellants. J. C. Bates, for respondent.

GAROUTTE, J. Foley recovered a judgment foreclosing a street assessment upon certain realty of defendants. Some of the defendants appealed from the judgment, but did not serve notice of appeal upon their codefendants. Respondent now moves to dismiss the appeal for that reason. The motion should be denied. The nonappealing defendants are not adverse parties, within the meaning of the statute.<sup>1</sup> Their rights will not be adversely affected by a reversal of the judgment. Under the authority of *Robinson v. Merrill*, 87 Cal. 11, 25 Pac. Rep. 162, it may be that the practical effect of a reversal of a judgment in this case will be a reversal as to all the defendants. If such is the result, then these codefendants certainly are not

<sup>1</sup>Code Civil Proc. § 940, provides that a notice of appeal must be served on the adverse party, or his attorney.

adverse parties. If a judgment of reversal leaves them in statu quo, then this appeal does not affect their rights, and they are not entitled to notice. If a judgment of reversal as to defendant appellants has not the practical effect of a reversal as to all the defendants, then these defendants not appealing are left in statu quo by such reversal. In this character of action, there is no personal liability, but the reality alone must be looked to for the satisfaction of the judgment. For these reasons, so far as the subject-matter of this litigation is concerned, it is of no interest to the defendants not appealing what may be the final result of the pending appeal. In *Millikin v. Houghton*, 75 Cal. 539, 17 Pac. Rep. 641, plaintiff appealed from the order setting aside an execution issued against all the defendants. It is very apparent that all the defendants had an interest in sustaining the order, and therefore should have been served with notice of the appeal. Let the motion to dismiss be denied.

We concur: PATERSON, J.; HARRISON, J.

(97 Cal. 523)

JONES v. JUSTICE'S COURT OF LOS ANGELES CITY. (No. 19,027.)

(Supreme Court of California. March 13, 1893.)

JUSTICE OF THE PEACE—NOTICE OF TRIAL.

1. Code Civil Proc. § 850, provides "that when all the parties to an action in a justice's court served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared thereof." *Held*, that the provision requiring such notice of the day of trial is imperative, and a judgment entered without it will be vacated on a writ of review.

2. Under Code Civil Proc. § 873, providing that the trial must commence at the expiration of one hour from the time specified in the notice mentioned in section 850, the notice must be given in writing, and, with proof of service, must form a part of the record.

Department 1. Appeal from superior court. Los Angeles county; W. H. Clark, Judge.

Petition by Ellen Jones against the justice's court of Los Angeles city. Petition granted, and defendant appeals. Affirmed.

Willis & Appel, for appellant. Horace Bell, for respondent.

PER CURIAM. The petitioner herein applied to the court below for a writ of review, and judgment was entered in her favor, directing the appellant to vacate and set aside a judgment entered in the justice's court of Los Angeles city, on the 4th day of June, 1891, in favor of one Brownseau, and against petitioner, Ellen Jones. The ground upon which the petitioner herein asked for the writ was that neither she nor her attorney ever had any notice that the case pending in the justice's court had been set for trial, and the learned judge of the court below sustained the petitioner's contention in that regard, and granted the writ prayed for. Section 850, Code Civil Proc., provides that "when all

the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared thereof." Appellant contends that, the justice having acquired jurisdiction, the failure to notify the defendant of the time fixed for trial was mere error, which could have been corrected only upon appeal. We do not think the contention a sound one. Justices' courts have peculiar and limited jurisdiction, and the powers conferred upon them by the statute must be strictly pursued. The statute requiring notice of the day fixed for trial to be given is imperative, and it is just and right that it should be strictly enforced, because no man should be deprived of his property without notice and opportunity to be heard. It was the intention of the legislature to relieve parties to actions in a justice's court from the necessity of making daily inquiry at the justice's office to learn when the case is to be tried. We do not think the cases cited by the appellant are opposed to the views we have expressed. *Clark v. Superior Court*, 55 Cal. 199, was an application for a writ of prohibition to annul an order of the superior court, dated April 13, 1880, directing the clerk of the court to file a decision and judgment, made by the judge of the district court on December 26, 1879. All the case decides is that, where the superior court has acquired jurisdiction of the parties and of the subject-matter, a judgment based upon findings made by the district court after a trial therein, but not filed until after the district judge went out of office, is merely erroneous. *Weinmer v. Sutherland*, 74 Cal. 341, 15 Pac. Rep. 849, decides that a justice's court has no power to review its own judgment, unless statutory authority therefor is given, and that, under section 859, Code Civil Proc., it can review no judgment except a judgment by default. In *Reagan v. Justice's Court*, 75 Cal. 253, 17 Pac. Rep. 195, it appeared that the defendant, who had been duly examined, failed to appear within the time required by law, but filed a demurrer one day too late. This demurrer was stricken out, and judgment entered against him by default. A motion was made, under section 859, Code Civil Proc., to have the default set aside, and this motion was denied. We held that the justice had regularly pursued the authority conferred upon him, and, if error intervened, it could not be corrected upon certiorari. *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. Rep. 143, simply holds that it is mere error for a justice to proceed to trial in a misdemeanor case without a jury; and *Heinlen v. Phillips*, 88 Cal. 559, 26 Pac. Rep. 366, holds that the provision of section 892 requiring the justice's court to render judgment at the close of the trial is merely directory.

It is claimed by appellant that it appears from the justice's return to the writ that he had evidence before him prior to entering upon the trial that notice had been given to the defendant, and that his decision upon such evidence, even if errone-



ous, cannot be reviewed in this proceeding. The return shows that, on the 27th of May, the justice set the case for trial June 4, 1891, at 2 P. M., and, by the entry in his docket, that June 4th, "at this 2 P. M., Willis and Appel in court as attorneys for plaintiff. No one appears for defendant. Counsel for appellant stated that notice of trial had been served on counsel for defendant, and that he would produce same. After waiting until 3:30 P. M., the court proceeds to try the case. Neither the defendant nor her attorney appears in court." It is also claimed that because it appears from the return to the writ that at a subsequent day, when a motion was made by the defendant to vacate the judgment, an affidavit of the service of a notice of trial was filed, the denial by the justice of this motion to vacate the judgment is a conclusive determination that the defendant had a proper notice of the time fixed for the trial. This portion of the return is as follows: "Sept. 12. Willis and Appel filed affidavits of service of notice of trial." The provision in section 873, Code Civil Proc., that the trial must commence at the expiration of one hour from the time specified in the notice mentioned in section 850 implies that this notice should be given in writing, and form a part of the record, and that there should be an entry thereof, and also of the mode in which it was given, in the justice's docket, so that there may be affirmative evidence of his authority to render a judgment. This notice and the proof thereof are as essential to the authority of the justice to proceed upon the trial of the case as is the summons and return of service thereof to his entering a judgment of default. The giving of the notice is a duty which the statute imposes upon the justice before he has any authority to proceed with the trial; and, while it is not necessary that he serve the notice himself, he ought not to accept the verbal statement of the plaintiff that the notice had been served upon the defendant. The justice did not embody in his return the affidavit of service of the notice, and the superior court was not required to accept the above memorandum in his docket as any evidence that the affidavit contained proof that the notice had been given. If, however, it be conceded that the affidavit was itself before the superior court, inasmuch as all intendment upon this appeal are in support of its judgment, we must presume that upon looking into the affidavit the court was satisfied that it did not show that any notice had been given. The return did not, moreover, purport to show that the justice had given any notice, nor did it contain or refer to the service of any notice given by him; and, as all notices are required to be in writing, (Code Civil Proc. § 1010,) such notice, if it had existed, would have formed a part of the return by the justice. As it is not there, the superior court was justified in finding that it had not been given, and, consequently, that the judgment of the justice was rendered without authority.

There are objections made to the form of the proceedings, and to the judgment of the superior court, but we think they are

immaterial; that the appellant could not have been prejudiced thereby; and they should therefore be disregarded.

Judgment affirmed.

(97 Cal. 532)

GOULD v. WISE et al. (No. 19,021.)

(Supreme Court of California. March 16, 1893.)

MORTGAGES—PRIORITIES—DELIVERY.

1. Defendant agreed with A. to sell him certain land, part cash, and balance secured by mortgage. Defendant went with A. to a notary's office, where a deed was executed. While the mortgage was being prepared, A. said, "Let me see that deed," and took it from the table, and went, without defendant's knowledge, to plaintiff, from whom he negotiated a loan. A. then returned to defendant, paid him the money, and executed the mortgage, which defendant at once recorded. Prior to this time plaintiff had the deed and A.'s mortgage to her recorded. *Held*, that defendant's mortgage was entitled to priority, as there had been no delivery of the deed to A. at the time he negotiated the loan from plaintiff.

2. Defendant's negligence in allowing the deed to be removed from the room was not such as would justify an estoppel against a plea of nondelivery of the deed.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Frederick S. Gould, executor of Julia S. Gould, deceased, against John Wise and others, to foreclose a mortgage. From a decree for plaintiff, defendant Wise appeals. Reversed.

Willis & Appel and Houghton, Silent & Campbell, for appellant. Richards & Carrier and Del Valle & Munday, for respondent.

GAROUTTE, J. Upon the 6th day of March, 1888, appellant, Wise, entered into an agreement with Charles O. and Asa Adams to convey to them certain land. Upon March 12, 1889, Charles Adams, one of the parties to the agreement, transferred his interest in the property to his copurchaser, Asa Adams. On the same day Asa Adams, having procured the deed from his copurchaser, applied to appellant Wise for a deed of the premises contracted for, representing to him that he would pay \$1,000 cash, which, together with \$500 which had been paid at the date of the execution of the contract, would amount to \$1,500 paid on the purchase price, and that he would execute the mortgage provided for in the agreement aforesaid for the balance. Appellant at the time was weak and infirm from old age and sickness, and was conveyed by Asa Adams in a vehicle to the office of a notary, and there the deed and the notes and mortgage set forth in the cross complaint herein were executed in the manner hereinafter stated. Before the payment of the \$1,000, Adams, without the consent of Wise, took the deed from the notary's office, presented it to R. W. Poindexter, a real-estate agent who was loaning money for the deceased, Julia F. Gould, and there executed the note and mortgage set forth in plaintiff's complaint. He thereupon returned to the notary's office, where Wise

was awaiting him, executed the notes and mortgage to Wise, and gave him a check for the cash payment, and Wise thereupon had his mortgage recorded. Prior to this time Poindexter went to the recorder's office, recorded the deed from appellant to Adams, and also the mortgage given to plaintiff. Appellant was ignorant of the transaction between Adams and Poindexter, and had no notice whatever concerning plaintiff's mortgage. When respondent's mortgage became due he commenced this action, and pleaded therein appellant, Wise, who answered, and filed his cross complaint, seeking to foreclose his mortgage, and claiming that it was prior and superior to plaintiff's mortgage.

The sole question involved in this case arises as to the relative priority of these respective mortgages. Upon the trial judgment went for the respondent, and this appeal is prosecuted from that judgment, and from the order denying a new trial. We will not enter into a discussion of the question whether the contract of sale constituted an equitable mortgage lien, of which the respondent had constructive notice, and which continued down to and merged in the mortgage made to Wise under the provisions of his contract. The case can be disposed of, and therefore should be disposed of, upon much more simple grounds. At the time respondent loaned the money and took the mortgage as security for the loan, Adams had no title to the land, and, as a necessary consequence, respondent got no security for the money loaned. This view of the matter is not directly presented in appellant's argument, but it goes to the heart of the case, and is so apparent from a reading of the evidence that we cannot avoid its consideration. Appellant gave the only evidence bearing upon this branch of the case, and his testimony was as follows: "I am eighty-three years old. I was sick on the 12th of March, and Adams came to my house in a buggy. He had a deed for my property with him, ready. He got me to sign it in the wagon. Then he took me to a place to give a mortgage. He was to give me one thousand dollars, and a mortgage and notes for the balance. He hurried me up so that he could get the money out of the bank before it was closed. A man came out of a door with a pen and ink, and swore me, and I signed the deed. Then Adams drove off, and took me to another place. He had spoke to a man to make out the mortgage, and he stayed there a little bit, and the man was making out the mortgage and writing it up. I thought I was to have the first mortgage. He says, 'Let me see that deed.' He got the deed, and cleared out with it. I didn't like it very good. I hadn't got no mortgage yet, and he left the mortgage and these notes laying there. He was not gone more than half an hour. He didn't leave the notes and mortgage with anybody; left them laying where the man was writing them. When he came back we drove to the courthouse, and I recorded my mortgage. He gave me a check for seven hundred dollars, and paid me most of the balance of the one thousand dollars afterwards in small

sums. The deed laid on the table, and he says, 'Let me see that deed.' He reached over and pulled it away. I did not think he was going away, but he was gone. He signed the mortgage and notes when he came back, and gave me the check then." This evidence, sifted of immaterial matters, discloses that after the deed was signed and acknowledged, and while lying upon the table in the presence of both parties, it was taken therefrom by Adams, who thereupon left the room with the deed in his possession. At that moment the conveyancer was engaged in preparing the notes and mortgage which formed the principal consideration for the deed, and which were to be delivered contemporaneously with the deed. Upon this state of facts it is apparent that no delivery occurred at the time Adams obtained possession of it, and that, as a consequence, no title was in him at the time he negotiated the loan, and no mortgage lien was secured upon the realty by the mortgagee at that date as against the grantor, Wise. Delivery is the force that vitalizes the instrument. Here there was no life in the instrument, because there was no delivery. Delivery is dependent upon the intention—the consent—of the grantor, and here there was an entire absence of intention to make a delivery until the notes and mortgage were also delivered. The respective acts of the grantee and grantor as to the delivery of the deed and the securities were to be concurrent. The delivery of the deed was dependent upon the assent of the grantor, and his assent was dependent upon the performance of acts by the grantee. The grantee's possession of the deed upon any other terms or conditions was against the assent of the grantor, and for that reason the instrument had no life. This principle is elementary, but is fully discussed in *Everts v. Agnes*, 4 Wis. 343; *Henry v. Carson*, 96 Ind. 412; *Fitzgerald v. Goff*, 99 Ind. 28; *Jones v. Loveless*, Id. 317.

Again, it has been repeatedly held that the fraudulent procurement of a deed deposited as an escrow from the depositary by the grantee named therein will not operate to pass the title, and the subsequent purchaser from such grantee, without notice, and for a valuable consideration, derives no title thereby, and will not be protected. *Everts v. Agnes*, 6 Wis. 453; *Shirley v. Ayres*, 14 Ohio, 308; *Stanley v. Valentine*, 79 Ill. 544; *Harkreader v. Clayton*, 56 Miss. 383; *Henry v. Carson*, *supra*; *Tisher v. Beckwith*, 30 Wis. 55. The foregoing cases are conclusive to the effect that, if a grantee secure possession of a deed clandestinely, or in any manner without a fulfillment of the agreed conditions, there has been no delivery with the assent of the grantor, and therefore no title has passed. These principles of law being established, there is nothing remaining to defeat appellant's rights in the premises, unless he was guilty of such negligence in allowing the deed to be taken from his presence and from the room as to create an estoppel against him in favor of respondent, as an innocent third party; and we think no such state of facts is disclosed by this record. The principle of eq-

uity that where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to cause the loss must bear it, is entirely too broad in its scope to be invoked in this character of action. That principle is specially applicable where the loss has been occasioned by reason of a trust or confidential relation having existed, to some extent at least, towards the third party. But we have failed to find a case where an estoppel has been successfully pleaded under the circumstances here presented. To create an estoppel against the grantor in this character of action, if one can be created, requires the proof of that degree of negligence upon his part which could only result from the want of ordinary care. As was said in the case of *Burson v. Huntington*, 21 Mich. 417, in discussing this principle with reference to the delivery of a promissory note: "The maker, therefore, cannot be held responsible for any negligence. There was nothing to prove negligence, unless he was bound to suspect and treat as a knave, a thief, or a criminal the man who came to his house, apparently on business, because he afterwards proved himself to be such. This we think would be preposterous." In *Tisher v. Beckwith*, 30 Wis. 55, Chief Justice Dixon, in speaking to this subject, said: "It might possibly be that a case of that kind could be presented where the negligence of the supposed grantor in this respect was so great, and his inattention and carelessness to the rights of others so marked, that the law would on that account estop him from setting up his title as against a bona fide purchaser for value under such a deed." Even conceding some negligence upon the part of the grantor, Wise, in allowing the deed to be removed from the room, it certainly does not reach that degree of negligence which would justify an estoppel against a plea of nondelivery of the deed. For the foregoing reasons let the judgment be reversed, and the cause remanded.

We concur: HARRISON, J.; PATERSON, J.

(97 Cal. 590)

COYNE v. RENNIE. (No. 19,088.)

(Supreme Court of California. March 23, 1893.)

MUNICIPAL CORPORATIONS—SALARY OF CHIEF OF POLICE—REDUCTION.

1. Const. art. 11, § 8, provides that a city charter can be amended only on the vote of electors of the city, and the approval of the legislature. Charter San Diego, c. 9, art. 3, § 1, fixing the salary of the chief of police, provides that "the common council, in the month of January, 1891, and every four years thereafter, shall readjust and fix anew the amount of all official salaries." *Held*, that a reduction of the salaries was not an amendment of the charter, but was the execution of a power conferred on the common council by the charter itself.

2. The chief of police was not bound to hold office, and, after the salary was reduced, having voluntarily held it and accepted the reduced salary, until the expiration of his term, a demand for additional salary, made eight months afterwards, was properly refused.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Application by Joseph Coyne for a writ of mandamus to compel Gilbert Rennie, as auditor of the city of San Diego, to issue a warrant for certain salary. From a judgment dismissing the proceeding, plaintiff appeals. Affirmed.

Parrish, Mossholder & Lewis, for appellant. William H. Fuller, for respondent.

PER CURIAM. This is a proceeding for a writ of mandate to the respondent in his official character as auditor of the city of San Diego, commanding him to issue his warrant for an unpaid portion of plaintiff's salary as chief of police. The respondent demurred to the petition for the writ. The court sustained the demurrer, and dismissed the proceeding. Plaintiff brings this appeal from the judgment of dismissal, and contends that the court erred in sustaining the demurrer.

The petition shows that since May, 1889, the city of San Diego has been a municipal corporation by virtue of a charter generally known as a "Freeholders' Charter;" that from the date of the organization of the corporation until June 1, 1891, the petitioner held the office of chief of police; that by section 1, c. 9, art. 3, of the city charter, the salary of the chief of police was fixed at \$1,800 per annum; that for the last four months of his official term, viz. February, March, April, and May, 1891, petitioner had been paid for salary only \$100 per month, by reason of an ordinance of the city adopted January 31, 1891, by which the salary of chief of police was reduced to \$1,200 per annum; and that after the expiration of his term of office, to wit, on February 24, 1892, the petitioner demanded of the auditor warrants upon the treasurer of the city for the unpaid portions of his salary for said four months, amounting to \$200, which the auditor (respondent) refused to issue, for the alleged reason that the salary of the chief of police had been reduced, as aforesaid, by ordinance. Section 1, c. 9, art. 3, of the charter of San Diego, after fixing the salaries to be paid to certain city officers, including the chief of police, provides: "The common council, in the month of January, eighteen hundred and ninety-one, and every four years thereafter, shall readjust and fix anew the amount of all official salaries provided for in this charter." It is contended by appellant that, notwithstanding this provision in the charter, the city had no power to reduce his salary, inasmuch as such reduction would be equivalent to an amendment of that clause in the charter fixing his salary; and under the provisions of section 8, art. 11, of the constitution, the charter can be amended only upon the vote of electors of the city and the approval of the legislature. The vice of this argument, however, rests in the assumption that the reduction of the salaries is an amendment of the charter. Instead thereof, it is the execution of a power conferred upon the common council by the charter itself, and is within the direct lines of the authority

conferred by the people in the adoption of that instrument, as much as would be the redistricting of the city into wards in the year 1892, and every five years thereafter, which is authorized in section 12, c. 2, art. 1, of the same charter. The section is to be construed as if it was a direct provision that the salaries of the city officials shall be fixed in the month of January, 1891, and every four years thereafter, but that, until so fixed, they shall be at the amounts specified therein. It is well settled that the mere appointment or election of a municipal officer for a specified time and salary creates no contractual relation, if such officer is at liberty to resign whenever he may elect to do so. "Neither acts of the legislature nor ordinances of city councils or boards naming terms and salaries are in the nature of contracts with officers. Although the term and salary may be named in the charter, yet there is no contract for a stipulated time or price that is binding on the public." *Love v. Jersey City*, 40 N. J. Law, 458; *Dill. Mun. Corp.* §§ 231, 265. The appellant was not bound to hold the office, or to perform the duties thereof; and, after the salary was reduced, having voluntarily held the office and accepted the reduced salary until the expiration of his term, his demand upon the auditor for additional salary, made eight months afterwards, was properly refused.

The judgment is affirmed.

(97 Cal. 575)

**RILEY v. MARTINELLI et al.** (No. 18,064.)  
(Supreme Court of California. March 21, 1893.)

**EXECUTION SALE—TITLE ACQUIRED—UNRECORDED DEED—EVIDENCE OF NOTICE—INSTRUCTIONS.**

1. Where a judgment creditor bids in at a sheriff's sale and is given a deed of land, recorded in the name of the judgment debtor, but held in trust by such debtor for his wife, she having paid the purchase price, and permitted title to be taken in the husband's name, under an agreement that he was to convey it to her, such creditor acquires a good title thereto, where he had no notice of the wife's equity; *Civil Code*, § 1107, providing that grants of estates in land are conclusive against the grantor and every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith acquires title by an instrument first duly recorded. *Breeze v. Brooks*, 9 Pac. Rep. 670, 11 Pac. Rep. 885, and 71 Cal. 169, and *Id.*, 31 Pac. Rep. 742, distinguished.

2. In an action by such wife against the judgment creditor to obtain a judgment decreeing her to be the owner of such land, evidence of a witness as to declarations made to him by her as to her ownership of such land was properly refused, where it was not offered for the purpose of showing defendant's knowledge of such declarations.

3. Where, in an equity case, one issue is submitted to a jury, and the court afterwards adopts their verdict, and finds on all the issues of the case, errors in refusing instructions asked are immaterial. *Hewlett v. Pilcher*, 24 Pac. Rep. 782, 85 Cal. 545, followed.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; J. E. Prewett, Judge.

Action by Ellen L. Riley against F. Martinelli and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Eugene Aram and Craig & Hawkins, for appellant. F. E. Baker and R. Clark, for respondents.

**SEARLS, C.** This action is brought to obtain a judgment decreeing Ellen L. Riley, the appellant, to be the owner of certain premises situate in Woodland, Yolo county; that a sheriff's sale thereof to defendant F. Martinelli be declared null and void, etc. J. T. Riley, one of the defendants, and Ellen L. Riley, the plaintiff, were at the several dates herein mentioned husband and wife. About January, 1890, plaintiff and her husband negotiated for the purchase of the premises in question, which negotiations culminated in the purchase and paying for the same by the plaintiff, who took a deed of conveyance therefor in the name of her husband, which deed was duly recorded in the office of the county recorder of the county of Yolo. The purchase price of the land was \$375, and was paid by the plaintiff from her separate property. She also, according to her testimony, built a dwelling house upon the land, at an expense of \$1,000, which was also paid for by her out of her separate property. Plaintiff and her husband, J. T. Riley, occupied the premises as a family residence up to the time of the levy of the execution hereinafter mentioned, and subsequent thereto, which was known to defendant Martinelli, but there was nothing in the manner or method of the residence or occupation or use of the property which imparted or tended to impart notice to any person that plaintiff had or claimed to have any separate property interest or estate in or to said premises. There was a private understanding between plaintiff and her husband, before the conveyance, that the title to the premises should be conveyed to the latter, and that thereafter, when plaintiff desired him to do so, he would convey to her. Plaintiff often requested her said husband to make such conveyance, but he failed and neglected so to do. Plaintiff stated to her friends that she claimed said premises as her property, but such claim was not openly proclaimed, was not known by the defendant Martinelli or by the public generally. Defendant Martinelli held a mortgage against property of the husband, J. T. Riley, other than the premises in question, which he foreclosed, and under which he sold; and, there being a deficiency, judgment was docketed in his favor and against J. T. Riley, upon which judgment execution issued to the sheriff, who levied upon the premises in question in this action and in due time, and, after proper notice, sold the same as by law required, said Martinelli, the judgment creditor, becoming the purchaser for \$1,265.73, the amount of his judgment and costs. A certificate of sale was issued to him as purchaser, and a duplicate thereof recorded in the office of the county recorder of the county of Yolo. The time for redemption expired July 10, 1891, and no redemption was made or had. Before purchasing the property, Martinelli examined the records of the county, and found it stood in the name of the husband, J. T. Riley, and that there was a mortgage

thereon executed by the latter. The findings show that Martinelli, up to the time of his purchase, had no notice of any equitable claim of plaintiff in or to the premises. Martinelli received a sheriff's deed of the premises after the filing of the original complaint herein, but before the amended complaint was filed, viz. August 5, 1891. As between the plaintiff, who is appellant here, and her husband, there is no question but that the latter held the legal title to the premises in trust for the former.

The doctrine is well established that where land is purchased in the name of one person, and the consideration is paid by another, the land will be held by the grantee in trust for the person furnishing the consideration. *Bayles v. Baxter*, 22 Cal. 575; *Hidden v. Jordan*, 21 Cal. 92; *Millard v. Hathaway*, 27 Cal. 119; *Currey v. Allen*, 34 Cal. 234. The doctrine is well established, also, that the lien of a judgment and execution attaches to the real, instead of the apparent, interest of the judgment debtor in and to his property; and that, under ordinary circumstances, a sale made under such lien transfers no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and before the sale. *Freem. Ex'ns*, § 335; *Freem. Judgm.* §§ 356, 357; *Frink v. Roe*, 70 Cal. 296, 11 Pac. Rep. 820. "The purchaser at an execution sale takes his title subject to such liens, easements, and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith and without any notice, actual or constructive, of the existence of such lien, easement, or equity." *Freem. Ex'ns*, § 336. This doctrine does not, however, reach the point under consideration in this case. We may concede that the rule enunciated above applies to a third party purchasing at a sale under execution, and the question still remains, does the judgment creditor, who purchases at his own sale, and pays no money, but credits the amount of his bid on his judgment, stand in the same position as a third party who has purchased at a like sale and paid a money consideration? In other words, is the judgment creditor who bids at his own sale, and, as the effect thereof, satisfies his judgment in whole or in part, a purchaser for value in that sense which entitles him to protection? The authorities are by no means uniform on the question. In Iowa, in *Gower v. Doheney*, 33 Iowa, 36, a case in which the judgment debtor held lands under an implied trust in pursuance of which, subsequent to the judgment, he conveyed to the cestui que trust, the latter failed to record his deed, and the lands were purchased by the judgment creditor at execution sale without notice of the deed or of the equitable estate, and it was held that the execution creditor took his title freed from the equity. The decision was based upon the equitable theory that, where one of two innocent parties must suffer, the loss should fall upon that party who has been guilty of the first negligence. Other cases in Iowa hold that when a creditor merges his judgment into

a title, without notice, actual or constructive, of private equities, he becomes a purchaser, and is entitled to protection equally with any subsequent bona fide purchaser. In Indiana the court held both ways on the question. See *Vitito v. Hamilton*, 86 Ind. 137, and *Carnahan v. Yerkes*, 87 Ind. 62. In the latter case it was held that "an execution creditor who bids off property at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a bona fide or innocent purchaser." It is sufficient to say that a large number of cases to like effect are to be found, holding with more or less uniformity that a plaintiff purchasing at a sale under his own writ takes subject to all equities against the defendant in execution, whether he has notice of them or not. This view is founded upon the theory that to constitute a person a "bona fide purchaser," within the meaning of the law, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration, and that a creditor antecedent to his purchase, who pays for the purchase by a credit on his own demand, has parted with no consideration on the faith of the purchase, and is not such a bona fide purchaser as is entitled to protection against equities of which he has no notice. It is believed, however, that the current of modern authority tends to the doctrine that a judgment creditor purchasing at his own sale, equally with a third party making a purchase under the execution, is protected against latent equities of which he had no notice; and we can see no good reason for the distinction to which we have alluded. If A. advances money to B., which is not paid, and he obtains judgment, issues execution, levies upon the property of B., attends the sale, and, being the highest bidder, purchases the property, it is difficult to see why he is in a different position from any other purchaser. In such a case, the law seizes the property and sells it to the highest bidder, and the judgment creditor takes it, not in his capacity as creditor, but as purchaser. The law of this state, with a view no doubt of benefiting the debtor, by causing his property to bring the best attainable price, permits and encourages the creditor, alike with others, to purchase at sales under execution, and, having done so, the fact that he advanced the purchase price last month or last year should not militate against his rights, or alter his status in the eye of the law. It has repeatedly been held in this court that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration, within the meaning of section 1214 of our Civil Code. *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. Rep. 680; *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. Rep. 242; *Schluter v. Harvey*, 65 Cal. 154, 3 Pac. Rep. 659; *Frey v. Clifford*, 44 Cal. 335. In this state we think the question has been settled in consonance with this view. In *Hunter v. Watson*, 12 Cal. 377, (Baldwin, J., delivering the opinion of the court, Field, J., concurring,) it was said: "But a judgment creditor purchasing at

his own sale, without notice, is a 'bona fide purchaser,' within the act. The cases are not agreed upon this subject, but the weight of authority and the reason of the rule are as we have stated it." The act referred to in the foregoing quotation was the recordation act of 1850. Section 1107 of our Civil Code is as follows: "Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded." In *Forman v. Wallace*, 75 Cal. 552, 17 Pac. Rep. 680, it was held that a sheriff's certificate of sale of real property "is the evidence of the equitable interest which the purchaser has in the land, and is an 'instrument,' whereby an interest is created, within the meaning of section 1107 of the Civil Code," and in favor of the proposition *Page v. Rogers*, 31 Cal. 301, was cited. *Forman v. Wallace* held also that the filing and recording of the certificate of sale imparted constructive notice to all the world, and that the right acquired thereunder was prior and paramount to the title of a prior unrecorded deed, of which the holder of the sheriff's certificate had no notice at the date of recordation.

The plaintiff here cannot be said to be in a better position than she would have been had she held an unrecorded conveyance of the property. It was in her power for many years to have enforced her equitable right to the property; but having failed to do so until a sale thereof, and the recording of the evidence of such sale under an execution against her husband, who was the ostensible owner thereof, and in whose name the title was recorded, she comes too late to ask for relief against one clothed with the legal title and an equal equity. There is nothing in the views herein expressed in conflict with either of the decisions in *Breeze v. Brooks*, 71 Cal. 169, 9 Pac. Rep. 670, and 11 Pac. Rep. 885; *Id.*, 31 Pac. Rep. 742. In that case Patrick Brooks was the equitable owner of land the legal title to which stood in the name of John Brooks. The latter obtained credit from the plaintiffs in the cause, who believed him to be the owner. John Brooks conveyed the legal title to Patrick, the owner of the equity, who caused his deed to be recorded. Subsequently the plaintiffs brought suit against John on their demand, obtained judgment, sold the land under execution, became the purchasers, and in due time obtained a sheriff's deed, under which they sought to subject the land to their claim. There they sought to show that Patrick Brooks was estopped by his acts in the premises from asserting title; here the estoppel comes from the effect of our recording act, which establishes what the court has held to be a salutary and binding rule.

At the trial the court submitted to a jury the following single issue and question, against plaintiff's objection and exception, to wit: "Did Martinelli, on January 10, 1891, have notice that the property belonged to Mrs. Riley?" To which the jury answered, "No." Counsel for

plaintiff asked the court to submit to the jury the questions, in substance, (1) whether at the date of his purchase Martinelli had actual notice that plaintiff claimed the property, etc., which was substantially submitted; (2) whether at the said date he had constructive notice of such fact, which was refused by the court. Counsel then asked certain instructions in reference to actual and constructive notice, substantially as defined in sections 18 and 19 of the Civil Code, which were refused by the court, and the refusal excepted to. We think the court, on its own motion, instructed the jury as to the question submitted, as far as was necessary. It was an equity case, and the court adopted the answer of the jury, it is true, in its findings of fact, but it proceeded at length to find upon all the issues in the case. This being so, the refusal to give instructions is not cause for a reversal of the case. *Hewlett v. Pilcher*, 85 Cal. 545, 24 Pac. Rep. 781. The evidence was sufficient to warrant the findings.

There was no error in striking out the testimony of the witness Balzari as to declarations made to him by the plaintiff in reference to her ownership of the property, because it was not proposed to bring knowledge of such declarations home to defendant Martinelli. Again, the finding of the court as to plaintiff's ownership of the property cured the error, if any there was. Upon a review of the whole record, it is believed the cause was fairly tried and properly decided, and that the order overruling the motion for a new trial and the judgment should be affirmed; and we so advise.

We concur: BELCHER, C.; VAN-CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(99 Cal. 593)

LOS ANGELES COUNTY v. BALLERINO  
et al. (No. 19,036.)

(Supreme Court of California. March 9, 1893.)

DELINQUENT TAXES—COLLECTION—PENALTY—  
LIMITATION OF ACTIONS.

1. Under St. 1880, p. 136, providing that "any county, or city and county," where taxes are delinquent, may sue in its own name for the recovery thereof, "whether the same be for county or city, or city and county and state purposes or taxes, or either of them," a county may sue for delinquent taxes levied for county purposes only; and defendant cannot claim that it ought also to have sued for delinquent state taxes, levied in the same year, and not to have split its demand, thus subjecting defendant to two actions, when it is not alleged in the answer that another action to recover the state taxes is pending, or has been prosecuted to judgment.

2. An action to recover delinquent taxes is not within Code Civil Proc. § 339, providing that an action "upon a contract obligation or liability not founded on an instrument in writing" must be brought within two years after the cause of action accrues, but it is within section 338, providing that an action on a liability created by statute, other than a penalty

or forfeiture, must be brought within three years.

3. Pol. Code, § 3770, directs that 5 per cent. on the amount of the delinquent tax be collected in addition to such delinquent tax. *Held*, that the added per cent. is not such a penalty or forfeiture as is excepted from the operation of Code Civil Proc. § 338, or as falls within section 340, requiring an action "upon a statute for penalty or forfeiture when the action is given to an individual and the state" to be brought within one year after the cause of action accrues; but the statute contemplates that it shall be collected at the same time and in the same manner as the delinquent tax, and the right to recover it is not lost until the cause of action on the delinquent tax is barred.

4. Where a party defends an action for delinquent taxes on the ground that his property was fraudulently assessed in excess of its real value, he must show by his answer that he has paid or tendered the amount which would have been due if his property had been assessed at a fair valuation, and he must offer to pay what the court shall find equitable and just; otherwise evidence cannot be admitted as to matters alleged in the answer in regard to the unjust discriminations made against him in the assessment.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the county of Los Angeles against one Ballerino and others to recover delinquent taxes. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Horace Allen, for appellants. James McLachlan, for respondent.

DE HAVEN, J. This is an action by the county of Los Angeles to recover from the defendant Ballerino taxes levied for county purposes in the year 1888 upon certain real property and improvements owned by him in that county. The prayer of the complaint is for judgment against that defendant for the amount of the tax, "with five per cent. thereon for delinquencies, and two per cent. per month interest thereon from the last Monday of December, 1888, \* \* \* and for a decree \* \* \* that said real estate be sold, as provided by law," etc. The superior court gave judgment for plaintiff in accordance with the prayer of the complaint. The defendant appeals.

1. The act of April 23, 1880, (St. 1880, p. 186,) authorizing the bringing of suits to recover delinquent taxes, and prescribing the form of complaint therefor, provides in its first section that "any county or city and county, where such taxes are delinquent, may sue in its own name for the recovery of delinquent taxes, whether the same be for county or city, or city and county and state purposes or taxes, or either of them." This statute gives to plaintiff the right to maintain this action. *County of San Luis Obispo v. White*, 91 Cal. 432, 24 Pac. Rep. 864, and 27 Pac. Rep. 756. It is claimed by defendant that the plaintiff ought also to have sued in this action for the delinquent state taxes for the year 1888; that, having authority to sue for both state and county taxes, it ought not to have split its demand, thus subjecting the defendant to two actions, when the whole matter in controversy

could have been settled in one suit. But the question the defendant thus presents in argument does not arise upon this record, as it is not alleged in the answer that any other action is pending to recover the state taxes, or that any such action has been prosecuted to judgment; and the defendant is certainly not injured because the plaintiff did not sue for all that it was entitled to demand.

2. The action was not commenced until more than two years after it accrued, and defendant contends that it is barred by subdivision 1 of section 339 of the Code of Civil Procedure, which provides that an action "upon a contract, obligation, or liability, not founded upon an instrument, in writing," must be brought within two years after the cause of action accrues. This, however, is not such an action, but is one which arises upon a liability created by statute other than a penalty or forfeiture within the meaning of section 338 of the same Code. *San Francisco v. Luning*, 73 Cal. 610, 15 Pac. Rep. 311; *San Francisco v. Jones*, 20 Fed. Rep. 188; *Lewis v. Rothchild*, 92 Cal. 625, 28 Pac. Rep. 805; *State v. Mining Co.*, 14 Nev. 226. The 5 per cent. upon the amount of the delinquent tax, which, under section 3770 of the Political Code, the tax collector is directed to collect in addition to such delinquent tax, and which additional sum is included in the amount sued for in this action, is not such a penalty or forfeiture as is excepted from the operation of section 338 of the Code of Civil Procedure, or as falls within the provisions of subdivision 1 of section 340 of the same Code, requiring "an action upon a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state" to be brought within one year after the cause of action accrues. The statutory penalty there referred to is one which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong or injury suffered, and without reference to the actual damages sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong. The action to recover such a penalty is a penal action, founded upon a statute, and is the action which, under section 340 of the Code of Civil Procedure, must be brought within one year. But this is not such an action. Even in so far as the plaintiff seeks to recover the additional percentage which defendant has incurred by reason of his delinquency, the statute contemplates that the added per cent. sued for here shall be collected at the same time and in the same manner as the delinquent tax, and the right to recover is not lost until the cause of action upon such delinquent tax is barred. It is not, in terms, imposed as a penalty or punishment by section 3770 of the Political Code, (*High v. Shoemaker*, 22 Cal. 363,) and is only a mere incident to the cause of action arising upon the statutory liability to pay the taxes duly levied upon property which has been assessed in accordance with law.

3. As one defense to the action, the defendant alleged in his answer that the assessor fraudulently and corruptly assessed



his real estate at the exorbitant valuation of \$120,000, an excess of \$101,400 over and above its cash value; and in this connection the answer further alleged "that the said assessor did willfully and fraudulently and corruptly discriminate against this defendant in making his assessments; for instance, that while he imposed an assessment on his parcel of real property at more than \$800 per acre, he at the same time assessed the adjoining farm at \$200 per acre, and other farms of better land at \$50 per acre; that such exorbitant assessment on this parcel of real property was not from error of judgment on the part of said assessor, but it was done from corrupt and fraudulent motives, as aforesaid." Upon the trial the defendant offered to show by witnesses that the cash value of his property upon which the assessment in question was made in the year 1888 did not exceed \$50 per acre, and he offered to show by the assessment roll for that year that 67 acres of adjoining land belonging to another person was assessed at only \$15,000, or about one fourth the amount for which the land of defendant was assessed the same year. This offered evidence was excluded by the court, and we see no error in the ruling. It is undoubtedly true that a taxpayer may enjoin the collection of a tax founded upon an assessment fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes, (*Merrill v. Humphrey*, 24 Mich. 170; *Lefferts v. Board of Supervisors*, 21 Wis. 688; *Iron Co. v. Hubbard*, 29 Wis. 51;) and it is equally true that the fact of such a fraudulent assessment would be available to the taxpayer as an equitable defense in an action brought to enforce the collection of a tax founded upon an assessment of that character. But in appealing to a court of equity for relief by way of injunction against such fraudulent assessment, the plaintiff must show by his complaint that he has paid or tendered the amount of taxes which would have been due from him if his property had been assessed at what he concedes would have been a fair valuation, and he must, in addition, offer to pay what the court shall find to be equitable and just, (*Merrill v. Humphrey*, 24 Mich. 170; *State Railroad Tax Cases*, 92 U. S. 616; *Huntington v. Palmer*, 7 Sawy. 355; *Bank v. Kimball*, 103 U. S. 732; *Montgomery v. Sayre*, 65 Ala. 564; 1 High, Inj. § 491;) and we think the same facts should appear in an answer which seeks to defend against the collection of a tax upon the ground of a fraudulent assessment. Tested by this requirement, the answer of defendant fails to state facts sufficient to constitute an equitable defense to this action growing out of such alleged fraudulent assessment. It contains no allegation that defendant ever paid or offered to pay what would have been right for him to pay upon what he concedes would have been a fair valuation of his property, nor does he offer to pay what the court shall ascertain to be just; and for this reason there was no error in

excluding the evidence offered by him tending to prove the matters alleged in his answer as to the value of his land and the discrimination made against him in his assessment. Judgment and order affirmed.

We concur: MCFARLAND, J.; FITZGERALD, J.

(97 Cal. 507)

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE DE LOS ANGELES v. WEIDEMANN et al. (No. 19,105.)

(Supreme Court of California. March 10, 1893.)

FORECLOSURE OF MORTGAGE—DEFICIENCY DECREE—PARTIES—TENANTS IN COMMON.

1. Where a complaint in foreclosure names a partnership as a party defendant, and an amended complaint is filed, naming each member of the partnership individually as defendants, a judgment for a deficiency cannot be rendered against the partnership; the fact that service of summons and the original complaint was made on the partnership being immaterial.

2. A complaint in an action to foreclose a mortgage alleged that defendant W. executed a conveyance of the land on which the mortgage is sought to be foreclosed to defendants A., S., and R., forming the copartnership of R. & Co., which mortgage the grantees in such conveyance agreed to pay; that defendants A. and S. and the representatives of R., deceased, claim an interest in such land. The prayer was for judgment against defendants. *Held*, that the complaint shows that the title was in A., S., and R. as tenants in common, and not as a firm.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by La Societe Francaise de Bienfaisance Mutuelle de Los Angeles against Henry Weidemann and others to foreclose a mortgage. There was judgment of foreclosure, and that defendants Roth & Co. pay any deficiency if the sale of the land failed to satisfy the mortgage, and they appeal. Reversed.

Rosenbaum & Sheeline and Reymert & Orfilla, for appellants. Bicknell & Denis, for respondent.

PATERSON, J. This is an appeal by Roth & Co. from that portion of the decree of foreclosure and order of sale which adjudges and decrees that, if the moneys arising from the sale shall be insufficient to pay the amount found due to the plaintiff, together with the costs and expenses of sale, the clerk shall docket a judgment for the balance against Roth & Co., a copartnership, together with interest on such deficiency judgment at the rate of 7 per cent. per annum; and also from the deficiency judgment against defendant entered by the clerk upon the return of the sheriff. The action was commenced on October 22, 1890, and summons was issued on the same day. The defendants named in the original complaint were Henry Weidemann and Roth & Co., a copartnership composed of A. Room, S. Scheeline, and Joseph Roth. The note and mortgage upon which the action was based were executed and delivered by defendant Weidemann to the plaintiff March 29, 1888. It was alleged in the complaint "that the defendants Roth &

<sup>1</sup>8 Fed. Rep. 449.

Co., a copartnership composed of A. Roos, S. Scheeline, and Joseph Roth, have or claim to have some interest in or claim upon said premises, or some part thereof, as purchasers, mortgagees, and judgment creditors, or otherwise, which interest or claims are subsequent to and subject to the lien of the plaintiff's mortgage." A decree in the usual form was prayed for, including a deficiency judgment against Henry Weidemann in case the property should be sold for less than the amount of the judgment. Summons was duly served upon the defendants, but no appearance was made by any of them. On November 12, 1891, plaintiff filed an amended complaint in which the defendants named were "Henry Weidemann, A. Roos, S. Scheeline, and Bertha Roth, A. F. Benard, and O. Bozlo, executrix and executors, respectively, of the last will of Joseph Roth, deceased." In this amended complaint it was alleged that on January 22, 1890, Weidemann sold and conveyed the property to "A. Roos, S. Scheeline, and Joseph Roth, they—the said Roos, Scheeline and Roth—then constituting the firm of Roth & Co., of the city of San Francisco;" that the deed contained the following provision: "Subject, however, to a certain mortgage of \$2,000 held by the French Benevolent Society of Los Angeles, California, which payment the grantees herein hereby assume and agree to pay." This amended complaint was served upon all of the defendants, none of whom appeared. The court heard the evidence offered by the plaintiff, and thereupon rendered the decree which includes the deficiency judgment against Roth & Co. above referred to. The property was sold by the sheriff, who reported to the court that he had sold the land at public auction to the plaintiff, who was the highest bidder therefor, for the sum of \$2,000. After deducting his fees and expenses, amounting to the sum of \$54.50, there remained a balance due and unsatisfied of \$1,265.75. Thereupon the clerk made the proper entries in the judgment docket for a deficiency judgment against the appellants and in favor of the plaintiff for the sum of \$1,265.75.

It is claimed by the appellant that there is nothing in the complaint upon which to base the deficiency judgment against Roth & Co., and we think the contention is sound. The partnership was not named as a party defendant in the amended complaint. When the amended complaint was filed and served, the original ceased to perform any other function as a pleading, and the fact that service of the summons and the original complaint was made upon Roth & Co. is immaterial. It is claimed by respondent that "after the amendment of the complaint the action retained its identity, whatever the title given in the amended complaint, and each member of the firm being sued, the firm was sued." This proposition as to the effect of an amended complaint adding or dropping parties defendant is palpably erroneous, but the amended complaint shows very clearly that the conveyance by Weidemann was not to the firm of Roth & Co., but to Roos, Scheeline, and Roth, as ten-

ants in common. It is alleged in the complaint that "said A. Roos, S. Scheeline, and Joseph Roth, did thereby assume and agree to pay," etc.; also, "that the defendants A. Roos, S. Scheeline, and Bertha Roth, A. F. Benard and O. Bozlo, executrix and executors of the estate of said Joseph Roth, have, or claim to have, some interest in or claim upon said premises." The prayer of the complaint is for judgment against "the said defendants Henry Weidemann, A. Roos, S. Scheeline, and Bertha Roth, A. F. Benard, and O. Bozlo," and for judgment and execution against the defendants for any deficiency. Conceding that a partnership as such can take a conveyance of land, the language of the deed itself cannot be construed as a grant to the copartnership. It is as follows: "That the said party of the first part [Weidemann] for and in consideration of the sum of \$4,000 \* \* \* does by these presents grant, bargain, sell, and convey unto the said party of the second part, and to their heirs and assigns forever, \* \* \* subject, however, to a certain mortgage of \$2,000, \* \* \* which payment the grantees herein hereby assume and agree to pay, \* \* \* to have and to hold all and singular the said premises \* \* \* unto the said parties of the second part, and to their heirs and assigns forever." That portion of the decree described in the notice of appeal, and the deficiency judgment entered by the clerk against Roth & Co., are reversed.

We concur: HARRISON, J.; GAROUTTE, J.

(97 Cal. 484)

GUTZEIT v. PENNIE et al. (No. 15,261.)  
(Supreme Court of California. March 9, 1893.)

FORECLOSURE OF MORTGAGE—BOND ON APPEAL—STAY OF EXECUTION—RIGHTS OF JUNIOR MORTGAGEE.

1. Code Civil Proc. § 945, provides that, if a judgment direct the sale of land, the execution cannot be stayed, unless the undertaking on the part of appellant provides against waste, and when the judgment is for the sale of mortgaged premises, and the payment of any deficiency, the undertaking must provide for such payment. *Held*, that where a judgment in mortgage foreclosure directs the payment of a junior mortgage out of the surplus after payment of the prior mortgage, and, if the surplus be not sufficient, then that appellant, one of defendants, be made personally liable for the remainder, an undertaking to stay the execution is insufficient, in which the sureties are liable only in case of waste, and no provision is made for payment of the deficiency.

2. Where a junior mortgagee, who is made one of defendants in foreclosure proceedings by the prior mortgagee, by suitable pleadings between himself and the mortgagor, has the amount of his mortgage determined, and provision is made in the judgment for the sale of the premises, he has the same right to have the judgment executed as though he had instituted the action, and he did not waive his right to the enforcement of the judgment by not objecting to the insufficiency of the undertaking to stay execution at the time such undertaking was given.

Department 1.

Action by one Gutzeit against J. C. Pennie and others, Boso Radovich, and Ella

Chielovich, for the foreclosure of a mortgage. From the judgment defendant Radovich appealed. Afterwards an order of sale was issued, and placed in the hands of the sheriff for execution. Appellant moves for a writ of supersedeas. Denied.

Eugene N. Deuprey, for petitioner. J. R. Patton, for respondents.

HARRISON, J. Motion for a writ of supersedeas. The plaintiff brought this action for the foreclosure of a mortgage executed by one Palmer upon certain lands in Santa Clara county. After the execution of the mortgage, Palmer conveyed the property, and thereafter died. The defendants in the action are persons who have acquired an interest in the mortgaged premises, under Palmer, subsequent to the date of the mortgage. Palmer's grantee made an agreement with the appellant, Radovich, for a conveyance of a portion of the mortgaged premises, under which Radovich entered into possession, and thereafter made a mortgage of said premises to the respondent Chielovich. Chielovich, in addition to his answer to the plaintiff's complaint, set up this mortgage by way of a cross complaint against Radovich, and issue was joined thereon by Radovich. The court rendered judgment in favor of the plaintiff for the amount of his claim and for a sale of the premises, and also in favor of Chielovich for the amount of his claim against Radovich, and directed that out of the proceeds of said sale the sheriff, after paying the claims of the plaintiff, and certain other prior liens,—amounting in the aggregate to about \$33,000,—should, if there were any surplus proceeds in his hands therefor, pay to Chielovich the amount of his claim against Radovich, and, if the surplus proceeds therefor were insufficient to make such payment, judgment should be docketed in his favor against Radovich for the deficiency. Radovich appealed from the whole of the said judgment, making both the plaintiff and Chielovich respondents, and gave an undertaking in the sum of \$300 for the costs of appeal, and also an undertaking in the sum of \$10,000 against waste; that amount having been fixed by the judge of the court. The undertaking against committing waste, after reciting the order of the judge fixing the amount, is that the surety, "in consideration thereof and of the premises, does undertake and promise, and does acknowledge itself bound in the sum of ten thousand dollars, that, during the possession of such real property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and does undertake and promise that this undertaking for a stay of proceedings herein is given in compliance with the provisions of section 945 of the Code of Civil Procedure of the State of California, and in conformity to the order of court in this connection, as aforesaid." After the appeal had been taken, Chielovich caused an order of sale to be issued upon the judgment, and placed it in the hands of the sheriff for execution, and, the sheriff being about to sell the premises under said order of

sale, Radovich applied to this court for a writ of supersedeas pending the appeal, and urges in support thereof that the undertaking given by him is sufficient to stay the execution of the judgment.

Section 942, Code Civil Proc., provides that an appeal from a judgment directing the payment of money does not stay the execution of the judgment unless an undertaking be given on behalf of the appellant, in double the amount of the judgment for the payment of the judgment in case it be affirmed. And section 945 provides that, "if the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon;" and the same section further provides that "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." In *Johnson v. King*, 91 Cal. 307, 27 Pac. Rep. 644, it was held that, if the appellant from a decree of foreclosure which provides for the payment of a deficiency upon the sale would stay the execution of the judgment, he must give an undertaking for the payment of such deficiency, even though he is not the party against whom the deficiency judgment was rendered; and this rule was affirmed in *Spence v. Scott*, 95 Cal. 152, 30 Pac. Rep. 202.

The judgment in the present case, after providing for the sale of the mortgaged premises, and the payment of the claims whose lien is prior to that of Chielovich, provides that, if any surplus proceeds shall thereafter remain, the sheriff shall pay therefrom to Chielovich the sum of \$3,849.40, with interest from the date of the decree to the date of sale, or so much thereof as such surplus proceeds will pay, and that, if the surplus moneys shall be insufficient to pay said amount to defendant Chielovich, "the judgment of this court shall be docketed for such balance against the defendant Bozo Radovich in favor of said Ella Chielovich, and that the defendant Bozo Radovich, who is personally liable for the payment of the debt secured by the said defendant's mortgage, pay to the said defendant Ella Chielovich the amount of such deficiency and judgment, with interest thereon at the rate of seven per cent. per annum from the date of said last-mentioned return and judgment, and that the defendant Ella Chielovich have execution therefor against Bozo Radovich." This provision in the judgment brings the case within the express language of the statute, and upon the authority of the foregoing cases the undertaking must be held insufficient to stay the execution of the judgment. The clause in the undertaking, that it is given in compliance with the provisions of section 945 in the Code of Civil Procedure, does not extend its effect beyond the condition for which it was executed. The order of the court lim-

its the condition of the undertaking to the commission of waste, on the part of the appellant, and in any action upon the undertaking the surety could be held liable only upon proof that waste had been committed on the part of the appellant. In any attempt to recover from the surety the amount of any deficiency in the judgment, he would have a perfect defense in the fact that his undertaking made no provision therefor. The provision of section 945, requiring the judge to fix the amount of the undertaking against waste, is distinct from the clause which requires that the undertaking must also provide for the payment of a deficiency; and the authority of the judge to fix the penalty of the undertaking is limited to the object named in the clause in which it is granted. For the purpose of staying the execution of the judgment the appellant must give an undertaking against waste, and also an undertaking to pay the deficiency; the former in the amount that may be fixed by the judge, and the latter for the entire deficiency, whatever that amount may prove to be.

It was competent for Chielovich to cause the clerk of the court to issue the order of sale upon the judgment, and place it in the hands of the sheriff for execution. By virtue of his cross complaint against Radovich, he was the plaintiff, as against Radovich, for the purpose of foreclosing his mortgage, and the judgment thereon, although rendered in the same action with that of the plaintiff, Gutzeit, was a judgment in his favor against Radovich, which he had the right to enforce. In any sale of the premises under such judgment, he could receive no portion of the proceeds until after the satisfaction of the prior liens, but, unless the execution of the same was stayed, he had the right to have the premises sold for the purpose either of receiving therefrom the amount of his judgment against Radovich, or, if there should be a deficiency, of ascertaining the amount of such deficiency, and collecting the same from other property of Radovich. The plaintiff could not either capriciously, or by any arrangement with the appellant, allow the judgment in his favor to remain unexecuted, and the amount of its lien upon the mortgaged premises thereby to increase, to the detriment of the junior mortgagee; but, after the entry of the judgment by which the amount and priority of the several liens upon the premises was determined, either party to the judgment had the right to its execution. A junior mortgagee has a right, in an action to foreclose his mortgage, to bring before the court the holder of a prior mortgage, which has matured, and obtain a decree for the sale of the premises and the satisfaction of his own mortgage, after payment of the amount of the prior mortgage; and when, in an action brought by the holder of the prior mortgage, a junior mortgagee, by suitable pleadings, as between himself and the mortgagor, has the amount of his mortgage determined, and provision made in the judgment for its sale, he has the same right to have the judgment executed as though he had himself instituted the action.

Chielovich did not waive his right to the enforcement of the judgment by reason of not objecting to the insufficiency of the undertaking at the time it was given. He had obtained a judgment in his favor, and there remained nothing more for him to do in order to entitle him to its enforcement. He was at liberty to enforce it at any time during its life. If the appellant would stay its execution, it was incumbent upon him to give such an undertaking as the statute requires, and he assumed the burden of a compliance with the statute. If he omitted to take such steps as would constitute a compliance, it was his fault, rather than that of Chielovich. The motion for a writ is denied, and the temporary restraining order heretofore made herein is discharged.

We concur: PATERSON, J.; GAROUTTE, J.

(87 Cal. 542)

**PEOPLE v. GILLIS. (No. 20,944.)**

(Supreme Court of California. March 18, 1893.)

**CRIMINAL LAW—EVIDENCE—APPEAL—RECORD.**

1. In a prosecution by the state, a question to the prosecuting witness as to whether he employed the attorney who was assisting the district attorney in the prosecution was competent, as tending to show whether the witness was interested in the proceedings to the prejudice of defendant.

2. Where the record is so incomplete that the appellate court is unable to form an opinion as to the propriety of a ruling of the court below which was excepted to, the ruling will not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

William Gillis was convicted of simple assault, and appeals. Reversed.

M. L. Rawson and H. E. Doolittle, for appellant. W. H. Hart, Atty. Gen., and Johnstone Jones, Dist. Atty., for the People.

SEARLS, C. The defendant, William Gillis, was prosecuted by information for an assault with a deadly weapon upon the person of one Till Vasquez, and upon trial by a jury was convicted of "simple assault." Judgment was rendered upon the verdict, imposing a fine of \$200. From the judgment, and from an order denying a motion for a new trial, this appeal is taken. Two errors are assigned by the appellant.

1. At the trial the prosecution was conducted by District Attorney Johnstone Jones and J. L. Copeland, Esq., as associate counsel. Upon cross-examination, counsel for defendant asked Till Vasquez, the prosecuting witness, the following question: "Have you employed Mr. Copeland in this case?" The question was objected to as immaterial and irrelevant. Counsel for appellant insisted the question was intended to show the interest of the witness. The court sustained the objection, remarking: "It is presumed the prosecuting witness has interest. I do not think it necessary." This ruling is assigned as error. It is a well-settled doctrine that in

determining the guilt or innocence of one charged with crime it is proper to inquire of a witness for the prosecution, on cross-examination, whether he has not expressed feelings of hostility towards the prisoner. Questions of like character, tending to show animus, are equally proper. It has been contended that in the case of a prosecuting witness who has been directly injured by the alleged offense, bias and feeling are to be presumed by the jury, and the propriety of permitting or refusing questions of this character should be confined to the discretion of the trial court, and that error assigned upon its action should not be upheld. In the light of the former rulings of this court, I am not at liberty to consider this distinction. In *People v. Blackwell*, 27 Cal. 66, which was a criminal action, the prosecutrix was asked by defendant's counsel, on cross-examination, "if she had employed Budd & Carr and Heslep & Jenkins to assist the district attorney in the prosecution?" The district attorney objected to the question on the ground that the proof was incompetent. The objection was sustained, and the defendant excepted. This court, in its opinion, reversing the judgment, said: "We cannot determine, nor is it either necessary or proper for us to inquire, what, if any, effect an affirmative answer to the question would have had on the minds of the jury. The defendant had a right to ask the question. If a witness retain counsel in a case to which he is not a party, and in the result of which he has no interest, it is a fact going to the credibility of the witness. The witness may have thus interposed on considerations of humanity, or of public justice, or he may have been influenced by private grudge; but the party against whom the witness is produced is always entitled to inquire of the witness as to the fact, and, if admitted, it goes to the jury for whatever it is worth; and such explanation of motives as the witness may give for his action goes with it." *Baker v. Joseph*, 16 Cal. 173, and 1 Greenl. Ev. §§ 449, 450, are cited in support of the opinion. *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. Rep. 859, and the late case of *People v. Thomson*, 92 Cal. 506, 28 Pac. Rep. 589, are to the same effect. In the case last cited a witness for the prosecution in a case of homicide testified, on cross-examination, that "shortly after the shooting he went to the scene of the homicide, and took his rifle with him. Question. What did you take your rifle with you for?" An objection to this question was sustained, and the ruling was held erroneous. I am of opinion a like conclusion should be reached upon the error assigned in this case.

2. The second error assigned is based upon the action of the court in ruling out the answer contained in a deposition taken on behalf of the defendant. At the taking of the deposition, counsel for defendant asked the following question: "Do you know what the reputation of William Gillis, the defendant in this action, is; that is, what his general reputation is for peace and quiet, and as a law-abiding citizen?" It does not appear that any ob-

jection was made to the question at the time and place of taking the deposition. It was objected to, however, at the trial, as not being in statutory form, and as incompetent; the objection was sustained by the court, and the ruling excepted to. The position taken by counsel for defendant in their brief seems to be and is that the deposition in question was taken by stipulation of counsel before a notary public, in the presence of counsel for the people and for defendant; that no objection was taken to the question at the time or previous to the hearing, and that it was then too late. The record is searched in vain for light on this subject. It nowhere appears when or where or before whom the deposition was taken, whether within or out of the state, whether in the presence or absence of counsel for the people. In short, there is an entire absence of such a statement as will enable us to form an opinion as to the propriety of the action of the court below. An error will not be assumed, but must be shown by the record, it must be held that the second error urged is without foundation. For the reasons given relating to the first error it is advised that the judgment and order denying the motion for a new trial be reversed, and a new trial ordered.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

(3 Cal. Unrep. 839)

**AUBURN OPERA-HOUSE & PAVILION ASS'N v. HILL. (No. 18,097.)**

(Supreme Court of California. March 9, 1893.)

CORPORATIONS—SUBSCRIPTIONS TO STOCK—CONTRACT—CONSTRUCTION—LIABILITY OF SUBSCRIBER—WAIVER OF CONDITIONS.

1. In an action by an opera house company to recover a subscription to its capital stock, it appeared that a "prospectus" recited in detail the objects of the intended corporation, the amount of stock, etc., and that the subscriptions were to be called in on installments; that defendant signed the prospectus for a certain number of shares; that four calls had been ordered by the board of directors, and payment demanded; and that defendant had failed to pay. *Held*, that plaintiff was entitled to recover.

2. Such prospectus stated that the building was "to be built by a corporation with a capital stock of \$20,000, consisting of one thousand shares at twenty dollars per share." *Held*, that it was not a condition precedent to defendant's liability that \$20,000 of plaintiff's stock should be first subscribed for.

3. It appeared that defendant was one of plaintiff's directors for two months, during which time he signed the articles of incorporation, was present at meetings of the board when the calls for the first two installments were ordered, and voted in favor of accepting the building lot, and that he served as a member of the building committee, prepared several plans for building, and consulted various architects and contractors about the same. *Held* that, though the subscription for the full amount of stock mentioned in such contract was a condition precedent to defendant's liability, he had waived any objection on the ground that such amount was not subscribed.

Department 2. Appeal from superior court, Placer county; W. H. Grant, Judge.

(Not to be published in California Reports.)

Action by the Auburn Opera-House & Pavilion Association against George M. Hill on a contract of subscription to stock in such corporation. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint set out the prospectus in full, which constitutes the alleged contract signed by defendant, as follows: "Object: To build an opera house and pavilion, combined, in Auburn, Placer county, California. To be built by a corporation with a capital stock of \$20,000, consisting of one thousand shares at twenty dollars per share. The property to be owned by the shareholders, and controlled and managed by a board of trustees. The building to be used for opera-house purposes, balls, large assemblies, reunions, and conventions, and with the pavilion annex for district fair exhibits, circus exhibits, celebrations, and drill hall. The revenues to pay dividends on stock will be derived from rentals of storerooms below and offices above on street front, and theatricals, halls, fairs, etc., etc., from rear portions of building. The location of the building, and the selection of the trustees, to be determined by the subscribers of the majority of the stock. As the district fair is again approaching, the above suggestions, if carried out, will solve the vexed question of a permanent exhibit hall for our district fair, besides furnishing a much-needed public building for Auburn. The subscriptions to be called in on installments, as needed to purchase a site, and erect and furnish the building." The names of subscribers, with the number of shares and the amount subscribed, follow. It was also stated in the complaint that, when stock to the amount of \$17,660 was subscribed, it was agreed among all the subscribers—defendant being one—that such sum was sufficient for the purpose intended, and waived the procuring of subscriptions to the full amount; that defendant was actively promoting said corporation; that the subscribers selected five trustees, among whom was defendant; that they purchased ground selected by such shareholders, and paid the money therefor, and also for the building erected thereon; and that plaintiff, by its board of directors, made calls and demands for installments on the several subscribers as follows: One fourth of each subscription, May 2, 1890; one fourth, July 6, 1890; one fourth, August 26, 1890; and one fourth, October 2, 1890,—at which times such calls and demands were made on defendant, but he failed and refused to pay the same, or any part thereof. It appeared that defendant was elected a director May 2, 1890, and remained such until July 6, 1890, when his resignation was accepted; that while a director he signed and acknowledged the articles of incorporation, served as a member of the building committee, prepared several drafts and plans for building, and consulted various architects and contractors about such building; and that as such director he was present at the meeting when the first call for an installment was ordered, and voted in favor of accepting the building lot which had

been previously reported; also, that the second call, made while defendant was still a director, was ordered by a unanimous vote. It was contended by defendant that the prospectus was too indefinite and uncertain to constitute a contract; that, if it did constitute a contract, it required that stock should be subscribed for to the amount of \$20,000 before it became binding on any of the subscribers; and that defendant had not waived such condition.

J. O. Hamilton and G. W. Hamilton, for appellant. Johnson, Johnson & Johnson and John M. Fulweiler, for respondent.

PER CURIAM. 1. Under defendant's contract of subscription for the stock of plaintiff, as contained in the prospectus signed by defendant, and upon the facts alleged in the complaint as to plaintiff's calls or demand for the amount agreed to be paid for such subscribed stock, the plaintiff is entitled to maintain this action. *Light Co. v. Johnson*, 93 Cal. 546, 29 Pac. Rep. 126; *Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. Rep. 859.

2. It was not a condition precedent to defendant's liability that \$20,000 of plaintiff's stock should be first subscribed for; but, were it otherwise, the defendant has waived the objection which he now makes upon this ground. *Hotel Co. v. Callender*, supra. Indeed, the acts of defendant constituting such waiver are stronger than those held to have that effect in the case cited. Judgment and order reversed.

(97 Cal. 475)

SUTTON v. SYMONS et al. (No. 18,163.)  
(Supreme Court of California. March 8, 1893.)

APPEAL—TIME OF TAKING—RECORD.

1. An order striking out the statement on motion for a new trial being an order after final judgment, an appeal therefrom must be taken within 60 days.

2. A preliminary motion to strike out a portion of the transcript on the ground that it is no part of the record will not be granted, because, if the matters objected to form no part of the record, they will not be considered when the case is under consideration on the merits.

Department 1. Appeal from superior court, Tuolumne county; Joseph Budd, Judge.

Action by Fred Sutton against William Symons and others. From the judgment entered, defendants appealed. Plaintiff moves to dismiss the appeal, and to strike out a part of transcript. Appeal dismissed, and motion to strike denied.

Moses G. Cobb and J. B. Curtain, for appellants. F. W. Street, for respondent.

PER CURIAM. Respondent has moved to dismiss the appeal from an order of the superior court of Tuolumne county striking out appellants' statement on motion for a new trial, upon the ground that it was not taken in time. Such an order is an order made after final judgment, and an appeal therefrom must be taken within 60 days. The appeal in this case was taken too late, and must be dismissed.

Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 533.

Respondent also makes a motion to strike out certain portions of the transcript upon the ground that they are no part of the record. The motion will be denied. Such a practice is not recognized in this court. If the matters to which counsel object form no part of the record, they will not be considered by the court when the merits of the appeal are before us for determination. The motion to dismiss the appeal will be granted. The motion to strike out will be denied.

(97 Cal. 546)

HARRIS et al. v. BARNHART. (No. 18,086.)  
(Supreme Court of California. March 18, 1893.)

RECORD ON APPEAL—RES JUDICATA—MOTION FOR  
NEW TRIAL—STAY.

1. A claim that the evidence was insufficient to justify the verdict will be disregarded when the evidence is not in the record.

2. Error cannot be predicated on instructions when the evidence on which they are based is not brought up; and when the record states that the court gave certain other and additional instructions it will be assumed that the law of the case was properly presented.

3. Code Civil Proc. § 1049, provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed. *Held*, that where a former judgment is pleaded in bar to another action within the year allowed for appeal, but no objection is taken to the sufficiency of the pleading on the ground that a year has not elapsed, it is proper on the trial, which occurs more than a year after the entry of the judgment, to admit the evidence of the former judgment in bar of the action.

4. The pendency of a motion for a new trial does not stay proceedings under the judgment, and is no objection to the introduction of the judgment in evidence in bar of another action for the same cause during the pendency of such motion.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by B. C. Harris and Hannorah Harris against Henry Barnhart to have an absolute deed, executed by plaintiffs, declared a mortgage, on the ground that it was given merely as security. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

J. B. Webster, L. W. Elliott, and Thompson & Paulsell, for appellants. F. T. Baldwin and W. N. Rutherford, for respondent.

SEARLS, C. Plaintiffs, who are husband and wife, brought this action to recover \$3,600. According to the allegations of the complaint, the plaintiffs, on the 15th day of December, 1884, were indebted to defendant in the sum of about \$4,374, a balance due upon a promissory note of \$8,000, made by them to the latter. That on said date, and as security for the payment of such balance, they executed, acknowledged, and delivered to defendant an absolute deed of certain premises, consisting of 10 acres of land, with the improvements thereon, known as the "Stockton House," situated near Stockton. The complaint avers that it was intended by

all the parties to the transaction that the deed should be taken as security, etc. It further avers that defendant, in February, 1885, sold the premises for \$8,000, and the action is brought to recover the excess received by him over and above his demand against plaintiffs. The action was commenced August 26, 1889. The answer denies that the deed was executed and delivered as security, and avers that it was an absolute conveyance, in consideration of the indebtedness of plaintiffs to him, amounting to \$6,000, and was not intended or received as security, etc. Defendant, as a further answer, and as a bar to the action under the statute of limitations, sets up subdivision 4 of section 338, and subdivision 1 of section 339, of the Code of Civil Procedure, as defenses to the action. As a further answer, defendant alleges that on the — day of July, 1889, in an action then pending in the same court between the same parties, and for the same cause of action, judgment was rendered in his favor and against the plaintiffs, wherein it was adjudged "that said plaintiffs are not entitled to recover in this action, and that defendant is entitled to a judgment for his costs." It is further averred in the usual form that such judgment has not been reversed, vacated, or set aside, and remains in full force and effect. The cause was tried before a jury. Defendant had a verdict, upon which judgment was rendered in his favor for costs of suit. Plaintiffs moved for a new trial, based upon the minutes of the court, and from an order denying the motion and from the judgment this appeal is taken.

Plaintiffs, in their notice of motion for a new trial, specified several particulars in which it was claimed the evidence was insufficient to justify the verdict, but the evidence in support thereof is not to be found in the record, and they must therefore be disregarded. Like considerations apply to the instructions given at the request of the defendant, except that marked "2," in relation to the effect of the former judgment. Also to those asked on behalf of plaintiffs and refused. Not having the testimony before us upon which they are predicated, it is impossible to say whether or not the court erred. Another reason for not disturbing the judgment on account of the instructions given and refused is that it appears from the record "that the court, at the request of the plaintiffs and the defendant, and on the court's own motion, gave certain other, further, and additional instructions to the jury." As these additional instructions are not embodied in the record, it must be assumed that, taken with those given and refused, the law of the case was properly presented to the jury. At the trial defendant was permitted by the court, against the objection of plaintiffs, to introduce in evidence the judgment roll in the case of B. C. Harris et al. vs. H. Barnhart, No. 3,635; the object being evidently to support the defense of a former adjudication of the same subject-matter set out in the answer. Plaintiffs excepted to the ruling of the court admitting the judgment roll, and later to the instruction No. 2, given by the court at the request of the defendant, hold-



ing that the facts and issues passed upon in the former case were conclusive in the present action, and these rulings are assigned as error. The verdict in this case was rendered February 28, 1891. At the date of the trial, and when the judgment roll in the former cause was admitted in evidence, a motion for a new trial in such former cause was pending and undetermined. I am satisfied that if the record was properly admitted it proves the subject-matter of this action to be res adjudicata. The parties in each action are the same; the same conveyance of the same property is set out in each action. Plaintiffs in the former as in this action claim that the instrument was given merely as security for a pre-existing debt. Defendant in each case claims that the conveyance was intended to be just what on its face it purported to be, and was executed in consideration of a debt due and owing to him from the plaintiffs. The only perceptible difference is apparent, rather than real. In the former case plaintiffs alleged that they were illiterate, and were induced to sign the conveyance upon the representations of defendant that it was a power of attorney under which he would sell the premises, and when so sold would pay them \$3,000, and cancel their note. The court found against plaintiffs on this proposition, and to the effect that the deed of conveyance was fully explained to and understood by plaintiffs, and was not represented to them to be a power of attorney. The very gist of that action, as well as of this, was as to whether a conveyance, admitted to be absolute on its face, was signed, sealed, and delivered as an absolute conveyance of the property described therein, or merely as security. When its character was once put in issue, tried, and determined, and such determination crystallized by a final judgment, it became a finality as between the same parties, provided such judgment was not suspended and rendered inoperative by the pending motion for a new trial, or by section 1049 of the Code of Civil Procedure.

The only question remaining is, was the judgment offered in evidence suspended by the pendency of a motion for a new trial, or from other cause? It has been repeatedly held by this court that the operation of a final judgment is suspended by an appeal therefrom, and that pending such appeal the judgment is not admissible in another case as evidence even between the same parties. *Woodbury v. Bowman*, 13 Cal. 635; *McGarrahan v. Maxwell*, 28 Cal. 75; *Thornton v. Mahoney*, 24 Cal. 569; *Murray v. Green*, 64 Cal. 363, 28 Pac. Rep. 118; *Freem. Judgm.* § 328. The contention of appellants is that the judgment was not a final one, for the reason that a motion for a new trial was pending, and by reason of the fact that one year had not expired since entry of judgment. A motion for a new trial does not operate as a stay of proceedings under the judgment. *People v. Loucks*, 23 Cal. 69. Section 1049 of the Code of Civil Procedure provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless

the judgment is sooner satisfied." If it be held that during the period of one year next after the entry of a judgment, during which period, under our law, an appeal may be taken, the action is to be deemed as pending, and the judgment is so far in abeyance as not to be a bar to another action for the same cause, and it must be conceded there seems good reason for so holding, still it is not apparent that appellants are gainers thereby. The former judgment was rendered, as before stated, July 16, 1889. It was offered in evidence on or about February 28, 1891,—a period of more than one year after entry. It is true that at the date of the plea of the judgment, viz. November 30, 1889, one year had not elapsed since the entry of the judgment. The evidence, when offered, was admissible, and sufficient to constitute a defense to the action, and it is not perceived that an inherent defect at a former period could be urged against it after the infirmity ceased. The vice, if any, was in the answer, which showed upon its face that the judgment had been rendered within one year. No objection having at any time or place been urged against this pleading, it was proper for the court below to admit the evidence, and enter judgment upon the verdict. Objection was made to the introduction in evidence of the record in the former cause, it is true, but it was based upon its supposed defects in not showing a former adjudication of the same cause of action, that a motion for a new trial was pending, and that one year had not elapsed since the rendition of the judgment. If, as hereinbefore, we still assume the position of appellants that a judgment is ineffectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement until the judgment therein became final, when a supplemental answer averring the proper facts, in bar of the action, would be in order.

In conclusion, I am of opinion: (1) That a motion for a new trial, in the absence of an order of the court to that effect, does not stay or suspend the operation of a final judgment in the cause. (2) That where an appeal is pending, and until the time therefor has expired, a final judgment, unless satisfied, is not evidence in bar of recovery, in another action for the same cause. (3) That until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under section 1049 of the Code of Civil Procedure, to be deemed as pending, and the proceedings therein are admissible under proper pleadings in abatement of a subsequent action for the same cause. (4) That in this cause, the time for an appeal having expired before the judgment was offered in evidence, it was admissible in support of a plea in bar of the action, and, no objection having been urged upon the ground of the insufficiency of the answer pleading such judgment, it was properly admitted in evidence. (5) That defects in the answer were waived by acquiescence and by failure to object there-

to. It must not be understood that any reflection is cast upon the diligence or acumen of counsel for appellants in the assertion that they waived the rights of their clients by failure to object to the answer. Doubtless they were aware of the fact that, if they did so, it would simply involve, as a consequence, the filing of a supplemental answer, and no gain would have accrued to their clients. It is recommended that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 553)

DRISCOLL v. MARKET ST. CABLE RY. CO. (No. 14,232.)

(Supreme Court of California. March 18, 1893.)  
STREET RAILWAYS—INJURY TO PERSONS ON TRACK.

In an action against a street-railway company for causing the death of plaintiff's intestate, it appeared that, on a dark night, deceased approached a street occupied by defendant's tracks, and, when a car going east had passed, started to cross the street, when a car going west ran over him, and killed him. There was slight evidence that the car was moving faster than the statutory eight miles an hour, and it was admitted that the persons in charge of the car wholly failed to ring the bell, as required by the ordinance, from a point 25 feet from the crossing till the same was passed. *Held*, that there was no such absence of substantial evidence to support a verdict for plaintiff as would warrant the court in setting it aside.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Margaret Driscoll, administratrix of Alexander Driscoll, deceased, against the Market-Street Cable Railway Company, for causing the death of the deceased. There was judgment for plaintiff, and, its motion for a new trial being overruled, defendant appeals. Affirmed.

Frank Shay, for appellant. Frank Sullivan, for respondent.

McFARLAND, J. On December 10, 1884, Alexander Driscoll was struck and killed by a car of defendant at the intersection of McAllister and Larkin streets, in San Francisco; and his widow, as administratrix, brought this action to recover damages for his death. The jury returned a verdict for plaintiff in the sum of \$7,775, for which judgment was rendered. The defendant appeals from the judgment, and from an order denying a new trial. The only point urged by appellant is that the evidence is insufficient to justify the verdict; the positions of appellant being that the evidence does not show that the accident was the result of any negligence of appellant, and does show that it was the result of the negligence of the deceased.

The question presented is certainly one of some difficulty. The rule is well established that this court will not disturb a verdict where there is a conflict of evi-

dence on material points, and where there is evidence to support the verdict; but such conflict and such evidence must be real and substantial. When a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions, by taking money from one party, and giving it to the other, without legal cause, the trial judge should, without hesitation, set the verdict aside; and, in the event of his not doing so, this court will grant a new trial. Street railroads are an established feature of modern city life. They are a convenience and a necessity to all classes of people, and are desired by all. But their operation on crowded streets is necessarily attended with considerable danger to pedestrians,—a danger which all people are bound to know, and against which they should protect themselves by the use of at least reasonable caution. While, therefore, the owners of these railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless or reckless or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him, has a right to assume that people will not suddenly undertake to cross in front of it; otherwise, he could not make any headway, and no street-car line could be successfully operated, either for the profit of the owner, or the convenience of the public. And the general rule is that, where the negligence of the injured party is a contributing proximate cause of the accident, he cannot recover damages. But whether or not his negligence did so contribute, in any particular case, is generally a question around which conflicting evidence will be gathered; and in such case a railroad company, which was itself guilty of negligence at the time of the accident, cannot often expect to be relieved from an unfavorable verdict.

Section 501 of the Civil Code provides that the speed of a street car shall not exceed eight miles an hour; and an ordinance of the city and county of San Francisco provides, substantially, that every car shall have attached to it a bell or gong of sufficient size and weight to be distinctly heard, when rung or sounded, at a distance of at least 100 feet, and that the persons in charge of a car must keep the bell ringing, or the gong sounding, from a point 25 feet from a street crossing until the crossing shall have been passed.

In the case at bar the deceased, at the time the car struck him, was walking northerly along the easterly crossing of McAllister street, where it intersects Larkin. On McAllister street the appellant has two parallel tracks, on the northerly of which the cars going west run, and on the southerly the cars going east. The deceased was struck by a car going west, on the northerly track; and, according to the custom of appellant, a car thus going comes to a standstill at a certain point, called "Stop," which is 37 feet east of the center of the said crossing. After starting again, it goes to a point called "Let Go,"

about five or six feet east of the crossing; and at the point "Let Go" the gripman suddenly releases the grip from the cable, and the car runs across Larkin street from the impetus given by the cable, and without being attached to the latter. This is necessary because the cable is crossed by another cable running along Larkin street. The custom above stated was followed by the gripman of the car by which the deceased was killed. There was some evidence that the car, at the time of the accident, was running faster than eight miles an hour, though such evidence was exceedingly slight. It is admitted that the rate of speed at which the cable itself ran was only eight miles; but two of the witnesses testified that, after the car was released from the cable at the point "Let Go," it ran faster than the cable. The position of appellant, that it was physically impossible for the car, after it was detached from the cable, to have run faster than the cable, is hardly tenable; for there was a slight artificial down grade at that point for a few yards,—1 7/8 inches from the "Let Go" to the center of Larkin street. But the testimony of the witnesses who swore to the increased speed was so unsatisfactory, and the increased speed itself so improbable, that a verdict founded on such speed alone, as constituting negligence on the part of appellant, could hardly be sustained. But it is clear that the employees of appellant in charge of the car failed to ring the bell as provided by said ordinance, and as due care required. There was a conflict of evidence as to whether or not the bell was rung at all until after the deceased was struck. Witnesses differed about it having been rung once just before or at the time the car started from the point "Stop," thirty-seven feet away; but the evidence is uncontradicted, and the fact is admitted, that the bell was not rung after leaving said point until after the deceased had been struck. This was clearly negligence, because it was in violation of a reasonable ordinance, and also because the omission was in itself, under the circumstances, careless. *Siemers v. Eisen*, 54 Cal. 418; *Higgins v. Deeney*, 78 Cal. 578, 21 Pac. Rep. 428; *Orcutt v. Railroad Co.*, 85 Cal. 291, 24 Pac. Rep. 661; *Shear. & R. Neg.* § 13. It is true that failure to ring a bell, or to comply with some other statutory requirement, will not make a railroad company liable, if such failure is not the proximate cause of the accident, or if it was caused by the negligence of the injured party; and in the case at bar it is contended by appellant that it was the negligence of the deceased, and not the failure to ring the bell, that caused the injury. The contention is that, upon the evidence, we must hold, as a matter of law, that the negligence of the deceased was the proximate cause of the injury; but, after a thorough examination of the record, we do not think that such contention can be maintained.

There is a conflict of evidence as to the actual conduct of the deceased, and the circumstances under which he acted, at the time of the accident. He was crossing McAllister street from the south side,—going north. It is beyond dispute that

about that time another car of appellant came down McAllister street, going east, and crossed said street on the south track, and stopped a few yards east of the crossing, although there is a conflict in the evidence as to the precise point which said car had reached when deceased started across the street. It was, however, clearly at a point where it was, to a greater or less extent, (as it was further east or west,) an obstruction to the observation of the deceased. The jury had warrant in the evidence to find that he started as soon as the east-bound car had passed the crossing; that the time was after daylight; and that the night was "dark and foggy," although there was a headlight on the car. The two tracks are about 4½ feet apart, and the deceased had nearly crossed the second or north track when the north side of the car struck him. One or two persons shouted to him to get out of the way, but it does not appear that he heard the warning. Under these circumstances, the appellant being in default for not giving the proper warning, we think that the question whether deceased was guilty of contributory negligence was a proper one for the jury; that deceased cannot be held, as a matter of law, to have been so guilty; and that there was sufficient evidence to warrant the jury in finding that he was not. Counsel for appellant, in his very thorough and able brief, has cited a number of cases in which it was held that the plaintiff could not recover because he had not exercised sufficient caution in attempting to cross a railroad track. Those were cases, however, where the accidents occurred on ordinary steam railroads running through the country at comparatively long intervals of time; and the rule there laid down can hardly be applied in all its strictness to street railroads in crowded cities, where a car that can be speedily stopped passes a crossing every two or three minutes, and where people necessarily cross the streets frequently and hurriedly. *Shea v. Railroad Co.*, 44 Cal. 414; *Swain v. Railroad Co.*, 93 Cal. 183, 28 Pac. Rep. 829; 1 *Thomp. Neg.* p. 396, and cases there cited. Of course, if all people exercised the greatest care and caution in approaching and crossing railroad tracks, such accidents as the one here involved would rarely, if ever, occur; but the law does not expect or require such extreme care. Ordinary care is all that is required; and ordinary care is that degree of care which people of ordinarily prudent habits—"people in general"—could be reasonably expected to exercise under the circumstances of a given case. And considering all the evidence and circumstances in the case at bar, and particularly the fact that the deceased had a right to rely upon the usual and required signal of bell ringing when a car is approaching a crossing, we cannot say that the jury abused its power in holding that the deceased was not guilty of contributory negligence. The judgment of the learned judge of the court below, who heard all the evidence, and refused a new trial, is also entitled to great consideration. It is, no doubt, what is sometimes called a "close case;" but, in our opinion,

there is no such absence of substantial evidence to support the verdict as would warrant us in setting it aside.

There is nothing in the point that the gripman could not have rung the bell because his hands were necessarily otherwise engaged. If it was not convenient for him to have performed that duty, the conductor should have done it; and it was no excuse that the conductor was temporarily absent from his post. Neither is there anything in the point that the ordinance requires, in terms, that the persons immediately in charge of the car, and not the company, shall give the warning. The judgment and order appealed from are affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

(97 Cal. 596)

GORDON v. BOOKER. (No. 18,083.)

(Supreme Court of California. March 21, 1893.)

BOUNDARIES—SECTION CORNERS—EVIDENCE—ADVERSE POSSESSION.

1. In an action to quiet title, it appeared that plaintiff's land was north, and defendant's land was south, of a half-section line, the location of which depended on the location of the half-section corner on the east line of the section. The surveyor who ran the half-section line found a stake on the east line of the section, which he assumed to be the half-section corner. Three surveyors, and two other persons, testified that the stake found was the government corner. There was no evidence that a corner had been found at a different place in that vicinity. Measurements from a known corner,  $1\frac{1}{2}$  miles south of the half-section line, would place the corner 24 feet north of the stake found, but a line due west from such point would locate the west half-section corner 20 feet north of its known location. *Hdd.*, that the court erred in holding the half-section corner to be 24 feet north of the stake found, since evidence based on courses and distances from other known points is inadmissible to change the location of an original corner, when found.

2. A finding that defendant had been for five years in possession of the strip in dispute is not sustained by evidence that the strip has been lying open and unoccupied, and that defendant only claimed the land lying south of the half-section line.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Alexander Gordon, administrator of James H. Hamilton, deceased, against Jane E. Booker, to quiet title. There was judgment for defendant, and plaintiff appeals. Reversed.

Firman Church, J. P. Meux, and Garber, Boalt & Bishop, for appellant. Geo. L. Hood and W. S. Crawford, for respondent.

HAYNES, C. This action is brought by plaintiff to quiet title to certain lots in the Central addition to the city of Fresno. The defendant had judgment, and the plaintiff appeals from the judgment and an order denying his motion for a new trial.

The half-section line running east and west through section 4 is the north boundary line of the city of Fresno. Plaintiff's lots lie on the north side of this line, and

defendant's on the south side. The point in controversy is the location of this half-section line, and upon the trial that point turned upon the location of the half-section corner on the east line of section 4. Tellman surveyed and platted Central addition, and ran the half-section line, and plaintiff claims to this line. The court found the line to be 24 feet north of the line so surveyed. In making this survey, Tellman found a stake which he assumed and believed to be the half-section corner. Five other witnesses—at least three of them being professional surveyors—testified that the corner from which Tellman made his survey was a "charcoal" or "government" corner; and there was no evidence tending to show that a stake or corner had ever been seen at a different place in that vicinity. This testimony was *prima facie* sufficient to establish it as a government corner, and to justify a finding to that effect. The finding of the court was based on a survey and measurement from the southeast corner of section 9, a distance of a mile and a half south of the stake in question. A ditch or canal had been dug on the south line of section 9, and for several miles east of that section. Defendant's witness, who dug this canal, testified that he took up the stakes, and set them on the south side of the canal, but the distance they were removed is not definitely shown. But, assuming that the southeast corner of section 9 was definitely established, a survey from that point could be used but for one purpose, *viz.* to show that the half-section corner in question was not in fact a government corner. It could not be used to show that the government surveyor made an error in placing it there. In *Hall v. Tanner*, 4 Pa. St. 244, it was said: "It has ever been held that the marks on the ground constitute the survey. The courses and distances are only evidences of the survey." This court, in *Ferris v. Coover*, 10 Cal. 629, said, "preference is given to monuments, because they are least liable to mistake;" and in the same case, quoting from *Fulwood v. Graham*, 1 Rich. Law, 497, said: "That in locating lands we are to resort—First, to natural boundaries; second, to artificial marks; third, to adjacent boundaries; fourth, to courses and distances; but it has never been said that each of these occupied an inflexible position. It sometimes might occur that an inferior means of location might control a higher, when it was plain there was a mistake." Evidence based upon courses and distances from other known points is admissible to fix a corner where no corner is found, but never to change the location of an original corner when found. It seems to have been considered that, because townships are subdivided by commencing at the south and east sides, therefore points to the south are more reliable than those on the north; but such is not the case. A survey by courses and distances from the nearest established corner is least liable to error. The northeast corner of section 4 is upon the north line of the township, and that corner is not disputed. Several measurements from that corner to the half-section corner in question made the distance 2,623

feet, while the government field notes call for 2,624.8 feet,—a difference of only 1.8 feet from the corner found by Teilman. The conflict of testimony cannot be said to be material. The evidence of defendant, based on course and distance, being of a lower order, because of its greater uncertainty, cannot be said to raise a material conflict with the higher order of proof unless it demonstrates to a reasonable probability that the corner as found now upon the ground is not the corner established by the government, and this it fails to do.

The line found by the court is erroneous in another particular. The half-section corner on the west line of section 4 is not disputed, and that corner is shown to be 2,619 feet south of the northwest corner of the section. Assuming that the north line of the township is a due east and west line, as we must, in the absence of evidence to the contrary, the half-section line found by the court, starting from a point 24 feet north of the stake in the east line, and running "due west," would intersect the west line of the section 20 feet north of the half-section corner, while that line should be drawn from one corner to the other, regardless of a variation from the due east and west course.

If the sixth and seventh findings are to be understood as finding that defendant had been for more than five years in possession up to the line fixed by the court, such finding cannot be sustained. Defendant testified that "all this strip of land in controversy has been lying out, open, unfenced, and uncultivated." And again: "I never claimed anything except what was actually embraced in fractional block 340. That is all I ever claimed, or claim now." It does not appear that either party had actual possession of the strip in controversy, while the constructive possession of each extended only to the true line.

I think the findings discussed herein are not justified by the evidence, and that the judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; VANCLIEF, C

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

#### REYBURN v. BOOKER. (No. 18,082.)

(Supreme Court of California. March 21, 1893.)

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. J. Reyburn against Jane E. Booker to quiet title. There was judgment for defendant, and plaintiff appeals. Reversed.

Firman Church, J. P. Meux, and Garber, Boalt & Bishop, for appellant. Geo. L. Hood and W. S. Crawford, for respondent.

HAYNES, C. This cause was submitted and decided in the court below upon the evidence heard in No. 18,083, Gordon, Adm'r, v. Jane E. Booker, under stipulation of counsel, and is submitted here upon the same briefs by

appellant; no brief for respondent. The judgment was for defendant, and this appeal is from the judgment and an order denying plaintiff's motion for a new trial. Upon the authority of *Gordon v. Booker*, 32 Pac. Rep. 593, (No. 18,083, this day filed,) I advise that the judgment and order appealed from be reversed, and a new trial granted.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons above given the judgment and order appealed from are reversed, and a new trial granted.

(97 Cal. 600)

#### ORANGE COUNTY v. HARRIS. (No. 14,645.)

(Supreme Court of California. March 23, 1893.)

COUNTY OFFICERS—COMPENSATION—CONSTITUTIONAL LAW.

1. St. 1883, p. 361, (County Government Act,) § 164, providing that "the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants," operates as a repeal of that provision of Pol. Code, § 3770, which gives one half of certain additional fees collected on delinquent tax lists to the collector for preparing the list.

2. St. 1883, p. 300, (County Government Act,) § 164, provides that whenever a board of supervisors shall, without authority of law, order any money paid as salary or fees, and such money shall have been actually paid, it may be recovered back in a suit in the name of the county against the person to whom it was paid, together with 20 per cent. damages for the use thereof. *Held*, that the provision for the recovery of such damages is not unconstitutional, as taking property without due process of law.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the county of Orange against one Harris. Plaintiff had judgment, and defendant appeals. Affirmed.

Chas. S. McKelvey and W. L. Campbell, for appellant. W. H. Hart, Atty. Gen., and F. W. Sanborn, for respondent.

PATERSON, J. This is an action to recover from the defendant, who is sheriff and tax collector of Orange county, the sum of \$657, together with 20 per cent. damages. The action is based upon the provisions of section 8 of the county government act, which provides, in substance, that whenever any board of supervisors shall without authority of law order any money paid as salary or fees, and such money shall have been actually paid, it shall be the duty of the district attorney to commence suit in the name of the county against the person to whom the money was paid to recover the same and 20 per cent. damages for the use thereof. Appellant's claim to the money is based upon section 3770 of the Political Code, which provides that the tax collector must collect, in addition to the taxes due on the delinquent list and 5 per centum added thereto, 50 cents on each lot, piece, or tract of land separately assessed, and on each assessment of personal property, one half of which must go to the county, and the other to the collector for preparing the list. It appears that the defendant adver-

tised 2,628 items of delinquent property, and collected, under the section referred to, \$1,314, one half of which he claimed the right to hold under the statute. Section 211 of the county government act, as amended in 1887, provides that "the salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." St. 1887, p. 207. Following this provision in the section are certain provisions, which are referred to and commented upon in *Dougherty v. Austin*, 94 Cal. 608, 28 Pac. Rep. 834, and 29 Pac. Rep. 1092. It was held in that case that the provisions for extra compensation and employment of additional deputies at the expense of the county were unconstitutional; and it may be admitted that all parts of the section fell together, the various provisions with respect to salaries being so interlaced and mutually connected with and dependent upon each other as to warrant the belief that the legislature intended the section to stand as a whole, and if it had been believed that all of the provisions could not be carried into effect, no part of the act would have been passed. *Cooley*, Const. Lim. 211. This being the case, the enactment of section 211 of the amendatory act did not operate to repeal section 3770 of the Political Code. An act, unconstitutional in itself, may contain a valid clause repealing another act, but the intention of the legislature to wipe out the previous enactment, at all events, must be clearly and unequivocally expressed. No repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force, and it is not sufficient to effect a repeal to say in an unconstitutional act that all acts inconsistent therewith are thereby repealed. Enl. Interp. St. § 192; *Campau v. Detroit*, 14 Mich. 276; *Tims v. State*, 26 Ala. 170; *People v. Fleming*, 7 Colo. 236, 3 Pac. Rep. 70; *Childs v. Shower*, 18 Iowa, 272. But, conceding the contention of the appellant in this regard to be sound, *id est*, that section 211, being unconstitutional, did not repeal, section 3770 is not saved by the concession. The county government act, as originally passed, contained a section which provided that "the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided." St. 1883, p. 361, § 164. This section did not contain the objectionable provisions found in the amendment of 1887, and, being a valid enactment, it operated to repeal the provisions of section 3770 of the Political Code. It did contain a provision that the assessor might retain 15 per cent. of all amounts collected by him for poll taxes, and it is claimed that by reason of this provision the act was unconstitutional

and void. We do not deem it necessary to consider the question whether or not the legislature has the constitutional right to authorize the retention by the assessor of any portion of the poll taxes collected by him. It may be conceded, and still section 164 is good, so far as it affects the compensation of officers other than assessors.

There is no merit in the contention that the provision for 20 per cent. damages, if enforced, is unconstitutional, because it deprives a defendant of property without due process of law. It is no more obnoxious to such a criticism than the provisions of the Code relating to costs and damages in cases of delinquent taxes. As was said by Chief Justice Beatty in *State v. Huffer*, 11 Nev. 303, in speaking of an act prescribing an additional penalty for nonpayment of taxes in certain cases after suit: "We think the penalty is to be regarded not only as a punishment to the delinquent, but also and principally as a compensation to the state and county for the delay of payment, and the consequent derangement of their finances."

The contention of the appellant that the money was paid under "authority of law" is equally unsound. It is the legislature, and not the board of supervisors, which is charged with the duty of fixing the compensation due to the county officers, and *Miller v. Dunn*, 72 Cal. 462, 14 Pac. Rep. 27, is not in point. The other points raised by appellant, viz. that the subject-matter of this section is not expressed in the title of the county government act as required by section 24, art. 4, of the constitution, and that the act is not uniform in its operation, because the supervisors of certain counties are given powers not given to others, do not require notice.

Judgment affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.

(97 Cal. 670)

ESHLEMAN v. HENRIETTA VINEYARD CO. et al. (No. 18,096.)

(Supreme Court of California. March 24, 1893.)

SPECIFIC PERFORMANCE — TERMINATION OF CONTRACT — TENDER OF PERFORMANCE BY VENDOR.

In a suit for specific performance, it appeared that plaintiff agreed to purchase the land within a reasonable time after defendant perfected its title thereto; that, after the title was perfected, defendant tendered a conveyance, but plaintiff declined to accept, for reasons given, which did not relate to the title; that defendant afterwards conveyed the land to another party. *Held*, that plaintiff could not recover, as his refusal to accept the conveyance when tendered terminated the contract.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by I. S. Eshleman against the Henrietta Vineyard Company and others for the specific performance of a land contract. Defendants had judgment, from which, and an order denying a new trial, plaintiff appeals. Affirmed.

Edward Lynch, for appellant. W. D. Tupper, for respondents.

SEARLS, C. Appeal from a final judgment in favor of defendants, and from an order denying a motion for a new trial. The action was brought to enforce the specific performance of a contract for the conveyance of land based upon the following agreement: "This agreement, made the twenty-first day of January, 1886, between the Henrietta Vineyard Company, a corporation, party of the first part, and I. S. Eshleman, of the county of Alameda, state of California, party of the second part, witnesseth: Whereas, the party of the second part has this day purchased certain lands of the party of the first part, situate in section 16, township 14 south, range 21 east, amounting to about one hundred acres; and, whereas, part of said section 16, to wit, the southeast quarter of the northwest quarter of said section, is in dispute; that is to say, the party of the first part insists that he owns said quarter of said quarter section, and the party of the second part is in doubt: Now, therefore, it is agreed and understood that if the party of the first part is the owner of said quarter of said quarter section, and the same can be demonstrated by the records of the county of Fresno, state of California, then the said party of the second part hereby covenants, promises, and agrees to and with the party of the first part that he, the said party of the second part, will purchase said quarter of said quarter section, and the party of the first part covenants and agrees that he will sell and convey, by good and sufficient deed, to said party of the second part, the said southeast quarter of said northwest quarter of section 16, comprising about forty acres of land, at and for the price of \$41.66% per acre, and that he will accept said conveyance when tendered to him within a reasonable time after it shall be ascertained that the party of the first part is the owner of said quarter of said quarter section of land. In witness whereof, we have hereunto set our hands and seal this 21st day of January, 1886. Henrietta Vineyard Co. G. H. Malter, Pres. I. S. Eshleman. Witness: Minnie D. Eshleman." The theory of the complaint is that at the date of the foregoing agreement the corporation defendant claimed to own the land agreed to be conveyed, but that at that time, and for a long time subsequent thereto, several other persons also claimed, or appeared of record to claim, interests, estates, and liens in and to and upon said land, adversely to the corporation; that on the 28th day of October, 1887, the corporation could have conveyed the land free and clear of incumbrance, and offered to do so; that on or about November 5, 1887, plaintiff accepted the offer of a conveyance, tendered the price agreed to be paid, and demanded a deed; that on the 25th day of January, 1888, the corporation defendant refused, and has since refused, to convey the land. The further allegations of the complaint are mainly ancillary to this general statement. The answer negatives many of the allegations of the complaint, and avers, in

substance, that as early as February, 1886, it was able and willing to convey the land, by good title, free from incumbrance, and thenceforth, and up to November 5, 1887, repeatedly offered to convey, but that the plaintiff refused to accept a conveyance and pay for the land. The defendant corporation admits an allegation of the complaint, that on the 14th of November, 1887, it conveyed the land to one Karl Sheffer, but denies that it was so conveyed to defeat plaintiff's claim. The agreement and evidence, taken together, show that the corporation defendant had previously sold to plaintiff and his daughter a very considerable tract of land, in which the 40-acre tract involved in this action was included, but which was not conveyed by reason of the title being in doubt. Thereupon the agreement in this case was made. In selling another tract of land by the corporation defendant to one E. R. Holton, a mistake had been made in the deed, and this 40 acres described, instead of the land actually sold, and a mortgage had been given back by Holton, containing the same mistaken description. This mistake was remedied on the 13th of February, 1888, by a reconveyance of the land in question here; and on the same day satisfaction of the mortgage by the corporation defendant, by its president, was acknowledged on the margin of the record of said mortgage. A regular release of the same mortgage, dated April 23, 1887, was recorded January 11, 1888.

2. The land in question had also been sold for taxes levied upon an assessment against George H. Malter, individually, (but who was president of the corporation defendant,) for the fiscal year 1884 and 1885, and the tax certificate at the date of the agreement was held by one Henry Horstman. There was evidence tending to show that this tax matter, which related as well to other lands sold to plaintiff, was adjusted about the time of the execution of the agreement of January 21, 1886, but in what precise manner is not clear. On September 26, 1883, the sheriff of Fresno county levied a writ of attachment on the land in question in an action in which the Llewellyn Steam Condenser Manufacturing Company was plaintiff, and George H. Malter et al., copartners under the name of Malter, Lind & Co., were defendants, which attachment was not released until November 22, 1888. The cause was tried by the court without the intervention of a jury. The findings were in favor of the defendants.

It is objected that the evidence is insufficient to support the third finding of the court, which is in the following language: "That on the 21st day of January, 1886, said corporation was the owner of the land described in said agreement." If by this finding the court meant to say that on that day the corporation was vested with the legal title, it is not technically correct. The title on that day, and until February 13, 1888, stood in Holton, under the deed to him, in which, by mistake, the tract of land in question was described, instead of that which had actually been sold to him. On the last-named day it was conveyed by Holton to the corpora-



tion, as hereinbefore stated, and at the same time the Bolton mortgage was satisfied on the margin of the record. There was also evidence tending to show that the Horstman tax lien, which covered other land purchased by plaintiff from the corporation defendant, was cleared up, and the tax certificate assigned to plaintiff, or a deed given to him by Horstman, at or about the date of the execution of the agreement. The levy of the attachment against Malter, Lind & Co. upon this land, the title to which was in the corporation, created no cloud upon the title. The levy of an attachment against A. upon the land of B. gives no lien thereon, and creates no cloud upon the title of B. *Pixley v. Hugkiss*, 15 Cal. 135. When a deed from the corporation defendant was tendered to the plaintiff by the witness McPike, it appears that he made no objections on the score of title, but declined to accept the deed upon the ground that the land was "hogwallow land, and that he would not take it. Had made up his mind that he had land enough down there," etc. Similar expressions are shown to have been used when, at a later period, the witness Ashdown tendered the deed to plaintiff. Indeed, it is apparent from plaintiff's own testimony that he did not, at the date of the contract, want the land in question, and only agreed to take it on a compromise, and to have peace. As the title to the land was perfected before a tender of the deed was made, it is not regarded as important that it was at a date later than that mentioned in the finding. The right to have the title when he received the deed was the substance of what he could claim. We may, however, admit that the earlier efforts of the corporation defendant to convey the property to plaintiff were futile, by reason of defects in the title which would have prevented a complete title vesting in the latter. It is admitted in the complaint that on the 28th day of October, 1887, the corporation defendant was the owner of the land, and was able and could have freed it from all adverse claims, and could have conveyed it free from incumbrance, and that at said date it notified plaintiff that it was ready and willing to do so, etc. The complaint then proceeds to aver that within a reasonable time thereafter, to wit, on or about November 5, 1887, plaintiff offered to perform, and demanded a deed, etc. The finding of the court negatives the offer of performance on the part of plaintiff, and is supported by evidence. This seems conclusive of the whole case. In this view, the sufficiency of the evidence to support the finding that plaintiff's cause of action was barred by the statute of limitations need not be discussed. A finding upon the offer of plaintiff made January 25, 1888, to take the land, and pay for it, was immaterial. Having been requested to do so in October, 1887, and having neglected so to do, the defendant had a right to consider the contract terminated. That it did so consider is evidenced by its conveyance of the land to another on the 14th day of November, 1887, for the purpose of raising money thereon.

The rulings of the court on the admission and rejection of evidence are not of sufficient importance to vary the result, and, as the judgment and order must be affirmed, what might be said as to the rulings is not important. It is only where a new trial is granted that the views of this court upon questions of law, of no general interest to the profession, become important, as serving to guide the lower court in a retrial of the cause. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(97 Cal. 568)

DOUGHERTY et al. v. MILES et al. (No. 19,029.)

(Supreme Court of California. March 18, 1893.)

#### ADVERSE POSSESSION.

In an action to quiet title, it appeared that J. died, seized of the land in dispute, in 1857, and his administrator conveyed the land to R., under whom defendants held, though neither R. nor defendants ever occupied the land. Plaintiffs were administrators of a brother of the original owner, who took possession of the land in 1860, and for nearly 20 years before the suit claimed the whole tract, paid the taxes, and occupied a part of the tract, on which he lived, without interference by defendants or their ancestor. *Held*, that plaintiffs had acquired a title to the whole tract by prescription.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Dougherty and another, administrators of Edward Hayes, deceased, against Mary C. Miles and others, to quiet title to a certain tract of land. There was judgment for plaintiffs, and defendants appeal. Affirmed.

Works, Gibson & Titus and S. W. & E. B. Holladay, for appellants. McNealy, Trippett & Neale, for respondents.

McFARLAND, J. This is an action to quiet title to a certain tract of land, described in the complaint by metes and bounds, and generally called the "Hayes Ranch." Judgment went for plaintiffs, and defendants appeal from the judgment, and from an order denying a new trial. The action was commenced by Edward Hayes, who died during its pendency, and it was prosecuted to judgment by his administrators. Both parties claim through John Hayes, who died intestate, and seised of the land in contest, on May 20, 1857. His next of kin and only heirs were two brothers,—Edward, who commenced this action, and Robert Hayes; and Edward acquired the title and interest of Robert in the estate. At the time of the death of John, the two surviving brothers, Edward and Robert, lived in New Brunswick. A few days after the death of said John Hayes, one Gitchell was appointed special administrator of his estate, and

sold the personal property for \$696.41. Afterwards he applied for letters of general administration; and on August 3, 1857, the probate court made an order that such letters issue to him upon his giving a bond in a certain named sum. There is no evidence that he ever gave any bond, or that said general letters were ever issued to him. Neither is there any evidence that he ever made application to sell the real property of the estate, other than the recital of the court hereinafter mentioned. No bond or letters of administration or application to sell said property were among the papers on file, nor was there any evidence that either of them was ever in existence. But on November 23, 1857, the court made an order that the said real property be sold, and the order recited that there had been due publication of an application for such sale, and declared that the sale of the real property of the estate was necessary. Gitchell returned that, pursuant to said order, he had sold the Hayes ranch to George R. Ringgold for \$975. On December 28, 1857, the court approved the sale to Ringgold. On August 27, 1858, Gitchell made a deed of the Hayes ranch to Lucius B. Northrop, which recited that Northrop was the bidder at the sale. Afterwards, on January 14, 1859, Northrop made a conveyance of said ranch to said George R. Ringgold. Defendants and appellants claim title through the above proceedings as heirs and representatives of said Ringgold, who died before the commencement of this action. Neither Ringgold nor either of the defendants, nor any grantee or representative of Ringgold, was ever in possession of any part of the land. About 1860 Edward Hayes came to California to look after the estate. He found that Gitchell had sold, or attempted to sell, all the property; and, upon demand for settlement, Gitchell paid him \$173, and no more. Edward then sued him, averring that he was administrator, (whether special or general, not stated,) and that he had fraudulently, and without authority of law, sold all the property, real and personal, and appropriated the proceeds to his own use. Gitchell answered, denying that he was general administrator, and also denying some of the other averments. Judgment was rendered against Gitchell for something over \$3,000; and, the court having found fraud, he was imprisoned, but was released because Edward did not advance the cost of imprisonment. No part of the judgment was paid.

We have briefly recited the foregoing facts because they seem to be necessary to an understanding of the case; but we do not deem it necessary to determine the many questions discussed by counsel as to the validity of the probate sale,—whether Edward was estopped by his judgment against Gitchell; what should be presumed from the recitals of the order of sale, and from the lapse of a long period of time; whether the sale authorized a deed to Northrop; the effect of the discharge of Gitchell from imprisonment, etc. Waiving all of these questions, we will assume, for the purposes of this decision, that the

sale could not be attacked after three years from its date, under section 190 of the probate act. Wood, Dig. p. 410; *Harlan v. Peck*, 33 Cal. 515; *Reed v. Ring*, 93 Cal. 108, 23 Pac. Rep. 851. But we think it clear that, as found by the court, Edward Hayes, at the time of the commencement of the action, had acquired a title to the land in contest by prescription. As before stated, the alleged probate sale was made in 1857; and neither Ringgold nor any of his successors ever took possession of any part of the land in contest, although 30 years elapsed before the commencement of this action, and although Edward Hayes, for nearly 20 years of the time, was in the actual possession of part of the land, and claiming the whole. The land being unoccupied, Edward entered upon it in 1870, and inclosed and cultivated about five acres, and built a small house, and lived in it, claiming the whole tract. In 1872 he filed a petition for letters of administration of the estate of John Hayes, in which he stated that Gitchell had died, leaving the estate finally unadministered. He was regularly appointed general administrator, and duly qualified as such; and such proceedings were regularly had that in 1876 the administration was closed, and there was a final decree of distribution distributing the land to said Edward. After 1876, for some years, he did not live personally on the land, but was represented by others. Afterwards he made it his permanent home, and in 1886 or 1887 he built a new house on the land, costing about \$1,000, and lived in it until his death. He always claimed the whole tract, which was well known as the "Hayes Ranch" or "Farm," and paid all taxes on it from at least 1872; and no protest was made by any representative of Ringgold. There was no interference with Edward's possession, nor any attempt by any other person to take possession of any part of the ranch. Upon the foregoing facts, we think that the adverse possession of Edward Hayes extended to the boundaries of the Hayes ranch, as held by his ancestor John Hayes, and described in the decree of distribution.

There is one alleged error in ruling to be noticed. The complaint, after describing the land in contest by metes and bounds, has these words: "As per map made by Chas. H. Poole, July 5, 1853, and on file in the office of the trustees." Appellants offered this map in evidence, and respondents objected to it, so far as it was offered for the purpose of identifying the land sold by Gitchell as administrator, and of adding to or aiding in the description of the land sought to be described in the order of sale under which Gitchell acted. The objection was sustained, but the map was "admitted for all other purposes." This ruling is entirely immaterial, for there was no real question about the identity of the ranch sold under the probate order. We assume that it was the tract of land described in the complaint, and which had been distributed to Edward Hayes. It was a piece of land well known since before the death of John Hayes as the "Hayes Ranch." There was also an ex-

ception to a ruling about the testimony of the witness Dougherty, to which the foregoing remarks apply. We see no reason for disturbing the judgment. Judgment and order affirmed.

We concur: FITZGERALD, J.; DE HAVEN, J.

(97 Cal. 572)

SHIPMAN v. FORBES et al. (No. 15,094.)

(Supreme Court of California. March 21, 1893.)

STREET ASSESSMENTS—WARRANT—DATE.

1. St. 1872, p. 813, § 10, which requires a date to be affixed to the warrant issued by the superintendent of streets of the county of San Francisco authorizing the collection of street assessments by the contractor doing the work, is not complied with by simply affixing the year; and a warrant so insufficiently dated cannot serve as the foundation of legal proceedings for the collection of the assessment, since section 11 requires the contractor to return the warrants to the superintendent "within 10 days after its date" to preserve the lien of the assessment, and section 13 prohibits an action from being brought on the assessment until "after the period of 15 days from the day of the date of the warrant."

2. The fact that the county auditor, on countersigning the warrant, affixed a date to his signature, does not cure the omission of the date from the warrant, since the auditor's function is limited merely to approval, and whatever is essential to the issuance and validity of the assessment must be done before it reaches him.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Shipman against Forbes and others to foreclose the lien of a street assessment. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

J. M. Wood, for appellant. Cope, Boyd, Fifield & Hoburg and Stanly, Stoney & Hayes, for respondents.

HARRISON, J. Action to foreclose a street assessment in San Francisco. The plaintiff offered in evidence the original assessment, diagram, warrant, and affidavit of demand and nonpayment, to which defendants objected upon the ground that the warrant was not dated. The warrant is in the following form: "By virtue hereof, I, C. S. Ruggles, superintendent of public streets, highways, and squares of the city and county of San Francisco and state of California, by virtue of the authority vested in me as said superintendent of public streets, highways, and squares, do authorize and empower Jas. S. Dyer, his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be his warrant for the same. San Francisco, 1885. C. S. Ruggles, Superintendent of Public Streets, Highways, and Squares. Countersigned by Fleet P. Strother, Auditor of the City and County of San Francisco, September 7, 1888." The court excluded the evidence,

and rendered judgment for the defendants, and this ruling is now assigned as error.

Section 10 of the act of 1872, (St. 1872, p. 813,) under which the proceedings were had, directs the superintendent of public streets, highways, and squares to attach to the assessment a warrant, which shall be signed by him and countersigned by the auditor, and prescribes the form of the warrant. In this form, after giving the body of the warrant, its date and authentication are prescribed as follows: "San Francisco, (date,) eighteen hundred and \_\_\_\_\_. (Name of Superintendent,) Superintendent of Public Streets, Highways and Squares. Countersigned by (Name of Auditor,) Auditor of the City and County of San Francisco." The warrant issued in the present case follows the prescribed form, except in the matter of its date. The words "San Francisco, 1885," cannot be considered as a compliance with the statutory requirement that the warrant be dated. Other portions of the statute show that the "date" which the warrant is to contain includes the month and the day of the month as well as the year. Section 11 requires the contractor to return the warrant to the superintendent of streets "within ten days after its date," in order to preserve the lien of the assessment; and by section 13 an action upon the assessment cannot be brought until "after the period of fifteen days from the day of the date of the warrant." The form prescribed by the statute makes the date as much a part of the warrant as it does the signature of the officer, and in matters of this character, in which the property of a citizen is to be taken in invitum, it cannot be said that any requirement of the statute is to be disregarded. Every requisite having the semblance of benefit to the owner must be complied with, and, where the form of a statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings. *Smith v. Davis*, 30 Cal. 537; *Taylor v. Donner*, 31 Cal. 483; *Hewes v. Reis*, 40 Cal. 263; *Grimm v. O'Connell*, 54 Cal. 522. It is conceded on the part of the appellant that these words did not amount to the dating of the warrant, but it is contended by him that when the auditor countersigned the warrant over the date of September 7, 1888, the warrant itself took that date, and therefore was dated. The function of the auditor, however, being merely that of approval, and limited to countersigning the warrant, is not called into exercise until after the warrant has been completed. Whatever is essential to the issuance and validity of the warrant must be done before it reaches the auditor, and no act of his can supply any defect or cure any irregularity in the prior proceedings. The position of the date, September 7, 1888, after the countersigning by the auditor, shows that it was a part of his act, and not a part of the warrant itself.

The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATTERSON, J.

(97 Cal. 604)

**WHITE v. WHITE.** (No. 15,043.)

(Supreme Court of California. March 24, 1893.)

**DIVORCE—PAYMENT OF COSTS—ORDER AUTHORIZING MORTGAGE.**

A decree of divorce having been rendered in favor of the wife, a referee was appointed to take testimony, and report on the character and value of the husband's property, preliminary to final judgment; the decree requiring the latter to pay referee's costs and expenses. The referee having petitioned for an order directing the husband to pay a certain sum into court to be used for payment of such costs and expenses, the wife objected to the court granting the husband permission to mortgage his property to secure money to comply with such order. The evidence was conflicting as to whether he could procure the money from any other source, and the court granted an order authorizing such mortgage, and set aside the injunction and lis pendens in the case to that extent, and for that purpose, alone. *Held*, that the order was properly issued.

Department 1. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by George E. White against Frankie White. From an order authorizing plaintiff to mortgage his property to obtain funds for the payment of referee's costs, defendant appeals. Affirmed.

Henry E. Highton, H. C. McPike, and J. A. Cooper, for appellant. Barclay Henley and E. D. Wheeler, (Henley, MacSherry & Herrmann, of counsel,) for respondent.

**GAROUTTE, J.** In this action a decree of divorce was rendered in favor of appellant, and H. T. Cresswell was appointed a referee by the court to take testimony, and report thereon as to the character, condition, and value of the property of respondent, preliminary to a rendition of final judgment. The decree required that the costs and expenses of the referee should be paid by respondent. The referee filed a petition asking the court to make an order directing respondent to forthwith pay into court the sum of \$2,500, to be used in the payment of the costs and expenses of such reference. The appellant in this proceeding appeared at the hearing of the said petition, joined with the referee in asking for the order, but objected to the court granting respondent permission to mortgage his property for the purpose of securing the money wherewith to comply with the order; and the consideration of appellant's objection was the matter of contest before the court. If we understand appellant's affidavits, it was contended by her that respondent was able to procure the money from other sources, but the affidavits and oral evidence placed before the court at the hearing are sharply conflicting upon this issue, and therefore we will not discuss the evidence. The court made an order that respondent be allowed to mortgage his realty for the purpose of securing the money upon terms to be approved by the court, and set aside the injunction and lis pendens in the case to that extent, and for that purpose alone. The order of the court meets with our entire approval. No final decree in the action could be entered until the referee made his report. The

referee could not make his report until the money was forthcoming to enable him to do his work. The money could not be advanced unless a mortgage was given to obtain it. Hence the further progress of the trial was completely blocked unless the court made the order here contested. We see no reason why the court did not possess the power to make the order, and, if it did not possess such power, we see no reason why appellant should complain of that fact. Let the order be affirmed.

We concur: **HARRISON, J.; DE HAVEN, J.**

(97 Cal. 610)

**EX-MISSION LAND & WATER CO. v. FLASH et al.** (No. 14,731.)

(Supreme Court of California. March 24, 1893.)

**FORECLOSURE—JUDGMENT—ACTION TO SET ASIDE—FRAUDULENT ORGANIZATION OF CORPORATION—LACHES.**

1. Defendants, having a contract for land at \$5 an acre, employed agents to organize a corporation to purchase it at \$25. It was represented to the subscribers for stock in such corporation that the contract held by defendants was for the purchase of the land at \$25 an acre, the lowest price at which it could be obtained; and it was concealed from them that one of defendants, a large subscriber to the corporation, was interested in the contract, and that the organizers were defendants' agents. The corporation gave a mortgage for part of the price, which was foreclosed, defendants buying in the land and obtaining a deficiency judgment. *Held*, in an action to set aside the foreclosure decree and the judgment, and to cancel the notes and mortgage, that the corporation was the proper plaintiff, rather than the individual subscribers to stock.

2. In such case, as adequate relief necessarily embraced the cancellation of the notes and mortgage, the remedy by motion to set aside the foreclosure and for leave to answer was not exclusive.

3. The decree of foreclosure was rendered April 5th, the stockholders first obtained notice of the fraud June 5th, and the action was begun in December. *Held* that, as defendants were in control of the corporation till the last of September, and the delay in beginning the action had not prejudiced defendants, plaintiff's right of action was not barred.

4. Code Civil Proc. § 473, limiting the time within which one can obtain relief from a judgment or order taken against him through his mistake, inadvertence, surprise, or neglect, has no application to such a case.

5. The fact that defendants purchased the land before they put themselves in a position of trust towards the corporation by its organization did not prevent it from recovering the secret profits made by them.

6. The fact that rescission of the sale and restoration of the land to defendants was a practicable mode of relief does not exclude the relief actually sought.

7. That the decree asked for by plaintiff was more disadvantageous to defendants than to the actual organizers of the corporation, who had received cash commissions for their services, does not affect plaintiff's right to such relief.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Ex-Mission Land & Water Company against H. L. Flash and A. D. Childress to set aside a decree of foreclo-

sure and a judgment, and to cancel notes and a mortgage on which the decree was based. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Gibbon & Creighton, A. W. Hutton, and Welborn, Parker & Stevens, for appellants. Conklin & Hughes, Hunsaker, Britt & Goodrich, J. G. Garrison, and Chapman & Hendrick, for respondent.

**VANCLIEF, C.** The defendants, having foreclosed a mortgage on the land of the plaintiff, purchased the land at the foreclosure sale for a sum less than the amount due on the mortgage, and caused a judgment to be docketed against the plaintiff for the deficiency. The plaintiff brought this action to set aside and annul the decree of foreclosure and the judgment for the deficiency, and also to cancel the notes and mortgage on which the decree was founded, on the alleged ground of fraud in procuring the notes and mortgage. The judgment of the court below was in favor of the plaintiff, granting all the relief prayed for. Defendants appeal from the judgment and from an order denying their motion for a new trial.

The facts, as found by the court, relevant to the questions presented, are substantially as follows:

In March, 1887, the administrator of the estate of Augustine Olvera offered for sale at public auction a tract of land situate in the county of San Diego, containing 4,500 acres, pursuant to order of the superior court of the county of Los Angeles, in which said estate was then being administered. One Charles H. Forbes requested the defendants to join him in the purchase of the land, and to furnish the money to make a payment of 10 per cent. of the purchase money required to be paid at the time of the bid, which they did. On March 19, 1887, Forbes bid in the land at the price of \$5.05 per acre, and paid 10 per cent. of the purchase money, furnished by defendants, amounting to \$2,272.50, it being understood that Forbes, Flash, and Childress should be equally interested in the purchase. On April 15, 1887, the sale was confirmed by the court as a sale to Forbes alone. A copy of the order of confirmation was delivered to Forbes on April 15, but was not recorded in San Diego county until June 6, 1887. In the latter part of April, 1887, the defendants and Forbes employed H. T. D. Wilson and N. D. Coleman to sell the land, and for that purpose to organize a corporation to make the purchase from the estate of Olvera, at the price of \$25 per acre, amounting to \$112,500, for which, in case of such sale, Wilson and Coleman were to be paid a commission of \$5 per acre, amounting to \$22,500.

On May 8, 1887, a written agreement was signed between Forbes, Flash, and Childress of the first part, and Wilson of the second part, witnessing "that the said parties of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agree to sell and convey unto the said party of the second

part, and said second party agree to buy, all that certain lot or parcel of land, situate in the county of San Diego and state of California, and bounded and particularly described as follows, to wit: 'All that portion of that certain rancho situated in the county of San Diego, state of California, known as the "Runcho Ex-Mission of San Diego," described as follows, \* \* \* containing about 4,500 acres, for the sum of one hundred and twelve thousand, five hundred dollars, gold coin of the United States; and the said party of the second part, in consideration of the premises, agrees to pay said sum to the said parties of the first part, the said sum of \$112,500 to be paid as follows, to wit, \$10,000 on or before May 20, 1887, \$27,500 within sixty days, \$20,000 within six months, \$20,000 within twelve months, \$20,000 within eighteen months, \$15,000 within twenty-four months. Deferred payments to be secured by mortgage on said land, and to bear eight per cent. interest per annum from date. The parties of the first part agree to release land under above agreement at the rate of fifty dollars per acre outside of town sites, and at rate of one hundred and fifty dollars per acre in town sites. And the said party of the second part agrees to pay all state and county taxes or assessments of whatsoever nature, which are or may become due on the premises above described. It is further agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms hereof by the said party of the second part the said parties of the first part shall be released from all obligations in law or in equity to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys heretofore paid under this contract, and their interest in or to said moneys or said property shall thereupon immediately cease, as fully as if said moneys had never been paid or this agreement entered into. And the said parties of the first part, on receiving such payment, at the time and in the manner above mentioned, agree to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed of grant, bargain, and sale. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties. In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written. Chas. H. Forbes. H. L. Flash. A. D. Childress. Harvey T. D. Wilson, per N. D. Coleman." This agreement was prepared by Childress, and signed by Coleman for Wilson during Wilson's absence; and the court finds that it was a sham, and not intended to be binding upon either party.

On May 20, 1887, the following agreement, called the "Subscription Contract," (plaintiff's Exhibit A.) was drawn, and subscribed by all the parties thereto at or within a few days after its date: "Los Angeles, California, May 20, 1887. We, the undersigned, hereby agree to pay for the proportion of property hereinafter de-

scribed as is set opposite our signatures, according to the terms stipulated in this writing. We agree to buy forty-five hundred acres of land in San Diego county, lying north of the city of San Diego about six miles, to wit: "All that portion of that certain rancho situate in the county of San Diego, state of California, known as the "Rancho Ex-Mission of San Diego," described as follows, to wit, " \* \* \* " containing about forty-five hundred acres. For the foregoing land the sum of one hundred and twelve thousand five hundred dollars in legal money of the United States is to be paid on the following terms, —the same being twenty-five dollars per acre: Ten thousand dollars down, to bind the trade; twenty-seven thousand five hundred dollars within sixty days, without interest; thirty-seven thousand five hundred dollars in one year; and the balance, thirty-seven thousand five hundred dollars, in two years, from date of purchase. Deferred payments to be secured by mortgage on said land, and to bear eight per cent. (8%) interest per annum, from date. The parties buying being guaranteed a release on any part they may sell, upon their paying for the part so released at the rate of fifty dollars per acre, outside of town sites, and at the rate of one hundred and fifty dollars per acre in town sites. It is further agreed that parties selling shall furnish satisfactory abstracts fifteen days prior to the second payment, (\$27,500.00,) and that the ten thousand dollars, first payment, shall remain in the Childress Safe-Deposit Bank of Los Angeles, Cal., in trust, until said abstract or title papers are presented. C. E. Mackey, one tenth; J. H. Outhwaite, per N. D. Coleman, one tenth; A. D. Childress, two tenths; P. C. Baker, one tenth; J. W. Montgomery, one tenth; Harvey T. D. Wilson, one tenth; Nicholas D. Coleman, one tenth; Flower, Jones & Co., one tenth; R. A. Thomas, one twentieth." La Tourette, who took one twentieth, did not sign this contract, but authorized Coleman to take that share for him, and there is no question that he was a party to the contract.

On May 26, 1887, Forbes and the defendants executed to Wilson and Coleman the following instrument: "Los Angeles, Cal., May 26, 1887. Having entered into an agreement with H. T. D. Wilson and N. D. Coleman, of Los Angeles, California, for the sale of a certain tract of land, about forty-five hundred acres, lying in San Diego county, California, known as a part of lot seventy (70) of the Ex-Mission grant, for the sum of one hundred and twelve thousand five hundred dollars, on terms as shown by a bond or agreement held by them, which expires on May 21, 1887, we hereby set forth the terms of the commission we obligate ourselves to pay to said Coleman and said Wilson. We agree they shall receive the sum of twenty-two thousand five hundred dollars, as follows: Out of the first ten thousand dollars cash payment that shall be made in the purchase of said land said Coleman and Wilson shall receive three thousand dollars; out of the next payment of twenty-seven thousand five hundred dollars they shall

receive the sum of seven thousand dollars. The balance of said commission shall be paid, six thousand two hundred and fifty dollars in one year, and six thousand two hundred and fifty dollars in two years, from date of sale, with 9% interest per annum from date, by the surrender to said parties four notes of thirty-one hundred and twenty-five dollars each, signed by the company purchasing, two of said notes due in one year, and two of said notes to be due in two years, from date of purchase. This agreement, however, is subject to the consummation of sale as set forth in agreement of sale made this day. [Signed] Chas. H. Forbes. H. L. Flash. A. D. Childress."

On the 4th day of June, 1887, according to the verbal agreement and understanding of all the parties at the time the subscription agreement of May 20th was signed, the plaintiff corporation was organized with a capital stock of \$500,000, divided into 500 shares, 450 of which were subscribed for as follows: R. A. Thomas, 25; J. W. Montgomery, 50; C. E. Mackey, 50; J. H. Outhwaite, 50; P. C. Baker, 50; A. D. Childress, 100; N. D. Coleman, 50; H. T. D. Wilson, 50; and J. R. La Tourette, 25. Between the time of the execution of the subscription agreement (May 20th) and the 16th day of July, 1887, Thomas, La Tourette, Montgomery, Mackey, Outhwaite, Flower, Jones & Co., and Baker paid to the defendant Childress, as trustee, to be applied to the purchase of the land by the corporation, the sum of \$26,700, about one fifth part of which had been so paid before the organization of the corporation. Out of the money so paid to him by the persons last above named, Childress, on July 16, 1887, paid to the administrator of the estate of Olvera the balance of the purchase price of the land (\$20,452.50) and caused a deed for the land to be executed by the administrator to Forbes, in pursuance of the order confirming the sale. After making this payment there remained in his hands, of moneys paid him as aforesaid by the persons last above named, \$6,247.50. Deducting from this the 10 per cent. originally paid by defendants on Forbes' bid, there remained in Childress' hands \$3,975 after paying the whole purchase price of the land.

On July 19th, Flash and Childress entered into a written agreement, reciting their several relations to the transactions above stated, and agreeing, among other things, that Childress should act as trustee for Flash in all matters pertaining to the land transactions until all the purchase money should be paid by the corporation; and should also act as trustee for the corporation. On July 20th, Forbes conveyed the land to Childress, as trustee for the corporation, and on the same day the corporation made its promissory notes for the unpaid balance of the purchase money, (\$75,000,) payable in one and two years, to "A. D. Childress, trustee, or order," with interest at 8 per cent. per annum; and to secure these notes the corporation on the same day executed a mortgage on the land to "A. D. Childress, trustee." The notes were antedated to May 31st. It does not appear on the face of

the mortgage or notes for whom Childress was trustee, but the court found that he held the notes and mortgage for himself and Flash, Forbes having theretofore assigned all his interest to them. On January 28, 1889, on his own motion, Childress conveyed the legal title of the land to the corporation, and about the same time assigned the notes and mortgage to Flash, but to the extent of his interest in trust for himself. On February 18, 1889, Flash commenced the action to foreclose the mortgage; and on April 5, 1889, a decree of foreclosure was entered by default for the sum of \$88,875.61, including \$2,500 for attorneys' fees. On May 4, 1889, the mortgaged land was sold by the sheriff, under the decree of foreclosure, to Flash, for the sum of \$31,500, leaving a deficiency of \$58,126.14, for which a judgment was docketed in favor of Flash against the corporation. The sheriff executed a deed to Flash November 8, 1889.

The fraudulent acts by which the corporation was induced to purchase the land and to execute the notes and mortgage, as found by the court, are substantially as follows: That the defendants, by their agents, Wilson and Coleman, for the purpose of inducing Mackey, Montgomery, Thomas, La Tourette, and Flower, Jones & Co. to subscribe the agreement of May 20th, and to subscribe for stock in the corporation, represented to them that Forbes and Flash held a contract for the purchase of 4,500 acres of land from the estate of Olvera, deceased, at the price of \$25 per acre, which price was the lowest figures for which the land could be purchased. That those who would subscribe the agreement of May 20th would get in "on the ground floor at bed rock figures." That a corporation was to be immediately formed for the completion of the purchase under the said contract held by Forbes and Flash, and, upon the organization of the corporation, shares of the capital stock would be issued to the subscribers of the agreement in proportion to their subscription; and that all such representations were willfully false, except that Forbes and Flash held a contract for the purchase of the land. That defendants, by their said agents, fraudulently concealed from the subscribers last above named that the contract price of said land was only \$5.05 per acre, and also concealed the facts that Childress was interested with Forbes and Flash in said contract of purchase from the estate of Olvera, that Forbes and Flash were interested with Childress in his subscription to the agreement of May 20th, and that Wilson and Coleman were agents of defendants and Forbes to make the sale to the corporation, for which they were to be paid a commission. That, although the subscriber Outhwaite was informed by Coleman that Childress was interested with Forbes and Flash in the contract to purchase the land from the estate of Olvera at \$5.05 per acre, defendants, by their said agents, fraudulently concealed from him the facts that Wilson and Coleman were agents for the real sellers, and were to be paid said commission; and falsely represented to him that he was being admitted

to the company on an equal footing with all other members thereof. While no express misrepresentations were made to the subscriber Baker, defendants fraudulently concealed from him the facts that Childress was interested with Forbes and Flash, as a seller of the land to the corporation, and that Wilson and Coleman were agents of defendants, and as such were to be paid said commission. That each of the above-named subscribers, to wit, Mackey, Montgomery, Thomas, La Tourette, Flower, Jones & Co., Outhwaite, and Baker, believed all the false representations made to him, and none of them had any notice of the facts concealed as aforesaid, nor of the falsity of said representations, until long after the foreclosure sale; and that by reason of said false representations and concealment of facts each of them was induced to subscribe the agreement of May 20th, and to join in the organization of the corporation. That the directors of the corporation were five in number, and from the organization of the corporation until September 23, 1889, consisted of Childress, Wilson, Coleman, Thomas, and Mackey, and during all that period the corporation was under the control of Childress, Wilson, and Coleman, who, with notice of all the aforesaid fraudulent acts and concealments, willfully and fraudulently permitted said judgment of foreclosure to be taken by default. This action was commenced on December 17, 1889, one month and nine days after the execution of the sheriff's deed to Flash.

1. Counsel for appellants contend that the findings of fact show no cause of action in favor of plaintiff, for the reason that the frauds found were committed, not against the corporation, but only against the individual subscribers to the agreement of May 20, 1887, who, by virtue of that agreement, became the purchasers of the land, and subsequently conveyed it to the plaintiff, but did not assign to the plaintiff their rights of action for fraud in the sale of the land to them. I think counsel are mistaken in contending that the agreement of May 20th is a contract of purchase in any proper sense of the term. No party to it purports to be seller or agrees to sell. All are represented as agreeing with each other to purchase the land, but from whom they propose to purchase is not expressed or implied in the written agreement. The agreement as written imposes no obligation upon the owner of the land in favor of the subscribers, nor upon the subscribers in favor of such owner. From other evidence than the subscription agreement, however, the court found that it was never the intention of the subscribers, or any of them, to purchase the land, but merely to take stock in a corporation thereafter to be organized by the subscribers, which should purchase the land from the estate of Olvera, or complete a purchase thereof under the contract held by Forbes and Flash, such stock to be issued to them in proportion to their subscriptions, it being an expressed and well-understood condition of their subscriptions that such corporation should be organized to make the purchase. Childress, who represented Flash, demand-



ed this condition, as he would not personally sign the notes and mortgage for the deferred payments. Nor would Thomas subscribe without this condition. All the subscribers were informed by Wilson and Coleman, before they subscribed, that a corporation would immediately be organized to make the purchase of the land, and that they would receive shares of the capital stock for their subscriptions. Indeed, their subscriptions were intended to be, and were, substantially, subscriptions for stock of the corporation, though more formally repeated on June 4th, when the corporation came to be organized. At the time the corporation was organized, Childress, Flash, and Forbes were still the owners of the contract to purchase from the administrator of the estate of Olvera, made in the name of Forbes; and two days thereafter (June 5th) Forbes, who was not then known, except to defendants and their agents, to be interested in the transaction, recorded the order of the probate court confirming the administrator's sale to him. On July 16th the administrator's deed was executed to Forbes, for the use of Childress, Flash, and himself. On July 20th the purchase of the land by the corporation, ostensibly from Forbes, but really from Childress, Forbes, and Flash, was consummated by a conveyance from Forbes to Childress, trustee for the corporation, in consideration of \$37,500 in cash, and the notes of the corporation then made to Flash, as trustee for Forbes, Flash, and Childress, for \$75,000, secured by the mortgage of the corporation, as above stated. The \$37,000 cash paid was the money of the corporation, theretofore advanced by the subscribers, as aforesaid, through Childress, their trustee, in payment for their stock in the corporation. Such having been the real nature of the transactions, dressed in gauzy disguise, no doubt the corporation purchased immediately from the defendants and Forbes. That the defendants so understood it is further evinced by the agreement between them of July 19, 1887, and the letter of Childress to the corporation dated January 5, 1889.

The defendants, by their agents, Wilson and Coleman, and otherwise, were evidently promoters of the corporation to purchase their own property. A "promoter of a corporation" is defined by Mr. Morawitz (section 545) to be "a person who, by his active endeavors, assists in procuring the formation of a company and the subscription of its shares. \* \* \* The word 'promoter' has no technical legal meaning, and applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not." The definition given in Cook, Stock, Stockh. & Corp. Law, (section 631,) is as follows: "A promoter is one who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which looks to the formation of a corporation. A promoter is considered in law as occupying a fiduciary relationship towards

the corporation." "The subscriptions of the shareholders are made upon the trust that the promoters are men of rectitude and business sagacity, who will use their knowledge and exercise their control over the enterprise for the benefit of the company. \* \* \* Justice demands that the promoters of a company should not abuse the confidence placed in them by the subscribers for shares, or derive any unjust advantage through their control over the organization or management of the company." Mor. Corp. § 545. Again, at section 546, the same author says: "Accordingly it has been held that, if persons start a company, and induce others to subscribe for shares for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts or suppression of truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction, or recover compensation for any loss which it has suffered." The above quotations are well supported by authority, the principal and leading case being that of *Phosphate Co. v. Erlanger*, 5 Ch. Div. 73, affirmed by the house of lords in 1878, 3 App. Cas. 1218, a synopsis of which is given in Mor. Corp. at section 291. See, also, in re *British Seamless Paper Box Co.*, 17 Ch. Div. 471; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. Div. 394; *McElhenny's Appeal*, 61 Pa. St. 188; *Simons v. Vulcan O. & M. Co.*, Id. 202; *Getty v. Devlin*, 54 N. Y. 403; *Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. Rep. 259, 17 Amer. St. Rep. 149, with notes. It therefore appears that the corporation was the party directly injured by the fraud, and was the proper party to bring this action.

2. While admitting that Wilson and Coleman were promoters of the corporation, counsel for appellants contend that the finding that they were authorized by the defendants to promote the corporation is not justified by the evidence. That Wilson and Coleman were the authorized agents of defendants and Forbes to sell the land, and were to be paid a large commission for their services, there is no doubt. The agreement of May 26th as to the amount and manner of payment of their commission would be nonsense on any other supposition. A large portion of the commission (\$12,500) was to be paid in notes of "the company purchasing," which notes were understood to be the notes of an incorporated company, and not the notes of the persons who subscribed the agreement of May 20th; since Childress, who subscribed that agreement for himself and Flash, had made it a condition of his subscription that he was not individually to sign notes for the deferred payments of the purchase money; but that a corporation should be formed to purchase the land and to make the notes for the purchase money. The reason he assigned for this was that, being a banker, his credit might be injured by signing such

notes individually. The evidence certainly tends to prove that the promotion of the corporation was an essential part of the scheme designed by and for the benefit of all the conspirators, including the defendants, and that Wilson and Coleman were authorized to execute the scheme. Childress, for himself and Flash, subscribed for one fifth of the capital stock of the contemplated corporation two weeks in advance of its organization. If the authority of Wilson and Coleman to sell to the particular corporation to be promoted by them for the benefit of defendants did not imply authority from the defendants to promote the corporation, it had sufficient tendency, in connection with other evidence, to prove it, to justify the finding of such authority by the court. Under this head counsel also contend that the agreement of May 8, 1887, was a contract of sale of the land from Forbes, Flash, and Childress to Wilson, but the finding of the court that it was not is fully justified by the evidence. Coleman testified that when it was presented to him by Childress, in the absence of Wilson, he protested against signing it for Wilson, for the reason that he had no specific authority to do so; and that he would not have signed Wilson's name if he had not understood that it would not be enforced against Wilson. Wilson testified that he was dissatisfied with it, and withdrew it. Besides, it is inconsistent with the agreement of May 26, 1887, in regard to the commission to be paid to Wilson and Coleman. It was evidently prepared by Childress for the purpose of concealing his interest as a seller to the contemplated corporation. Again, counsel have made extracts from the findings and complaint in which the subscribers of the agreement of May 20, 1887, are carelessly designated as "purchasers;" but, read in connection with their context, these expressions cannot be understood to mean that the subscribers of the agreement of May 20th purchased the land, except in the sense that their purchase of capital stock of the corporation gave them an interest in the land purchased by the corporation.

Appellants have specified more than 20 particulars in which they claim that the findings are not justified by the evidence, none of which are material, except such as relate to the agency of Wilson and Coleman, and to the contract of May 8, 1887, which have been answered. If the evidence justifies the finding that in promoting the corporation Wilson and Coleman represented the defendants as well as themselves, and the finding that the alleged agreement of May 8th was a sham, then the finding of all other facts herein stated are fully justified.

3. There is nothing worthy of special consideration in the points to the effect that the court erred in admitting evidence objected to by defendants' counsel, except to say that Wilson and Coleman, having represented the defendants in promoting the corporation, what they said to induce subscriptions to the agreement of May 20th was competent evidence against their co-conspirators.

4. Appellants contend that the plaintiff

is barred by its own laches, especially in that it neglected to move the court in which the foreclosure was had to set aside the judgment of foreclosure within six months after its rendition, upon which motion, it is claimed, the plaintiff could have obtained all the relief to which it is entitled in this action. But I think this point is not maintainable, even on the facts as claimed by appellants, viz. that the defrauded stockholders had general notice of the fraud on June 5, 1889,—one month after the foreclosure sale,—and within the month of June consulted a lawyer as to their rights and remedies, and thence had more than four months within which to make their motion under section 473, Code Civil Proc., to set aside the judgment. While it may be true that they had notice on June 5th that they had been defrauded, and generally of the mode and means by which the fraud had been perpetrated, yet it does not appear that they were then sufficiently informed as to the particulars, nor as to the evidence by which the fraud might be proved in a court of justice. As yet few, if any, of them, knew how many of the stockholders had participated in the fraud, or where to apply for reliable information. Three of them resided in Los Angeles and three in San Diego, and it necessarily required considerable time to bring about unanimity and concert of action. It does not appear when they were first advised that the corporation was the proper party to sue, but it must have been after they were so advised that they determined to get control of the corporation at the next ensuing annual stockholders' meeting, to be held September 28, 1889, by electing a new board of directors. There was no reasonable prospect of their getting control of the corporation before the regular annual meeting by means of a called special meeting of the stockholders under section 310 of the Civil Code, since no director could have been ousted at such special meeting except by a vote of the stockholders owning two thirds of the capital stock, and the fraudulent stockholders held four tenths of the stock. In answer to this, counsel for appellants say Wilson would have voted with the innocent stockholders, but this is only an inference of counsel, drawn from the facts that Wilson consulted with plaintiff's counsel in the latter part of June, and testified on the trial to the facts constituting the fraud. It does not appear when Wilson first fully disclosed to the innocent stockholders the facts to which he testified on the trial; and, admitting that he did so in the latter part of June, 1889, it does not follow that the innocent stockholders could then have relied upon his voting with them to oust from the office of director his co-conspirators in the fraud. At the annual meeting of September 28, 1889, a new board of directors was elected, constituted of Thomas, Montgomery, Mackey, La Tourette, and Wilson,—the first four of whom were of the victimized stockholders; and on the same day the new board adopted a resolution authorizing and directing the commencement of this action, which was commenced two months and nineteen days thereafter. The new board of directors

was elected only seven days before the expiration of the six months, within which it is contended a motion to set aside the judgment of foreclosure must have been made under section 473 of Code Civil Proc.

But a more conclusive answer to appellants' contention as to the six-months limitation is that none of the grounds upon which a party may be relieved from a judgment under section 473, Code Civil Proc., appear to have existed in this case. The judgment was not taken against the corporation through its "mistake, inadvertence, surprise, or excusable neglect," but through the fraud of its directors, in aid of the original fraud by which the notes and mortgage were procured. Having notice of the original fraud constituting a meritorious defense to the foreclosure action, a majority of the directors—Childress, Wilson, and Coleman—purposely, willfully, and fraudulently permitted the judgment to be taken by default. There was no mistake, no inadvertence, no surprise, and no excusable neglect. Therefore, conceding as I do, that the judgment and default might have been set aside, and leave to answer obtained on motion, on the ground of fraud, independently of section 473 of Code Civil Proc., yet such motion was not subject to the six-months limitation prescribed by that section of the Code. Nor was the remedy by motion, on the ground of fraud, exclusive of the remedy by regular suit in equity, unless it was perfectly adequate. *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. Rep. 232. The only relief to which the corporation would have been entitled on such motion was the setting aside of the judgment and default with leave to answer, which would have been but one step, circuitously leading to the same equitable relief which has been directly obtained by this suit. The very next step must have been the commencement of a distinct suit in equity, which, though called a cross suit, commenced by a cross complaint, would have been in fact and substance the same as this suit; and I am unable to perceive why, on the score of equitable jurisdiction, such cross suit would have been less objectionable than this suit. Should it be claimed that the corporation might have obtained complete and adequate relief in the foreclosure suit by simple answer without a cross complaint, the answer is that adequate and complete relief embraced the cancellation of the notes and mortgage, and possibly more, which is affirmative equitable relief that could not have been obtained without a cross complaint in the foreclosure suit, or a separate suit in equity.

It only remains, under this head, to consider the effect of the delay of the commencement of this action independently of the six-months limitation prescribed by section 473, Code Civil Proc. Was such delay, under the circumstances of the case, sufficient to bar the remedy? The mere lapse of time less than the statutory period of limitation will not bar an action for equitable relief unless the delay, under the circumstances, has been such as to justify the presumption that the defendant may have been prejudiced thereby. The bar of an equitable remedy in such cases is not

imposed upon the plaintiff as a penalty for his negligence, but is intended merely to protect the defendant from such consequences of the delay as may be prejudicial to his rights. In the Case of the New Sombrero Phosphate Co., supra, it was contended that the remedy was barred by laches of the complainant, similar to such as claimed in this case, but the delay was held to be insufficient. Speaking to this point, Lord Penzance said: "The nearest approach to a definition of the equitable doctrine upon this head which is to be found amongst the cases cited is the statement made in the case of *Petroleum Co. v. Hurd*, L. R. 5 P. C. 221. Delay is there said to be 'material where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted.'"

"\* \* \* It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case."

Nothing of the facts or circumstances of this case indicates acquiescence of the defrauded stockholders in the wrongs complained of or a waiver of their rights. Nor was the situation of the defendants or the condition of the property so changed during or in consequence of the delay as to cause the judgment rendered against them to be more onerous than it should have been if the action had been commenced in June instead of December, 1889. Nor can the presumption be indulged that evidence which would have been beneficial to defendants might have been lost in consequence of the delay, since all persons who participated in, or appear to have had any knowledge of, the transactions, were living and testified at the trial; and all documents claimed to be material for the defense were produced. Another important circumstance in this connection is that during the first six months after the rendition of the judgment the plaintiff corporation was under the control of the defendants and their associates in the fraud, and therefore, to say the least, it would seem unjust that they should be heard to complain of laches of the plaintiff during that period, or of delay on the part of the defrauded stockholders in ousting them from the position of trust which they had taken and held for the purposes of promoting the fraud and obstructing any remedy therefor. Considering all the facts and circumstances, I think it does not appear that the trial court erred in holding the suit not barred by laches of the plaintiff.

5. Counsel for appellants further contend "that the findings do not support the judgment, for the reason that Childress and Flash bought the land for themselves and on their own account before the cor-

poration was formed or any steps taken towards its formation." It is not claimed, however, that for this reason there was no fraud, nor that the corporation was not entitled to some species of relief, but only that "the remedy allowed by the court—'secret profits'—is inapplicable, because Childress and Flash, even conceding them to have been promoters of the corporation from the time the first steps were taken towards its formation, were not promoters at the time of the original purchase from the Olvera estate." Counsel say under this head: "The point is this: Conceding misrepresentations as to the price paid the Olvera estate, as well as concealment of Childress' ownership, and that these things were fraudulent and actionable, still, inasmuch as there was no agency when defendants and Forbes bought from the Olvera estate, the recovery of 'secret profits' was not authorized or appropriate relief." By this I understood counsel to mean that there was no confidential or fiduciary relation between the defendants and the corporation in respect to the contract of purchase from the estate at the time it was made. Conceding this, it is found by the court, and for the purpose of this point is admitted by counsel, that the defendants afterwards placed themselves in a fiduciary relation to the corporation by promoting it; and while in that relation, by means of the fraudulent representations and concealments found, induced the corporation to purchase their land, whereby they made "secret profits" exceeding \$75,000. Admitting, for the sake of argument, that the relief granted (the canceling of the notes and mortgage) was equivalent to a recovery of secret profits fraudulently made, in what respect is the relief inappropriate? Surely it does no injustice to defendants, since it appears that the amount recovered is nearly \$4,000 less than their cash profits, besides one fifth of the stock of the corporation, which they still retain, for which they paid nothing. Their co-conspirators, Wilson and Coleman, also retain one fifth of the stock which is a part of the fraudulent profits, while the defrauded stockholders have only three fifths of the stock for the \$37,500 paid by them. Assuming that the price for which the land sold at the foreclosure sale (\$31,500) was equal to its value, and that the corporation has no other property than the land, the innocent stockholders have lost \$18,600 by the transaction, while the defendants and their co-conspirators have gained \$12,600, notwithstanding the relief granted to the corporation. These results may be accounted for by the facts (1) that the relief granted to the corporation was not equivalent to a recovery of all the fraudulent profits; and (2) that the relief granted to the corporation necessarily operated in favor of all the stockholders equally. Yet it does not follow from these results that the corporation was not entitled to the relief granted; nor that it was not entitled to all the fraudulent profits. An objection to the recovery of secret fraudulent profits, similar to the objection under consideration, was answered in the case of *Getty v. Devlin*, 54 N. Y. 412. In

that case the subscribers to a paper agreed jointly, and for their mutual benefit, to purchase certain lands for a specified price. The court said: "No one of the subscribers could, after this, purchase the lands for a less price, and compel his associates to allow him more than he paid. His purchase would inure to the benefit of all the subscribers. That this is so is so thoroughly settled, both upon principle and authority, that it will not be disputed. \* \* \* If this be so as to a purchase made after the subscriptions are written, why should not the same rule be applied to a purchase made before? The wrong and breach of faith is just as great, and every reason and authority showing that the rule should be applied in one case would show that it should be applied in the other. *Bentley v. Craven*, 18 Beav. 75, is an authority quite in point." I think this is a satisfactory answer to appellants' point, grounded on the fact that defendants purchased the land from the estate of Olvera before the date of the subscription agreement of May 20th.

It is suggested that just and appropriate relief could have been granted only by a rescission of the sale and restoration of the land to the defendants, as in the *Sombrero Case*, supra. Conceding that such rescission would have been a practicable mode of relief, I do not think it exclusive of any other appropriate mode by which a court of equity might have given appropriate relief, doing no injustice to the defendants. But it does not appear that such rescission and restoration of the parties to their original status were practicable, or desired by the defendants; nor does it appear that it would have been less onerous upon the defendants, as above shown. The land should not have been restored to defendants unless they were able to refund all the money which they and their associates in the fraud had wrongfully obtained from the corporation, and caused it to expend, with interest, which must have amounted to more than \$40,000. Were the defendants solvent independently of the land? If not, could \$40,000 have been realized from the land? These, and perhaps other, difficult questions must have been solved before it could have been determined whether rescission was the proper or even practicable mode of relief. Had the defendants requested that mode, and tendered payment of the requisite sum of money in the court below, they would be in a more favorable position to advocate this point here.

6. The point is made that the effect of the decree is more favorable to Wilson and Coleman than to defendants, since they retain both their stock in the corporation and their large commissions. In answer to this it is enough to say that it is a matter that does not concern the corporation. It concerns only the defendants and their co-conspirators in the fraud, and must be adjusted, if at all, among themselves. As before remarked, the relief granted to the corporation is equally favorable to all the stockholders. The grievances of individual stockholders, suffered from the wrongs of other stockholders, could not have been redressed in this

action. I think the judgment and order should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

### BECK v. RAVENNA MILLING CO.

(Supreme Court of Washington. Jan. 24, 1893.)

#### CAPACITY OF FLOURING MILL — EVIDENCE TO ASCERTAIN—CONCLUSIVENESS.

1. On an issue as to the capacity of a flouring mill, evidence that the contract for its erection providing that it should "have an easy capacity of 150 barrels of flour per run of 24 hours, and on trial test of 6 hours to make 200 barrels," is not conclusive evidence that the mill did not have a capacity of "200 barrels daily."

2. Evidence by an employe in such mill that the foreman had ordered him to clear the hopper for a 6-hour test; that he did so, and that the result of the test was 43 barrels,—is insufficient to show its actual capacity, where such witness further testified that he did not know whether it was running at its full capacity, and where there is an absence of evidence to show that the management of the mill was such as to afford a satisfactory test.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by W. W. Beck against the Ravenna Milling Company, or Waters, Blakeley & Co., to recover damages for alleged fraud on the part of respondent in obtaining certain money and land in payment of a subscription to a subsidy given by plaintiff and others to defendant. From a judgment for defendant, plaintiff appeals. Affirmed.

Allen & Powell, for appellant. Strudwick, Peters & Van Wyck, for respondent.

STILES, J. Appellant, having subscribed to a fund as a subsidy to be expended in the erection of a flouring mill, paid his subscription on the representations of respondent's officers that the mill had been completed in accordance with the contract, and in an action for the falsity and fraudulent nature of the representations, whereby he was deceived and induced to pay his subscription, he objects to several charges given by the court to the jury. Whatever error there may have been in these charges was not prejudicial to the appellant, because, as we view the evidence, he made no case which should have been submitted to a jury. The material portions of the subsidy contract are as follows: "We, the undersigned subscribers, agree to pay the amounts set opposite our names as a subsidy to secure the location of a flouring mill at Ravenna Park station, upon the following terms and conditions: 'Said flouring mill, together with necessary and sufficient warehouse room, shall be completed and operated so soon as the same may reasonably be completed; work to begin within thirty days from date. Said flouring mill shall have a capacity of 200 barrels daily.'" The com-

plaint alleged as a ground of damage that the respondent had wholly failed to comply with his contract, but upon the trial the only evidences adduced by appellant was directed to two points: First, that the mill actually erected had a capacity of less than 200 barrels daily; second, that the warehouse room provided was insufficient. Appellant himself testified that he was not a milling man, and knew nothing about mills, but that he knew that the mill erected was not a 200-barrel mill—First, from reading the contract made between the respondent and the Nordyke & Marmon Co. for the erection of the mill; and, second, because the employes had told him so. Of course, what the employes told him was incompetent, and the court rightly told the jury to disregard it. The contract between the respondent and the Nordyke & Marmon Co. contained the following provision, upon which the appellant practically based his whole case: "Articles of agreement entered into this 23d day of April, 1890, by and between Nordyke & Marmon Company of Indianapolis, Marion county, Indiana, as first party, and Waters & Morlock, of Brownsville, Linn county, Oregon, as second party, for the erection of a steam-power flouring mill, to have an easy capacity of 150 barrels of flour per run of twenty-four hours, (and on trial test of six hours to make 200 barrels.)" This contract was a printed form, in which the words "easy," and "on trial test of six hours to make 200 barrels," were written in ink, showing a qualification of what would have been the ordinary printed contract without interlineation.

There was no evidence whatever tending to explain the language of the subsidy contract that said flouring mill should have a capacity of 200 barrels daily. It seems to be conceded, however, by the testimony of the appellant that he understood it to mean a mill which should be able to produce 200 barrels of flour in 24 hours. It is maintained that the mention of 150 barrels in the mill contract is alone sufficient to sustain plaintiff's contention that the contract with him was not fulfilled, but that contention cannot be sustained. The witness Wilson, a man who had never worked in a mill before, but who had been employed in this mill after it was started in operation for a period of 21 days, testified, in substance, that upon the 15th of October, 1890, the day when a six-hours' test was made, he saw some one who was in the employ of the Nordyke & Marmon Company putting into the feed hopper a sack of flour which had been previously ground, and, as there were other sacks of flour near by, the argument is that all this flour—some 40 or 50 sacks—was dumped in with the wheat and reground, thus having the effect of making the mill appear to produce more flour during the six hours than it actually did produce. But there was no evidence whatever that more than one sack of such flour was put in on that day, nor does the appellant produce any competent or material evidence whatever to show what the result of the test was, or that the mill would not produce at the rate of 200 bar-

rels. From the other side of the case there was uncontroverted testimony that the test showed a rate of upwards of 240 barrels for 24 hours. Wilson also testified that at a later day the mill foreman told him at noon to clear the flour hopper, and observe how much flour was produced from 12 o'clock until 6. He says he did so, and took out about 48 barrels as the result of 6 hours' run; but he says that he did not know whether the mill was then running at its full capacity or not; and it is not shown whether the management of the mill was such as would be reasonably necessary to make any satisfactory test. No attempt was made by appellant to produce the evidence of any person who had actually witnessed or noted the facts connected with any test of the capacity of the mill, or any person skilled in mill matters. Concerning the warehouse, the only evidence produced was that of appellant, who said that the warehouse seemed to him small, and he knew that the company had another warehouse in Seattle where they stored flour.

One of the elements of the case as presented to the jury was wholly without the issues made, viz. that the mill was not operated after it was completed. The subsidy contract called for its operation, but whether from its indefiniteness that clause would be enforceable or not we shall not attempt to determine. The fact is that it was in the original contract. Appellant says that at the time he paid his money respondent informed him, or promised him, that it would operate the mill; but unless it could be shown that that promise was made fraudulently, and with no present intention of operating it, it could not enter into such a case as the one at bar. Appellant has his subsidy contract, in which the clause providing for operation exists. If it has not been operated, and he has been damaged thereby, he can maintain his action upon the contract for his injury, but it constitutes no element of litigation in a suit brought for damages for false representations. When the plaintiff's case was concluded there was really nothing to be submitted to the jury, and the motion for a nonsuit ought to have been granted. For these reasons it is unnecessary that we review the instructions complained of, and the judgment will be affirmed.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

(5 Wash. 613)

# CARROLL v. CENTRALIA WATER CO.

(Supreme Court of Washington. Jan. 31, 1893.)

ACTION FOR PERSONAL INJURIES — NEGLIGENCE — LEAVING EXCAVATION IN STREET — PLEADING AND PROOF — VERDICT.

1. Plaintiff was injured on a dark night by falling into a hole dug by defendant in a public alley for a telephone pole, and left unguarded. The injury resulted solely through defendant's negligence, and incapacitated plaintiff for labor for six weeks, thereby causing him to lose two dollars a day. He was lame 10 months thereafter, and one of his legs would probably always be weaker and stiffer than before. In

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an action for damages, the verdict gave plaintiff "\$85 for loss of time and doctors' fees, and the sum of \$600 as damages for injuries sustained." *Held*, that the verdict showed on its face that the jury comprehended the evidence, and also the law applicable to the assessment of damages.

2. While, in such case, the question of negligence is for the jury, the fact that the trial judge undertook to tell the jury on what state of facts defendant would be deemed negligent, where he drew a correct conclusion from the facts stated, would not entitle defendant to a new trial, as no injury could result therefrom.

3. An allegation in the complaint that the excavation into which plaintiff fell was in a public highway, and "within the corporate limits of the city of C.," was sufficiently proved by introducing the recorded plat of C., showing such alley; the material question being, not the incorporation of the city, but whether the alley was a public highway, and 1 Hill's Ann. St. § 746, declaring all streets and alleys shown on such a plat to be public highways.

4. In such case, it is not material to plaintiff's right to recover whether the city ever formally accepted the alley on which the injury occurred as a public highway, and improved it by grading or otherwise.

Appeal from superior court, Lewis county; Edw. F. Hunter, Judge.

Action by William H. Carroll against the Centralia Water Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. E. Rhodes and Tripp, Town, Likens & Dillon, for appellant. A. E. Rice and C. B. Reynolds, for respondent.

ANDERS, J. This action was brought by the respondent to recover damages for injuries sustained by falling into an excavation alleged to have been made in a common and public highway in the city of Centralia, and negligently left open and unguarded, by the appellant. Judgment was entered upon the verdict of the jury in favor of the plaintiff, to reverse which the defendant prosecutes this appeal.

It is shown by the evidence in this case, beyond dispute, that the appellant corporation caused a hole about 4 feet deep, and some 18 or 20 inches in diameter, to be dug in an alley running north and south between blocks 15 and 16, in Railroad addition to the city of Centralia, for the purpose of placing therein a telephone pole, and that on the night of March 28, 1891, which was cloudy and dark, it was left uncovered, and without any barrier to prevent travelers from falling into it, or anything to warn them of danger. The respondent lived some distance from the business portion of the town, and at about 9 o'clock that night was returning home from the store and butcher shop, where he had purchased some eggs and beefsteak, which he carried in a pail. From the street west of the blocks mentioned to the alley the land was level and uninclosed; and the respondent passed over this vacant space, and into the alley, where he stepped into the hole dug by appellant, and fell forward, and severely injured the joint of his left knee. He was well acquainted with the premises where the accident happened, and had been accustomed to go that way in passing to and from his home, for 15 or 18 months previously, but had no knowledge of the exist-

ence of the excavation until he fell into it. Other persons, and especially those living in that part of town, frequently passed and repassed at the same place.

No claim is made by appellant that the damages awarded by the jury are excessive, but the appellant contends that the court committed prejudicial error in curtailing the cross-examination of the plaintiff, in denying appellant's motion for a nonsuit, in holding that the plaintiff had proved that the city of Centralia was incorporated, and in charging the jury upon the law applicable to the case.

As to the cross-examination of plaintiff, we fail to perceive how the appellant was prejudiced by the action of the court in not permitting, on its own motion, the questions, "How much beefsteak" the witness had purchased while down town that evening, and "How were you carrying them?" (referring to the eggs and beefsteak,) to be answered, in view of the fact that the witness had already testified that he was carrying "two dozen eggs in a tin pail, and two pounds of beefsteak," at the time the accident occurred. While a party has a perfect right to freely and fully cross-examine the witnesses of his adversary upon all material matters brought out on the examination in chief, still the character and extent of such examination rest largely in the sound discretion of the court; and, unless such discretion is abused, to the injury of the party complaining, the judgment will not be reversed, even although the examination is not allowed to be carried to the extent desired by counsel. We think the cross-examination in this instance was not unduly restricted, as to any of the points mentioned in the brief of appellant. The manner in which the witness was traveling, what he was carrying, the condition and character of the surface of the ground, and whether or not the witness was walking in a well-defined path at the time he received the injury complained of, were questions to which the cross-examination was directed, and upon which the witness testified fairly and freely, and without any apparent endeavor to conceal the facts.

The complaint alleged that the excavation into which the plaintiff fell was in a common and public highway, and "within the corporate limits of the city of Centralia;" and the court held that the plat of Railroad addition to the city, which was introduced in evidence, and which was of record in the office of the county auditor, and on which the alley was shown in which it was alleged that the excavation was made by defendant, was sufficient proof of the allegation of the complaint. The material question was not whether the city of Centralia was in fact incorporated, but whether the place described was a public highway, and the plat was competent evidence to prove that fact. In every city or town which has been surveyed and platted, and a plat thereof, showing the roads, streets, and alleys, has been filed in the office of the auditor of the county in which such city or town is located, the roads, streets, and alleys, as shown by such plat, are made public highways by statute. See 1 Hill's

Ann. St. §§ 744-746, 755. It follows, therefore, that the alley between blocks 15 and 16 of Railroad addition to the city of Centralia, as shown by the plat, was and is a public highway, over which all persons have a right, at any and all times, to pass; and the court would have been justified in so charging the jury. Moreover, the alley must have been within the jurisdiction of the city, else the appellant would not have attempted to justify its action in digging the hole, as it did, by introducing in evidence a resolution of the city council authorizing it to place its telephone poles in the streets and alleys. It would seem, therefore, that the fact, if it be a fact, that the court deemed the evidence sufficient to prove the incorporation of the city, in no way affected the rights of appellant.

The objection to the ruling of the court on the defendant's motion for a nonsuit cannot be sustained. The argument of the learned counsel for appellant upon this point is that there was no proof showing, or tending to show, that the path traveled by the respondent was a highway or street, and therefore no proof of negligence on the part of appellant. But the difficulty with the argument is that it was of no consequence whether there was or was not a street or highway across the vacant block over which the respondent passed before reaching the alley; for it was in the alley, a place where the respondent had a right to be, that the act constituting negligence was alleged to have been committed, and, as we have already seen, the alley was a public highway. Nor was it material, so far as appellant's liability is concerned, whether the city had ever formally accepted it as a public highway, and improved it by grading or otherwise. *Beck v. Carter*, 68 N. Y. 283.

The next objection relates to the judge's charge to the jury. It is contended that in stating to the jury that certain facts, if proved, established negligence or want of ordinary care, the court took the question of negligence from their consideration, and, further, that the court's instruction as to the meaning of contributory negligence, and the rules of law governing that question, were misleading and erroneous, and that the jury were not given any proper rule or direction by which they were to be governed in the assessment of damages. We quite agree with the view of appellant, that negligence is, under almost all circumstances, a question of fact, for the determination of the jury, and we may concede that that question should have been unequivocally left to the jury to determine. But, upon the facts established by the evidence in the record, it does not necessarily follow that the action of the court in that regard is a sufficient ground for a reversal of the judgment. It can scarcely be denied that the digging of a deep pit in a highway in a town or city, and leaving it uncovered and unguarded, at night, with nothing to protect or warn travelers, is negligence. In *Sexton v. Zett*, 44 N. Y. 430, it was held that proof of the fact that the defendant dug a ditch across a public sidewalk, and allowed it to re-



main open, in the nighttime, with no provision for warning or protecting travelers, established negligence, as matter of law, and that a refusal to submit the question to the jury was not error. See, also, 2 Shear. & R. Neg. § 715. Such excavations are nuisances. Beck v. Carter, supra; Elliott, Roads & S. pp. 483, 487. And a license from the city, in such cases, is no protection against liability to persons injured while exercising ordinary care and diligence. Pfau v. Reynolds, 53 Ill. 212; 2 Shear. & R. Neg. § 360; Sexton v. Zett, supra. Assuming that the trial judges should not have undertaken to tell the jury upon what state of facts appellant would be deemed negligent, yet, having done so, and, according to the foregoing authorities, having drawn a correct conclusion from the facts stated, a new trial should not be granted on that ground, for the reason that no injury could result therefrom. Thomp. Char. Jur. pp. 160, 161. And, besides, the appellant is hardly in a position to justly criticize the court for stating what facts would establish negligence on the part of the appellant, because, at its request, the court also instructed the jury that, if they found certain facts established by the evidence, then the defendant (appellant) would not be guilty of negligence. If it is error to say that particular facts, in a given case, do constitute negligence, it is equally erroneous to state what facts do not establish it.

We will not now stop to discuss the objections of appellant to the instruction of the court upon the question of contributory negligence, and that of the measure of damages, but simply remark that the former is obscure, and the latter incomplete and inaccurate, but that it does not appear that the jury were thereby misled.

The ultimate fact for us to determine is whether the jury arrived at a correct conclusion; and we think they did, and that complete justice has been done in this case. There is no conflict in the testimony on the material questions in issue; and the verdict is unmistakably in accordance with the evidence, and consonant with justice, and ought not, therefore, to be set aside, and the judgment rendered thereon reversed, on account of erroneous instructions by the court. Harris v. Doe, 4 Blackf. 370; Wood v. Wylds, 11 Ark. 754; Terhune v. Dever, 36 Ga. 648; Depeyster v. Insurance Co., 2 Calnes, 85; Branch v. Doane, 17 Conn. 403. It is clearly and indisputably shown by the evidence that the injuries received by the respondent were of an exceedingly painful character. The ligaments of the joint were so sprained that his knee became swollen and inflamed to such an extent as to cause great and constant suffering for several days. He was entirely incapacitated from labor for six weeks, thereby losing his ordinary earnings, of \$2 per day, during that time, besides the physician's bill, which was \$10. At the time of the trial, some 10 months after the injury was received, he was lame, and his knee joint was stiff, and much weaker than formerly, and, according to the testimony of the attending physician, the chances are that it will permanently

so remain. And all these things resulted solely, according to the evidence, from the negligent conduct of the appellant. Upon this state of facts the jury returned the following verdict: "We, the jury in the above-entitled cause, do find for the plaintiff, and assess the amount of his recovery at the sum of \$85 for loss of time and doctors' fees, and the sum of \$600 as damages for injuries sustained." This verdict shows on its face that the jury not only comprehended the evidence in the case, but also the law applicable to the assessment of damages. Its language precludes the idea that punitive damages were given, and demonstrates that the jury were not misled by a mistaken view of the law. The judgment of the court below is affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

(18 Colo. 317)

#### IN RE INTERNAL IMPROVEMENTS.

(Supreme Court of Colorado. March 25, 1893.)

#### CONSTITUTIONAL LAW—INTERNAL IMPROVEMENTS.

1. "Internal improvements," within the meaning of section 12 of the Colorado enabling act, must be improvements located within the state; they must be improvements of a fixed and permanent nature, as improvements of real property; and, furthermore, they must be such improvements as are designed and intended for the benefit of the public.

2. Appropriations from the fund provided for by said section for transient objects, as for personalty, as well as appropriations to promote private or individual enterprises, would be contrary to the intention of the general government as donor of the fund. No part of such fund can be lawfully appropriated to defray the current expenses of carrying on state institutions. (Syllabus by the Court.)

Opinion of the supreme court as to the proper construction of section 12 of the enabling act, rendered at the request of the house of representatives.

The opinion of the court is in response to the following preamble and resolution submitted by the honorable the house of representatives: "Whereas, there are now pending in the ninth general assembly of the state of Colorado, bills appropriating all of the available revenues of the state for the years 1893 and 1894, under the general appropriation bill, World's Fair appropriation, appropriations for buildings for state institutions and maintenance of state institutions; and whereas, many bills are also pending appropriating money for internal improvements, such as wagon roads, bridges, etc.: Therefore, be it resolved that the honorable supreme court be requested to render an opinion to the house of representatives of the ninth general assembly as to whether or not the moneys belonging to the internal improvement fund of the state, under the act of congress, March 3, 1875, (being section 12 of the enabling act,) can be lawfully appropriated for the construction of buildings for state institutions, or for maintenance of any such institutions."

Section 12 of the enabling act reads as follows: "That five per centum of the proceeds of the sales of agricultural public

lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state for the purpose of making such internal improvements within said state as the legislature thereof may direct: provided, that this section shall not apply to any lands disposed of under the homestead laws of the United States, or to any lands now or hereafter reserved for public or other uses."

**PER CURIAM.** The question submitted is too general to admit of a direct answer. We shall, however, express our views upon the subject as fully as we deem expedient, without asking for a reformation of the question. In 12 Colo. 285, 287, 21 Pac. Rep. 483, will be found opinions of this court relating to appropriations for internal improvements. These opinions have some bearing upon, though they are not decisive of, the question now presented. Section 12 of the act of congress of March 3, 1875, commonly known as the "Colorado Enabling Act," provides for the creation of a fund to be paid to the state for the purpose of making such internal improvements within its borders as the legislature may direct. It must not be understood from this language that there are no limitations upon the power of the legislature respecting the use of such fund; for, by the terms of the act of congress, it is contemplated—First, that the expenditures from such fund shall be confined to the purpose of making internal improvements; and, second, that the improvements shall be located within the state of Colorado. This view is in harmony with section 10, art. 9, of our state constitution, which provides: "The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved, and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made." The enabling act does not specify what kind of improvements shall be considered internal improvements; hence we must consider the sense in which those words are used in American legislation. The meaning of the phrase "internal improvements" has been considered and passed upon as necessary thereof has arisen in particular cases. Sedg. St. Const. Law, (2d Ed.) 446, and notes; *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. Rep. 449; *Mayor, etc., v. Winter*, 29 Ala. 651; *Union Pac. R. Co. v. Com'rs of Colfax Co.*, 4 Neb. 450; *Dawson Co. v. McNamar*, 10 Neb. 276, 4 N. W. Rep. 991; *Williams v. School Dist.*, 33 Vt. 271; *Long v. Fuller*, 68 Pa. St. 170.

It is in general unwise, as well as difficult, to attempt to give either a comprehensive or a restrictive definition of words and phrases used in legislative enactments. Such an attempt is especially hazardous in answer to a legislative question, for the reason that such definitions may embarrass the courts, and prejudice the rights of parties in litigated cases then

pending or thereafter arising; hence it is that upon the question now presented we do not feel at liberty to say more than that "internal improvements," within the meaning of the enabling act, must be located within the state; they must be improvements of a fixed and permanent nature, as improvements of real property; and, furthermore, they must be such improvements as are designed and intended for the benefit of the public. From the foregoing it results that appropriations of the internal improvement fund in question must be confined to permanent improvements of real property within the state, and for the benefit of the public. Appropriations for transient objects, as for personalty, as well as appropriations to promote private or individual enterprises, would be contrary to the intention of the general government, as donor of the fund. The character and purpose of the "buildings for state institutions," contemplated by the question are not stated; but, whatever their character or purpose, it would seem clear that no part of such internal improvement fund can be lawfully appropriated to defray the current expenses of carrying on state institutions.

(18 Colo. 279)

#### FARNCOMB et al. v. STERN.

(Supreme Court of Colorado. March 6, 1893.)

APPEAL—REVIEW OF EVIDENCE—FORCIBLE ENTRY  
—DEMAND FOR POSSESSION—ENTRY BY OWNER  
—JOINDER OF CAUSES—WAIVER OF OBJECTIONS.

1. The question of the sufficiency of the evidence to support the finding and judgment of the court will not be reviewed upon error or appeal unless it appears that objection or exception was taken in apt time in the trial court.

2. In an action of forcible entry and detainer, where the entry complained of was forcible and illegal, the plaintiff need not make a demand for the possession of the premises before commencing his action.

3. The owner of the fee, as well as a stranger to the title, may be guilty of an unlawful and forcible entry upon premises demised to his own tenant.

4. Objections on the ground that several causes of action have been improperly united, as well as on the ground of misjoinder of parties, must be taken by demurrer or otherwise in the trial court, or they are to be deemed waived. This rule is as applicable to actions for forcible entry and detainer as to other civil actions.

(Syllabus by the Court.)

Error to Arapahoe county court.

Action by Samuel A. Stern against Mary S. Farncomb and another for forcible entry and unlawful detainer, and for damages. There was judgment for plaintiff, and defendants bring error. Affirmed.

M. B. Carpenter and W. N. McBird, for plaintiffs in error. C. F. Butter, for defendant in error.

**ELLIOTT, J.** 1. The review of this case cannot extend beyond the record proper. The trial below was to the court without a jury, by consent of parties. The record brought to this court shows no objection or exception of any kind during the trial. No objection or exception

was taken to the finding or judgment as rendered, nor was any motion made for a new trial. At no stage of the proceeding in the trial court was the sufficiency of the evidence to support the finding questioned in any manner. Under such circumstances it is well settled that this court will not review the judgment upon the evidence. *Hopple v. Best*, 4 Colo. 555; *Law v. Brinker*, 6 Colo. 555; *Breen v. Richardson*, Id. 605; *Brown v. Landon*, 11 Colo. 162, 17 Pac. Rep. 515. It is a salutary rule which requires a party to try his cause thoroughly at nisi prius before seeking a review in an appellate court of any supposed errors not in the record proper. A party neglecting to present in apt time to the trial court objections to its rulings or decisions at the trial will not, as a rule, be heard in the appellate court to complain of such rulings or decisions. To permit him to be so heard would be manifestly unfair to the opposite party. Besides, it would have the effect of transferring the real trial of almost every litigated cause from the nisi prius court to the appellate tribunal. See *City of Durango v. Luttrell*, 17 Colo. —, 31 Pac. Rep. 853, and cases there cited. Upon this subject an eminent author observes: "Unless objections are seasonably made upon specific grounds, and exceptions properly taken in the trial courts, the rulings of such courts, in actions at law, cannot be reviewed in the appellate tribunals. If this were not the rule, the spectacle would be presented of causes tried upon one theory in the court of nisi prius, and decided upon a different theory in the court of appeal. The rule is therefore general, in actions at law, that no objection to a ruling made on the progress of the trial is available upon error or appeal unless it was first made and ruled upon in the court below." 1 *Thomp. Trials*, § 690.

2. The assignments of error in respect to the record proper require brief consideration. It is objected that no demand for the possession of the premises is alleged. The complaint alleges a lawful possession and actual occupancy of the premises by plaintiff, and that, while he was in such possession and occupancy, defendants, by force, entered and dispossessed him, and are now occupying and holding the premises by force. Counsel for plaintiffs in error cites *Doss v. Craig*, 1 Colo. 178, wherein it is said that in an action for unlawful detainer under section 5, c. 35, Rev. St., the plaintiff must aver and prove a demand in writing for possession of the premises which he seeks to recover. The *Doss* case was an action by a landlord against his tenant for holding over after the expiration of the term, and the court said that the demand required in such an action "is analogous to the demand required in replevin." The comparison is pertinent. The general rule in replevin is that, where possession of the goods has been illegally obtained by the defendant, the plaintiff need not make a demand for the return thereof before commencing his action. So, in an action of this kind, no demand is necessary where the entry complained of was forcible and illegal. There is a distinction in this respect between an

action for a forcible and illegal entry and an action for unlawful detainer after a peaceable and lawful entry. *Miller v. Sparks*, 4 Colo. 303; *Grice v. Ferguson*, 1 Stew. (Ala.) 36; *Crane v. Dod*, 2 N. J. Law, 320; *Kilburn v. Ritchie*, 2 Cal. 145; *Warren v. Kelly*, 17 Tex. 544.

3. It is contended that no judgment should have been rendered against the defendant Henry Farncomb, because it does not appear that he had any interest in the premises; and, further, that plaintiff was not entitled to recover damages without bringing a separate action therefor. The fact that the defendant Mary was the owner of the property in fee, the defendant Henry having no interest therein, does not affect their status or liability in this action. If, as charged in the complaint, Mrs. Farncomb leased the premises to plaintiff, and, while he was in the lawful possession and occupancy thereof, defendants jointly made an illegal and forcible entry therein, both were jointly liable in a possessory action of this kind. This was not an action to try the title. The gist of this action was the tortious entry. The owner of the fee, as well as a stranger to the title, may be guilty of an unlawful and forcible entry upon premises demised to his own tenant. *Dustin v. Cowdry*, 23 Vt. 631.

4. Objections on the ground that several causes of action have been improperly united, as well as on the ground of misjoinder of parties, must be taken by demurrer or otherwise in the trial court, or they are to be deemed waived. This rule, by the express terms of the Code, is as applicable to actions for forcible entry and detainer as to other civil actions. It is true section 25 of the act of 1885, (page 231,) provides that a plaintiff who has been successful in an action of forcible entry and detainer may recover treble damages, under certain circumstances, against the guilty party. In this case, however, plaintiff did not sue for treble damages, but for actual damages. No objection was made in the trial court to the uniting of both causes of action, and no reason is perceived why the parties should not have been permitted to litigate and have the whole controversy determined in one action, since they both appeared, and by their mode of pleading waived all objections. So far as the pleadings disclose, both causes of action affected all of the parties, both plaintiff and defendant, in the same character and capacity, and did not require different places of trial. Code, §§ 50, 54, 70; *Miller v. Sparks*, supra; *Gilliam v. Sigman*, 29 Cal. 637; *Green v. Taney*, 7 Colo. 278, 3 Pac. Rep. 423; *Fillmore v. Wells*, 10 Colo. 228, 15 Pac. Rep. 343. The cases of *Wilbur v. Maynard*, 6 Colo. 483; *Irwine v. Wood*, 7 Colo. 477, 4 Pac. Rep. 783; and *Brown v. Kennedy*, 12 Colo. 235, 20 Pac. Rep. 696,—cited by counsel for plaintiff in error, are not in point in this case. Those were actions of a different nature,—they were actions upon contract,—and there is no intimation in either case that an appellate court should review an assignment of error alleging misjoinder of parties, or the improper uniting of causes of action, in an action ex delicto, where no

objection on that ground was made in the court below, and where there was no objection to the finding or judgment, so as to authorize a review of the case upon the evidence. The judgment of the county court must be affirmed.

(18 Colo. 283)

# HOOK et al. v. FENNER.

(Supreme Court of Colorado. March 6, 1893.)

PRACTICE—FILING PAPERS—REPLEVIN—UNDERTAKING—DESCRIPTION IN WRIT—APPEAL.

1. A paper in a case is filed when it is placed as a permanent record in the proper office, though the officer fails to perform the clerical act of indorsing it as filed.

2. The fact that an undertaking in a replevin action in justice's court was indorsed as filed at a date subsequent to the issuance of the writ is immaterial where the undertaking was executed at a prior date, and the writ itself recites that before its issuance an undertaking was filed.

3. In a writ of replevin, a description of the property as "2,000 pounds of oats, more or less, now situated in a certain granary on defendants' premises," is sufficiently certain to warrant a recovery of the property, which the evidence shows had been segregated, and placed in a certain bin in the granary.

4. After defendants have pleaded that the property is theirs, and have submitted the case to the jury on its merits, it is too late for them to object for the first time on appeal to the insufficiency of the description of the property in the writ.

Error to Eagle county court.

Replevin by D. W. Fenner against W. R. Hook and others, brought before J. S. McMun, justice of the peace within and for the county of Eagle. Writ of replevin issued upon the 1st day of November, 1889. A trial before the justice resulted in a verdict and judgment for the plaintiff. Appeal taken to the county court, where the case was again tried with the same result, and defendants bring error. Affirmed.

Norris & Howard and C. K. Phillips, for plaintiffs in error. Montgomery & Frost and H. M. Jacoway, for defendant in error.

HAYT, C. J. In the county court a motion was made for the first time to dismiss the action for the want of jurisdiction, because, as it is alleged, the writ was issued before the filing of any undertaking with the justice. This motion was overruled, and this ruling of the court constitutes the principal ground of error relied upon in this court. There is an undertaking in the statutory form in the record, but there is a dispute between the parties as to whether it was in fact filed before or after the issuance of the writ by the justice. The plaintiff in error claims that it was not filed until after the writ had been issued and executed. In support of this contention they rely upon the filing indorsement of the justice upon the instrument. This shows that the undertaking was filed upon the 8th day of November, —seven days after the date of the writ. The defendant in error claims that this date is manifestly incorrect. To show this, he relies upon the fact that the bond itself bears date the 1st of November, 1889, and also calls attention to the recitals in

the writ of replevin, under the hand and seal of the justice, to the effect that, the plaintiff having previously given good and sufficient security to prosecute his action, and to make return of the goods and chattels described therein if return should be awarded, etc. In the consideration of the question thus raised, it becomes important to determine at the outset what constitutes the filing of a paper. Is it the clerical act of indorsing it as filed, or is it receipt of the paper by the proper custodian, and its lodgment in his office? The duty of a party required to file any paper would seem to be discharged when he has placed the same in the hands of the proper custodian, at a proper time, and in a proper place. If a paper in the case is placed as a permanent record in the office of the justice of the peace, this ought to be sufficient, no matter if the justice fails to perform the mere clerical act of indorsing it as filed. If the paper was actually placed in the hands of the justice for filing before the writ was issued, it is clear that it was his duty to mark the same as filed. Failing to discharge this duty, can it operate to the prejudice of either party to the suit? We are of the opinion that it cannot. The undertaking as presented by the plaintiff below is in strict accordance with the statute. No question is made upon the responsibility of the sureties. It appears that it was in every way satisfactory to the justice, and the fact that he did not mark it as filed we think is quite immaterial if, as a matter of fact, it was left with him, at his office, for filing, within the proper time. It has been repeatedly held that the filing of a paper in court may be complete without the indorsement of such filing; the indorsement being only evidence of the filing, but not the exclusive evidence. *Lessee of Haines v. Lindsey*, 4 Ohio, 88; *Thompson v. Foster's Adm'r*, 6 Ark. 208; *State v. Gowen*, 12 Ark. 62; *Bettison v. Budd*, 21 Ark. 578.

Was the undertaking in this case filed within the time required by law? That it was executed at the proper time is apparent from the date of the bond; that it was filed before the writ was issued is certified to by the justice of the peace in the writ itself. When we add to these facts the presumption that must be indulged in favor of the regularity of the proceedings of all public officers, we think that it sufficiently appears that the bond was filed with the justice of the peace before the writ was issued. This position receives further support from the fact that none of the papers show a filing indorsement of a date prior to the 8th of November, although it sufficiently appears that the affidavit was made and sworn to before the justice on the 1st day of November, and no evidence allunde was offered to show that either affidavit or bond was not filed upon that date. Moreover, as no question was raised before the justice of the peace in regard to the date of the filing of the undertaking, this may be considered as additional evidence that all parties conceded that the proper preliminary steps had then been taken to give the justice jurisdiction.

It is contended that the description of

the property replevied as given in the writ of replevin is insufficient. The property is described as follows: "Two thousand pounds of oats, more or less, now situated in a certain granary, on the premises now occupied by defendants." The evidence shows that these oats had been segregated and placed in a certain bin in a granary, owned by the defendants, and that the constable had no difficulty in finding them. The record also shows that two juries have found the description sufficient. We think, under the circumstances, greater minuteness should not be demanded. While certainty in the description of property should be required in replevin, it would be unreasonable to require greater certainty of description than the property will reasonably admit of. Aside from this, as no objection to the description was made for uncertainty in the court below, it must be deemed to be waived. After the defendants have pleaded that the property is theirs, and have submitted the case to the jury upon its merits, it is too late to ask that the judgment should be reversed because of uncertainty in the description. Wells, Rep. § 185.

Some question is raised as to the amount of damages allowed. This was a question of fact for the jury to determine under all the evidence in the case, and we see no reason for interfering with their conclusion in the matter.

The judgment is affirmed.

(18 Colo. 287)

BATES et al. v. WILSON et al.

(Supreme Court of Colorado. March 6, 1893.)

JUDGMENT FOR COSTS—INTEREST.

The statutory provision that judgments shall draw interest from the day of entry until satisfied includes a judgment for costs.

Motion in supreme court by Mary Barker Bates and others, appellants, for execution for interest in a judgment for costs. Execution ordered.

L. C. Rockwell, for petitioners. Hugh Butler, for respondents.

PER CURIAM. This is an application for a rule on the clerk of this court to issue an alias execution for interest upon a judgment for costs. The facts, in brief, are as follows: On January 20, 1890, final judgment was entered in this cause in this court, reversing the judgment of the district court, and awarding costs to appellants. 24 Pac. Rep. 99. Some time in October, 1892, an execution was issued by the clerk of this court for the amount of these costs. Appellees subsequently paid the costs, the parties agreeing at the time that the question of interest should be left for consideration and determination by this court. After the return of the execution, an application was made to the clerk for an alias execution for the amount of the interest claimed upon the judgment. The clerk, being uncertain as to his duty in the premises, refused to issue such execution. Afterwards a rule to show cause was entered, at the instance

of appellants. The clerk, for answer, demurs to the petition.

The question presented is, does a judgment for costs bear interest? The answer must be gathered from the statute. It provides that judgments shall draw interest from the day of entry "until satisfaction of said judgment be made." There is no distinction made by the statute regarding the kind of judgments that shall draw interest, and we see no reason why such distinction should be made by the court. The costs are a part and portion of the judgment, and should draw interest accordingly. The demurrer is overruled, and the execution ordered.

(18 Colo. 288)

IN RE EXTENSION OF BOUNDARIES OF CITY OF DENVER.

(Supreme Court of Colorado. March 14, 1893.)

SPECIAL LEGISLATION—MUNICIPAL CORPORATIONS.

1. Const. art. 14, § 13, requires the legislature to provide for the organization and classification of cities by general laws, and section 14 enables existing municipalities to elect whether they will retain their special charters or be governed by the general law. Held that, while the legislature may by special act amend an existing charter retained by a city, yet it cannot, by special act, under the guise of amending the charter of such a city, extend the city limits so as to destroy the corporate existence of adjoining towns incorporated under the general law.

2. Though the above constitutional provisions expressly prohibit only the organization and classification of cities by special acts, the disincorporation by special act of a city incorporated under the general law is within the object of the provision, and is also opposed to Const. art. 5, § 25, which prohibits special laws where general laws can be made applicable.

The opinion of the court was given in response to a resolution by the honorable house of representatives, having reference to the constitutionality of a bill for an act entitled "An act to revise and amend the charter of the city of Denver."

PER CURIAM. The city of Denver was incorporated by a special act of the territorial legislature, previous to the institution of the state government. In reference to such municipal corporations the framers of our state constitution provided, in section 14 of article 14, as follows: "The general assembly shall also make provision by general law whereby any city, town, or village incorporated by any special or local law may elect to become subject to, and be governed by, the general law relating to such corporations." In a number of cases this provision has been held as conferring upon such corporations the right to retain their corporate existence, and also that any legislation which may be fairly considered as revisory or amendatory to such charters is not inhibited by this or any other provision of the fundamental law. *Brown v. City of Denver*, 7 Colo. 305, 8 Pac. Rep. 455; *Carpenter v. People*, 8 Colo. 116, 5 Pac. Rep. 828; *Darrow v. People*, 8 Colo. 426, 8 Pac. Rep. 924. By the bill before us it is sought to extend the boundaries of the city of Denver beyond the present limits of the

city, and include therein 13 other municipalities, incorporated under the general laws of the territory and state. The principal question therefore is, can the legislature so amend the charter of the city of Denver as to wipe out the corporate existence of other municipalities, and include the territory thus covered in an amended charter of the city of Denver? That the proposed act is special in character is admitted. Section 25 of article 5 of the constitution provides that the general assembly shall not pass local or special laws in certain enumerated cases, nor in any other case where a general law can be made applicable. It is contended, however, that as to whether a general law can be made applicable is a matter for the legislature, and not for the courts, to determine. As far as the organization and classification of cities and towns are concerned, the framers of our constitution have put the matter at rest by section 13 of article 14 of the state constitution. The section reads as follows: "The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions." As to whether or not any amendment to the city charter of the city of Denver could be made by a special act, in view of the provisions of this section, was for a long time a subject of grave discussion. It was finally set at rest by this court in the cases cited *supra*. As we have seen, however, it is not every amendment that can be permitted under this section. To make such amendment free from constitutional objection, it must be of such character as to be fairly considered as revisory or amendatory of the charter existing prior to the adoption of the constitution. See *Darrow v. People*, *supra*. Under the guise of amending the charter of the city of Denver, it was never contemplated, in our judgment, that adjoining towns, incorporated under the general law of the state, could have their corporate existence destroyed. If the proposed legislation can be upheld, then it is difficult to conceive of any legislation with reference to the corporate boundaries of the city of Denver that cannot be enacted as an amendment to the present charter. Should it be contended that section 13 of article 14 furnishes an inhibition only in reference to the organization and classification of cities and towns, and that the legislature may, by special act, disincorporate such cities and towns, the answer is apparent. If the latter is not directly inhibited by the letter of the constitution, it is certainly opposed to the spirit of the provision. The object being to free all towns and cities from local or special legislation, it is clear that the inhibition of the section must be held to extend to the disincorporation, as well as the incorporation, of such cities and towns. Aside from this, the inhibition of section 25 of article 5 against local or special laws must not be lost sight of. If it be granted that it is

within the province of the legislature to determine whether or not a general law can be made applicable in a given case, then, so far as the applicability of such law to the annexation of contiguous cities and towns is concerned, the question has already been decided in the affirmative by the legislative department of the government. *Gen. Laws 1877*, p. 876 et seq.; *Sess. Laws 1885*, p. 372 et seq.; *Mills' Ann. St.* § 4374 et seq. See, also, *People v. Common Council*, 85 Cal. 369, 24 Pac. Rep. 727; *Hambleton v. Town of Dexter*, 89 Mo. 188, 1 S. W. Rep. 234; *State v. City of Cincinnati*, 20 Ohio St. 18; *Van Riper v. Parsons*, 40 N. J. Law, 1. In our opinion, the power of the legislature to annul the corporate existence of the adjoining towns by an amendment to the special charter of the city of Denver, as provided by the bill submitted, must be denied.

ELLIOTT, J., did not participate in the decision.

(18 Colo. 274)

### SMITH v. HARRIS.

(Supreme Court of Colorado. March 6, 1893.)

ELECTIONS—NOMINATIONS—BALLOT—CONTEST—PLEADING.

1. Though the secretary of state may have acted illegally in causing the names of certain persons to be printed on the official ballot as the nominees of a certain party for the office of presidential electors after they had declined to accept such nomination, yet such misconduct cannot have the effect of avoiding the election of candidates for other offices, whose names were printed on the same ticket, and who were legally and properly nominated and certified.

2. Where it appears that each of two factions of a party held a separate state convention, a candidate for a county office nominated by such party is not entitled to have his name printed on the tickets of both factions; and the refusal of the county clerk to print it on the ticket of one of such factions cannot be declared illegal in the absence of a showing that the convention nominating him represented such faction.

3. In an election contest instituted in the supreme court, a petition which alleges that the election judges in each and every precinct rejected a large number of legal votes given for contestant, for the reason that the cross was not placed in the proper position, is too indefinite.

4. General averments of election frauds, and of the intimidation of voters, are insufficient, as the same particularly is required in stating causes of contest in the supreme court, under rule 39, as in cases of contest under the statute.

Original proceedings in the supreme court, instituted by Emery A. Smith to contest the election of Ira Harris as county judge of El Paso county. The contestant demurred to the petition. Demurrer sustained in part, and overruled in part.

Statement by the court:

This proceeding was instituted by Emery A. Smith to contest the election of Ira Harris as county judge of El Paso county. The petition sets forth five separate causes of contest, which, in brief, are as follows: First. That the county clerk of El Paso county caused to be printed illegal ballots, which were used, to the prejudice of the contestant, at the election held

in said county on the 8th day of November, 1892, and that about 200 votes were lost to contestor by such illegal printing of said ballots. The facts relied upon as showing such illegality are that the presidential electors nominated by a convention of the Democratic party of the state—John L. Carlisle, James A. Shinn, Charles O. Unfug, and Ansel Watrous—resigned as such electors, and that in their stead the committee authorized by such convention to fill vacancies nominated the presidential electors of the People's party, to wit, Higley, Berry, Overholt, and Hanchett, and that the secretary of state certified to the county clerk of El Paso county the resignation of the first-named electors, and the latter-named electors as presidential electors of the Democratic party, under the device or emblem chosen by said convention of the Democratic party, to wit, the rooster, and that the said clerk of El Paso county printed said names as such electors, notwithstanding the fact that they had declined to accept such nominations; that a convention of the Democratic party held in and for the county of El Paso certified a list of nominations, among which was the name of contestor as the nominee for county judge on said ticket; that the county convention failed to select any device or emblem, and that the county clerk published the list of nominations so made by the county convention on the ticket headed by the rooster emblem; that proceedings were instituted to compel the county clerk to print the rooster ticket without the names of the last-named electors, which relief was refused by the judge to whom such application was made; and that, notwithstanding the objection made by the chairman and secretary of said county convention, the county clerk proceeded to and did cause to be printed the names of said electors upon that ticket. The second ground of contest is substantially the same as the first, except that therein it is alleged that the county clerk was requested by the chairman and secretary of said Democratic county convention to print contestor's name on another ticket under the device of the miner; that said clerk declined so to do, and thereupon an application was made to the proper court for an order to compel him to so print the name of contestor on both of said tickets, which application was denied; that, by reason of the county clerk's refusal to print contestor's name on the ticket with the device of the miner, he lost many votes thereby, aggregating at least the number of 200. In the third ground of contest it is alleged that the election judges in each and every precinct of the county rejected a large number of legal votes given for contestor, exceeding 200, for the reason that a cross was not placed in such a position as to have the effect of voting for contestor. The fourth ground of contest is that at least 200 legal voters and electors of said county were misled and deceived by persons friendly to contestee, and on his behalf, as to the boundaries of their respective precincts, and were registered in wrong precincts, and were thereby wrongfully and intention-

ally deprived of their elective franchise, and that such voters would have voted for the contestor. The grounds of contest alleged in the fifth cause of action are that the boards of registration in precincts 5 and 6 of said county failed to properly register voters therein, and that the registration lists in such precincts were false, illegal, and fraudulent, and for that reason divers legal electors were prevented from voting in said precincts at said election, and that a number of illegal votes were cast in said two precincts, and that it was impossible to ascertain the true number of legal votes cast in said precinct at said election. Prays that contestor be declared elected to the office of county judge, or, in the alternative, that the election be declared void, so far as regards the election of contestee. To the petition of the contestor the contestee interposes a demurrer to each separate cause of contest, for the reason that the same fails to state sufficient facts to constitute a cause of action; second, because the court has no jurisdiction in the subject-matter referred to in said petition; third, because the petition is ambiguous, unintelligible, and uncertain, etc.

William Dillon, for petitioner. J. K. Goudy, for respondent.

PER CURIAM. The illegality complained of in the first cause of contest consists in the printing of the names of Higley, Berry, Overholt, and Hanchett as presidential electors upon the ticket designated as the "Rooster Ticket;" that by reason of the printing of those names thereon a large number of voters refused and declined to vote that ticket, and thereby contestor lost their votes. The insufficiency of this claim to entitle contestor to the office seems to be conceded by his counsel in his argument; but it is insisted that, if insufficient for that purpose, it should be held adequate cause for voiding the election. If it be conceded that the secretary of state acted illegally in certifying those names, in accordance with a certificate of their nomination by the committee, without their acceptance being first had, or in refusing to certify their declination, and therefore the names were illegally printed upon that ticket, such illegal action could in no way affect other candidates, properly printed thereon,—much less affect other ballots, legally and properly certified and printed. The misconduct of the secretary of state, if his action can be held to be such, in wrongfully certifying the names of these particular candidates could not deprive voters of their franchise, or destroy the efficacy of their ballots cast for other candidates, who were legally and properly nominated and certified. To this effect is the decision of this court in *Allen v. Glynn*, 29 Pac. Rep. 670, 17 Colo. —. The remedy, if any existed, for the alleged misconduct of the secretary of state, should have been sought in a proper proceeding against him. It was not properly invoked in this case. It was the duty of the county clerk to cause to be printed the names as certified to him. Page 150, § 17, Laws 1891. If such nominations were improperly



certified, it constituted no such error or omission \* \* \* in the publication of the names or description of the candidates as the county clerk was authorized to correct, under page 152, § 20, Laws 1891.

The second cause of contest is of the same purport, with the additional fact alleged that the county clerk refused to print contestor's name upon the "Miner Ticket." Whether it was the duty of the clerk to so print it, we have no means of knowing. It is alleged that a Democratic county convention nominated and certified to the county clerk a list of candidates, including contestator's name; that the convention neglected to select or designate any emblem. It appears that there were two factions of the Democratic party, and that each held a separate state convention; but it nowhere appears which wing or faction of the Democratic party this county convention represented. Unless the convention represented the party that selected the miner as the emblem for the state ticket, its nominees were not entitled to have their names printed on that ticket. The contestor had no right to have his name on more than one ticket by reason of his nomination by that convention. We cannot, therefore, determine whether the county clerk acted illegally in this particular, or not, and we must indulge the presumption that his acts were legal and proper.

The third cause as alleged is obnoxious to demurrer for indefiniteness. The fourth and fifth are insufficient under the rule announced in *Todd v. Stewart*, 14 Colo. 286, 23 Pac. Rep. 426. The same particularity is required in stating causes of contest in this court under rule 39 as in cases of other county officers under the statute. Demurrer is sustained as to the first and third grounds, and overruled as to the second.

(3 Colo. App. 106)

**LAMB v. PEOPLE ex rel. JEFFERDS.**<sup>1</sup>

(Court of Appeals of Colorado. Jan. 23, 1893.)

**STATE VETERINARY SURGEON—APPOINTMENT AND REMOVAL.**

Act March, 1885, requires the governor to appoint to the office of state veterinary surgeon the person elected by the state board of agriculture as professor of veterinary science in the state agricultural college. Act March 3, 1887, amends Act of 1885, repeals section 2 thereof, and provides that the state veterinary sanitary board shall appoint the state veterinary surgeon, and provides that the surgeon so appointed shall hold office for two years, "provided he is not sooner deposed by the board." Act April 1, 1891, amends act of 1885, vesting the appointing power in the governor, and declares that "all acts and parts of acts in conflict with this act are hereby repealed." Const. art. 4, § 6, provides that the governor shall nominate, and, with the consent of the senate, appoint, all officers whose office may be created by law, and whose appointment is not otherwise provided for. *Held*, that the power of appointing and removing a state veterinary surgeon was in the governor alone, and that a removal of such surgeon by the state veterinary sanitary board was unauthorized.

<sup>1</sup>Rehearing denied March 27, 1893.

Appeal from district court, Pitkin county.

Proceeding by the people of the state, at the relation of Edward Gay Jefferds, against Charles G. Lamb. Judgment for relator. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by REED, J.:

This was a proceeding in the nature of a writ of quo warranto to test the title to the office of state veterinary surgeon. On the 1st day of April, A. D. 1891, Hon. John L. Routt, governor, appointed the relator, Jefferds, to the office. The appointment was confirmed by the senate on the 9th of April. He qualified by filing the required bond, and taking the oath of office, and entered upon the duties. On June 22d of the same year, the state veterinary sanitary board attempted to remove him, and passed the following resolution: "Whereas, the present state veterinarian has proven utterly incompetent and inefficient to fill said position, he it resolved, that, under the power vested in us by law, he is hereby removed, and the office declared vacant, and the governor be requested to appoint without delay a competent person to fill the office of state veterinarian, and H. H. Metcalf is appointed Secy. pro tem., until such appointment. J. L. Bush, Pres't. H. H. Metcalf. C. E. Stubbs." Thereupon the governor appointed appellant to the position, who entered upon his duties, and has since been in possession of the office. In answer to the relation, the defendant set up the incompetency of relator, the supposed removal by the state veterinary sanitary board, the appointment of appellee, etc. A demurrer was filed to the answer; sustained by the court. Defendant declined to amend, and judgment in favor of appellee and ouster of appellant was entered, from which this appeal is prosecuted. Several errors are assigned, but all going to the same point, viz. that the court erred in sustaining the demurrer and adjudging the answer insufficient.

Maupin & Babb and Hartzell & Patterson, for appellant. Charles R. Bell and Joseph W. Taylor, for appellee.

REED, J., (after stating the facts.) The relator was duly appointed, confirmed by the senate, qualified, and legally in the possession of the office. The only question to be determined is as to the power of the state veterinary sanitary board to make the attempted removal. The question of competency cannot be considered. Competent or incompetent, he had a right to the office until deposed by competent authority. Nor shall we consider whether such board was the proper tribunal to pass upon his qualifications and determine the question. It is said in the answer that the relator "admitted to said board his said inefficiency and incompetency." No evidence was taken. Consequently there is no proof of such admission. If it was made, it should be particularly remembered and transmitted to posterity as the first instance where a state officer admitted his incompetency to discharge the duties of any office of which

he was an incumbent. The offices of state veterinary surgeon and state veterinary sanitary board were both created by the act of March 23, 1885, entitled "An act to prevent and suppress infectious and contagious disease among the domestic animals of this state, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation." By section 2 of such act the governor is required to appoint to the office of state veterinary surgeon "the person elected by the state board of agriculture as the professor of veterinary science, and holding the chair of veterinary science in the State Agricultural College." By section 3 it is provided that he shall hold his office two years, unless he is sooner deposed from his office in the State Agricultural College. By section 5 it is provided that, in case of a vacancy by the removal of the incumbent from his position in the State Agricultural College, the successor to such position in the college shall be appointed by the governor to fill the unexpired term of state veterinary surgeon. Section 6 provides for the creation of the state veterinary sanitary board, which was to consist of the state veterinary surgeon and two other members, appointed by the governor and confirmed by the state. The balance of the act defines their respective powers, duties, etc. On March 3, 1887, an act was passed entitled "An act to amend an act entitled 'An act to prevent and suppress infectious and contagious diseases among the domestic animals of this state, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation,'" of which the 1st, 2d, and 3d sections are as follows: "Section 1. That section 2 of an act to amend an act entitled 'An act to prevent and suppress infectious and contagious diseases among domestic animals of this state, and for the appointment of the necessary officers to carry into effect the same, and to fix compensation,' be, and is hereby, repealed, and the following enacted in lieu thereof: 'Sec. 2. The state veterinary sanitary board shall appoint the state veterinary surgeon.' Sec. 2. Section 3 of said act is hereby amended so as to read as follows: 'Sec. 3. The person so appointed shall hold his office for the term of two (2) years from the date of his appointment: provided, such person is not sooner deposed by the state veterinary sanitary board.' Sec. 3. Section 5 of said act is hereby repealed, and the following enacted in lieu thereof: 'Sec. 5. The state veterinary surgeon shall be the secretary of the state veterinary sanitary board.'" Section 4 amends the sixth section of the act of 1885, in relation to the state veterinary sanitary board, making it consist of three members, to be appointed by the governor and confirmed by the senate; also contains new matter not necessary to be considered. Sections 19 and 20 are also amended. It will be observed that in section 1 of the bill the author became slightly "tangled" in saying "that section 2 of an act to amend an act entitled," etc. The mistake is in speaking of the original act as an amended act, which was evidently a clerical error.

There had been but one act, which had not been previously amended. The title of the amending act is correct; the intention of the legislature apparent; and, there being but one act to which the amendment could apply, there can be no question, and the error must be disregarded. No one could be misled by it, and its application and reference to the original act is conclusive of the legislative intention.

By this amendment the appointing power is vested in the state veterinary sanitary board. The state veterinary surgeon is to be the secretary of the board. His term of office is to be two years: "provided, such person is not sooner deposed by the state veterinary sanitary board." No direct power of removal is conferred upon the board. It is only by inference or implication that the supposed power of removal is conferred, and was probably deemed incidental to the power of appointment, and the officer being an appointee and servant of the board, that the power of removal by the same body was inherent. This might admit of question without power expressly conferred; but the evident intention of the legislature being, by the language used, to invest the board with the power to remove, it might, and probably would, prevail in a case where the appointment was made by that body. By an act of April 1, 1891, the original act of 1885 was again amended. In the same section, (2) the appointing power is again given to the governor, but without any restriction as in the first act. The appointee is to hold his office for two years, and there is no provision for his removal. In this amendatory section no reference whatever is made to the amendment of 1887, but it directly asserts it to be an amendment of section 2 of the act of March 23, 1885; and this is probably proper from the fact that by the act of 1887 the original section 2 was repealed, and the new section substituted, and it thus became incorporated into and a part of the original act. If this is not so, the question becomes unimportant; for by section 3 of the act of 1891 it is declared, "All acts and parts of acts in conflict with this act are hereby repealed," which would operate as a direct repeal of that section of the statute of 1887 conferring the appointing power upon the board. The following is the constitutional provisions in regard to the appointment and removal of officers, (article 4, § 6:): "The governor shall nominate, and, by and with the consent of the senate, appoint, all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty, or malfeasance in office." The office is not one established by the constitution, but was expressly created by law, and by the amendatory act of 1891 the appointing power was expressly conferred upon the governor. By that act the office of state veterinary surgeon was divorced and entirely separated from all connection with the state board. His duties remained as defined in the act of

1885. The act of 1885, as amended by subsequent act of 1891, leaves the offices of state veterinary surgeon and the state veterinary sanitary board separate and distinct. Each are state officers, with independent and well-defined duties. Section 1 of the act of 1887, repealing section 2 of the act of 1885, and the latter clause conferring the power of appointment upon the sanitary board, and section 2 of such act, amending section 3 of the act of 1885, must be construed together. The former makes the surgeon the appointee and servant of the board, to be appointed, and, impliedly by the latter section, removable at its pleasure. No confirmation by the senate is required. The whole matter rests in the discretion of the board, whose servant he is made by the act; and the right to remove its own appointee and servant is properly regarded as incidental or inherent, and with the repeal of the appointing power the latter section must fall with the former, upon which its sole vitality was predicated. By the act of 1891, amending the act of 1885, the appointing power was vested in the governor, subject to approval by the senate, and the veterinary surgeon became as thoroughly a state officer as any other known to the law, and the power of removal was by the constitution vested in the governor. He held his office by the same tenure as the sanitary board, by the appointment of the governor and confirmation of the senate. It is not necessary to inquire whether, under the constitution, the power to remove an officer so appointed could, by the legislature, be delegated to any other individual or body. The power is very doubtful, but it is sufficient to say that it could not be delegated without direct and special legislation conferring the power of removal. The power could neither be implied nor inferred in this case. No such special designation of power was made or attempted; and when, by the act of 1891, he became a state officer, and occupied the same legal position as that occupied by those who attempted to remove him, they had no more power to effect such removal than to remove the state engineer, or if the surgeon had attempted to remove the sanitary board.

The constitution itself is conclusive upon the question. The power to remove is vested in the governor, and the power, being designated, is exclusive, in the absence of positive legislative enactment. In the very nature of the administration of public affairs, the power of one appointee to remove another cannot be supposed to exist. Persons filling co-ordinate offices cannot remove each other. The conclusions here adopted are so self-evident from the provisions of the constitution and the examination of the statutes that no authorities are necessary for their support, but a few may be cited. In Cooley, Const. Lim. (6th Ed.) 133, the whole doctrine is briefly summed up as follows: "That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitu-

tion requires of him he cannot be excused by law." In Attorney General v. Brown, 1 Wis. 513, the court says: "Whatever power or duty is expressly given to or imposed upon the executive department is altogether free from interference of the other branches of the government. Especially is this the case where the subject is committed to the discretion of the chief executive officer either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise." In State v. Doherty, 25 La. Ann. 119, it is said: "Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected." See, also, State v. Kennon, 7 Ohio St. 546; Lane v. Com., 103 Pa. St. 481; Wilcox v. People, 90 Ill. 186. It follows from the premises that the state veterinary sanitary board had no authority to pass upon the relator's qualifications; and no power of removal; that such authority and power were by the constitution vested only in the governor; consequently, that the relator was not deposed. The judgment of the district court will be affirmed.

(23 Or. 593)

**RANKIN v. MALARKEY et al.**

(Supreme Court of Oregon. March 22, 1893.)

**MECHANIC'S LIEN—NOTICE.**

A notice of lien, which states that claimant had a contract with A. for furnishing lumber and material used in erecting a dwelling house on ground, describing it, belonging to B., who caused the dwelling house to be erected, and that the value of such lumber and material was a specified sum, is not sufficient to create a lien, because it fails to state the name of the person to whom the materials were furnished, or to connect the person with whom claimant had the contract with the owner of the ground and building, as required by Hill's Code, §§ 3669, 3673.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by N. K. Rankin against Charles A. Malarkey and others to foreclose a mechanic's lien. From a judgment in plaintiff's favor, defendants appeal. Reversed.

Chas. H. Carey and Dan'l. J. Malarkey, for appellants. C. M. Idleman and Durham & Platt, for respondents.

**MOORE, J.** This is a suit to foreclose a lien upon lots 3 and 4 in block 7 of King's second addition to the city of Portland, Or., and upon a dwelling house erected thereon, the property of C. A. Malarkey, one of the appellants herein, for material furnished to the contractor. The court below held the lien valid, and a decree was entered foreclosing it, from which the defendants appeal.

Appellants contend that the notice set out in the pleadings fails to comply with the statutory requirements, and for that reason is ineffectual to create a lien. It is unnecessary to notice all the objections presented, as, in our judgment, one point urged is decisive of the case. Section 3669 of Hill's Code gives this remedy to one

who has furnished material to be used in a building at the instance of the owner or of his agent, and provides that every contractor shall be held to be the agent of the owner. Section 3673 provides that every lumber merchant desiring the benefit of the act shall file with the county clerk a claim containing a true statement of his demand, with the name of the owner, the name of the person to whom he furnished the materials, and also a description of the property to be charged with said lien sufficient for identification, which claim shall be verified, etc. The plaintiff, desiring to avail himself of the benefit of this act, filed the following claim:

"Know all men by these presents, that I, N. K. Rankin, of the city of Portland, in the county of Multnomah, Oregon, have, by virtue of a certain contract made with D. C. Macdonald & Co., of the county of Multnomah, Oregon, and for the furnishing of lumber and material used in the erecting and building and completing of a certain dwelling house, the ground upon which the said dwelling house was erected being at the time the property of C. A. Malarkey, who caused the said dwelling to be erected, said superstructure and land being known and particularly described as follows: Lots three and four, in block seven, in King's second addition to the city of Portland, Oregon. That the contract and reasonable price of such material so furnished was the sum of \$2,090.81, lawful money of the United States. That the sum of \$1,877.51 is now due or to become due in United States lawful money, said account and demand being hereinafter specifically set forth and stated. That it is the intention of the said N. K. Rankin to hold a lien upon the premises hereinbefore described, and that it is his intention to claim and hold such lien, not only upon the buildings, erections, and superstructures, but also upon the land upon which the same are erected. That the following is a true and correct statement of the account and demand of the claimant herein:

For labor performed.....	\$	
Materials furnished .....	2,090	81
Total amount of debts		\$2,090 81
Deductions by credits....	\$	213 80
Total amount of deductions .....		213 30
Balance now due.....		\$1,877 51

—That thirty days have not elapsed since the completion of the said dwelling house.

"N. K. Rankin."

—Which was duly verified by the claimant.

Can it be said that this notice complies with the provisions of the statute? Alien can be secured only by filing the required notice within the time prescribed. No other notice or claim of lien, though brought to the knowledge of the owner, has any effect. The lien exists by virtue of the statutory provisions, and the requirements prescribed for securing the benefits of this remedy must be observed. 2 Jones, Liens, § 1389. The decisions are unanimous that when a notice is required by statute, either to create or con-

tinue the lien, it is a matter of substantial requirement, and must be complied with on the part of the claimant. Phil. Mech. Liens, § 338; Kezartee v. Marks, 15 Or. 529, 16 Pac. Rep. 407. What the statute requires in order to perfect the lien is a condition precedent, and must be complied with before the lien can attach. Pilz v. Killingsworth, 20 Or. 432, 26 Pac. Rep. 305; Gordon v. Deal, (Or.) 31 Pac. Rep. 287. The notice of lien in this case does not comply with the requirements of the statute, because it fails to state the name of the person to whom the materials were furnished. There is no direct statement that Macdonald was the person to whom the claimant delivered the materials, or that he ever delivered any, to be used in the construction of said building, nor is there any fact stated from which such an inference could be drawn. It cannot be supposed that a notice which states that A. claims a lien for a given sum; that the name of the owner is B.; that the name of the person to whom he furnished the material is C., and that the property was lot 1 in block 2 of a designated city,—would create a lien, without connecting the claimant with the owner of the property. The statement should show a prima facie right of lien. It therefore must connect the claimant with the owner of the lot or building against which it is sought to enforce the lien, either by showing that the claimant contracted with the owner or his agent, or that he furnished materials to one who was erecting a building under a contract, or with the owner's consent. 2 Jones, Liens, § 1392; Anderson v. Knudsen, 33 Minn. 172, 22 N. W. Rep. 302. While no particular form is necessary, the notice on its face should show that the claimant, at the instance of the owner or his agent, had furnished certain materials to be used in the construction of a building upon which he claimed a lien, and for this purpose the statute has required the claimant to name the person in his notice to whom the materials were furnished. The plaintiff having failed to do this, or to connect the owner of the premises with the materials furnished, his lien never attached to the land or building, and the decree of the court below must be reversed, and the complaint dismissed.

(23 Or. 562)

#### STATE v. DUNN.

(Supreme Court of Oregon. March 20, 1903.)

##### FORGERY—NOTE BARRED BY LIMITATION.

A note against which the statute of limitations has apparently run is not wholly void, since judgment may be rendered against the maker unless he pleads the statute; and therefore the altering and publishing, as genuine, of a false and forged note, though apparently barred by the statute, is a forgery, within Hill's Code, § 1808, which defines the crime as the false making or altering of any promissory note, etc., or altering and publishing the same as true and genuine, with intent to injure or defraud any one.

Appeal from circuit court, Multnomah county; T. A. McBride, Judge.

R. H. Dunn pleaded guilty to an indictment charging him with forgery. From

a judgment overruling his motion in arrest of judgment, and sentencing him to imprisonment, he appeals. Affirmed.

McGinn, Sears & Simon, for appellant.  
Geo. E. Chamberlain, Atty. Gen., and  
W. T. Hume, Dist. Atty., for the State.

LORD, C. J. The defendant pleaded guilty to an indictment which charged that he, "on the 15th day of December, 1892, in the county of Multnomah and state of Oregon, did willfully, knowingly, and feloniously utter and publish as true and genuine, to one W. G. Jenne, a certain false and forged writing and promissory note, knowing the same to be false and forged, the tenor, purport, and effect whereof is as follows: '\$165.00. Portland, Oregon, Dec. 14, 1882. Ninety days after date, without grace, we, jointly and severally, promise to pay to the order of R. H. Dunn one hundred and sixty-five dollars, for value received, with interest from date, payable at the rate of ten per cent. per annum until paid, principal and interest payable in U. S. gold coin at the Alna-worth National Bank, in Portland, Oregon; and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in said suit or action. Jonathan Richardson, J. J. Fisher,'—with intent to injure and defraud the said W. G. Jenne and other persons," etc. Before judgment was rendered on defendant's plea of guilty, he filed a motion in arrest of judgment, upon the ground that the facts stated in the indictment do not constitute crime, which the court overruled, and thereafter sentenced him to imprisonment in the penitentiary.

It will be observed that nearly ten years have elapsed since said note became due, or a cause of action accrued thereon, and our statute prescribes that an action can only be commenced on a contract of this character within six years after the action has accrued. Hill's Code, § 6. Upon this state of the case, the contention for the defendant is that the note set out in the indictment appears on its face to be barred by the statute of limitations, or not to be enforceable, and therefore is not such an instrument as can be the subject of forgery. The defendant is indicted under section 1808, Hill's Code, which provides that "if any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit \* \* \* any promissory note, \* \* \* or shall, with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, or counterfeited record, writing, instrument, or matter whatever, shall be punished by imprisonment in the penitentiary not less than two nor more than twenty years." By this section the uttering or passing, as well as the making, of a forged instrument, is declared a forgery. They are separate and distinct crimes, though both offenses are forgery. The party uttering need not be the party who forged the instrument. To make out the offense, it is sufficient that the writing or instrument should be forged or altered;

that the party uttering or passing it knew it to be false, altered, or forged; and that he should utter, or attempt to utter, it with intent to injure or defraud some one.

As defined by Mr. Bishop, "forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bish. Crim. Law, § 523. "But," he further observes, "to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false. It must be also such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud." Id. § 533. "This is on the principle," said Gregory, J., "that every man knows the law, and is able to appreciate the legal effect of the instrument, and therefore it cannot, in legal contemplation, defraud any one." Reed v. State, 28 Ind. 397. Hence a writing invalid on its face cannot be the subject of forgery, because it has no legal tendency to injure or defraud. But while a writing which is void, or without legal efficacy, on its face, cannot be the subject of forgery, it may be, when it is shown by the averment of proper extrinsic facts to be capable of injury, or affecting the rights of another. Of course, if the instrument is void or invalid on its face, and cannot be made good by averment, the crime of forgery cannot be predicated upon it. An indictment for forgery must therefore disclose an instrument which is calculated, on its face, to have some effect, or extrinsic facts must be alleged which will enable the court to see judicially its fraudulent tendency. See note to Arnold v. Cost, 22 Amer. Dec. 306-321. In the case at bar the alleged invalidity of the note appears on its face, and arises from the fact that it is subject to the bar of the statute of limitations. The contention is, on account of the bar of the statute, that the note is not enforceable, and cannot, therefore, be the subject of forgery, because, in such case, there can be no legal tendency to injure or defraud another. This argument proceeds upon the principle that the note, if genuine, would be void and worthless, because the statute not only bars the remedy, but extinguishes and destroys the legal obligation, and consequently the note could not be the foundation of a criminal action for forgery. But, we apprehend, it is not absolutely essential that a writing or note must be capable of enforcement, to be the subject of forgery. In Hawkesward's Case, 1 Leach, 257, the defendant was indicted for forging a bill of exchange. The bill was not stamped as required by the statute, which provided "that a bill without a stamp shall not be pleaded, or given in evidence, or be available, in law or equity." It was contended by counsel for the prisoner that "the writing was not a bill of exchange, but a piece of waste paper, incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or he must have been grossly negligent,—the

defect being visible upon the face of it." But Buller, J., overruled the objection on the ground that the stamp acts were merely revenue laws, and did not purport in any way to alter the crime of forgery, and that the effect of the stamp act, saying a bill without a stamp shall not be pleaded, or given in evidence, or be available, in law or equity, signified only that it should not be made use of to recover the debt. This and other cases which might be cited indicate that it is not absolutely essential the writing or instrument must be enforceable at law, to predicate forgery upon it. While it is true that a writing alleged to have been forged must, if genuine, have some legal efficacy, or be the foundation of some legal liability, yet it is not always necessary that it should be enforceable, to be the subject of forgery. It is sufficient if it may be the basis of an action, or is of such a character that it may defraud, or injuriously affect the rights of another. It is laid down as a fundamental principle that statutes of limitation affect the remedy, but not the merits; in other words, that they bar the remedy, merely, but do not extinguish or destroy the obligation. Hence the defense of the statute is a personal privilege, and no one can compel any one to take advantage of it, if he chooses not to. 18 Amer. & Eng. Enc. Law, 703-707. Mr. Wood says that "a rule of great importance is that the bar of the statute must be interposed by the diligence of the debtor, and as early as possible, and usually, unless otherwise provided by statute, on the pleadings previously to the hearing, and that it will not be raised by the court, unsolicited, and also that the protection afforded by the statute may be waived by the debtor." "The law allows a man to be honest, and to pay an honest debt, however stale and ancient it may be. He may interpose the statute of limitations, but he may waive it, also. The law does not compel him to resort to this defense, nor can others insist upon it for him." Bank v. Kimble, 76 Ind. 203. A note may be barred by the statute of limitations, and still support a judgment, if no defense be interposed. In this state, on contracts of this character, the statute only affects the remedy, and, in order to avail a party, must be pleaded, if it does not appear on the face of a complaint, or demurred to, if it does. This being so, if an action should be begun on a note subject to the bar of the statute, the makers would be compelled to come into court, and defend against it, in order to avoid the recovery of a judgment upon it. This shows that such a note has some efficacy or validity, and is not wholly void, even though its collection might be defeated by such appearance in court, and it is, therefore, within the principle announced, the subject of forgery. In People v. Fadner, 10 Abb. N. C. 462, it was objected that the indictment was void for the reason that the note alleged to be forged was usurious, and void on its face. The court says: "The answer to this question would seem to be found in the answer to another, viz.: Would the maker of this note, if genuine, be compelled to defend, in order to

protect himself from judgment, in an action founded upon it? If the note, in the form set forth in the indictment, be the subject of legal proceedings in which a judgment may be lawfully recovered against the maker on default, then he may be injured, within the meaning of the statute. It is an injury to be compelled either to defend a suit or suffer judgment." So, here, if the makers of the note set out in the indictment, if genuine, would be compelled to come into court, and defend, in order to protect themselves against a judgment in an action founded upon it, then such a note may be the subject of legal proceedings, in which a judgment may be lawfully recovered against the makers on default, and they be injured, within the meaning of the statute. Such a note has sufficient efficacy or validity to sustain a judgment, and create a lien upon the property of the makers, unless they come into court, and defend against the action, as provided by the Code. It is a writing, according to Mr. Bishop's definition, which, if genuine, might be of legal efficacy, or the foundation of a legal liability. It is not wholly void, or absolutely worthless, but, as we have seen, might become the foundation of a valid judgment, and thus establish a legal liability. Such being the case, the makers might be injured or prejudiced by it; "and that," said the judges in King v. Ward, 2 Ld. Raym. 1461, "makes the forgery an offense for which an indictment would lie at common law," and, as we think, under our statute. The judgment is affirmed.

(23 Or. 568)

## STATE v. BYAM.

(Supreme Court of Oregon. March 20, 1893.)

## SELLING LAND WITHOUT TITLE—CRIMINAL PROSECUTION—EVIDENCE.

1. On a prosecution under Hill's Ann. Laws, § 1783, for selling and conveying land without having title thereto, the fact that the land is situated in another state does not render competent the testimony of a witness as to the result of his examination of the records of title in that state, where it does not appear that he is skilled in such matters, or that the records he examined are the official records.

2. Neither can such witness testify to a declaration of ownership made to him by the person in possession of the land, since such testimony is hearsay.

3. On such a prosecution, the state must prove by competent evidence every material ingredient of the crime, including the want of title in defendant to the property conveyed.

Appeal from circuit court, Multnomah county; M. D. Clifford, Judge.

C. P. Byam was convicted of the crime of selling land without having title thereto, and he appeals. Reversed.

The other facts fully appear in the following statement by BEAN, J.:

The defendant was convicted and sentenced to imprisonment in the penitentiary for the crime of selling and conveying real estate without having title thereto, under section 1783 of Hill's Annotated Laws of Oregon. The real estate which defendant is charged to have fraudulently so conveyed is situated in the town of Wheaton Heights, Du Page county, Ill. The state,

in order to maintain the issues on its part, and show that defendant had no title to the property conveyed, called as a witness one George S. Lewis, who testified on direct examination that he was the constable of Albina district, Multnomah county, Or., and was in Wheaton Heights in December, 1892, and while there, in company with one Ira Brown, a real-estate dealer, examined the records of Du Page county, and found that defendant did not own any property appearing of record in that county; that Ira Brown was, or claimed to be, in possession of the property defendant is charged with having sold, and told witness he was the owner. On cross-examination the witness testified that he did not have a description of the property, and could not tell who was the owner, and all he knew about the ownership was what Brown told him; that he did not know whether the records he examined were the records of deeds for the county, or that the place where he made the examination was the county seat. All he knew about the matter was that Brown told him they were the records of Wheaton Heights, and he found them in a building at that place, in charge of some person he supposed to be a clerk in the office; and that these books were shown him in response to his request for permission to examine the records affecting the title to the land in question. This evidence, which was admitted under the objection and exception of the defendant on the ground that it was incompetent and hearsay, is all the evidence given or offered on the trial showing or tending to show that defendant did not own the property conveyed by him. At the close of the testimony the defendant, by his counsel, moved the court to direct the jury to return a verdict of acquittal on account of a total failure of proof, which being overruled, defendant was convicted, sentenced to imprisonment, and now brings this appeal, assigning as error the admission of Lewis' testimony and the refusal of the court to direct the jury to return a verdict of acquittal.

McGinn, Sears & Simon, for appellant.  
Geo. E. Chamberlain, Atty. Gen., and W. T. Hume, Dist. Atty., for the State.

BEAN, J., (after stating the facts.) The mere statement of Lewis' testimony is sufficient to show its manifest incompetency. He does not know or pretend to know anything about the title to the land, except what Brown told him and what information he received from looking at the supposed records. That the contents of a public record cannot be proven by parol is so elementary that it would be useless to cite any authorities in support of the principle; and if it be conceded that in cases of this character, where the records are not within the jurisdiction of the court, the evidence of a witness skilled in the examination of records and in searching titles is competent to prove that the name of a certain person does not appear upon the record of titles as the owner of property, (*Burton v. Driggs*, 20 Wall. 125; 1 Greenl. Ev. 93,) the testimony of Lewis does not come within the rule, because it

does not appear that he is skilled in such matters, or that the record he claims to have examined was in fact the record of titles for Du Page county or the official record of the titles to property in Wheaton Heights. It seems to us, therefore, that there is a total failure of evidence tending to prove one of the material allegations of the indictment.

We are unable to agree with counsel for the state that this is a case in which the burden of proof rests upon the defendant to show that he did actually have title to the property conveyed by him. In all criminal cases the law requires the prosecution to prove every material allegation of the indictment by competent evidence. 1 Bish. Crim. Proc. § 1058. It has been held, it is true, in prosecutions for selling liquor without a license, that the defendant must show that he was authorized to make the sale; but this is an apparent, rather than an actual, exception to the rule, founded on necessity and grounds of public policy. It proceeds upon the theory that, all sales of liquor being prohibited, except licensed sales, when a sale is shown, the presumption *prima facie* is that it is unlawful, and this presumption makes out a case for the state unless it is overcome by proof of license. Bish. Crim. St. § 1051; *State v. Schmail*, 25 Minn. 370. But, conceding that this rule applies in prosecutions for selling liquor without a license, no such presumption can attach in the case of an execution of a conveyance of real property. It is not prohibited by law, nor *prima facie* unlawful, but the presumption is that every conveyance of real estate is lawful; and before a conviction can be had in such case the prosecution must prove, by competent evidence, every material ingredient of the statutory crime, among which is the want of title in the defendant to the property conveyed. There being no such proof in this case, the court should have directed a verdict of acquittal; and, for a failure to do so, the judgment must be reversed, and the cause remanded.

(51 Kan. 39)

#### HASKELL COUNTY BANK et al. v. BANK OF SANTA FE.

(Supreme Court of Kansas. March 11, 1893.)

#### JOINDER OF ACTIONS—DEMURRER—CONSPIRACY—DAMAGES.

1. An action to recover damages against a number of defendants for a fraudulent conspiracy cannot be joined with an action to obtain a cancellation of a certificate of deposit owned and held by one of said defendants alone, even though such certificate was obtained as one of the fruits of the conspiracy.

2. Where facts sufficient to constitute both of such causes of action are blended in the same petition, without any separation, and the plaintiff prays judgment both for the damages and for a cancellation of such instrument, and a demurrer is filed by the defendant, alleging an improper joinder of several causes of action, such demurrer should be sustained.

3. Only such damages as accrue from acts done prior to the commencement of the suit can be included in the recovery in this case; and it is error for the court to instruct the jury that they may include attorneys' fees,



expenses, and damages incurred in an action brought subsequent to the commencement of this case, in their verdict herein.

(Syllabus by the Court.)

Error to district court, Haskell county; Theodore Botkin, Judge.

Action by the Bank of Santa Fe against the Haskell County Bank, Charles B. Ream, F. B. Price, L. T. Armstrong, C. L. Clayton, Joseph Rosenthal, J. F. Kern, and C. W. Wadsworth to cancel a certificate of deposit held by defendant bank and for damages for a conspiracy against all defendants. There was judgment against defendant bank, and against defendants Rosenthal, Kern, and Wadsworth, and all the defendants joined in a petition of error. A motion to dismiss the petition in error was sustained, and defendants bring error. Reversed.

Hopkins & Hoskinson, for plaintiffs in error. Milton Brown and Waters & Waters, for defendant in error.

ALLEN, J. The petition in error in this case is entitled, "The Haskell County Bank, a corporation, Charles B. Ream, F. B. Price, L. T. Armstrong, C. L. Clayton, Joseph Rosenthal, J. F. Kern, and C. W. Wadsworth, versus The Bank of Santa Fe, a corporation," and alleges that the defendant in error recovered a judgment in a certain action wherein the defendant in error was the plaintiff, and the plaintiffs in error, Z. T. Wright, and A. J. Holsington were defendants. The record shows that judgment was rendered against Joseph Rosenthal, J. F. Kern, C. W. Wadsworth, and the Haskell County Bank, and that no judgment was rendered against the other plaintiffs in error.

A motion is made to dismiss because the petition in error recites a judgment appealed from and no such judgment is evidenced by the pretended case made, and on other grounds, which we do not deem worthy of especial notice. On the other hand the plaintiffs in error ask leave, not to amend the case made, but to amend the petition in error by striking out the names of Ream, Price, Armstrong, and Clayton. We think it in the furtherance of justice that this amendment should be permitted, and the motion to dismiss the action will be overruled.

The original petition in this action was filed on September 12, 1888. An amended petition was filed on the 13th of December, 1888. The petition alleges, in substance, that the defendant the Haskell County Bank was a corporation. That defendant Holsington was president; Wright, vice-president; Kerns, cashier; and Rosenthal, secretary thereof. That both the plaintiff and defendant banks were carrying on a banking business in the town of Santa Fe. That the defendants entered into a conspiracy for the purpose of injuring the plaintiff. That the Haskell County Bank was the holder of a mortgage for \$5,000, executed by one S. P. Axtell on certain property known as "The Highland Addition to the Town of Santa Fe." That the other defendants procured the defendant Charles B. Ream to come to Santa Fe, and hold himself out as a person represent-

ing a syndicate of persons desiring to purchase property, and that the defendants caused it to be noised about that Ream was a man of means, desiring to purchase property. That the defendant Rosenthal made a sham sale of a lot to said Ream for the pretended price of \$1,000, and pretended to accept in payment therefor a certified draft on the Deposit Bank of Georgetown, Ky., drawn by said Ream. That said defendants prepared a letter of credit purporting to be written by one Sinclair, as cashier of said Deposit Bank of Georgetown, Ky., representing said Ream to be a man of means, and able to fill his contracts. That the defendant Wadsworth went to plaintiff's officers, and represented said Sinclair to be an old schoolmate, and introduced said Ream to be a man responsible, financially and morally. That, through the scheme of the defendants, they procured said Ream to enter into negotiations with C. D. Benton, who was secretary of plaintiff's bank, for the purchase of said Highland addition; that in pursuance of their plans the defendants caused Ream to make a pretended purchase of 100 lots in said Highland addition for the price of \$3,500. That, after said Ream had agreed to take said addition, he made inquiry as to the title thereto, and pretended to have learned of the existence of said mortgage, and then, for the sole purpose of inducing plaintiff to step into the trap laid for it, declined to purchase said addition unless said mortgage was released, all of which had been agreed between defendants should be his line of conduct in said matter. That thereafter Ream tendered in payment for said addition three certain sight drafts for \$1,000 each, and one for \$500, drawn on said Deposit Bank of Georgetown, Ky., signed by himself, and offered to leave them with plaintiff, and let Axtell and wife execute a deed to said lots, conveying them to Ream, and leave the same with said bank in escrow until said drafts were paid, on condition that said mortgage should first be released. That plaintiff, through its officers, went to said defendant bank, and inquired if it would accept said sight drafts, and satisfy said mortgage to the extent thereof, but said bank refused for the pretended reason that it was not their trade, and informed plaintiff's officers that they would accept Ream's sight draft for any property he would buy of them; that they had sold him \$900 worth of property, and taken his sight draft therefor on said Deposit Bank; and that the same had been promptly met and paid. That all of said line of conduct had been previously agreed upon between the defendants. That solely because of the representations of the defendant, and relying upon them, the plaintiff agreed to, and did, accept said drafts, and took a deed from said Axtell and wife to Ream, to hold it in escrow, and thereupon paid to said Haskell County Bank the sum of \$1,500 in cash, and issued its certificate of deposit for \$2,000, and the remainder of said mortgage was raised by the investment company, for which Axtell held the legal title as trustee. The drafts were drawn by Ream, and were payable at said Georgetown Bank. The drafts

were not paid, and the Georgetown Bank promptly informed plaintiff that it had no funds belonging to Ream, nor to Price, Armstrong, or Clayton, whose names were associated with said Ream; and the plaintiff charges that each of said defendants well knew that Ream was an impostor, and had no money at said Georgetown Bank, and had no credit thereat, and that he was not acting in good faith, and was engaged in a scheme concocted by said defendants to procure said money out of plaintiff's bank, hoping thereby to cripple and bankrupt it, and drive it out of competition with the defendant's bank. Copies of these drafts, and of the certificate of deposit, are attached to the plaintiff's petition, and bear date September 5, 1898. The petition then goes on to further state, and plaintiff charges, "that, since the filing of her original petition herein, defendants, pursuing their original design to destroy plaintiff's business in said town of Santa Fe, did, after plaintiff refused to pay said certificate of deposit, cause an attachment to issue from this court, attaching all the property of said plaintiff, and after finding that all this could not close plaintiff's business, and for the purpose of further annoying and damaging the same, they served notice upon plaintiff that defendants would apply before Hon. A. J. Abbott, judge of this judicial district, at chambers, in Garden City, Kan., for a receiver to take charge of the assets of plaintiff, thereby causing plaintiff to be at great expense in attending at said time, and rendering her liable for counsel fees thereby, of the fair value of \$100. And the defendants, well knowing that they had no cause to justify the appointment of a receiver, failed to appear at said time, but instead, and for the sole purpose of further injuring plaintiff's business and destroying her reputation, caused an additional notice to be served on plaintiff, that they would apply for a receiver before said judge, at chambers, at Lakin, Kearney county, Kan., distant from Santa Fe about 50 miles, and caused plaintiff to pay counsel to attend thereat, and where they again failed to appear, and for like reasons last above given; and the fair value of plaintiff's attorney's fees were \$100 therefor. And that each of said notices and said attachments were served and issued by defendants for the sole purpose of bankrupting plaintiff, and driving her out of business. And plaintiff charges that, by reason of defendant's malicious and unlawful conduct, they have destroyed plaintiff's business, have caused her customers to withdraw their deposits, and their correspondents to withdraw their business, and they have robbed plaintiff of her surplus cash, and damaged the business reputation of said plaintiff until her profits have fallen off from \$1,000 a month until at this time they are practically nothing." The petition closes with a prayer (1) for the cancellation of said \$2,000 certificate of deposit; (2) for \$500 for attorneys' fees and expenses; (3) for the \$1,500 paid; (4) for \$10,000 damages. To this petition there was a demurrer alleging (1) the improper joinder of causes of action; (2) that the petition

fails to state a cause of action. This demurrer was overruled by the court, and afterwards an answer containing a general denial was filed by the defendants. A trial was had before a jury, and a verdict rendered in favor of plaintiff for \$2,549.55. Motion for a new trial was overruled, and judgment entered for the amount of said verdict, and cancelling said \$2,000 certificate of deposit.

An elaborate brief is filed by counsel for plaintiffs in error, and the assignments of error are so numerous, and many of them are so unimportant, that under some circumstances we should feel constrained to refuse to proceed with the investigation. It is the duty of counsel to aid the court in its investigations, and not to impose upon it useless labor. Exceptions were preserved to the ruling of the court on the demurrer, to innumerable rulings on the admission of testimony, and to each of the instructions asked and refused, as well as to each of the instructions given by the court; and our attention is directed to each and all of these various alleged errors, most of which are absolutely trivial. Two important questions are, however, presented in the record, which we do not feel at liberty to overlook.

The first question to be considered arises on the pleadings. The defendants demurred to the petition on the ground that several causes of action were improperly joined. There is no separate statement in the petition of various causes of action, but the prayer asks judgment (1) for the cancellation of the certificate of deposit; (2) for \$500 expenses in the attachment suit; (3) for the \$1,500 paid to the bank; and (4) for \$10,000 damages. The jury were instructed, in effect, that all these matters were properly before the court for its determination. While the question as to the right of the plaintiff to obtain a cancellation of the certificate was not submitted to the jury, the instructions authorized them, in making up their verdict, if they found for the plaintiff, to include attorneys' fees, expenses in the attachment case, the \$1,500 cash paid, and any other damages which the plaintiff was shown to have sustained by reason of the acts of the defendants. We think the averments of the petition sufficient to show a cause of action in favor of the plaintiff against the Haskell County Bank for a cancellation of the \$2,000 certificate, but there is no averment in the petition showing that the defendants other than the Haskell County Bank had or claimed any interest in said certificate. We think the petition also stated a good cause of action for the recovery of damages from all of the defendants who were served. It also states most of the facts necessary to constitute a good cause of action for the malicious prosecution of civil actions against the plaintiff. These various causes of action were pleaded by the pleader throughout the petition, without any attempt at separation, and the case was tried to a finish as though such blending were proper, and the verdict and judgment include relief under all of these different causes of action. Section 83 of the Code provides: "The plaintiff may unite several causes of action in the same

petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of either one of the following classes: First, the same transaction, or transactions, connected with the same subject of action; second, contracts, express or implied; third, injuries, with or without force, to person and property, or either; fourth, injuries to character; fifth, claims to recover the possession of personal property, with or without damages for the withholding thereof; sixth, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; seventh, claims against a trustee by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens." So far as this was an action for the cancellation of the certificate, the only necessary or proper defendant was the Haskell County Bank, but all of the defendants seem to have been properly joined, so far as it was an action for the recovery of damages. We think these causes of action were improperly joined. In *Hoye v. Raymond*, 25 Kan. 665, Mr. Justice Valentine, speaking for the court, said: "Causes of action in tort can only be united with causes of action on contract where they all arise out of the same transaction, or transactions connected with the same subject of action; but even then they cannot be united unless they all affect all the parties to the action, except in actions to enforce mortgages or other liens." This was, in substance, but a reiteration of the language of the section quoted. We are of the opinion that these two causes of action could not be properly united in this case. It is not necessary, however, for us to decide, nor do we decide, that if an action for damages were solely against the Haskell County Bank the court could not also have granted relief by cancellation of the certificate, where the right to obtain such cancellation accrued out of precisely the same state of facts as the right to recover damages.

It appears from the petition and the evidence that the suit brought by the Haskell County Bank on the certificate of deposit, and in which the attachment was issued, and applications for a receiver were made, was brought after this suit was commenced. The court instructed the jury that they might include in their verdict the attorneys' fees and expenses incurred in those proceedings, and other inconveniences and injuries occasioned by the acts complained of, and that those damages which were occasioned by the acts of defendants, done after this suit was brought, should be included in the damages awarded in this case. Counsel for defendant in error contends that these are but items of damage flowing out of the original conspiracy, and that the plaintiff is entitled to recover all the damage it has sustained because of the conspiracy. This position is not sound. The plaintiff's recovery must be, not for the formation of the conspiracy, but for the execution of it. It is

not the planning and contriving to injure that furnishes ground for recovery, but it is the carrying into execution of the design to injure which constitutes the basis of the action. It is the execution of the conspiracy which causes the injury. If we were to hold that all of these various acts, including the suing out of the attachment and the giving of notices of applications for the appointment of a receiver, were necessary parts of one complete cause of action, we should be forced to also hold that this action was prematurely brought. We think the court erred in instructing the jury that it might include these elements of damage. Perhaps, where no motion was made to strike out these averments, evidence tending to prove them might be admissible solely for the purpose of proving the defendants' motives in their actions prior to the time of the commencement of this suit, but clearly not for the purpose of awarding damages for these subsequent acts. The court having erred in its rulings on the demurrer, the whole trial was tainted with the same errors.

While the evidence in this case abundantly sustains most, if not all, the material averments of the petition, and shows most reprehensible conduct on the part of the defendants, and while we should be inclined to overlook trivial errors in a case of this kind, the errors in this record are so numerous, and so important, that we are forced to reverse the judgment, and remand the case for further proceedings in accordance with the views herein expressed. All the justices concurring.

(51 Kan. 50)

# BANK OF SANTA FE v. HASKELL COUNTY BANK.

(Supreme Court of Kansas. March 11, 1893.)

ERRONEOUS JUDGMENT—VALIDITY—REMEDY BY APPEAL.

An erroneous judgment rendered by a court having jurisdiction of the subject-matter of the action, and the persons of the parties, is valid and binding until set aside or reversed. (Syllabus by the Court.)

Error to district court, Haskell county; Theo. Botkin, Judge.

Action by the Haskell County Bank against the Bank of Santa Fe to recover the amount of a certificate of deposit. There was judgment for plaintiff, and defendant brings error. Reversed.

Milton Brown and H. F. Mason, for plaintiff in error. A. J. Hoskinson and J. Rosenthal, for defendant in error.

ALLEN, J. This action grows out of the same state of facts as the case of *Haskell County Bank v. Bank of Santa Fe*, 32 Pac. Rep. 624, (just decided,) and a reference to that case will give a more perfect understanding of the decision in this. This was a suit brought by the Haskell County Bank against the defendant to recover the sum of \$2,000 and interest on a certificate of deposit alleged to have been executed by the defendant bank in favor of plaintiff. An answer was filed, alleging, in substance, the same matters as are

set up in the petition in the other case referred to. Afterwards a supplemental answer was filed, alleging that on the — day of —, 1888, the matters and things involved in said action were fully tried in this court upon issues pending between the same parties, wherein the things involved were identical with the matters involved in this action, and the parties to this action were parties to the action wherein the said adjudication was held, in the same quality, and that in said action, tried and determined as aforesaid, judgment was rendered in favor of this defendant, and this defendant, now and here, as a part of this supplemental answer, files herewith, attached hereto, as part hereof, a certified copy of the journal entry of the judgment in said former adjudication. In the judgment attached to the answer we find the following, after formal judgment for the damages: "And that the certificate of deposit for \$2,000.00 issued by plaintiff to the Haskell County Bank on September 5, 1888, as mentioned and described in the pleadings, be, and the same is hereby, annulled and canceled, and held for naught, and plaintiff is forever released from any liability thereunder; and it is further ordered that said defendants, that each of them be, and they are each of them hereby, forever enjoined from, in any manner or form, setting up, prosecuting, or attempting to set up or prosecute, any claim upon plaintiff, its stockholders, or assigns, by virtue or reason of said void certificate of deposit, or from in any manner or at any time, by reason of said certificate of deposit, doing, or attempting to do, anything to the injury of plaintiff's business, credit, or financial standing." To this answer the plaintiff replied, (1) generally denying the allegations of the answer. Then follows the averment: "Plaintiff, for further reply to said answer and supplemental answer, says that the defendant, prior to the filing of its answer in this case, commenced suit in this court against the defendant and others for damage, for procuring the certificates of deposit sued on in this action by fraudulent representations, and thereby, with a full knowledge of all the facts, elected to affirm the contract upon which said certificates of deposit were executed, and is estopped from pleading the same as a defense in this action." On the trial the defendant introduced the record in the case of the bank of Santa Fe against C. B. Ream and others, showing the final judgment entered in that case, canceling the certificate of deposit sued on herein, and also offered evidence showing the identity of the certificate mentioned in that action with the one sued on in this. The plaintiff demurred to this evidence, and the court sustained the demurrer, and rendered judgment in favor of the plaintiff for the amount of the certificate.

It is hardly worth while to spend time in any discussion of this case. The judgment offered in evidence was conclusive between the parties until reversed. The fact that various causes of action were improperly joined, and an improper judgment rendered by the court, did not ren-

der such judgment void. We see no stronger ground for holding the judgment canceling the certificate void, than for holding the judgment for damages void. Though erroneous, the whole judgment was valid and binding until set aside or reversed. It is impossible to conceive how the same court which rendered the first judgment could have held its own judgment absolutely void, as it must have done in this case. The judgment will be reversed, and a new trial ordered. All the justices concurring.

(51 Kan. 23)

# INTERSTATE GALLOWAY CATTLE CO. v. KLINE.

(Supreme Court of Kansas. March 11, 1893.)

FIRE SET ON DEFENDANT'S LAND—NEGLIGENCE—PRAIRIE LANDS.

1. Plaintiff sued defendant to recover damages for property alleged to have been destroyed by a fire set out by defendant, on its own lands, for the purpose of burning off prairie grass thereon. The evidence shows that the land was inclosed with a wire fence, surrounded by a fire guard 6 furrows wide, plowed with a 16-inch plow, and was used by defendant as a pasture. The court instructed the jury, in substance, that, if the plaintiff's property was burned by the fire set out by the defendant, they should find in favor of the plaintiff for the value of the property destroyed. *Held*, error.

2. Where prairie lands are inclosed, and in the actual use of the owner, it becomes a question of fact, to be determined by the jury, whether they still retain the character of prairies, within the meaning of section 7277 of the General Statutes.

(Syllabus by the Court.)

Error from district court, Edwards county; J. C. Strang, Judge.

Action by Joseph Kline against the Interstate Galloway Cattle Company to recover damages for property destroyed by a fire negligently started by defendant. Verdict and judgment for plaintiff. New trial denied. Defendant brings error. Reversed.

Charles W. Clarke, for plaintiff in error.  
C. N. Sterry, for defendant in error.

ALLEN, J. This action was brought by Joseph Kline, plaintiff below, to recover of the cattle company damages which he sustained by reason of a fire which he alleges the defendant, through its employes, willfully and intentionally set to prairie grass on the lands of the defendant near the premises on which plaintiff's property was situated. The petition alleges negligence on the part of the defendant in permitting the fire to escape from its lands. The case was tried with a jury, and a verdict rendered in favor of the plaintiff for \$437.77. Motion was made for a new trial, and overruled by the court, and judgment rendered on the verdict. The cattle company brings the case here for review, and alleges numerous errors.

The rulings of the court on the admissions of testimony are assigned as errors. While some of the rulings of the court with reference to the admission of testimony to prove the plaintiff's damages ap-

pear to be erroneous, inasmuch as the defendant, on cross-examination, called out all the facts, and all of the preliminary facts which the plaintiff should properly have shown before having the witness state with reference to the amount of his damages, we think the errors were not such as would warrant a reversal of the judgment; and we do not deem the questions presented with reference to these matters of sufficient importance to be discussed at length.

The principal question arises on the instructions given by the court, and, as they are brief, we give them in full, as follows: "In this case the defendant alleges that the defendant corporation, by its agents and employees, set out a fire on the 12th day of March, 1887, on their premises, in Edwards county, Kan., and in the neighborhood of the premises of plaintiff, to burn off the grass from their land; that said fire escaped from the premises of defendant, spread to and run over the plaintiff's premises, and thereon burned up and destroyed the property of plaintiff, described in his petition in this case, including grass growing upon said premises. The defendant corporation, answering, admits that on the 12th day of March, 1887, in the neighborhood of plaintiff's premises, it put out a fire on its own land to burn off the grass, but denies that said fire escaped from the land of the defendant, and spread to and run over upon the plaintiff's premises, and thereby destroyed plaintiff's property. The questions for you to decide are: (1) Did the fire defendant admits it set out on its premises escape from the premises of the defendant, spread and run upon the premises of plaintiff, and there destroy the property described in plaintiff's petition, or any part of it? If, from all the evidence in the case, you find that the fire set out by the defendant did not escape from its premises, and run to and upon the premises of the plaintiff, and there destroy his property, then this case is at an end, and your verdict should be for the defendant. (2) If you find, from a preponderance of all the evidence in the case, that the fire set out by the defendant did escape from its premises, and spread to and run upon the premises of the plaintiff, and there destroy the property of the plaintiff, you will ascertain what was the nature of the property of plaintiff so destroyed at the time, and at the time and place where it was destroyed, and give the plaintiff a verdict for the value of the property of the plaintiff so destroyed, with seven per cent. interest on such value from date of said fire until now. In considering the value of grass destroyed on the premises of plaintiff, you will not consider any damages done to the land thereby,—to the fee simple. You will confine your inquiry to the injury to the use of the property by the plaintiff, and thus estimate your damages. You will also take into consideration, in connection with claim for damages, the lease of plaintiff from Mr. Geise for premises occupied by plaintiff, to ascertain the interest plaintiff had in the grass growing upon the premises, and give him, if any damage to the grass, what the evidence shows him to have been damaged

in his own right, as distinguished from the interest Mr. Geise had in it. He who affirms a proposition, to support it, must furnish a preponderance of evidence upon the proposition; that is, a preponderance in weight of evidence. You are the exclusive judges of the weight to be given to the evidence in the case."

It is apparent that these instructions were given under the view that the act of the defendant in setting fire to the prairie came within the provisions of section 7277 of the General Statutes, which reads, "If any person shall set on fire any woods, marshes, or prairie, so as thereby to occasion damage to any other person, he shall be liable to the party injured for the full amount of such damage, to be recovered by a civil action."

It appears that the defendant company was the owner of a section and a half of land, used as a pasture; that this tract was inclosed by a wire fence; that inside of the fence a fire guard, 6 furrows wide, had been plowed with a 16-inch plow; that a number of men in the employment of the defendant, on the 12th day of March, 1887, went to the pasture for the purpose of burning off the old grass; that they commenced firing near the northeast corner, and divided into two gangs,—one going west, and the other east, down the east side; that, at the time they commenced firing, there was but little wind, and what little there was was blowing from a southerly direction; that soon after the wind changed to the north or northeast, and increased until it blew hard. The men drove across to the south side, and commenced firing from along that side. The fire escaped on the east side, and there is also testimony tending to show that it escaped from the south side, though on this question there is some conflict. We need not discuss the evidence with reference to the question of negligence, for the court, in its instructions, wholly ignored the matter of negligence, and charged, in effect, that if the fire set out by the defendant did escape, and destroy the property of the plaintiff, the defendant was liable for all damage sustained by the plaintiff thereby. This could only be the correct rule in a case where the defendant had set fire to a prairie, within the meaning of the section of the statute above quoted. We shall assume that the allegation in the petition that the defendant set fire to the prairie grass is a sufficient allegation that it set fire to the prairie, though the language of the petition is certainly open to some criticism; and we shall consider only the question whether, under the facts, as disclosed in this case, the court was warranted in charging, as a matter of law, that the defendant, in attempting to burn off its pasture, set fire to a prairie, within the meaning of the statute. The word "prairie," as defined by Webster, means (1) "An extensive tract of land destitute of trees, covered with coarse grass, and usually characterized by a deep, fertile soil; (2) a meadow or tract of grass land, especially a so-called natural meadow." In the case of *Sweeney v. Merrill*, 38 Kan. 216, 16 Pac. Rep. 454, this court held: "Where the defendant set out a fire within

its inclosed field, and it escaped from him, and destroyed the property of the plaintiff, he will not be liable, unless he is guilty of negligence, either in setting out the fire, or attempting to control it." That case was one in which the defendant had set fire to some cornstalks, and the fire had escaped, and swept over the plaintiff's meadow, and burned up his property. In the case of *Railroad Co. v. Dennis*, 38 Kan. 422, 17 Pac. Rep. 153, this court decided that "section 2, c. 118, of the Compiled Laws of 1885, does not authorize a recovery against a railroad company for a fire caused by burning dry grass and weeds on its right of way, in the performance of its duty to prevent an accumulation thereof, when there is no negligence or carelessness on the part of the company, or when the damages claimed are the result of unavoidable accident, only." We think the object of the statute under consideration, to quote the language of Chief Justice Horton in the case last cited, "was to prevent these prairie fires, so disastrous in this state, and make those who set the prairies on fire responsible for all damages done thereby." See, also, *Railroad Co. v. Davidson*, 14 Kan. 349; *Emerson v. Gardiner*, 8 Kan. 452. It appears, however, in this case, that the tract of land which the defendant sought to burn over was large; that it was not in cultivation, but used for pasturage. We do not think that the fact of its having been inclosed with a fence would, of itself, necessarily deprive it of the character of a prairie, nor do we think that the mere plowing of a few furrows around a great tract of prairie land can be said, as a matter of law, to deprive it of its prairie character. On the other hand, where the owner of a tract of land has inclosed it, and is making a beneficial use of it, we do not think that the court is warranted in charging, as a matter of law, that it is prairie, within the meaning of the statute. In a certain sense, any small portion of the original prairie which has not been reduced to actual cultivation may be said still to be prairie, yet we know that as cultivation is extended, and more and more use is made of our prairie land, by the farmers, it frequently becomes necessary, in order that the owner may fully enjoy the use of his property,—in order that he may obtain the best results from its use,—to burn off the dry grasses, weeds, etc.; and the object of the statute could not be to prevent him from doing so, or to impose any extreme penalty, where all reasonable care was used to prevent the spread of the fire. We are unable to see how a rigid rule of law can be laid down, which will determine in every case whether the particular place where the fire is set out is or is not prairie, within the meaning of the statute. We think, where use is actually made of the land, it becomes a question for the jury to determine, under proper instructions from the court, whether or not it is still prairie, within the meaning of the statute; and this will be determined largely by the character of the use made of the land, and the extent to which it has been brought under the actual dominion and control of the owner. We are not pre-

pared to say, as a matter of law, that a wire fence and six furrows plowed around a section and a half of land transforms it from a prairie to a cultivated farm, nor that the pasturing of cattle, added to such fencing and plowing, will deprive it of its character as prairie, but that it is a question to be determined by the jury, from all of the facts and circumstances connected with its use. If the jury shall determine that it was at the time of the fire still prairie, then the defendant would be liable for setting out the fire, whether guilty of negligence or not; but if the jury are of the opinion that it has ceased to be prairie, and become a farm, then the defendant would only be liable in case of negligence in permitting the escape of the fire, and in determining the question of negligence the jury should take into consideration all the facts and circumstances of the case, and the size of the pasture, the time necessarily consumed in burning over it; and the probabilities of changed atmospheric conditions while the fire would ordinarily still be burning, are all circumstances to be taken into consideration by the jury in determining whether or not the defendant was in fact negligent.

Complaint is also made of the refusal of the trial court to charge with reference to contributory negligence on the part of the plaintiff. While we do not think, under the testimony in this case, the failure of the court to give proper instructions upon that proposition is error for which the case would be reversed, we think it proper that the court should give suitable instructions on that point, if the testimony on another trial should be substantially the same as shown in the record, and leave the whole subject to the jury to decide. For the errors of the court in instructing the jury, the judgment must be reversed, and a new trial ordered.

All the justices concurring.

(51 Kan. 6)

ATCHISON, T. & S. F. R. CO. et al. v. BROWN.

(Supreme Court of Kansas. March 11, 1893.)

ORDER GRANTING NEW TRIAL—REVIEW.

Where a jury returns a verdict in a civil action in favor of the plaintiff, and also returns certain findings of fact, and the plaintiff files no motion for a new trial, but the defendant makes a motion for judgment upon the special findings, which is overruled by the trial court, and also files a motion for a new trial, which, before action is taken thereon, he asks to withdraw, and, when this is refused, in open court waives all errors committed upon the trial against him as alleged in the motion for a new trial, and thereafter the plaintiff confesses the grounds of the motion which have been waived by the defendant, and the court grants a new trial, *held* that, as it does not appear from the record that there was any sufficient reason for granting the new trial, the order of the trial court must be reversed.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by Joseph Brown against the Atchison, Topeka & Santa Fe Railroad Company and another to recover dam-

ages for malicious prosecution. There was a verdict for plaintiff. Defendant's motion to withdraw its motion for a new trial was denied, and defendants bring error. Reversed.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiffs in error. E. N. Smith and McGinnis & McGinnis, for defendant in error.

**HORTON, C. J.** This was an action in the court below by Joseph L. Brown against the Atchison, Topeka & Santa Fe Railroad Company and H. T. Dobson to recover damages for malicious prosecution. At the January, 1890, term of the court the case was tried before the court with a jury, and the jury returned a verdict for \$2,030 in favor of Brown, and also returned certain findings of fact. A motion for judgment on the findings was filed by the railroad company; also a motion for a new trial. Afterwards, and before any action was taken by the court upon either of these motions, the railroad company filed a motion for leave to withdraw the motion for a new trial. Afterwards, in open court, the railroad company waived all errors committed upon the trial against it, except the overruling the motion for judgment on the findings, but the court overruled the motion for judgment, and at the same time, upon Brown confessing the motion for a new trial to have been well taken, (but after the railroad company had waived all errors, and asked to withdraw its motion,) the court granted a new trial. No motion for a new trial was filed by Brown. Any alleged error concerning the overruling of the motion for judgment upon the special findings is, upon the application of the railroad company, waived.

The only question presented for our determination is whether the court erred in granting a new trial in the cause. If the company had not asked leave to withdraw its motion for a new trial, and had not, when this was refused, waived all errors committed upon the trial against it, we would not interfere. The granting of a motion for a new trial is largely in the discretion of the trial court, and, where such a motion is granted, the order will not be reversed, unless it clearly appears that there is no error in the record upon which the motion ought to have been granted. *City of Sedan v. Church*, 29 Kan. 190; *Barney v. Dudley*, 40 Kan. 247, 19 Pac. Rep. 550; *Insurance Co. v. Thorpe*, 40 Kan. 255, 19 Pac. Rep. 631. The trial court overruled the motion for judgment for the railroad company upon the special findings of fact returned by the jury. The court therefore held that the special findings were not inconsistent with the verdict, and, such having been its ruling, judgment should have been entered upon the verdict in favor of Brown, the plaintiff below. There were no grounds to grant the new trial on account of the motion which was filed, but afterwards waived, by the railroad company. Under these circumstances, it is nowhere shown that the court, for any good reason, granted the new trial. It is not alleged

that the verdict of the jury was insufficient in amount. We perceive no good reason why the railroad company should not have been permitted to withdraw its motion, or, if not withdrawn, to waive all errors alleged therein. Under the circumstances, there was an abuse of discretion upon the part of the trial court in granting a new trial without any apparent reason therefor, either in law or otherwise. If the court had held the special findings inconsistent with the verdict, it might have ordered a new trial; but it ruled otherwise on the special findings. We have held that a new trial may be denied, although both parties ask it. *Gunn v. Durkee*, 41 Kan. 144, 21 Pac. Rep. 156. But that was upon the ground that the granting of new trial with consent of the parties would prolong and protract litigation. It is the interest of the public that there should be an end to litigation, and a court is not compelled to grant a new trial, even if all the parties request it; but where there are no grounds for a new trial, in the interest of an end to litigation, no new trial should be granted. This court has authority to reverse an order granting a new trial. Section 542, Civil Code. "Where a motion is made for a new trial, and the trial court sustains the motion for a manifestly insufficient reason, and it does not appear from the record brought to the supreme court that there was any sufficient reason for granting the new trial, the order of the trial court granting the new trial will be reversed." *Lindh v. Crowley*, 29 Kan. 756. The order of the district court will be reversed, and cause remanded for further proceedings in accordance with the views expressed herein. All the justices concurring.

(51 Kan. 16)

#### CHICAGO, K. & W. R. CO. v. EMERY.

(Supreme Court of Kansas. March 11, 1893.)

EMINENT DOMAIN—COMPENSATION—EVIDENCE—BENEFITS.

1. In an appeal from an award of damages for a right of way for a railroad through a farm, the railroad company offered testimony of the sales of other similar farms in the same neighborhood for a less price than was claimed by the owner of the land in question. The landowner then offered testimony tending to show that his land was superior in quality and of greater value than that with which it was compared. *Held*, that the admission of the latter testimony was not error.

2. It was not error for the court to instruct the jury that in determining the compensation to which the landowner was entitled they should disregard any benefit to or advancement in the value of the land resulting from the construction of the railroad. *Railroad Co. v. Ross*, 20 Pac. Rep. 197, 40 Kan. 598.

(Syllabus by the Court.)

Error from district court, Jewell county; Clark A. Smith, Judge.

Proceedings by the Chicago, Kansas & Western Railroad Company against C. P. Emery to condemn land for right of way. Defendant appealed from the award of the commissioners, and on trial in the district court a verdict was rendered in his favor, and plaintiff brings error. Affirmed.



Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Cooper, Meek & Cooper, for defendant in error.

**JOHNSTON, J.** The Chicago, Kansas & Western Railroad Company procured the condemnation of a right of way for its railroad through a 240-acre tract of land owned by C. P. Emery. The award made by the commissioners being unsatisfactory, Emery appealed to the district court, where the case was tried by a jury, which awarded a verdict in Emery's favor in the sum of \$1,001.07½. This award was considerably in excess of the amount allowed by the commissioners. The railroad company complains of the rulings of the court in admitting evidence and in charging the jury.

Objection is made to the testimony of a witness who compared Emery's land with another farm in the same neighborhood, and described the difference between the two farms. There is no good reason for this complaint. A witness called by the railroad company stated that he based his judgment of the market value of the land on sales made in the neighborhood, and gave testimony with reference to several farms which had been sold at a stated price. In his testimony he compared these tracts with the Emery land, stating that they were smoother, more fertile, nearer market, etc., than the Emery land, and were therefore of greater value. To meet this testimony Emery offered testimony contradicting that of the railroad company in this respect. While he could not properly have offered proof of this character in the first instance, it was properly admitted to meet that which had been offered by the company.

Complaint is made of an instruction in which the court advised the jury to disregard any advancement in the value of, or benefit resulting to, the land from the building of the road. The question suggested by this objection has been fully considered by the court in recent cases, and the correctness of the instruction has been sustained. *Railroad Co. v. Ross*, 40 Kan. 598, 20 Pac. Rep. 197; *Railroad Co. v. Shepard*, 50 Kan. —, 31 Pac. Rep. 1002. There is some complaint because of the refusal of instructions with reference to the rule which should be followed in determining the market value of the land, and also in regard to the measure of damages, but the charge as given appears to us to fully cover both of these subjects. We think the case was fairly submitted to the jury, and no sufficient reason has been given for a reversal. Judgment affirmed. All the justices concurring.

(51 Kan. 34)

**WHITE et al. v. SMITH-FRAZIER BOOT & SHOE CO.**

(Supreme Court of Kansas. March 11, 1893.)  
INSOLVENCY—DISTRIBUTION OF FUNDS—PAYMENTS  
TO BAR THE STATUTE.

After the assignee of an insolvent debtor, under the statutes of Missouri, had been duly discharged, and the circuit court, having jurisdiction of the insolvent's estate, had made an order for general distribution to the clerk

of the court out of the funds turned into the court by the assignee, when he was discharged, held, that the payment made by the clerk of the court is not such a one as to avoid the bar of the statutes of limitations, when it did not appear that the claim upon which the payment was made was scheduled, and there was no express direction from the assignor, to his assignee, to pay such claim.

(Syllabus by the Court.)

Error to district court, Brown county; R. C. Bassett, Judge.

Action by the Smith-Frazier Boot & Shoe Company against G. L. White and William White to recover for goods sold and delivered. A judgment for plaintiff, rendered by a justice of the peace, was affirmed, on error to the district court, and defendants bring error. Reversed.

Keller & Noble and John C. Archer, for plaintiffs in error. Ryan & Stuart, for defendant in error.

**HORTON, C. J.** G. L. White and William White, partners as White Bros., were doing a general merchandise business at Orchid, De Kalb county, Mo., during the years 1883 and 1884. White Bros. made an assignment in 1884 to Chesley M. Wyatt, as assignee, for the benefit of all their creditors, and Wyatt, as such assignee, duly qualified and entered upon his trust. Afterwards, on or about the 16th day of November, 1886, Wyatt was discharged as assignee upon the order of the circuit court of De Kalb county, Mo. All the assets then in his hands, and undispensed of, were turned over to the clerk of the circuit court of De Kalb county, and the assignee was then discharged from further duty. During the time the White Bros. were in business at Orchid, they purchased certain goods, wares, and merchandise from the Smith-Frazier Boot & Shoe Company. The first purchase was made in the year 1883, and the last purchase on the last day of September, 1884. The first payment was made August 9, 1883, and the last payment on February 2, 1888. The purchases during all this time aggregated \$1,313.34. The total amounts of credits amounted to \$1,176.88. This action was brought to recover \$136.46, the balance remaining unpaid. All the payments from 1 to 7, inclusive, were made in the years 1883 and 1884 by White Bros. The eighth and ninth payments were made by C. M. Wyatt, the assignee. These two payments were January 10, 1885, and December 17, 1885. The last payment that is claimed to have been made, February 2, 1888, was made by the clerk of the circuit court of De Kalb county, state of Missouri. This action was originally brought before a justice of the peace in Brown county. A sworn statement of the account was embraced in the bill of particulars. The answer alleged that the Whites did not make, or authorize to be made, the payments alleged in the bill of particulars, and further alleged that they had been actual residents of the state of Kansas for more than three years next preceding the commencement of the action.

Pleadings before a justice of the peace are construed very liberally, and we think that under the pleadings, and the trial had

thereon, the three-year statute of limitations was fairly presented in the case.

The justice of the peace, upon the stipulation of the parties and the testimony offered, rendered judgment in favor of the Smith-Frazier Boot & Shoe Company, against the Whites, for \$136.46, with interest and costs. Subsequently the Whites took the case to the district court of Brown county by proceedings in error, and attached to their petition in error the record of the judgment and proceedings before the justice of the peace. That court affirmed the judgment of the justice of the peace. Complaint is made of this affirmation, and the case is now here for review. It is alleged that the record does not contain all of the proceedings before the justice of the peace, including the judgment rendered by him, and it is further contended that no motion was filed for a new trial in the district court. It appears, however, from the record, that the judgment rendered by the justice is contained therein; and the case makes shows that it "embraces all the proceedings, motions, orders, evidence, findings, and proceedings upon which the judgment was rendered." This is sufficient. *Wilson v. Howell*, 48 Kan. 150, 29 Pac. Rep. 151. As the district court heard the case upon the petition in error, no motion for a new trial was necessary.

The pivotal question in this case is, was the action barred by the three-year statute of limitations at the time it was commenced? It is apparent that if the payment upon the account made by the clerk of the circuit court of De Kalb county, Mo., on February 2, 1888, does not avoid the statute of limitations, plaintiff below is not entitled to recover. The case of *Letson v. Kenyon*, 31 Kan. 801, 1 Pac. Rep. 562, is cited as conclusive in favor of the judgment; but that case differs materially from this one. In that case the debtor appointed the agent to make the payment, designated the debt to be paid, designated the property out of which the debt should be paid, and the payment was in fact made before the debt had been barred by any statute of limitations. Mr. Justice Brewer, in concluding the opinion in that case, said that when a debtor chooses to make an assignment, and when, in such assignment, he makes an express direction to his assignee to sell the property assigned, and apply the same in payment of certain scheduled debts, and the assignee does as directed, that payments so made are payments by the debtor, within the meaning of said section 24, Civil Code. In this case there was a general assignment under the statutes of Missouri, which in many respects are similar to the statutes of Kansas. Rev. St. Mo. 1879, § 390; Gen. St. Kan. 1860, pars. 342-388. Mr. Justice Valentine, who filed a concurring opinion in that case, said: "If, however, this agent had been removed from his position as assignee, and some other person appointed under the assignment act to take his place as assignee, then as to whether this other person would be such an agent of the debtor that he could make a part payment of the debt that would be binding upon the debt, within the meaning of said section 24 of the Civil Code, it is not necessary to ex-

press any opinion. Neither is it necessary to express any opinion as to whether such a part payment could be made of a debt which the debtor himself had not ordered to be paid, out of property which the debtor had not appropriated for the payment of the same." There are a great many authorities to the effect that the payment of a dividend by the assignee of an insolvent debtor is not such a payment as will, under the twenty-fourth section of the Code, take the residue of the debt out of the statute of limitations, as the debt of such debtor. Several of these cases are cited in *Letson v. Kenyon*, supra. But this case differs from the latter case, because, although it appears that the Smith-Frazier Boot & Shoe Company was a creditor of the Whites, it does not appear that its claim was scheduled, or that the debtors expressly designated this debt to be paid, as the debtor did in *Letson v. Kenyon*. The assignee was discharged on November 16, 1886, and the payment by the clerk was on February 2, 1888. The stipulation reads that "the payment of February 2, 1888, of \$8.56, was made by the clerk of the De Kalb county, Mo., circuit court, upon the order of the court, and out of funds turned into said court by said C. M. Wyatt as such assignee, and by him received out of the assets of the defendants' firm as such assignee." The case of *Letson v. Kenyon* is an exception to the general rule, and is properly such exception, because the payment in that case was made in pursuance of express direction from the assignor, for his benefit, and out of the proceeds of his property. The judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

(51 Kan. 9)

#### CARTER v. MOULTON.

(Supreme Court of Kansas. March 11, 1893.)

##### PROMISSORY NOTE—DELIVERY—LIABILITY OF SURETY—ESCROW.

1. Where several persons sign a negotiable promissory note as joint makers, and intrust the same to one of their number, who is in fact the principal, and known to be so by the payee, it will be presumed that such principal has the right to deliver the same to the payee, and receive the consideration therefor; and no private understanding between the surety and the principal with reference to any act to be done before the delivery of the note, of which the payee has no notice, can defeat a recovery on the note.

2. A written instrument can only become an escrow when it is placed in the hands of a person not a party to it. The delivery of a promissory note into the hands of one of several joint makers, by the others, on any agreement or understanding between themselves with reference to its delivery, does not impart to it the legal qualities of an escrow.

(Syllabus by the Court.)

Error from district court, Marion county; Frank Doster, Judge.

Action by A. L. Moulton against Martha A. Carter on a promissory note. Plaintiff's demurrer to the answer was sustained, and defendant brings error. Affirmed.

Jetmore & Jetmore, for plaintiff in error.  
Carpenter & Ketcham, for defendant in error.

ALLEN, J. This action was brought by A. L. Moulton on a promissory note, which reads as follows: "\$600.00. Marion, Kansas, December 7, 1887. Nine months after date, we promise to pay to the order of A. L. Moulton, at the Cottonwood Valley Bank, Marion, Kansas, six hundred dollars, with interest at 12 per cent. per annum until paid. Value received. J. M. Wishart, R. E. Knapp, R. C. Cable, C. E. Foote, M. A. Carter." The defendant, M. A. Carter, filed her separate answer, which reads as follows, (omitting title:) "Now comes the defendant, M. A. Carter, and for her separate answer herein says that the consideration of the note sued on by the plaintiff herein was for money borrowed by J. M. Wishart of and from the plaintiff, no part of which was ever had or received by this defendant; that this defendant signed said note as surety, only, for said Wishart, all of which was at the time well known and understood by the plaintiff; that this defendant signed her name to said note only as an escrow, on the express condition that said Wishart, the principal in said note, would hold the same as such escrow, and not deliver it to the plaintiff until he, the said Wishart, should execute in favor of said plaintiff, to secure the payment of said note and interest, a mortgage on his homestead in the city of Marion, county of Marion, state of Kansas, and upon that condition only did this defendant sign her name to said note, and not otherwise; and that defendant never delivered said note to plaintiff, nor authorized the same to be delivered, and, if delivered by said Wishart, it was done without the authority or consent of defendant; that said Wishart failed, neglected, and refused to execute said mortgage on his homestead, in favor of said plaintiff, to secure the payment of said note and interest, as aforesaid. Wherefore, said note is not the act and deed of this defendant. Defendant, having fully answered, asks to be discharged, with her costs." To this answer the plaintiff demurred, and the district court sustained the demurrer, and the plaintiff in error brings the case here to review that decision.

Counsel for the plaintiff in error contends that the note sued on was signed by the plaintiff in error as surety, only, upon an expressed condition which was never performed, and that the plaintiff in error was therefore not liable; that the note is void because it was never delivered to the defendant in error by the plaintiff in error, or by her authority. It is conceded by the demurrer that the plaintiff knew the fact that M. A. Carter signed the note as surety, but it is nowhere averred that the plaintiff knew of the agreement between M. A. Carter and the principal in said note, with reference to the giving of a mortgage. The plaintiff in error contends that the delivery of the note by the surety to the principal after its execution by the surety, under an agreement of the kind stated in the answer, made the instrument an es-

crow, and that no validity could be given to it by a delivery in violation of the terms agreed on between the parties.

It is true that the holder of an instrument placed in escrow can give it no validity, generally speaking, by a delivery in violation of the agreement. In order to make the instrument an escrow, however, such delivery must be to a third person, not a party to the instrument. See *Bouv. Law Dict.* and cases therein cited; *State v. Potter*, 63 Mo. 212. The note in this case was perfect in form at the time it was delivered to the payee. It is not claimed that the principal made any change in the form of the note, nor in the signatures thereto, after it was signed by the plaintiff in error. It is the fact that it was delivered in violation of a secret understanding between the principal and the surety, which plaintiff in error claims renders the note void in the hands of the payee, who, for anything that appears in the note, paid full value for it. Many authorities are cited by counsel to sustain the proposition that the note is void as to the surety, but none of them go so far as to sustain the plaintiff's position in an action brought on a negotiable promissory note. In the case of *People v. Bostwick*, 32 N. Y. 445, it is held that a bond delivered under similar circumstances is void as to the surety; and in the case of *Pawling v. U. S.*, 4 Cranch, 219, the same doctrine is held. The New York case comments on the difference in the rule with reference to the delivery of a deed and a delivery of a sealed instrument securing the payment of money, and also on the difference between a bond and a negotiable bill of exchange or promissory note. In the case of *Bank v. Luckow*, 37 Minn. 542, 35 N. W. Rep. 434, the delivery was to the agent of the payee; and in the case of *Perry v. Patterson*, 5 Humph. 133, the delivery was to the attorney of the payee. None of the cases cited by counsel for plaintiff in error are directly in point. The doctrine contended for, even as applied to bonds, is expressly denied, we think, by the weight of authority. See *Dair v. U. S.*, 16 Wall. 1; *State v. Potter*, 63 Mo. 212; *State v. Peck*, 53 Me. 234. The precise point presented in this case is very fully considered by the supreme court of Indiana in the case of *Deardorff v. Foresman*, 24 Ind. 481, where it is held: "If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it is not to be delivered to the obligee, payee, or grantee until some persons, who are agreed on, shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee, or grantee has no knowledge of the condition, the delivery will bind the surety." To the same effect, also, are the cases of *Gage v. Sharp*, 24 Iowa, 15; *Bonner v. Nelson*, 57 Ga. 433; *Fowler v. Allen*, (S. C.) 10 S. E. Rep. 947. Where a negotiable promissory note, perfect in form, executed, as in this case, by a number of persons, is intrusted to one of the makers by all, we think there is a presumption that the party so holding the note has authority to deliver it to the payee. When a note so executed is presented by the principal

to the payee without any notice to the payee of any understanding between the makers, affecting the right of the principal to deliver to the payee, we think he is justified in assuming that the parties who so signed the note intended to be bound thereby, and that he may receive the note, and deliver to the principal the consideration therefor, without first making inquiries of the other parties to the instrument for the purpose of learning whether there are any secret agreements or understandings affecting the instrument. We see no error in the ruling of the court below, and the judgment will be affirmed. All the justices concurring.

(51 Kan. 53)

WM. W. KENDALL BOOT & SHOE CO. et al. v. AUGUST et al.

(Supreme Court of Kansas. March 11, 1893.)

DISSOLUTION OF ATTACHMENT — VERIFICATION OF MOTION—WHO MAY BRING.

1. A motion to discharge an attachment, which contains an explicit denial of the allegations in plaintiff's affidavit for attachment is sufficient to raise an issue as to the truth of the grounds laid for attachment, and a verification of the motion or of the allegations of denial is not essential.

2. One claiming to be the owner of property which has been attached, although not a party to the proceeding, may move the court to discharge the attachment; and the fact that after the motion to discharge was filed he began an action of replevin, and obtained the possession of the attached property under the writ issued in that action, will not prevent the hearing and decision of the motion to discharge.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Proceedings in attachment by the Wm. W. Kendall Boot & Shoe Company and others against Eli J. August and another. There was an order vacating an order of attachment, and plaintiffs bring error. Affirmed.

L. F. Bird, for plaintiffs in error. W. W. & W. F. Guthrie, for defendants in error.

JOHNSTON, J. For several years prior to January 1, 1890, Eli J. August was engaged in the sale of boots and shoes at Atchison, and to quite an extent on borrowed capital. He had two business houses, which are spoken of as the "uptown" and "downtown" stores. In December, 1889, he became financially embarrassed, and unable to meet the accruing claims of creditors. On December 30, 1889, he sold and delivered to his father, Jacob August, his uptown store, to satisfy certain claims which his father held against him, and on January 1, 1890, he executed two mortgages on his other stock of goods to certain creditors which he preferred, and also a third mortgage to all the remaining creditors. The last-named creditors did not choose to rely on the mortgage executed in their favor, and many of them caused attachments to be issued and levied on the two stocks of goods, and notices of garnishment were also served on Jacob August and the preferred creditors. To prevent further at-

tachments, and to protect and preserve his property to the creditors secured by the third mortgage, on January 6, 1890, he made a general assignment of his property for the benefit of all his creditors, and designated J. P. Adams as assignee, who afterwards was duly appointed permanent assignee by the court. The attaching creditors, 14 in number, continued to press their claims to the property, and motions to discharge the several orders of attachment and garnishment and to discharge the garnishee were made by Eli J. August, Jacob August, and the assignee. On February 10, 1890, and by agreement of the parties, all of the motions were heard on the same evidence, and the court was to make conclusions of fact and law in one set, which were to apply to all cases. The court reached the conclusions that the sale of the stock of goods to Jacob August was made in good faith, and that the three chattel mortgages which have been mentioned were made in good faith and were valid, and ordered that the attachments and garnishments in the several causes should be dissolved and discharged. Eleven of the creditors joined in bringing this proceeding in error, asking for a reversal of the orders made by the district court; but all of them have abandoned the case except the Wm. W. Kendall Boot & Shoe Company. The claim of this company was \$787.75, and its attachment was levied upon the uptown store, which had been transferred to Jacob August. The only motion to discharge the attachment in the Kendall case was made by Jacob August. No affidavit denying the grounds of attachment was made or filed by Jacob August, and it is insisted that, until an affidavit denying the grounds for attachment was made, there was no issue to try. There can be no question as to the right of Jacob August to ask for a discharge of the property. It was found by the court, and upon sufficient evidence, that the goods purchased by him were not worth any more than the price paid for the same, and that the sale was valid. As owner of the property, and interested in discharging it from the attachment, he was authorized to move the court to discharge the attachment levied upon his property. Civil Code, § 532; Long v. Murphy, 27 Kan. 381. There is nothing substantial in the objection that the motion of Jacob August to discharge the attachment was not accompanied by an affidavit denying the grounds laid for attachment. Proof was offered by both parties as if the allegations of the affidavit for attachment were in issue, and this was received and acted upon by the court as if an issue had been properly formed. But was not the procedure adopted sufficient under the statute? The motion for the discharge of the attachment contained an explicit denial of the truth of the allegations in plaintiffs' affidavit for attachment. The procedure to raise the issue of fact varies in the different states. In some it is by plea in abatement; in others, by supersedeas; and in still others, by motion. The only procedure prescribed in this state for the discharge of an attachment is by motion and, upon reasonable

notice. Civil Code, § 528. No affidavit or verification of the motion is required by the statute; nor has it ever been held that the filing of an affidavit or the verification of the motion was essential to the raising of an issue. It has been determined that where such an affidavit is filed the burden of proof is placed upon the plaintiff to establish the grounds laid for attachment. *McPike v. Atwell*, 34 Kan. 142, 8 Pac. Rep. 118; *Grocery Co. v. Records*, 40 Kan. 119, 19 Pac. Rep. 346. The statute contemplates that such an issue shall be raised in a summary way, and, in the absence of a specific provision making an affidavit essential to the forming of an issue, none can be required.

Another objection is that after Jacob August had filed his motion to discharge the attachment, and on January 14, 1890, he began an action of replevin against John H. Barry, and the attached property was delivered to him under the writ issued in that action. The suit was not brought against Barry in any official capacity, but probably he had obtained possession of the goods as sheriff, under orders of attachment. We see nothing inconsistent in the two proceedings. The motion of August to discharge, as has been seen, was a proper remedy to release property from an unwarranted attachment; but his action in that regard is no reason why he may not avail himself of the more complete remedy of replevin to try the title and ownership of the property. *White Crow v. White Wing*, 3 Kan. 276; *Watson v. Jackson*, 24 Kan. 442. The property had been attached before the action of replevin was commenced, and some disposition of that attachment was necessary. Even the determination of where the costs of the attachment proceeding should be assessed required an examination and decision of the issues formed by the motion. The claim of ownership made by Jacob August in the action of replevin is in no sense an admission of the validity of the attachment, as in both proceedings he asserts ownership in himself. We see no error in the rulings of the court, and hence there must be an affirmance of its judgment. All the justices concurring.

(51 Kan. 59)

P. COX MANUFACTURING CO. v. AUGUST. LEWIS v. SAME. BARTON et al. v. SAME.

(Supreme Court of Kansas. March 11, 1893.)

DISCHARGE OF GARNISHMENT—WHO MAY BRING MOTION—PROCEDURE.

1. The fact that a debtor has mortgaged his property, which is subsequently attached, will not preclude him from moving for a discharge of the attachment, or for the discharge of the garnishees.

2. Ordinarily, where a general assignment is made and the property assigned is held under attachment or garnishment process, the assignee may move to set aside the process, and for a release of the property.

3. In moving to dissolve garnishment process and to discharge garnishees one of the grounds was a denial of the truth of the allegations in the affidavit for "attachment," where it is manifest that the word "garnishment" was intended. Following the making

of the motion testimony was received and considered by the court upon an agreement of the parties, as if an issue had been formed upon the truth of the allegations in plaintiff's affidavit for garnishment, and the court, having found that the garnishees had no property or funds subject to garnishment process, discharged the garnishees. *Held* not error.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Garnishment proceedings by the P. Cox Manufacturing Company against E. J. August, Owen J. Lewis against same, Kimber L. Barton and others against same. The three cases were heard together, and defendant's motion to dissolve the garnishment in each action was sustained, and plaintiffs bring error. Affirmed.

H. M. Jackson, for plaintiffs in error. W. W. & W. F. Guthrie, for defendant in error.

JOHNSTON, J. Three separate proceedings in error have been brought in this court to review the orders and judgments made in the district court vacating garnishments and discharging garnishees. The cases were heard together in the district court with other creditors, as mentioned in *Shoe Co. v. August*, 32 Pac. Rep. 635. The P. Cox Manufacturing Company brought an action against E. J. August to recover a claim of \$563.10. Owen J. Lewis brought an action against the same defendant to recover a claim of \$581.80, and Kimber L. Barton et al. brought an action to recover \$438.54. Each of these actions was brought on January 3, 1890, and in each an affidavit and bond were filed to obtain a garnishment summons or order, which was served upon the parties to whom the property of E. J. August had been transferred and conveyed, as described in the above-mentioned *Shoe Co. Case*. E. J. August and the assignee, Adams, moved to dissolve the attachment and garnishment in each case, and to discharge the garnishee, for the reasons (1) that the affidavit was insufficient; (2) that no sufficient bond had been given; (3) that the statements in the affidavit were untrue. These motions were heard with those made by 11 other creditors, and by agreement the evidence offered upon the trial was considered by the court in each of the cases the same in all respects as if it had been heard separately. It was further agreed that the single set of findings made by the court should apply to each and all of the cases. The court found that the transfers and conveyances of property made by E. J. August were made in good faith, and were valid, and the orders of garnishment were vacated, and the garnishees discharged. The plaintiffs complain of these rulings, and insist that neither E. J. August nor the assignee had any standing in court to move for the discharge of the garnishees. E. J. August had sold some of the property, mortgaged the balance, and had made a general assignment, but, notwithstanding all these transfers, he was interested in having his property preserved and applied as he had attempted

to apply it. He had a contingent interest in it and in its disposal, as his liability over would be increased or diminished by the care and success used and realized in applying and appropriating it in satisfaction of the demands of creditors. As between himself and the plaintiffs, he was certainly entitled to make this motion, and his interest was sufficient to require the action of the court. *Shoe Co. v. Derse*, 41 Kan. 150, 21 Pac. Rep. 167. It is the duty of the assignee to protect the estate, and make a distribution of it as the law requires, and hence his interest is sufficient to move for a release and discharge of the property assigned to him. *White Crow v. White Wing*, 8 Kan. 276; *Long v. Murphy*, 27 Kan. 381; *Grocery Co. v. Records*, 40 Kan. 119, 19 Pac. Rep. 346; *Chapin v. Jenkins*, 50 Kan. —, 31 Pac. Rep. 1084.

It is contended that the grounds for the discharge of the garnishees in the August motion were not sustained. The first and second grounds of the motion were immaterial, as the affidavit and bond filed by the plaintiffs appear to have been sufficient under the statute. The third ground of the motion is that the affidavit for attachment is untrue, and it is said that the motion does not deny the grounds for garnishment. It is evident that the word "attachment" was carelessly used for "garnishment," as in the earlier part of the motion the defendant asks for the discharge of the garnishees, and no attachments were issued in any of these cases. The testimony was received and considered by the court upon agreement of parties as if an issue had been formed upon the truth of the allegations in the plaintiffs' affidavit, and, the findings of fact having been made in pursuance of that agreement, it is too late to raise this objection. The motions of the assignee positively allege that the allegations of the affidavit for the garnishment were untrue, and we are inclined to the opinion that these motions were sufficient, under the circumstances, to justify the inquiry that was made, and the action of the court in vacating the orders of garnishment. The court having found in favor of the validity of the mortgages and transfers, and as the debts for which they were made were largely in excess of the value of the property, it follows that the garnishees had no property or funds in their hands subject to the garnishment process. We see no material error in the rulings of the court, and hence its order and judgment in each case will be affirmed.

All the justices concurring.

(51 Kan. 62)

NATIONAL BANK OF ST. JOSEPH v.  
PETERS et al.

(Supreme Court of Kansas. March 11, 1893.)

ATTACHMENT—PROPERTY OF NONRESIDENT—ENFORCEMENT—RES JUDICATA.

In proceedings to enforce a debt by attachment upon the property of a nonresident defendant, after seizure of the property and due service upon such nonresident by publication, as prescribed by the statute, the action proceeds as one in rem. The judgment and

proceedings in such a case are conclusive upon all who are parties to the action and their privies, so far as the attached property is concerned, which is seized and sold.

(Syllabus by the Court.)

Error to district court, Jewell county; Clark A. Smith, Judge.

Attachment by the National Bank of St. Joseph against Simon C. Peters and others. Judgment for plaintiff. Plaintiff's motion that its judgment be declared a lien prior to the liens of other attaching creditors of defendants was denied, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On August 31, 1888, Simon C. Peters, as plaintiff, commenced two actions against John H. Schaeffer in the district court of Jewell county to recover in one action \$1,675 and interest, and in the other action \$1,650 and interest, upon two promissory notes executed by Schaeffer on July 19, 1887. On the same day orders of attachment were issued in the actions, and these orders were executed on August 31st, about 6 P. M., by levying upon certain lots and real estate in Jewell City, of the value of \$5,500, and upon personal property consisting of money, promissory notes, etc., valued at \$11,279.27. On the 16th of November, 1888, Peters obtained judgment in the first action against Schaeffer for \$1,895.68. The attached property was ordered sold, and the proceeds thereof were directed to be brought into court to abide the further order of the court. The sheriff of Jewell county was appointed receiver to collect the accounts, promissory notes, overdrafts, etc. On November 13, 1889, Peters obtained judgment in his second action against Schaeffer for \$2,032.70, and a like order was made as to the attached property as in the former action. On September 1, 1888, Peters commenced another action against Schaeffer in the district court of Jewell county. An order of attachment was ordered in that action. Judgment was rendered on the 16th of November, 1888, for \$700.67, and a like order was made in the other actions as to the sale of the attached property and the proceeds thereof. On September 1, 1888, Hirsch & Hill commenced an action in the court against Schaeffer, and an order of attachment was issued at the time of the commencement thereof, and placed in the hands of the sheriff, and by him served forthwith. Afterwards other actions were commenced, and orders of attachment issued and levied upon the same property. On the 3d day of September, 1888, the National Bank of St. Joseph brought its action in the district court of Jewell county against J. H. Schaeffer and Simon C. Peters, partners as J. H. Schaeffer & Co., to recover \$19,000 and interest, and sued out a writ of attachment (which was levied on the property attached in the actions of Peters against Schaeffer) upon the property of J. H. Schaeffer and Simon C. Peters, and the debtors of J. H. Schaeffer & Co. were garnished. In the action brought by the bank personal service was made on Schaeffer by leaving a summons at his residence, and service on Simon C. Peters was made by publication. In the petition it

was alleged that J. H. Schaeffer and Simon C. Peters were partners, and as such liable for the indebtedness of \$19,000 and interest due the bank. Each of the defendants, Schaeffer and Peters, made default. On the 17th of November, 1888, judgment was rendered in favor of the bank for \$15,03.65, and on the 11th of March, 1889, another judgment was rendered in the action for \$4,112. Orders were made concerning the sale of the attached property as in the other cases, and the garnishees served were ordered to appear and answer. Those that admitted indebtedness were required to pay to the sheriff, as receiver, the amounts thereof. The proceeds of the sales on the orders of attachment, and the other funds collected by the sheriff, as receiver, were required to be held to await the further orders of the court. On November 20, 1888, the bank filed its motion for the adjustment and determination of the liens of the various attaching creditors, and asking that its judgments should be declared first and prior liens. To this proceeding all of the attaching creditors were made parties. This motion was heard on November 27, 1889. On the hearing the court permitted ex parte affidavits to be read by Simon C. Peters, tending to show that he was not in fact a partner of J. H. Schaeffer, and had no interest in the property attached, except as an attaching creditor. These affidavits were received subject to the objections and exceptions of the bank. The court made findings to the effect that, notwithstanding the judgments of the bank against J. H. Schaeffer and Simon C. Peters, Peters was not a partner of J. H. Schaeffer, and not liable for the debts of J. H. Schaeffer & Co., and that he had no interest in the property attached other than as an attaching creditor, and that his attachment liens were prior to that of the bank. The latter excepted, and brings the case here for review.

Waggener, Martin & Orr, for plaintiff in error. C. Angevine, for defendants in error.

HORTON, C. J., (after stating the facts.) The judgment rendered in favor of the National Bank of St. Joseph against J. H. Schaeffer and Simon C. Peters, as partners under the style and firm of J. H. Schaeffer & Co., and the attachment proceedings in such action, were in all respects regular so far as proceedings in rem were concerned, and the judgment in the case was and is obligatory upon the debtors, J. H. Schaeffer and Simon C. Peters, as J. H. Schaeffer & Co., and their privies. Where there is a seizure and detention of property, or a garnishment under an attachment proceeding, the court has jurisdiction therein with limited notice and effect. Notice being limited to the debtor, the attached property being proceeded against only as his, and the judgment being against it only as such, the debtor and his privies are concluded. All who are parties to the action are bound, but only the rights of property of the debtor and his privies in the attached property, which is condemned and sold, is affected by the proceedings. Wap. Attachm. 14.

In the case of the bank against J. H. Schaeffer & Co., upon the service stated in the record, the court acquired jurisdiction over the property seized. Thereafter it had jurisdiction to hear and decide whether J. H. Schaeffer and Simon C. Peters owed the bank the amount claimed, or any part thereof. It also had jurisdiction to sell the attached property for any sum found due. The interest in the property that Peters obtained by virtue of his alleged prior attachment was not and could not be attached, and was not and could not be condemned, but all the proceedings in the case of the bank against Schaeffer and Peters were upon the theory that Schaeffer and Peters were indebted to the plaintiff as alleged, and the property attached was subject to seizure and sale as the property of Schaeffer and Peters. No personal judgment could be rendered against Peters, because there was no personal service obtained upon him, and no appearance, but Peters was and is as much concluded by the attachment proceedings and judgment, as to the property attached and sold, as if he had been personally served or personally appeared. So long as the attachment proceedings and judgment in the case of the bank against Schaeffer and Peters were not reversed, vacated, or appealed from, Peters could not, in a collateral proceeding, question or impeach, by ex parte affidavits or otherwise, the status or sale of the property seized. *Paine v. Spratley*, 5 Kan. 525; *Rowe v. Palmer*, 29 Kan. 340; *Pritchard v. Madren*, 31 Kan. 51, 2 Pac. Rep. 691. *Herman on Estoppel and Res Judicata* (page 371) says: "When the court has jurisdiction, its proceedings are in rem after publication, which constructively notified the defendant of the proceedings against the property. The court adjudicates upon the property,—the thing itself,—and orders it sold or delivered to the plaintiff in payment of his debt. The judgment changes the status of the property or debt. It deprives the attaching defendant of all title to it, and is binding and conclusive upon all the parties to the proceedings." *Voorhees v. Bank*, 10 Pet. 449; *Cooper v. Reynolds*, 10 Wall. 309; *Rudolf v. McDonald*, 6 Neb. 166. As the trial court had jurisdiction of the subject-matter in the bank against Schaeffer and Peters, and jurisdiction to seize and sell the property attached, such property, after being seized and sold as the property of Schaeffer and Peters, cannot be subject to further controversy by either of the parties, excepting upon an application for a vacation of the judgment, or other direct proceedings to set aside or reverse the same. If it were competent for Peters, in the proceedings to determine the priority of the attachment liens, to show by ex parte affidavits that he had no interest in the property attached by the bank, which was seized and sold as his property, then Schaeffer had also the right to make proof in the same way, and show that he had no interest in the property seized and sold. The result would be that upon ex parte affidavits in collateral proceedings, after seizure, judgment, and sale, such judgment and all proceedings thereunder might be



set aside and vacated. If such were the law, attachment proceedings against non-residents might be wholly abortive.

The judgments of the bank against Schaeffer and Peters were rendered on the 17th of November, 1888, and the 11th of March, 1889. A motion to settle the priority of liens was heard on November 27, 1889. At that time Peters personally appeared. If he had desired to open up the judgments under which his property had been seized and sold, he had notice in time to have done so under the provisions of section 77 of the Civil Code. Therefore, if any injustice were done Peters by the attachment proceedings or judgment in the case brought by the bank, he had an ample remedy under the provisions of the statute. He did not pursue this remedy. We think the trial court erred in admitting as evidence the ex parte affidavits. Our conclusion therefore is, under the facts disclosed, that Peters has no claim whatever, by attachment, prior proceedings, or otherwise, to the property seized and sold as his property in the action of the bank against him. This rule is also applicable to the garnishment proceedings instituted by the bank. Of course, other attaching creditors of J. H. Schaeffer or J. H. Schaeffer & Co. are not concluded by the judgments in favor of the bank, because their property has not been seized and sold, and they were not parties in the attachment proceedings brought by the bank. The court erred in allowing Peters any liens or claims upon the property seized and sold as prior or superior to those of the bank.

There is some discussion in the briefs about the possession of certain books of account by the sheriff. Such indebtedness can only be reached by garnishment proceedings, but it appears from the record that the trial court so ruled. The orders of the district court fixing the priority of liens are hereby reversed, and further proceedings are directed in accordance with the views herein expressed. All the justices concurring.

(50 Kan. 705)

FELLOWS et al. v. SNYDER et al.

(Supreme Court of Kansas. March 11, 1893.)

ACTION ON CONTRACT—DEMURRER TO EVIDENCE—CONSTRUCTION OF CONTRACT—QUESTION FOR JURY.

1. The record examined, and *held*, that the court below did not err in overruling the demurrer to the evidence of the plaintiffs below.

2. Also *held*, that the contract between the parties to this case does not provide any method for the final measurement of the walls of the school building, and that it was not error for the court to leave it for the jury, under the evidence, to say what system of measurement should be adopted in making such final measurement.

(Syllabus by Strang, C.)

Commissioners' decision. Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by H. G. Snyder and another against G. A. Fellows and another on a contract. Plaintiffs had judgment in a justice's court. On trial in the district on appeal plaintiffs had judgment, and, defend-

ants' motion for a new trial being denied, they bring error. Affirmed.

Hazen & Isenhardt, for plaintiffs in error.  
John H. Mahan, for defendants in error.

STRANG, C. This was an action to recover a balance due on the following contract: "Know all men by these presents that we, H. G. Snyder and E. F. Odle, of Chapman, Dickinson county, Kansas, do hereby agree to furnish and deliver all the stone for county high school on high school grounds in Chapman, Kansas, convenient to the building, for eighty-five cents per perch, architect's measurement in the wall; to be paid as per architect's estimate to the contractors, viz. 90 per cent. monthly." The action was begun before a justice of the peace, where the plaintiffs below obtained judgment against the defendants for the sum of \$300. An appeal was taken to the district court, and the case was there tried by the court and a jury, resulting in a verdict and judgment for the plaintiffs below for the sum of \$258. A motion for new trial was overruled, and the case is brought here for review.

The plaintiffs in error first allege that there was nothing due the plaintiffs below when this suit was begun, and therefore the court should have sustained the demurrer to the evidence of the plaintiffs below. This contention is based upon the theory of the defendants below that under the contract nothing was due until the architect had made his estimate, and that such estimate had not yet been made when the suit was brought. Upon the question as to whether or not the estimate had been made when the action was begun there is a conflict in the evidence. Mr. Snyder testifies that there had been a measurement of the stone in the building by the architect from Topeka before the action was begun, while Mr. Fellows, examined by the other side, says there had been no estimate by the architect. This evidence, however, was submitted to the jury, and passed upon by it, and their finding thereon is against plaintiffs in error. The evidence shows that all the stone was furnished and in the wall some weeks before the action was begun. With such evidence, and our view of the construction to be put upon the contract, we do not think the court erred in its instructions relating to this question. Nor do counsel for plaintiffs in error lay much stress upon this question, as they say in their brief that the real controversy in the case is whether the walls of this building should be measured without any deductions for openings, and double the corners, or by deducting the openings and measuring the corners singly. This question involves to a certain extent the construction to be put upon the written contract of the parties. If we construe the contract to mean that both the monthly and final measurements of the stone in the wall were to be submitted to the arbitrary determination of the architect employed by the county to look after the construction of the school building mentioned in the contract, then the contention of the plaintiffs in error is correct, and the case should be reversed, as the parties had the right

to submit the measurement to the arbitrary determination of any person whom they should select and agree to be bound by it. On the other hand, if we construe the language of the contract to mean that the parties agreed to be governed by a measurement known as "architect's measurement," and the evidence discloses the fact that there is no such system of measurement for the determination of the amount of material in the walls of a building, then we think the court below was right in holding that the customary measurement must be employed to determine the quantity of stone in the walls of the building and that what is the customary measurement was properly submitted to the jury, and particularly so in view of the fact that there is evidence tending to prove that at the time the contract was signed the plaintiffs here contemplated the final measurement of the walls of the building by the same system as that adopted by the jury. We think, however, that the contract may be construed to mean, so far as the question of measurement is concerned, that the monthly measurements, or the measurements to be made as the work progressed, were to be made by the architect, to enable the contractors to receive 90 per cent. of their pay as the work progressed; but that the final measurements of the walls is not provided for in the contract. Looking to the contract between the county and the builders, we find no method for final measurement therein pointed out, which we think strengthens our construction of the contract under consideration. This construction necessarily leaves the final measurement of the walls of the building to be made according to the custom of such measurements in the community where the building was erected. That custom must be ascertained by the jury from the evidence. The evidence shows that different customs prevail in different communities, so that one method of measurements might be adopted by custom in Topeka and another in Abilene. With this view of the contract, the refusal of the trial court to receive the builders' contract with the county in evidence cannot constitute material error. It follows, then, that the judgment of the court below must be affirmed, unless we ratify the construction placed upon the contract by the plaintiffs in error, which we are unwilling to do. We do not think the parties to the contract intended to submit the final measurement of the walls of the building to the arbitrary measurement of the architect. We therefore recommend that the judgment of the court below be affirmed.

**PER CURIAM.** It is so ordered; all the justices concurring.

(51 Kan. 30)

**ANDREWS v. MORSE et al.**

(Supreme Court of Kansas. March 11, 1893.)

**FORECLOSURE OF MORTGAGE—DEATH OF MORTGAGOR—PRESENTATION OF CLAIM.**

1. The failure of a mortgagee to exhibit his mortgage debt as a demand against the estate of a deceased mortgagor within three

years after letters of administration have been granted will not preclude him from foreclosing his mortgage lien, and subjecting the mortgaged property to the payment of the debt.

2. If he relies on the general assets in the hands of the administrator for payment of his debt, or any part of it, he must present the same in the manner required by section 80 of the act relating to executors and administrators; and, failing to do this, he is limited to the proceeds arising from the sale of the mortgaged property.

(Syllabus by the Court.)

Error from district court, Labette county; John N. Ritter, Judge.

Action by J. H. Andrews against Nelson Morse and others to foreclose a mortgage. There was judgment for defendants, and plaintiff brings error. Reversed.

Leroy Neale & Son, for plaintiff in error. Case & Glasse, for defendants in error.

**JOHNSTON, J.** This was an action by J. H. Andrews to recover upon a promissory note for \$300, and to foreclose a mortgage executed to secure the same by John E. Morse and his wife on January 16, 1882. The note was payable five years after date, with interest at 8 per cent. per annum, and the interest had been paid thereon up to April 1, 1888. John E. Morse died in December, 1885, and his wife died the following August. Letters of administration were granted upon the estates of each more than three years before the commencement of the action to foreclose. The children and heirs of the decedents resisted the action of foreclosure mainly upon the ground that the estates of the Morses had been in course of administration more than three years before the beginning of the action, and that Andrews had never presented or exhibited his claim against the estates, and therefore, within the provisions of section 81 of the act on executors and administrators, it was forever barred. Will the failure of the plaintiff to present his mortgage debt as a demand against the estate of the deceased mortgagor within three years prevent the enforcement of his mortgage lien in the district court? It is conceded that no part of the principal debt has been paid, and no ground of invalidity is asserted against the mortgage; nor is any objection made to the enforcement of the lien, except that the debt was not presented to the administrator as a demand against the estate of the deceased mortgagor. This objection is not good. The death of the mortgagor did not impair or affect the lien of the mortgage. It did not place the mortgagee who had a lien in the same position as an unsecured creditor, and remit him to the general assets of the estate to satisfy his lien. If he looks to the personal assets in the hands of the administrator for payment of his debt or any part of it, he must then present his demand under the statute. If he fails to present it within the three-year period, he can obtain nothing from the general assets, and is limited to the proceeds arising from the sale of the mortgaged property. An equitable claim like the plaintiff's is enforceable in the district court, and is not such a demand as the statute referred to contemplates. Neither the presentation

of the claim in the probate court nor the failure to present it precludes the foreclosure of the mortgage lien until the mortgage debt has been paid or extinguished. *Johnson v. Cain*, 15 Kan. 537; *Graham v. Graham*, 38 Kan. 440, 17 Pac. Rep. 152; *Crooker v. Pearson*, 41 Kan. 410, 21 Pac. Rep. 270. A like limitation was before the supreme court of Iowa, and it held that the limitation of the statute applied only to claims the satisfaction of which is primarily sought out of the personal assets of the decedent, and not upon claims secured by a mortgage upon which the creditor relies for satisfaction. It was decided that the fact that the creditor did not file his claim against the estate within the time prescribed by the statute was not a sufficient defense to an action to foreclose a mortgage executed to secure such claim. *Allen v. Moer*, 16 Iowa, 307. There is some diversity of opinion in the different states as to what claims are barred by the failure to present them as demands against the estate, but it is generally held that claims purely equitable in their nature require no presentation or approval. It has been said that "it would appear to be the better opinion that a creditor may rely upon a mortgage or other specific lien, although the claim secured by it has not been presented; but in such case he has no claim upon the general assets in the hands of the administrator." 5 Amer. & Eng. Enc. Law, 213. See, also, *Stimms v. Richardson*, 32 Ark. 297; *McClure v. Owens*, Id. 443; *Moore v. Ellsworth*, 22 Iowa, 299; *Bank v. Doe*, 19 Vt. 463; *Scammon v. Ward*, (Wash.) 23 Pac. Rep. 439; *Teel v. Winston*, (Or.) 29 Pac. Rep. 142; *McCallam v. Pleasants*, 67 Ind. 542; *Woerner, Adm'n*, § 409; *Wilts. Mortg. Forec. c. 73*. The failure of the plaintiff to present his claim secured by mortgage until after the lapse of three years will prevent him from obtaining a judgment for any deficiency that may remain after exhausting the mortgaged property, but it does not affect his rights to foreclose his mortgage, and to subject the land so mortgaged to the payment of the debt. The action of the court in refusing to foreclose the mortgage was erroneous, and its judgment must therefore be reversed. All the justices concurring.

(21 Nev. 404)

**FIRST NATIONAL BANK OF WINNEMUCCA v. KREIG et al.**

(Supreme Court of Nevada. April 7, 1893.)

**TAXATION OF NATIONAL BANKS—DEED ABSOLUTE, WHEN A MORTGAGE—RECONVEYANCE.**

1. National banks are only subject to state taxation upon the shares of stock owned by the shareholders therein, and upon their real estate. Mortgages held by such banks are not subject to taxation.

2. An absolute deed made by the owner of property for the purpose of securing money due to third persons, in connection with a written acknowledgment by the grantee that he holds it for that purpose, is a mortgage.

3. Where property so held is deeded back to the grantor, with the consent of the beneficiaries, the lien of the mortgage is lost; and such consent need not be in writing.

(Syllabus by Bigelow, J.)

v.32P.no.9—41

Appeal from district court, Humboldt county; A. E. Cheney, Judge.

Action by the First National Bank of Winnemucca against George Kreig and others to foreclose a mortgage. There was judgment for plaintiff, and defendants' motion for a new trial being denied, they appeal. Affirmed.

The other facts fully appear in the following statement by BIGELOW, J.:

The facts deemed material to the decision of the case are as follows: The property in controversy, together with a large number of cattle and horses, was originally owned by Isabella Sloan and her two children, James Sloan and Mary S. Kreig, wife of George Kreig, but prior to July 25, 1889, with unimportant exceptions, it had all been conveyed to James, who then owed his mother thereon about \$23,000, and his sister about \$11,000, and was largely indebted to the First National Bank, plaintiff herein. On that date defendant George Kreig purchased the property for \$80,000, assumed James' indebtedness to the parties mentioned, and borrowed more money from the bank, so that he owed the latter about \$40,000. To secure these various sums, for which he had given notes, Kreig made an absolute deed of the property to George S. Nixon, cashier and managing agent of the plaintiff, who gave back to Kreig a writing certifying that the deed was executed simply as security for the payment, first, of the money due the bank; next, that due Mrs. Sloan; and then, that due Mrs. Kreig. The notes to the bank became due that fall, but Kreig was unable to raise the money to pay them, and applied to Nixon to help him do so, as did Mrs. Sloan. Nixon ascertained that \$25,000 could be borrowed upon a mortgage to be made by Kreig and wife upon the whole property, provided the title was found to be perfect in them. Nixon testified that he explained this to all the parties, and told them that the title would have to be placed back in Kreig; that all consented to its being done, and upon this understanding the money was obtained, the mortgage given, and he made a deed of all the property back to Kreig, who promised to return the defeasance made by Nixon July 25, 1889, but failed to do so, and Nixon forgot about it. Kreig still owed the bank upon his note a balance of \$2,400, but the note was surrendered, and it was charged to his open account. By July 28, 1890, this had increased to \$7,646, for which the bank took a mortgage upon the property. On August 14, 1891, the mortgage was renewed, and this action is brought to foreclose the last-named mortgage. Over \$50,000 worth of the cattle and horses perished during the winter of 1889-90. Mrs. Sloan was made a party, as claiming some interest in the property, and Mary Kreig became a party at her own request. Mrs. Sloan's and Mrs. Kreig's answers set out various transactions between the parties, alleged that the plaintiff's mortgage was fraudulent and void as to them, that Nixon's deed to Kreig was made without their consent, and asked that it be decreed that they still held a lien upon the property to secure the sums due them from Kreig, and

that the lien be foreclosed and the property sold. The court rendered a decree in favor of the plaintiff, and directed a sale of the property to pay the plaintiff's mortgage.

R. M. Clark, for appellants. M. S. Bonfield, for respondent.

BIGELOW, J., (after stating the facts.) The defendants plead that the mortgage to the plaintiff of July 28, 1890, was canceled, marked "Satisfied" upon the records, and the new mortgage of August 14, 1891, taken, for the purpose of escaping taxation thereon; and for this reason it is claimed that the latter mortgage is void, under the authority of *Drexler v. Tyrrell*, 15 Nev. 114, upon the ground that it was taken and made for the purpose of defrauding the revenues of the state of Nevada. To this it is replied that the mortgage, being the property of a national bank, was not subject to state taxation, and it seems admitted that, if not, there could be no fraud in attempting to escape such taxation which would be sufficient to defeat the mortgage. In *State v. First National Bank of Nevada*, 4 Nev. 348, it was held that such mortgages were not subject to state taxation. The defendants, however, contend that this decision was erroneous, and ask us to overrule the doctrine there announced. But we are of the opinion, aside from that case, that it is now well settled by the decisions of the supreme court of the United States, which in such matters is the final arbiter, that national banks are only subject to state taxation upon their real estate, and upon the shares of stock in the bank owned by the stockholders. *Talbot v. Silver Bow County*, 139 U. S. 438, 11 Sup. Ct. Rep. 594; *People v. Weaver*, 100 U. S. 539; *Rosenblatt v. Johnston*, 104 U. S. 462; *Covington City Nat. Bank v. City of Covington*, 21 Fed. Rep. 484; *City of Carthage v. National Bank*, 71 Mo. 508; *National Bank v. The Mayor*, 62 Ala. 284; *Pittsburg v. National Bank*, 65 Pa. St. 45. Such being the case, the matter is not now open for discussion in the state courts, and it would be useless for us to consider it further.

2. The deed made by Kreig to Nixon was merely to secure the money due the bank, to Mrs. Sloan, and to Mrs. Kreig, and amounted simply to a mortgage. Taking the deed and the defeasance made by Nixon together, this is perfectly clear. If the money was paid, the property would revert to Kreig; if not paid, the only remedy of the parties would be an action for foreclosure, the same as upon any other mortgage. *Danzelsen's Appeal*, 73 Pa. St. 65; *Harper's Appeal*, 64 Pa. St. 315; *Steinruck's Appeal*, 70 Pa. St. 289; *Stephens v. Allen*, 11 Or. 188, 3 Pac. Rep. 168; *Brumfield v. Boutall*, 24 Hun. 451; 2 Perry, Trusts, § 602; Pom. Eq. Jur. §§ 1192, 1196. It is immaterial that it was made to a third person, instead of the beneficiaries, and this fact does not change the nature of the security. 2 Perry, Trusts, § 602, et seq. The transaction was quite different from that of a deed of trust authorizing the

trustee to dispose of the property, either to raise a fund or to pay a particular debt, which, in California, has been held to be a trust, and not a mortgage, (*Koch v. Briggs*, 14 Cal. 256;) although the weight of authority is the other way. *Jones, Mortg.* § 1769. Being simply a mortgage, which in this state amounts to merely an equitable lien upon the property, it could be released by parol, and need not be in writing. *Ackla v. Ackla*, 6 Pa. St. 228; *Howard v. Gresham*, 27 Ga. 347; *Griswold v. Griswold*, 7 La. 72; *Southern v. Mendum*, 5 N. H. 420; *Leavitt v. Pratt*, 53 Me. 147; *Wallis v. Long*, 16 Ala. 738; 2 Reed, St. of Frauds, § 453; 3 Pom. Eq. Jur. § 1183. It follows that, if Mrs. Sloan and Mrs. Kreig consented to Nixon's dealing back to Kreig, the mortgage was so released, for Kreig thereby became the holder, in his own right, of both the legal and equitable title to the property, free from any incumbrance. They thereby waived any lien which they had held upon it, and thereafter Kreig owned it, the same as any other property that had never been incumbered, and could sell or mortgage to others at his pleasure. The substance of the findings in the cases that they did so consent. This is supported by Nixon's testimony, and by the conduct and declarations of the parties, which are also competent evidence, and from which alone it might be inferred that the agreement was made. *Ackla v. Ackla*, 6 Pa. St. 228. Nor are we able to say that the testimony supporting this finding is not sufficiently clear and satisfactory. Taking it altogether, it seems reasonably certain that they did understand that Nixon was about to convey the property back to Kreig, that the effect of this would be to leave them without security upon the property, and that with this knowledge they consented to its being done. There is no evidence of any fraud, deception, or overreaching upon the part of the representatives of the bank. The most that can be said is that they drove some rather hard bargains upon the necessities of these people, whose misfortunes came about through no fault of their own, but there is very little to show that all the transactions were not open, well understood, and freely consented to by the defendants. Kreig owed money which was a first lien upon his property, and which had to be paid. If not paid, and the property was sacrificed, there would be nothing with which to pay what he owed his wife and her mother, and nothing left for him. They were as much interested in obtaining this money as Kreig was himself, and the situation forced them to do whatever was necessary to be done, in order to raise it. A full statement of the testimony would serve no useful purpose, and it is therefore omitted. Kreig being the absolute owner of the property on August 14, 1891, was, of course, at liberty to mortgage it, and we can see no reason why the mortgage then made by him is not legal and binding. The judgment and order refusing a new trial are affirmed.

MURPHY, C. J., concurs.

(97 Cal. 606)

MARION v. BOARD OF EDUCATION OF  
CITY OF OAKLAND et al. (No. 15,056.)

(Supreme Court of California. March 24, 1893.)

SCHOOL TEACHER — TERM OF EMPLOYMENT — DIS-  
MISSAL.

1. Pol. Code, § 1793, provides that school teachers, "when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct." *Held*, that where a teacher was elected in 1886 "for the ensuing year," and continued in her position for the two succeeding years without further act of the board, she was not elected for life, subject to removal only for cause, but could be dismissed at the end of the year. *Kennedy v. Board, etc.*, 22 Pac. Rep. 1042, 82 Cal. 483, distinguished.

2. If the board had no power to elect for a year, then the election was void, and the teacher was employed at the pleasure of the board, subject to be discharged, as any other employe, without a fixed term of employment.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Application by Eunice D. Marion for a writ of mandamus to compel the board of education of the city of Oakland and others to draw a warrant for the payment of certain salary alleged to be due her as a school teacher. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Chas. E. Snook, Geo. W. Reed, and E. Nusbaumer, for appellant. Wm. R. Davis and Jas. A. Johnson, for respondents.

GAROUTTE, J. This is an application for a writ of mandate to compel the respondents herein to approve and allow the demand of appellant, Eunice D. Marion, as a teacher of the school department of the city of Oakland, for salary from July 31, 1889, to and including the 28th day of February, 1890, for the sum of \$700, and to compel the defendants to draw a warrant for the payment of said claim. Petitioner was nonsuited in the trial court upon the grounds, among others, that she was employed or elected by respondents as a teacher for a certain definite time, and that period had expired prior to the time for which she now claims salary, and upon which claim she attempts to support this proceeding. The motion for a nonsuit was properly granted upon the ground stated. Petitioner was an applicant before the board of education for a position as teacher in the public schools of Oakland, and the records of the board of May 29, 1886, disclose the following: "The board then went into executive session for the election of teachers for the ensuing year," and thereupon certain teachers were declared elected, among others the petitioner. Under this order of the board she began teaching, and continued in the same position during the years 1887 and 1888. In 1889 the board elected another teacher to fill the position she had previously occupied, and this proceeding resulted. At the trial she introduced no evidence indicating her employment or election by the board as a teacher for the years 1887 and 1888 other than the action of the board already stated, but insisted that her election in the year 1886 was an

election for life, subject to removal for cause, as specified in section 1793 of the Political Code.<sup>1</sup> The case of *Kennedy v. Board, etc.*, 82 Cal. 483, 22 Pac. Rep. 1042, is the leading authority in this state bearing upon this question, and it is there decided that the election of a teacher for no specified period of time, under section 1793, is an election for life, subject to dismissal for any of the causes mentioned in said section. That case goes quite far enough, and the principle here insisted upon carries the doctrine away beyond anything there declared. In the *Kennedy Case* the election of the teacher was for no stated, definite time, and it was not held in that case that the board had no power to elect for a certain definite period. Under its general powers the board of education is authorized to enter into contracts with teachers, and fix their compensation and term of employment. If the board should employ a teacher for one year, it would be absurd to say that it could not dispense with the services of such teacher at the end of the year. In the present case, whatever doubt may surround other elements of the transaction between these parties, the time for which petitioner's services were secured was fixed and definite. The board so understood it, for its record so discloses the fact. She taught under that authorization of the board. She entered the schoolroom; performed her duties, and drew her salary under that resolution, for there was no other. And, even conceding that she labored under a resolution, not knowing some of its terms, and honestly supposing she held a life position, her mistake in this regard could avail her nothing in the present proceeding.

While the statute, as construed in the *Kennedy Case*, gives the teacher a life tenure when elected without specifying the term of service, we see no reason why a board of education has not the power to elect a teacher for a month or for a year. Conceding an election to presuppose an office, and that a teacher's position after an election is an office, the statute does not fix the term of such office; and while there might possibly be valid objections to fixing the tenure for a long period of time, there would seem to be no want of power in the board to fix the term for a period of time of as short duration as it might see fit. Under the *Kennedy Case* the board of education of Oakland had the power to elect petitioner for life, but its power was not exercised to that extent, and her election by explicit terms was confined to a period of one year. We find nothing in the law denying the right of the board to exercise such a power. Again, we see no necessity of indulging in fine distinctions between the hiring of a teacher by special contract and the election of a teacher under this provision of the Code. There appears to be no reason in saying that, if a board of education desires to secure the services of a teacher for a month or a year,

<sup>1</sup>Pol. Code, § 1793, provides that school teachers, "when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct."

such teacher must be hired by a special contract, and cannot be elected, for, if elected, a life tenure is created, even against the intentions and wishes of all parties concerned. We think the law was not enacted with such ends in view. If we concede petitioner's position to be true, that the board had no power to elect for a year, then her cause still remains without merit, for the action of the board in electing her was void, and no election whatever was had. Consequently she was teaching at the mere pleasure of the board, subject to be discharged, as any other employe, without a fixed term of employment. For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; HARRISON, J.

**MARION v. BOARD OF EDUCATION OF CITY OF OAKLAND et al.** (No. 15,055.)  
(Supreme Court of California. March 24, 1893.)

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Application by Eunice D. Marion for a writ of mandamus to compel the board of education of the city of Oakland and others to reinstate plaintiff as principal of a certain school. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. E. Snook, Geo. W. Reed, and E. Nusbaumer, for appellant. Wm. R. Davis and Jas. A. Johnson, for respondents.

**PER CURIAM.** This is an application for a mandamus to compel the board of education of the city of Oakland to reinstate the plaintiff, Eunice D. Marion, in the position claimed by her as principal of the Swett grammar school in Oakland. The judgment of the trial court went against her, and she is now before this court upon appeal from that judgment. For the reasons given in case No. 15,056, between the same parties, and filed on the same date herewith, (32 Pac. Rep. 643,) the judgment and order are affirmed.

(97 Cal. 594)

**SAN DIEGO COUNTY v. SIEFERT.** (No. 19,039.)

(Supreme Court of California. March 23, 1893.)

**PLEADINGS—WAIVER OF DEFECTS.**

1. Under Code Civil Proc. § 475, providing that defects in pleadings, not affecting the substantial rights of the parties, shall be disregarded, it is too late, after answering to the merits, decision, and judgment, to raise an objection that the complaint is insufficient.

2. Deer. Supp. p. 192, § 19, provides that the records and minutes of the board of county supervisors must be signed by the chairman and clerk. *Held*, that where it was contended that a regular meeting, held January 6th, was not regularly continued from day to day until January 22d, because the minutes of two of the intervening meetings were not attested by the clerk, and those of another meeting were not signed by the chairman nor attested by the clerk, it was competent to show by the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced, that the board met and adjourned at the times therein stated, and that

the meeting of January 22d was a regular one.

3. Deer. Supp. p. 192, § 21, provides that the county board of supervisors must cause to be kept an ordinance book, in which must be entered all ordinances duly passed by the board. *Held*, that the record of an ordinance, with proof of proper publication, was sufficient to entitle it to be admitted in evidence, and is prima facie proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and the burden of showing its invalidity was on defendant.

4. Where it appears that there was a difference between the ordinance as recorded and as published, but the error did not affect the provisions of the ordinance touching defendant's liability, such error should be held immaterial.

Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Action by the county of San Diego against John R. Siefert to recover a license tax. From a judgment for plaintiff, defendant appeals. Affirmed.

Welborn, Stevens & Welborn, for appellant. Johnstone Jones and John R. Aitken, for respondent.

**PER CURIAM.** This action is to recover from the defendant, Siefert, the sum of \$120, the amount of a license tax imposed upon his business as a saloon keeper for a period of 12 months, under an ordinance of the board of supervisors. The cause was tried by the court, and findings and judgment passed in favor of plaintiff, and the defendant appeals from the judgment and an order denying his motion for a new trial.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action in that (1) facts are not alleged showing the existence of the ordinance; and (2) that the complaint fails to show a violation of the ordinance upon which the action is founded. Upon this ground defendant objected in proper time to the introduction of any evidence. Neither of these points is well taken. The complaint alleges "that under and by virtue of the provisions of an ordinance of the board of supervisors of said county, duly passed and approved at a regular meeting of the board held on the 22d day of January, A. D. 1890, and thereafter duly published as required by law, said ordinance being known as 'Ordinance No. 48 of the Ordinances of the County of San Diego,' and entitled, 'etc.,' the defendant was required to procure a license from the tax collector, \* \* \* and to pay for such license the sum of ten dollars per month." This allegation might not have stood as against a demurrer for uncertainty, but no demurrer was filed. Furthermore, the defendant, in his answer, alleged that he had no information or belief as to the truth of the allegation above quoted, and therefore denied that the board of supervisors had duly or at all passed or approved ordinance No. 48, as in said allegation referred to. The complaint alleged that the defendant "failed, refused, and neglected, and still does fail, refuse, and neglect, to pay such license tax, contrary to and in violation of the provisions of said ordinance." There is no allegation

in the complaint that he failed to take out a license, but in his answer the defendant, "further answering, denies that he, during the times mentioned in said complaint, or at any other time or times, has or had neglected, failed or refused, or still neglects, fails, or refuses, to take out any license, as required by said ordinance." It is too late now, after answering to the merits, decision, and judgment, to raise the objections referred to. Section 475, Code Civil Proc.:<sup>1</sup> *Harkness v. McClain*, (Utah,) 29 Pac. Rep. 964. The findings support the judgment. There is a general finding that all the allegations of the complaint are true, and the denials and allegations of the answer are untrue. Several questions were made upon the trial and discussed in the briefs, which will necessarily arise upon a new trial.

1. It is contended that ordinance 48 was not adopted at a regular meeting of the board. For the purpose of proving that the meeting of the board at which this ordinance was passed was a regular meeting, plaintiff introduced in evidence ordinance No. 42, adopted January 11, 1889, declaring that the regular meetings of the board should be held monthly on the first Monday of each month. It is contended that plaintiff is required to show that ordinance 42 was adopted at a regular meeting also; that, without such evidence, it cannot be shown that the meeting at which ordinance 48 was adopted was a regular one. In *People v. Dunn*, 89 Cal. 228, 26 Pac. Rep. 761, it was held that an ordinance fixing rates of county licenses must be passed at a regular meeting, or at a special meeting called for that purpose. That the board must be regularly convened to perform any official act is true; but the legality of ordinance 42 was not put in issue by the pleadings, and the presumption arising from its existence upon the record of ordinances was quite sufficient to entitle it to be received in evidence without further proof. Code Civil Proc. § 1963, subd. 15; *Id.* § 1918, subd. 5; *Id.* § 1920. The presumption is, of course, a disputable one, but the burden of showing its invalidity was upon the defendant. But upon this point appellant further contends that the meeting at which ordinance No. 48 was passed was not a regular meeting, even if ordinance No. 42 was valid, for the reason that the regular meeting held January 6, 1890, was not regularly continued from day to day until January 22d, upon which last-named day it is claimed the ordinance was passed. This objection is based upon the fact that the minutes of two of the intervening meetings were not attested by the clerk, and that the minutes of another meeting were not signed by the chairman nor attested by the clerk. Section 19 of the county government act (*Deer. Supp.* p. 192) provides: "The records and minutes of the board must be signed by the chairman and clerk."

Substantially the same provision existed in the sixth section of the "Act to create a board of supervisors," (*Hitt. Gen. Laws*, § 6975,) and that provision was considered by this court in *People v. Eureka, L. & Y. C. Co.*, 48 Cal. 145. In that case the court said: "The action recorded is not the action of the chairman or clerk. They sign the minutes, not as certifying to their own official action, but as witnesses that the record is the record made by the clerk under the direction of the board. \* \* \* The statute does not declare that the record shall not be proof of the action of the board if not signed by the officers named, but the effect is only to make their signatures evidence, identifying the minutes. The failure of the chairman and the clerk to discharge their particular duty simply imposed on the party desiring to prove the official action of the board some additional trouble in establishing the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced." Upon this authority, the minutes of the meetings, if proved as there indicated, were competent to show that the board met and adjourned at the times therein stated, for the purpose of showing the continuity of the session, and that the meeting of the board on the 22d of January was a regular one. The custom of the chairman, as to the time and circumstances under which he signed the minutes, could be material only so far as it tended to explain the omission to sign them.

2. The question whether the ordinance was signed by the chairman and attested by the clerk, as required by the county government act, was seriously controverted. That the signing and attesting are necessary to the passage and validity of the ordinance is clear. The statute conferring upon the board the power of enacting ordinances specifies the manner in which it shall be exercised. *Deer. Supp.* p. 197, § 26. "When the mode of enacting ordinances is prescribed, it must be pursued." *Dill. Mun. Corp.* § 309. This signing by the chairman and attesting by the clerk is intended by the statute to be upon the original ordinance. Section 20, subd. 9, of the same act, makes it the duty of the clerk to "authenticate with his signature and the seal of the board all ordinances or laws passed by the board, and to record the same at length in the ordinance book." Section 21 provides: "The board must cause to be kept: \* \* \* (6) An ordinance book, in which must be entered all ordinances or laws duly passed by the board." The question whether the ordinance was passed, signed, and attested is one of fact, which need not be considered upon this appeal. The record of the ordinance, accompanied with proof of proper publication, is sufficient to entitle it to be admitted in evidence, and is *prima facie* proof that the ordinance was passed, signed, and attested in the form in which it appears in the record, and casts the burden on the defendant of producing evidence sufficient to rebut the presumption arising from the record, at least as to some particular essential to its validity. The principal question, therefore, is one of fact

<sup>1</sup>Code Civil Proc. § 475, provides that "the court must, in every stage of an action, disregard any error or defect in the pleadings. \* \* \* which does not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."



to be found by the court or jury upon legal evidence, as in other cases.

3. It was developed upon the trial that there was a difference between the ordinance as recorded and as published; but what the defect was, further than that "section 16 is different," was not disclosed. The object of publication is to impart notice to those who are or may be affected by its provisions. If an error occurs in the publication, which does not affect the provisions of the ordinance affecting the defendant's liability or his defense against such liability, it should be held immaterial. More cannot be said in the absence of definite knowledge of the defect in the published ordinance. The judgment and order appealed from are affirmed.

(98 Cal. 13)

DAVIS v. SOUTHERN PAC. CO. (No. 14,844.)

(Supreme Court of California. March 27, 1893.)

NEW TRIAL—CONDITIONS.

It is within the discretion of the trial court, after a verdict awarding excessive damages, to make an order denying a motion for a new trial on the condition that plaintiff will remit a certain part of the amount found by the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Flan, Judge.

Action by William Davis against the Southern Pacific Company to recover damages for personal injuries. Judgment was entered in favor of plaintiff, and defendant appeals. Affirmed.

W. H. L. Barnes and Frank Shay, for appellant. George A. Rankin, for respondent.

McFARLAND, J. This is an action to recover damages for personal injuries alleged to have been received by plaintiff on a passenger train of defendant. The jury returned a verdict for plaintiff of \$15,309. Defendant moved for a new trial upon various statutory grounds, including excessive damages. The trial court made an order that, if the plaintiff should consent that the judgment be reduced to \$9,000, the new trial would be denied, and that otherwise it would be granted. Plaintiff filed a written consent to such reduction, and the motion was thereupon denied. Defendant appeals from the judgment and from the order denying a new trial.

The main proposition argued by counsel for appellant is that the denial of the motion for a new trial, upon condition that respondent remit part of the amount found by the jury, was unauthorized by law; and that, if the court thought the verdict excessive, its duty was to have granted a new trial. This position is undoubtedly, upon principle, a very strong one, and counsel have defended it very ably. They have also cited authorities from other states, which support the proposition, although we are disposed to think that the weight of authority in other states is the other way. But, whatever might be considered the weight of reason and foreign

authority on the question above stated, if it were res integra here, the right of a court to do what is complained of in the case at bar is too firmly established in this state by a long line of decisions to be now questioned. The following are some of the cases in which the practice of denying a new trial when the plaintiff remits a part of the verdict has been established and recognized: *George v. Law*, 1 Cal. 363; *Benedict v. Cozzens*, 4 Cal. 381; *Chapin v. Bourne*, 8 Cal. 294; *Clark v. Huber*, 20 Cal. 196; *Carpenter v. Gardiner*, 29 Cal. 160; *Tarbell v. Railroad Co.*, 34 Cal. 616; *Harrison v. Peabody*, Id. 178; *Kinsey v. Wallace*, 36 Cal. 462; *Russell v. Dennison*, 50 Cal. 243; *Atherton v. Fowler*, 46 Cal. 323; *Dreyfous v. Adams*, 48 Cal. 131; *Gregg v. Railroad Co.*, 59 Cal. 312; *Clanton v. Coward*, 67 Cal. 373, 7 Pac. Rep. 787; *Phelps v. Cogswell*, 70 Cal. 201, 11 Pac. Rep. 628; *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. Rep. 302; Id., 84 Cal. 590, 24 Pac. Rep. 920; *Loveland v. Gardner*, 79 Cal. 317, 21 Pac. Rep. 766; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. Rep. 880. It is argued that these authorities constitute a recognition of the practice without inquiry, rather than the determination of a contested point; but it will be found that in a number of the cases the point was expressly raised and argued by counsel, and definitely determined by the court. Such was the fact in the above-cited cases of *Benedict v. Cozzens*, *Chapin v. Bourne*, *Dreyfous v. Adams*, *Clanton v. Coward*. In *Gregg v. Railroad Co.*, while the briefs of counsel do not appear in the report, the opinion of the court shows that the only point in the case was as to the power of the court to make an order similar to the one in the case at bar, and the court approves the practice as settled. Since then the practice has been frequently approved as beyond question. Moreover, this court has gone further, and has itself, on appeal, ordered a new trial, unless respondent should file a remittitur of damages. *Tarbell v. Railroad Co.*, *Kinsey v. Wallace*, *Atherton v. Fowler*, *Phelps v. Cogswell*, *Durfee v. Garvey*, *Loveland v. Gardner*, all *supra*. It is contended that the rule should not apply to unliquidated damages,—damages for personal injuries,—but the rule was applied to just such damages in the following cases, above cited: *George v. Law*, *Benedict v. Cozzens*, *Tarbell v. Railroad Co.*, *Kinsey v. Wallace*, *Gregg v. Railroad Co.*, *Phelps v. Cogswell*. Considering the foregoing authorities, and others not cited, it would be almost as great a stretch of judicial authority for us to undertake to overthrow this long-established practice as it would be to undertake to dispense with a statute. We hold, therefore, that the action of the court now under review was in accordance with settled practice. Some of the cases speak of such action as within the discretion of the court, and perhaps there might be a state of facts upon which such action would be an abuse of discretion. But there was no such abuse of discretion in the case at bar. There are no other points in the case which call for special notice. As to the general liability of the appellant, the evidence, although to some extent conflicting, sustains the ver-

dict, and, upon the evidence, we cannot pronounce the amount of the damages after the remittitur as excessive, at least in the sense that would warrant us in disturbing it. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(18 Colo. 231)

In re EMERGENCY CLAUSE.

(Supreme Court of Colorado. March 18, 1893.)

ENACTMENT OF STATUTE—ADOPTION OF EMERGENCY CLAUSE.

The emergency clause to a legislative act, to be effective, must be adopted by a vote of two thirds of all the members elected to each house. If not so adopted, it should be struck out before enrollment, even though the bill be otherwise constitutionally passed.

(Syllabus by the Court.)

The opinion of the court is in response to the following question submitted by the senate: "When a bill or act declares an emergency to exist, and directs an act to take effect upon its passage in the body of the act, under section 19 of article 5 of the constitution, is a majority vote sufficient to pass such emergency clause, and make the same effective, or does it require a vote of two thirds to declare an emergency in any event?"

PER CURIAM. The section of the constitution referred to in the question submitted reads as follows: "Sec. 19. No act of the general assembly shall take effect until ninety days after its passage (except in case of emergency, which shall be expressed in the act) [unless] the general assembly shall, by a vote of two thirds of all the members elected to each house, otherwise direct. No bill, except the general appropriation bill for the expenses of the government, only [which shall be] introduced in either house of the general assembly after the first thirty days of the session, shall become a law." Sess. Laws 1883, p. 21. The foregoing is a literal transcript of the amendment proposed to section 19 of article 5 of the constitution, as the same appears in the Session Laws of 1883,—the first publication thereof by authority. It will be observed that the word "unless," immediately following the parenthetical clause, and also the words "which shall be" are inclosed in brackets. In Mills' Ann. St. 1891, the words "which shall be" are omitted, but the word "unless" is retained, though not in brackets. After diligent search at the office of the secretary of state, we have not been able to find the original act providing for the submission of this amendment. Section 19 was amended at the same time as section 6 of the same article. The amendment to section 6 extended the limit of the legislative session from 40 days to 90 days. The amendment to section 19 extended the time for introducing bills from 25 days to 30 days. The amendment of the latter section was doubtless intended as a supplement to the former. No reason is perceived for otherwise amending the latter section. In our opinion the true intent and meaning of the

first clause of section 19 is that no legislative act can take effect until at least 90 days after its passage, unless it is otherwise provided by an emergency clause incorporated into the act; and such emergency clause, to be effective, must be adopted "by a vote of two thirds of all the members elected to each house." If such emergency clause be not adopted by such two-thirds vote, it should be struck out before enrollment, even though the bill be otherwise constitutionally passed.

(13 Mont. 160)

STATE v. BAKER.

(Supreme Court of Montana. April 3, 1893.)

MURDER—DEFINITION OF SECOND DEGREE—INSTRUCTIONS.

1. After defining murder in the first degree, merely reciting the words of the statute that "all other kinds of murder shall be deemed murder in the second degree" is not a sufficient definition of the second degree.

2. On a trial for murder the jury were instructed that if they "believe from the evidence that defendant had been injured or received provocation from deceased, whatever that injury or provocation might have been, yet if, after receiving such injury or provocation, there should have been an interval between the provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and shall be deemed murder in the first degree." *Held*, that the instruction was unnecessarily narrowed, as it failed to define provocation, and omitted all reference to time for the "passions to cool," as those words are used in the statute defining the degrees of homicide.

Appeal from district court, Custer county; George R. Milburn, Judge.

Charles A. Baker was convicted of murder in the first degree, and appeals. Reversed.

Middleton & Light, for appellant. Henri J. Haskell, Atty. Gen., J. W. Strevell, and T. J. Porter, for the State.

PEMBERTON, C. J. On the 3d day of December, 1892, the appellant was convicted of the crime of murder in the first degree, and, on the 10th day of the same month, the judgment of the lower court was rendered that the appellant be hanged on a day therein named. The appellant moved for a new trial. The motion was denied. From the order overruling said motion, as well as the judgment of the court, this appeal is prosecuted.

The principal error assigned is as follows: "That the court, by instructions, authorized the jury to find the defendant guilty of murder in the first degree or manslaughter, and did not sufficiently or at all define murder in the second degree in his instructions." From an inspection of the record, it appears that the court below, in its instructions, defined murder in the first degree and manslaughter, the only definition of murder in the second degree being found in these words of the statute, attached to the definition of murder in the first degree, to wit, "All other kinds of murder shall be deemed murder in the second degree;" and, without any other definition of murder in the second degree, the court, in its instructions, in several places,

told the jury that they were authorized, if the evidence warranted it, to find appellant guilty of either murder in the first degree, murder in the second degree, or manslaughter, under the information in this case.

The question for this court to determine is whether this was a sufficient definition of murder in the second degree to enable the jury to determine the essential characteristics of this degree of homicide. It was the duty of the court to so fully declare the law, by its instructions, upon every degree of crime of which the appellant could be convicted under the information, as to give him the benefit of having the evidence considered by the jury, under a full knowledge of all the essential elements of each degree of crime for which a verdict could be rendered against him. We think the authorities are substantially uniform upon this subject. This doctrine is fully and forcibly discussed in *State v. Meyer*, 58 Vt. 457, 3 Atl. Rep. 195, under a statute like ours, in which case the court says: "The reading of the statute, declaring what was murder in the first degree, and that all other kinds of murder shall be murder of the second degree, was not a sufficient explanation of the two degrees. The jury, from that reading, without explanation, would have no appreciation of the distinguishing characteristics of the two degrees, which have confessedly been something of a puzzle to lawyers and judges. How many would understand from the reading of the statute defining the first degree of murder, and the phrase, 'All other kinds of murder shall be murder of the second degree,' what, in fact, constituted murder in the second degree? How many men, not read in the law, would understand from it that murder in the second degree is the unlawful killing of a human being with malice aforethought, but without deliberation, premeditation, or preconcerted design to kill, and that the distinguishing feature of the two degrees rests in the absence of deliberation, premeditation, and preconcerted design from the second degree?" This case is exactly like the one under discussion. In both cases the trial court read the statutes defining the different degrees of homicide, or copied them into their instructions verbatim. The reasoning in *State v. Meyer* seems so convincing and conclusive that any other conclusion than therein stated seems to be unauthorized. This view of the law is supported by the following authorities: *Whart. Crim. Pl. & Pr. § 709 et seq.*; *State v. Brainard*, 25 Iowa, 572; *Owen v. Owen*, 22 Iowa, 270; *Wynne v. Georgia*, 56 Ga. 113; *Lancaster v. State*, 3 Cold. 339; *State v. Wyatt*, 50 Mo. 309; *Territory v. Scott*, 7 Mont. 407, 17 Pac. Rep. 627; *Crim. Pr. Act, § 326*; 1 *Rish. Crim. Proc. § 980*. From a consideration of these authorities, we are of opinion that the court, in its instructions, should have fully and completely defined murder in the second degree, distinguishing it from murder in the first degree and manslaughter, so that the jury could have had before them all the essential elements of each of these degrees of homicide, so that they could intelligently

determine from the evidence which of the degrees appellant was guilty of, if guilty at all. In cases where it is clear to the mind of the court that there is no evidence to reduce the killing to any lower degree of homicide than murder in the first degree,—for instance, in cases where the death is produced by poisoning or lying in wait,—the court is justified in refusing to instruct the jury in relation to such lower degrees of homicide. But this case is widely distinguished from such cases. In this case all the degrees of homicide known to our statute were submitted to the jury as issues to be passed upon and determined by the evidence and instructions of the court. In such cases the court should clearly define, in its instructions, each degree of homicide. This was not done in this case, and we think the omission was error.

Instruction 16, given by the court, is as follows: "If the jury, from the evidence in this case, believe, beyond a reasonable doubt, that the defendant, at or about the time charged in the information, killed Austin McDonald at and within the county of Custer, then it will devolve upon the jury, under the evidence, to determine what degree of offense such killing constituted; and if the jury believe from the evidence that the defendant had been injured or received provocation from the person killed, whatever that injury or provocation might have been, yet if, after receiving such injury or provocation, there should have been an interval between the provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and shall be deemed murder in the first degree, and the jury should so find by their verdict." We think this instruction is narrowed unnecessarily by the court, while it might not be considered fatally defective when taken in connection with the whole charge. In drawing the distinction in this instruction between murder in the first degree and manslaughter, the court omitted the words qualifying the provocation; and also, in his reference to the interval of time for the voice of reason to be heard, he omits all reference to time for the "passions to cool." These words were put into the statute by the legislature for a purpose, and it is dangerous to omit these statutory words defining any degree of homicide in a charge to the jury, unless the court is careful in using words equivalent in meaning. The order overruling the motion for new trial is overruled; the judgment is reversed, and a new trial ordered.

(13 Mont. 138)

STATE ex rel. JAY v. MARSHALL et al.,  
School Trustees.

(Supreme Court of Montana. March 27, 1893.)

SCHOOLS — LOCATION — REMOVAL BY TRUSTEES —  
WHEN AUTHORIZED — MANDAMUS.

1. Comp. St. § 1885, relating to schools, provides that a board of trustees shall have power "(6) to build or remove schoolhouses, and purchase or sell school lots, when the trus-

tees may be directed by a vote of the district so to do." *Held*, that such statute applies to the removal of the school, as well as "schoolhouses," and the board of trustees had no authority to remove a school from the established schoolhouse of their district to another part of such district without direction so to do by a vote of the district.

2. Where such school was removed three years prior to commencement of an action to compel the trustees by mandamus to move it back to the district schoolhouse, and the judge continued the case, and ordered an election, which resulted in an approval of the action of the trustees in removing the school, the writ of mandamus should be denied, though the judge had no authority to order such election, and the same was irregular.

Appeal from district court, Madison county; Thomas J. Galbraith, Judge.

Action by the state of Montana, on the relation of O. W. Jay, against Ira M. Marshall and others, trustees of school district No. 23, Madison county, for peremptory writ of mandamus to compel defendants to move the district school back to the district schoolhouse, from which it had been removed by them without a vote of the district authorizing them to remove it. From a judgment granting the writ, defendants appeal. Reversed.

The other facts fully appear in the following statement by DE WITT, J.:

This is an appeal from the judgment of the district court in a special proceeding, in which the relief granted was a peremptory writ of mandamus. The defendants are trustees of school district No. 23, of Madison county, Mont. The relator is a resident and taxpayer of said school district. In his application for the writ, he sets up that there is a regularly built and established schoolhouse, and that the trustees unlawfully moved the school properties and equipment to a house in another and remote part of the district, and ordered the teacher to go to said place and hold the school; that they are maintaining, and will continue to maintain, the school at said other place. The relator asks for the writ of mandamus to require the trustees to restore the school to the old schoolhouse. The answer of respondents is a very voluminous document, and sets up in great detail the alleged worthless and dangerous character of the old schoolhouse, and the inconvenience of its location for the people of the district. It admits the moving of the school to the new place, and describes the convenience and suitability of the new schoolhouse and site. It alleges that, for three years prior to the application for the writ of mandamus, the school had been maintained at the new place, and so maintained with the acquiescence of the people of the district. The answer admits that the new schoolhouse has been erected and used for a school without there being submitted to the qualified electors of the district the question of the removal of the school. The section of the statute requiring such submission is as follows: "Every board of trustees \* \* \* shall have power, and it shall be their duty, \* \* \* (6) to build or remove schoolhouses, and purchase or sell school lots, when the trustees may be directed

by a vote of the district so to do." Section 1885, div. 5, Comp. St. Mont. The relator demurred to the answer, in that it did not constitute a defense; that is to say, that it did not show a reason why the mandamus should not be issued. The point of the demurrer was that the moving of the school by the trustees was without authority, because they had not submitted the question to the electors, as provided in section 1885, subd. 6, supra, and that, as the trustees did not show by their answer that they had the vote of the district upon the question, they therefore did not show any reason why they should not be required by mandamus to restore the school to the old site and house theretofore established. Upon the hearing of the demurrer, on May 28th, in the district court, the judge said that he was inclined to believe that the demurrer must be sustained, but that he would not so decide at the present time. He then continued the hearing until July 25th, and he made an order that an election should be held on the 15th day of July; that the election be by ballot; that notices be posted; and that it be held under the school law providing for elections. The order of the court was that the question to be voted upon at said election should be:

"Shall the action of the board of trustees of district No. 23, in said county of Madison, in building a new schoolhouse, and removing the school furniture and appliances thereto, be approved and ratified? And at such election the ballot used shall contain the words, to wit:

"Approval and Ratification: Yes;" or  
"Approval and Ratification: No."

Thereafter, on the 25th day of June, the trustees duly posted notices of election. In pursuance to said notice, said election was held. The trustees returned their proceedings into court, and filed an amended and supplemental answer, setting up the holding of the election and the result thereof. The election showed a majority of the votes in favor of the ratification of the act of the trustees. The relator demurred to the amended and supplemental answer, and moved to strike out therefrom the matter in regard to the election and election returns. The motion to strike out and the demurrer were sustained. The judge of the court filed a short opinion in sustaining the demurrer and motion. The ground of his action was apparently that, notwithstanding the election which had been held, such election constituted no defense to the writ. He consequently issued the writ. From the judgment issuing the same, this appeal is taken.

Luce & Luce, for appellants. W. A. Clark, for respondent.

DE WITT, J., (after stating the facts.) When the statute provides that the school trustees shall have power to remove "schoolhouses" only when directed by a vote of the district so to do, we are of opinion that the term "schoolhouse" does not mean simply the house, but refers rather to the school plant, including the general equipment, furniture, maps, charts,

globes, and pupils and teacher. The rural school districts are large geographically, and small in population. The school should naturally be located to best serve the greatest number. Its location can in no way be so satisfactorily determined as by a vote of the electors of the district. Such determination is in accordance with the American principle of majority rule. We take it that it rarely, if ever, occurs that a schoolhouse is moved. In cities the schoolhouses are elaborate structures, the moving of which is wholly impracticable. In the country they are rude buildings, and are likely to be not worth the moving. We doubt that a schoolhouse, as a building, was ever moved in this state. We can scarcely conceive of circumstances where it would be practicable to move the house. On the other hand, changes in the centers of population frequently occur in rapidly developing communities. When they occur, the trustees are likely to be elected from such new center. The people of such new center are likely to want the school near to them. But the trustees must not change the place of the school without the vote of the district. At such election all elements express themselves. Matters of convenience to the majority, questions of expense to the district, suitability of site, and scores of opinions and influences which sway a rural school district, are sifted down through the ballots, and the result demonstrates the will of the people as to the site of their school. This, in our opinion, was within the view of the legislature, and they meant to express their intent (section 1885, subd. 6) that the people should determine the site of their school. This is a more reasonable view than to hold that the statute means to say only that a vote shall be had upon the question of moving the house. The house is the shell,—the envelope. The substance is the school itself, and it is that, in our opinion, which the statute contemplates. The district court judge was able to observe from the pleadings that the trustees had moved the school without being directed so to do by a vote of the district. He apparently held the view that we have suggested as to the interpretation of section 1885, subd. 6, and was of opinion that such act of the trustees was without authority, and that the demurrer to the answer ought to be sustained; but he was able to observe, further, that the school had been moved for three years before the commencement of the mandamus proceeding, and had been maintained at the new place for that time, with the acquiescence of all the people, and with complaint from none. He said that he thought the demurrer to the answer should be sustained, but he may have seen the hardship of disturbing the then and for three years existing condition of affairs until the will of the people was announced as to the site of the school. He therefore ordered an election to be held. We are not prepared to say that the court had authority to make this as an order. We may regard it as a suggestion by the court, acquiesced in by the parties. The court had authority to continue the hearing of the case, and the school trustees had authority to hold the

election. During the continuance the trustees did hold the election.

At the next hearing of the case in the court, the trustees exhibited the election returns, and the result thereof, in a supplemental answer. They presented them as a reason why the mandamus should not issue. In form, this election was an approval and ratification of the act of the trustees in moving the school to the new place. In this matter of form the election was not wholly regular; but we think that it may be reasonably held that the result obtained was an expression of the will of the people that the school should be at the new place. It is the same result that would have been reached if the court had, by mandamus, required the trustees to move the school back to the old place, and then an election had been held, and it was decided to move to the new site. By regarding the election which was held as practically an election authorizing the trustees to move the school, there is saved the twice moving of the school. We are of opinion that this view should obtain. The district court, therefore, on the final hearing, had before it this situation: That the trustees had moved the school, and that they had been directed by a vote of the district so to do. The order of these events had been reversed from that doubtless contemplated by the statute; but, by overlooking this irregularity, substantial justice is done, and the will of the people of the district is effected as completely as if the mandamus had sent the school back to the old place, and an election, wholly formal, had again sent it over to the new site. We are of opinion that the situation, as presented to the district court upon the final hearing, should have remained undisturbed. "Interest republice ut finis litium sit." And particularly it interests a small school district that its substance should not be consumed in unnecessary litigation. The district court judge must have inclined to these views when he ordered the election, but, upon the final hearing, he evidently considered the election as of no force, for he ordered the writ issued. We are of opinion that the court had better have refrained from interference. Let the judgment therefore be reversed. The case is remanded to the district court, with directions to dismiss the writ, and enter judgment in favor of the appellants for costs.

PEMBERTON, C. J., concurs.

HARWOOD, J., (concurring.) The real question for determination in this case is whether the supplemental answer of appellants set forth facts sufficient to constitute a defense to this proceeding for mandamus to compel said trustees to remove the school from its present location back to the schoolhouse formerly occupied; for, if the facts alleged in the supplemental answer constitute a defense, the demurrer thereto admits the truth of those allegations, leaving simply a question of law for determination, (section 575, Code Civil Proc.) and judgment should be entered accordingly. The first change of place of the schoolhouse for said school

district, without submission of that question to the electors of the district, as provided in section 1885, div. 5, Comp. St., was irregular, and appears to have been so regarded by the trial court. But that removal occurred about three years before the commencement of this proceeding, and I gravely doubt that, after such removal and establishment of said school at the latter place had been acquiesced in for such a period of time, a mandamus proceeding should have been entertained to compel the present board of trustees to again remove said school back to the former site, or elsewhere, without first submitting to the electors of said district the question of such removal, as provided in the section of the statute cited *supra*. Under such a state of facts, I doubt that it could be maintained that the law enjoins upon the present board of trustees the duty of removing said school back to the former site, and to a schoolhouse abandoned three years since, without submitting the question of removal to the proper electors. If the present board of trustees were not under such duty, then this proceeding will not lie for the purpose sought to be attained. Section 566, Code Civil Proc.

The court below, however, in the first stage of the proceedings, was of opinion that the question of the change of the location of said school from its former to its present site should, under the circumstances, be submitted to the electors of said district; and whether the action of the court upon this point be regarded as an order that such election be held, or as a suggestion of the propriety of settling the controversy by such election, to be held under the provisions of the school law, the fact appears by the supplemental answer that such order or suggestion was voluntarily acquiesced in, and such election held pursuant to the provisions of the school law, whereat, as appears, the supporters of each side of the controversy engaged their utmost endeavors to prevail, and the result was a ratification of the former action of the trustees. It is a familiar principle of law that although an agent, in doing an act for the principal, departs from or exceeds his authority, such action may be ratified by the principal. The electors of said district having, by their vote, not only ratified the former moving of said school, but in effect declared their will to be that the school remain where now located, it cures the former irregularity, as far as it can be cured. But, leaving the question of ratification aside, said election, in effect, as a new proposition, to all intents and purposes, involved the question whether said school should remain at its present location or be removed back to its former site, which question was resolved in favor of the present location. I am unable to conceive how it can be successfully affirmed, in the face of this authoritative declaration by the electors of said district, that said school must still be carried back to the former location, simply because of an irregularity committed by a board of trustees in removing said school to its present site three years ago. Giving to that irregularity all the force it could have, it does

not destroy the right of the electors of said district to now determine where said school shall be located; and that determination has been announced in favor of the present location, as appears by the supplemental answer. I therefore, upon these grounds alone, concur, without hesitation, in the conclusions that the supplemental answer, which is confessed as true by the demurrer, shows a sufficient defense to the proceeding; and that judgment of dismissal, with costs, in favor of appellants, should be entered in the court below.

(13 Mont. 127)

CHOATE v. SPENCER et al.

(Supreme Court of Montana. March 20, 1893.)

WRITS—SUMMONS IN DISTRICT COURT—FAILURE TO ATTACH SEAL—VALIDITY—UNITED STATES SUPREME COURT—DECISION—WHEN BINDING.

1. Code Civil Proc. §§ 527, 528, provide that the district court shall have a seal, and that the clerk of the court shall keep the seal. Section 68 provides that the summons "must" be issued under the seal of the court. *Held*, that a summons issued out of the district court without the seal of such court being attached was void, and the service thereof on the defendant, in an action in such court, gave the latter no jurisdiction. *Insurance Co. v. Hallock*, 6 Wall. 556, followed.

2. A decision of the supreme court of the United States construing a statute which is, in effect, the same as a statute of Montana, and rendered while the latter was a territory, is controlling on the supreme court of this state. *Sullivan v. City of Helena*, 25 Pac. Rep. 94, 10 Mont. 134, followed.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by George R. Choate against Almon Spencer and others, to quiet the title to certain real estate. From a judgment for defendants, plaintiff appeals. Reversed.

Thompson & Maddox, for appellant. F. N. & S. H. McIntire, for respondents.

PEMBERTON, C. J. This is a suit to quiet title to certain mining property, situated in Meagher county, and described in the complaint. The appellant, who was plaintiff below, alleges in his complaint that on the 16th day of July, 1888, he was, and is now, seised and possessed of an estate of inheritance in and to the mining claim described therein; that the respondents, who were defendants below, are tenant in common with him in and to said property, but dispute appellant's title to the same; that on the 17th day of July, 1888, the appellant was indebted to one Jere Sullivan in the sum of \$208.32; that on said last-mentioned day the said Sullivan commenced suit against him to recover judgment for such indebtedness in the district court of the then fourth judicial district of the territory of Montana, in and for Choteau county, and that on said last-mentioned day the said Sullivan procured to be issued, under the hand of the clerk of said court, a certain paper, purporting to require this appellant to appear and answer said complaint; that said paper or pretended summons did not contain or bear in any place or part there-

of the seal of said district court, but, on the contrary, bore the impression of the seal of the probate court of said Choteau county; that on the 21st day of July, 1888, there was served upon the appellant a copy of said pretended summons in Meagher county, in the territory of Montana, without the seal of said district court; that no summons issued out of said district court, and authenticated by the seal of said court, was ever served on the appellant; that appellant never appeared in said court at any time to answer said complaint; that said pretended summons, so served upon the appellant, was returned and filed with the clerk of said court on the 25th day of July, 1888; that thereafter, on the 5th day of November, 1888, the default of the appellant was entered in said court, and final judgment entered in said court against the appellant in said cause; that said pretended summons was the only means by which said court ever attempted to acquire jurisdiction of said appellant; and, as such, was the only basis for the judgment entered in said court against appellant in said cause; that on the 4th day of June, 1889, an execution issued out of said district court upon said pretended judgment, directed to the sheriff of Meagher county, who levied the same on the property of the appellant, (described in the complaint herein,) and on the 5th day of July, 1889, said sheriff sold said property to satisfy said pretended execution; that Timothy E. Collins et al. purchased said property at said pretended sale, that thereafter said Collins and others transferred their certificate of purchase of said property to the respondents, and that on the 13th day of January, 1890, the said sheriff executed and delivered a sheriff's deed to said property to the respondents, which deed was duly recorded in the office of the recorder of said county of Meagher; that said property was sold for the sum of \$722.86, but was of a much greater value, to wit, of the value of \$30,000; that said respondents, at the time of receiving the certificate of purchase and the deed to said property, were well acquainted with the defects and infirmities of the said pretended summons and judgment issued and rendered in said district court upon and against the appellant, and purchased the same with full knowledge of all the defects in relation thereto; that said respondents claim title in fee to the mining ground mentioned in the complaint, under and by virtue of said certificate of purchase and sheriff's deed thereto; and that said deed is a cloud upon the title of appellant, to the injury and damage of appellant in the free use and enjoyment thereof. Appellant asks that said deed be declared void, and that it be canceled. To this complaint the respondents filed a general demurrer, which was sustained by the court, and judgment was rendered for the respondents for costs. From this judgment the appellant prosecutes this appeal.

The appellant insists that the summons issued out of the district court of the fourth judicial district of the territory of Montana, in and for Choteau county, on the 17th day of June, 1888, in the suit of

Jere Sullivan against this appellant, was absolutely void, because it was not authenticated by the seal of said court. If this contention is correct, the district court never acquired jurisdiction of this appellant, who was defendant in that suit, by the issuance and service of such summons; and any judgment said court may have entered in said cause, as well as the execution issued for the enforcement of such judgment, and all other proceedings thereunder, including the levy thereof on the property of appellant, and the sale and execution and delivery of the sheriff's deed complained of, would necessarily be null and void. The complaint states that the said summons bore the impress of the seal of the probate court of Choteau county, instead of the seal of the district court, at the time of its issuance and service. For the purposes of this case we shall treat the summons as having been issued without a seal.

At common law, a writ issuing from a court having a seal, in order to be considered authentic or of any value, must be attested by the seal of the court from which it is issued. The laws of this state provide that the district courts shall have a seal, (section 527, Code (Civil Proc.)) and that the clerk of the court shall keep the seal, (section 528, Id.) And section 68, Id., requires that the summons must be issued under the seal of the court. So that, under our statutes, there is no departure from the common law rule requiring such writs to be authenticated by the seal of the court from which they issue. The appellant has cited a number of authorities holding the common-law doctrine that such writs must be authenticated by the seal of the court from which they are issued in order to give them validity, and without which they would be void. The principal case relied upon by appellant in support of his contention that the summons under discussion was void for want of the seal of the court is *Insurance Co. v. Hallock*, 6 Wall. 556. This case went to the supreme court of the United States, from Indiana, and involved the validity of a deed executed and delivered by a sheriff to real estate, under an order of sale, under a statute of that state. The statute required the order of sale to be issued under the seal of the court. The seal was omitted from the order of sale. In delivering the opinion of the court, Mr. Justice Miller says: "If the paper here called an 'order of sale' is to be treated as a writ of execution or fieri facias issued to the sheriff, or as a process of any kind issued from the court, which the law required to be issued under the seal of the court, there can be no question that it was void, and conferred no authority upon the officer to sell the land. The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one. We have decided in this court that a writ of error is void for want of a seal, though the clerk had returned the transcript in obedience to the writ. We have held that



a bill of exceptions must be under the seal of the judge." This was a collateral attack made upon the deed executed by the sheriff, under the order of sale from which the seal had been omitted. Counsel for the respondents contend that the case just cited is not controlling, and claim that the Indiana courts have declined to follow the rule therein asserted, and cite a number of Indiana cases in support of their position. From an examination of the Indiana cases cited by respondents, we are of opinion that the departure from the rule asserted in *Insurance Co. v. Hallock*, supra, has been occasioned by the legislation in Indiana since the decision in 6 Wall. In support of this view, we quote from *State v. Davis*, 73 Ind. 360, this case being cited by respondents. In this case the court say: "It is undoubtedly true, as appellees insist, that at common law a writ issuing from a court must, in order to be entitled to be considered as regular and authentic, be attested by the seal of the court from which it issued. *Williams v. Vanmeter*, 19 Ill. 293; *State v. Flemming*, 66 Me. 142; *Wheaton v. Thompson*, 20 Minn. 196, (Gil. 175); *Reeder v. Murray*, 3 Ark. 450. The case of *Insurance Co. v. Hallock*, 6 Wall. 556, does decide that an order of sale issued by a court of this state was void because not attested by the seal of the court. It has also been held by this court that, where there is no statute to the contrary, a writ or record must be attested by the seal of the court from which it comes. *Jones v. Frost*, 42 Ind. 543; *Hinton v. Brown*, 1 Blackf. 429; *Sanford v. Sinton*, 34 Ind. 539. The older cases did hold that a writ lacking the seal of the court was absolutely void, but there is much conflict upon this point among the modern cases, many of them holding that such a writ is not void, but merely voidable. Our court long since held that such a writ was not void. It is true, as argued by appellees, that a summons so clearly defective as to be insufficient to confer jurisdiction cannot, after judgment, be so amended as to give jurisdiction. If a summons without a seal be conceded to be void, then there can be no amendment, for it is axiomatic that a void thing cannot be amended. The liberal provisions of our statute respecting the summons would take such writs from under the old common-law rule, even if it were conceded that it is the rule which must be adopted respecting other writs. The provisions of the Code upon this subject are contained in article 4, and the provision which directly bears upon this point is found in section 87, and is as follows: 'No summons or the service shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him in court.' It must appear as conclusive that the court in this case would have held the summons void but for the statute of Indiana, quoted in their opinion. This case seems to us to be strong authority for holding that, but for the statute of Indiana in relation to the essentials of a summons, that court would have held to the doctrine contained in 6 Wall., to wit,

that such writs, without the seal of the court from which they issued, are void.

Counsel for the respondents have cited many authorities to the effect that defective process cannot be attacked in a collateral proceeding, and to the effect that defective process is amendable in many states. But this is not a collateral proceeding. It is a direct proceeding to have a deed canceled, which is not void on its face, but which is alleged to be void because of its being the result of a judgment void for want of jurisdiction of the court rendering it, and which deed is a cloud upon the title of the party seeking relief. See 3 Pom. Eq. Jur. § 1395 et seq.

The appellant further contends that, at the time of the issuance and service of the summons under discussion, Montana was one of the territories of the United States, and for this reason the opinion of the supreme court of the United States in 6 Wall., supra, is decisive of the question as to the validity of said summons, and controlling upon this court in the determination of this question; and relies upon the authority and reasoning in *Sullivan v. City of Helena*, 10 Mont. 134, 25 Pac. Rep. 94. We are of opinion that this position is unavailing, our statute being, in effect, the same as that of Indiana at the time of the rendition of the opinion in 6 Wall., supra. This reasoning and holding do not, in our opinion, contravene section 119 of our Code of Civil Procedure, which provides that "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect." This section presupposes an action pending, of which the court has acquired proper jurisdiction, and we are not passing upon the powers of the court under such circumstances. We hold in the case at bar that the summons,—the jurisdictional writ,—under the law and decisions in force and controlling in this jurisdiction at the time of its issuance, was void, because not issued under the seal of the court. If this case involved a defective process, issued subsequent to summons, and the acquiring of jurisdiction by the court thereunder, then the contention of respondents that such defect or irregularity could be amended or disregarded might be urged with great force. Judgment reversed, and cause remanded, with directions to overrule the demurrer.

HARWOOD and DE WITT, JJ., concur.

(13 Mont. 143)

McINTOSH v. PERKINS et al.

(Supreme Court of Montana. March 20, 1893.)

ACCOUNTING—APPOINTMENT OF RECEIVER—INJUNCTION.

1. Plaintiff sold defendant a one-third interest in a mine, and conveyed to him another third in consideration of his promise to develop and sell it, defendant to receive two thirds of the proceeds of the sale. At defendant's request plaintiff performed work in developing the mine, and afterwards conveyed defendant the remaining one third to enable him to sell the

property, which he did. *Held*, in an accounting by plaintiff against defendant, an injunction restraining the purchaser from paying defendant, and restraining a bank wherein a part of the purchase money had been deposited from paying it over to defendant, was irregular, the proper course being to appoint a receiver.

2. Where all the transactions between plaintiff and defendant with regard to such property had been consummated, and there remained only a dispute as to the proper apportionment of the fund, the appointment of a receiver to wind up the partnership affairs would be proper, under Code Civil Proc. § 229.

Appeal from district court, Beaver Head county; Thomas J. Galbraith, Judge.

Action by Henry A. McIntosh against George W. Perkins and others for an accounting, and for an injunction restraining defendant the First National Bank of Dillon from paying over to defendant Perkins a fund deposited in defendant bank by Perkins, and to restrain defendant Miller from paying over to Perkins the balance of the purchase price of certain property bought by Miller from Perkins. Injunction granted, and defendant Perkins moved to dissolve the injunction. From an order refusing to dissolve it he appeals. Modified.

The other facts fully appear in the following statement by HARWOOD, J.:

This appeal is from an order refusing to dissolve an injunction. The complaint sets forth that plaintiff, being the owner of several valuable mining claims, bearing gold, silver, and other valuable metals, and water rights, particularly described and situate in Beaver Head county, Mont., for a valuable consideration stated, sold and conveyed to defendant Perkins an undivided one-third interest therein, and in further consideration of the representations of defendant Perkins, to the effect that he had business relations, knowledge, and experience, whereby he could make an advantageous sale of said property, for both plaintiff and said defendant, if the same were further developed by sinking shafts, running tunnels, etc., so as to put said property into a marketable condition; that he, the said defendant Perkins, would, in consideration of the conveyance to him of an additional undivided one-third interest in and to said property, at his own expense, and without any expense to plaintiff, so develop and improve said mining claims, by running tunnels, shafts, levels, and otherwise, as to put the same into marketable condition; and that, after said work was accomplished, defendant Perkins would, at his own expense, and without expense to plaintiff, undertake and use his best endeavors to sell said property for as large a sum as could be obtained therefor, for the use and benefit of plaintiff and defendant, according to their respective interests therein, on condition that, in case defendant Perkins effected said sale, he should be entitled to retain two thirds of the price thus obtained for said property as his share of the proceeds derived from such sale, and that he would pay over to plaintiff one third of the gross sum for which said property was thus sold; that plaintiff, reposing implicit confidence in said defendant Perkins, and believing said repre-

sentations, and relying upon said promises made by him, and in consideration thereof, accepted said offer, and transferred to defendant Perkins an additional undivided one-third interest in and to said mining property on the conditions proposed by him as aforesaid; that thereafter, upon request, and employment by defendant Perkins, plaintiff performed a large amount of the development work on said property, by mining tunnels, drifts, shafts, and levels, greatly enhancing the market value thereof, to wit, work on one of said lode claims, to the reasonable value of \$2,000, and work on another of said lode claims, to the reasonable value of \$500; all of which work defendant Perkins had promised and agreed to do, or cause to be done, entirely at his own expense, and for the consideration aforesaid, and for the doing of which development work defendant Perkins agreed to pay plaintiff; that said defendant has not paid therefor, except certain payments, amounting in the aggregate to about \$500; that by reason of the faith and confidence reposed in defendant Perkins by plaintiff, and of said representations, promises, and agreements on the part of defendant Perkins, and plaintiff's reliance thereon, plaintiff, after conveying said additional one third of said property to defendant Perkins, as aforesaid, also committed to him the sole and exclusive matter of negotiating a sale of all of said property; that thereafter, defendant Perkins represented to plaintiff that he had at last arranged to sell said property for the sum of \$9,000, as the total and highest price he could obtain therefor, after using his best endeavors to that end, that, in order to effect said sale, it was necessary for plaintiff to execute and deliver to defendant Perkins a conveyance of plaintiff's remaining one third of said property, which conveyance was to be held by defendant Perkins for the period of six months, awaiting the consummation of said sale; that relying on and believing all representations made by defendant Perkins aforesaid, and having no other information, or means of information, concerning the truth of said statements, plaintiff made and delivered to defendant Perkins the last-mentioned conveyance of plaintiff's remaining undivided one-third interest in and to said property for the stated consideration of \$3,000; that said sum stated as consideration was not paid, but was to be paid when said sale was consummated; that contrary to the representations aforesaid, as to holding said last-mentioned deed for the period of six months, awaiting said sale, defendant Perkins, immediately after obtaining said deed, caused the same to be recorded in the office of the register of deeds of said county; that thereafter defendant Perkins represented that he had arranged for an extension of time within which to consummate said sale for the further period of six months, to which plaintiff consented; that thereafter said defendant Perkins represented to plaintiff that he, the said defendant, had sold said property for the total sum of \$9,000, and no greater sum; that said representations and state-

ments made by defendant Perkins to plaintiff, to the effect that the whole price for which he had negotiated and bargained to sell said property was only \$9,000, were false; and defendant well knew at the time of asserting the same that such statements and representations were false, and such statements and representations were made for the purpose, and with the design, of deceiving, cheating, and defrauding plaintiff of a large portion of his rightful share of the proceeds about to be obtained, and thereafter obtained, for said property, and to induce plaintiff to convey his remaining undivided one-third interest in and to said property, as aforesaid, for the stated consideration of \$3,000; for, on the contrary, defendant Perkins had, prior to the time of making said false representations and statements to plaintiff, negotiated and bargained to sell said mining property for the total price of \$15,000, to be paid therefor, and did, on the 23d day of October, 1891, sell said property for the sum of \$15,000, and received on said purchase price the sum of \$10,500, leaving a balance of \$4,500 still owing and to be paid on said purchase price by the vendee, according to the conditions of said sale; that as soon as plaintiff received information of the sale of said property by said defendant for the sum of \$15,000 as aforesaid, plaintiff demanded of the said defendant an accounting and payment to plaintiff of his rightful share of the proceeds of said sale, under the conditions and agreements existing between plaintiff and defendant as aforesaid; that defendant then and there denied that said property had been sold for the sum of \$15,000, and refused to account or pay over to plaintiff his rightful share of the proceeds of said sale, according to said agreement between plaintiff and defendant Perkins; and that said defendant has not paid plaintiff his share of said proceeds, or any part thereof, except the sum of \$2,100.

The First National Bank of Dillon, Mont., was made party defendant in the action, and as to it plaintiff alleges that according to his information and belief defendant Perkins had on deposit in said bank to his credit, and subject to his order, a large sum of money derived from the sale of said mining property, to wit, \$5,000, of which plaintiff was entitled to at least the sum of \$3,800. Phillip Miller was also made a defendant in the action. He was alleged to have been the purchaser of said property in said sale arranged by defendant Perkins; and it was further alleged that defendant Miller, as plaintiff was informed and believed, still owed the sum of \$4,500, as part of the purchase price of said property. The relief demanded by plaintiff is that defendant Perkins be compelled to account and pay over to plaintiff the sum of \$2,900, alleged to have been wrongfully and fraudulently withheld and retained by defendant Perkins out of plaintiff's share of the purchase price obtained for said property; and also the sum of \$2,000, the alleged reasonable value of work and labor performed by plaintiff in developing said mining property to put the same into salable condition, under the agreement aforesaid. Plaintiff further

asks that defendant Perkins be enjoined and restrained from interfering with, or drawing out of said bank, any of the said sum of \$5,000 deposited therein, derived from said sale, until the final determination of this action; that said bank be also enjoined from paying over to defendant Perkins, or his order, the said fund on deposit therein, as aforesaid, or any part thereof. The relief demanded against defendant Miller was that he be enjoined from paying over to defendant Perkins all or any part of the balance of the purchase price of said property then unpaid; and that defendant Miller be required, when such balance was due, to pay the same into court, to be there held to await the final determination of this action. Upon the institution of the action, the court, upon the application of plaintiff, and his execution and delivery to the clerk of said court the bond required in the sum of \$500, ordered an injunction to issue restraining the several defendants from doing any of the acts sought to be enjoined as aforesaid until the further order of the court in the premises. A motion was afterwards made to dissolve said injunction, which motion was denied; but the court thereupon modified the injunction so as to release certain portions of the fund on deposit in said bank, and also a certain portion of the balance of the purchase price to be paid by defendant Miller, from the effect of said injunction, but ordered the same to stand in force, as to portions of each of said funds, awaiting the final determination of the action. From that order refusing to dissolve said injunction, this appeal is prosecuted.

W. S. Barbour, for appellant. H. J. Burleigh, for respondents.

HARWOOD, J., (after stating the facts.) The grounds upon which appellants contend the injunction should be dissolved are: First, that the complaint does not state facts sufficient to warrant the granting of an injunction; second, that the complaint does not show that plaintiff would suffer great or irreparable injury, or that defendant Perkins is insolvent, or is about to dispose of his property for the purpose of defrauding the plaintiff, or that, unless the injunction was granted, plaintiff would be unable to satisfy any judgment he might obtain. The facts alleged, we think, show a pooling of interests in the property, on the conditions stated, for the purpose of development and sale for the best price obtainable, and division of the proceeds according to the respective interests of the parties. To that end, and for their mutual benefits, plaintiff conveyed to defendant Perkins an undivided one-third interest, in order to procure the necessary development of the property by defendant Perkins, and to engage his efforts in negotiating a sale; for which one-third interest, defendant Perkins agreed to cause said development, and use his best endeavors to consummate a sale at the highest price obtainable after development, for the mutual advantage of plaintiff and said defendant, under the express agreement that defendant Perkins

would bear all expense of development and of negotiating the sale, in consideration of the right to retain two thirds of the proceeds derived from such sale; and that he would account and pay over to plaintiff one third of the gross proceeds derived from said sale. These facts, in our opinion, show a partnership relation in respect to the property, and the enterprise of which it was the subject. *J. Pars. Partn.* 6. This is clearly an action wherein plaintiff seeks equitable relief, as contradistinguished from an action at law. It sets up the facts showing a fiduciary relation existing between himself and defendant Perkins respecting said property and transactions. On the face of the deeds whereby plaintiff conveyed certain interests in said mining property to defendant Perkins, it appears from a purely legal view that plaintiff sold and conveyed such interests for a stated consideration received. Plaintiff seeks to go back of this apparent legal phase of the transaction, and show that said interests were in fact conveyed to defendant Perkins in trust,—one-third interest to procure the necessary development of said mining property by defendant, and another third last conveyed as a convenience, in effecting the sale and passing title to the vendee, to carry out their mutual undertakings; and that all was done with reference to the prior agreement as to what each should do in respect to said property, and receive out of the proceeds resulting therefrom.

Upon such a state of facts growing out of partnership relations, plaintiff would, on the denial of his rights and refusal of defendant to account and pay over plaintiff's part of the proceeds obtained by such sale according to the joint compact, be entitled to prosecute his action in equity for such an accounting and payment. The court having jurisdiction of the whole subject would in the same action compel such adjustment of differences arising from one partner having borne more than his share of the common expense, or from one having prosecuted development work for which the other had specially agreed to pay, as would enable the court to do complete justice in the divisions of the partnership funds or property. We do not concur in the proposition urged by appellant's counsel that plaintiff has a plain, speedy, and adequate remedy at law. The question to be determined on this appeal is whether the preliminary proceedings had in this case were warranted by the showing made. Appellant insists that the facts alleged do not warrant the issuance of an injunction. The injunction appears to have been issued to require the defendant bank to hold funds alleged to be in its custody derived from the sale of said property; and also to require defendant Miller to withhold payment of the balance owing on the purchase price of said property, and pay the same into court, to await the determination of the action. We regard this proceeding as irregular. If the facts set up warranted the court in ordering said joint or partnership fund to be placed in custodia legis, that should have been effectuated through the

appointment of a receiver. Section 229, Code Civil Proc. The court did not get custody of said fund alleged to be in the bank by enjoining the detention thereof by the bank; for the bank may have been detaining said fund on other grounds or claims. Nor would the injunction requiring defendant Miller to withhold from defendant Perkins said balance owing on said contract of sale, and that the balance he paid into court, be a proper proceeding to accomplish the object aimed at by the court, unless the order for payment was voluntarily complied with; for Miller might be delinquent in payment, or claim some defense thereto; and in either event other proceedings would be necessary to accomplish the object sought by the court. A receiver would be in a position, and possess power under the direction of the court, to invoke remedies for such difficulties. Section 233, *Id.* Again, the proceeding of enjoining the retention of funds in the possession of a party simply in custody thereof, until the determination of the action, would be in effect making such custodian a receiver, without sureties, to guarantee the safety of the funds. This would not in general be a safe practice, (section 232, *Id.*) although in the present case the custodian, being a national bank, may have lessened the necessity for such security. If, therefore, the plaintiff was entitled to have the court take into control the fund in dispute, this should have been accomplished through the instrumentality of a receiver, clothed with power to get possession of the property, and hold the same, under bond to insure its safety, awaiting the determination of the action. Incidentally thereto an injunction may have been proper to restrain defendant Perkins from interference with said property, or the lawful action of the receiver.

This leads to the question whether the facts set forth would warrant the appointment of a receiver. If it appeared from the verified allegations of the complaint that defendant Perkins was insolvent, or said fund was in danger of being lost, squandered, or removed from the jurisdiction, we should unhesitatingly hold it a proper case for a receiver, on the execution and delivery of the undertaking mentioned in section 231, *Id.*; but no such facts are alleged. The statute on this subject provides: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof—First, in an action by a vendor to vacate a fraudulent purchase of property; or by a creditor to subject any property or fund to his claim; or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff; or of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable; and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." Section 229, *Id.* This statute declares the general doctrine on this subject long prevailing in courts of equity. We regard the case at bar as clearly standing within the category of cases mentioned in the first subdivision of this section of the statute. It should be observed that

in the present case all the joint operations and transactions in respect to said property and business have been consummated, and there appear to be no unsettled affairs concerning those transactions, except the collection of a balance owing on the price for which the property was sold. There remains simply a dispute as to the proper apportionment of the fund arising from said transaction between the joint owners. Herein this case is distinguished from those cases arising out of partnership relations, where, during the progress of a copartnership business, one partner is wrongfully excluded from possession and participation in the management of the property and affairs of the firm, in violation of his rights under the compact; and upon such showing a receiver is appointed to take possession of the partnership property, and wind up its affairs. 2 Lindl. Partn. 551. Inasmuch as plaintiff has sought to get sufficient of said fund into the custody of the court to answer his claims, and the court, in taking jurisdiction thereof, although through somewhat irregular proceedings, has required bond to guaranty defendant such damages as he might sustain by reason of withholding said fund from his control, we will not order dissolution of said injunction instant; but direct that unless plaintiff promptly, upon return of remittitur, make such proper showing as will warrant the appointment of a receiver, according to the practice in such cases; as suggested above, under such order as the trial court may make, allowing amendment or supplemental pleading, then the court shall dissolve said injunction, and release the parties from the effect thereof; but if a sufficient showing be made to warrant the appointment of a receiver, then such remedy may be granted.

Order modified.

PEMBERTON, C. J., and DE WITT, J., concur.

(51 Kan. 703)

#### ECKERT et al. v. RULE.

(Supreme Court of Kansas. March 11, 1893.)

##### REVIEW ON APPEAL—CONFLICTING EVIDENCE.

Although the verdict of a jury be contrary to the judgment of the supreme court, it will not be set aside upon the ground that the verdict is not sustained by sufficient evidence, unless there is a total want of evidence to sustain it.

(Syllabus by the Court.)

Error from district court, Meade county; Francis C. Price, Judge.

Action by Susan E. Rule against George F. Eckert and another for converting certain personal property of plaintiff. There was judgment for plaintiff, and defendants bring error. Affirmed.

Bodle & Bodle and L. J. Webb, for plaintiffs in error. M. L. Brown and H. G. Ney, for defendant in error.

HORTON, C. J. Mrs. Susan E. Rule brought her action against George F. Eckert and the Meade County National Bank, alleging in her petition that she

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was, in October, 1889, the owner and in possession of a large stock of hardware, cutlery, farm implements, etc., in the city of Meade, Meade county; and further alleging that in that month there was a wrongful taking, detention, and conversion of the stock of hardware, etc., by the defendants; that the stock of goods was of the value of \$1,700, and that she had been damaged in the sum of \$2,200. The case was tried before the court with a jury, and a verdict returned in favor of the plaintiff below for \$1,400. Special findings of fact were also made by the jury. Judgment was entered in accordance with the verdict, and of this complaint is made. It is contended that the verdict and judgment were not sustained by sufficient evidence, and that the verdict was given under passion and prejudice on the part of the jury. This court cannot review evidence, except to ascertain whether there is some evidence—that is, positive evidence—to sustain the verdict. In *Mills v. Ruchlin*, 29 Kan. 89, this court says: "We accept the decision of triers of fact, whether court or jury, as final." *State v. Mayberry*, 33 Kan. 441, 6 Pac. Rep. 553; *Cooper v. Sewing-Mach. Co.*, 37 Kan. 231, 15 Pac. Rep. 235; *Railroad Co. v. Foster*, 39 Kan. 329, 18 Pac. Rep. 285; *Martin v. Hopkins*, 40 Kan. 63, 19 Pac. Rep. 311. The evidence in this case is very conflicting, and there are contradictions of some of the witnesses upon cross-examination; but, after a careful perusal of all the evidence, we cannot affirm that there is a total want or failure of evidence to sustain the verdict. "Though the verdict of a jury be contrary to the judgment of the appellate court, it will not be set aside unless there is a total want of evidence to sustain it." *Railway Co. v. Kunkel*, 17 Kan. 145. We cannot say that there is sufficient showing in the record of passion or prejudice on the part of the jury. The trial judge seems to have acted impartially, and he has approved the verdict. The judgment will be affirmed. All the justices concurring.

(51 Kan. 1)

#### STATE v. LUND.

(Supreme Court of Kansas. March 11, 1893.)

##### INFORMATION—VERIFICATION—CONDUCT OF TRIAL—SALE OF LIQUORS—EVIDENCE.

1. Where an information is verified by the oath of a private person, it will be presumed, in the absence of anything to the contrary, that he has actual knowledge of the facts stated therein.

2. In such a case, and where there is no testimony to show that the complaining witness was without notice or knowledge of the facts stated in the information, the refusal of an instruction to the effect that the jury could not find the defendant guilty of any offense except such as the complaining witness had knowledge of at the time he verified the information is not error.

3. The appellant was charged with a misdemeanor. After the verdict was returned, a motion for a new trial was filed by him, in which several grounds were alleged why the verdict should be set aside. Appellant and his counsel were present in court when this motion was presented, and overruled by the court. Immediately after the denial of the

motion the judgment was pronounced. The entry of judgment does not affirmatively show that the court informed the defendant of the verdict of the jury, or made inquiry as to whether he had any legal cause to show why judgment should not be pronounced against him after the overruling of the motion for a new trial. *Held* not to be material error.

4. The evidence is found to be sufficient to sustain the verdict.

(Syllabus by the Court.)

Appeal from district court, Harper county; G. W. McKay, Judge.

C. Lund was convicted of unlawfully selling intoxicating liquor, and appeals. Affirmed.

Sam S. Sleson and Geo. W. Finch, for appellant. John T. Little, Atty. Gen., and T. J. Beebe, for the State.

JOHNSTON, J. This was a prosecution for the unlawful sale of intoxicating liquor, which resulted in the conviction of C. Lund, the appellant. The punishment imposed was imprisonment for 30 days, and the payment of a fine of \$500.

Several grounds of error are assigned for reversal, but there is little of merit in any of them. The first, that the verdict is unsupported by the evidence, does not require much attention. The appellant was engaged in the drug business, and was charged with an unlawful sale of intoxicating liquor on the 29th of May, 1892. There was testimony of a sale made on that day, and the state elected to rely upon a sale made to one Frank Case, who gave clear and positive testimony that he purchased a half pint of whisky from the appellant at that time. He was contradicted by the appellant, but the jury chose to believe the former, and a verdict based on such conflicting testimony will not be disturbed. There is some other corroborative testimony, however, which tended to show that the appellant was engaged in the unlawful sale of intoxicating liquors.

The complaint that a full cross-examination of this witness was not allowed is without justification. There was no undue restriction of the examination as to any matter material to the case. The information was verified by a private citizen, who swore positively that the allegations contained in the same were true.

The appellant requested an instruction to the effect that the jury could not find the defendant guilty of an offense except such as the complaining witness had notice or knowledge of at the time he verified the information. This was refused by the court, and the refusal is assigned as a ground of error. There is no testimony in the record, however, upon which to base such an instruction. The prosecuting witness who verified the information did not testify in the action, nor was there any testimony to show that he did not have notice or knowledge of the facts stated at the time the information was verified. As stated in the case of *State v. Brooks*, 33 Kan. 712, 7 Pac. Rep. 591: "It must be presumed, in the absence of anything to the contrary, that he has such actual knowledge. It cannot be supposed

that he makes oath to an offense of which he has no knowledge."

The final contention is that the judgment was void because it does not affirmatively show that the court informed the defendant of the verdict of the jury, and inquired if he had any legal cause to show why judgment should not be pronounced against him before it was rendered. *State v. Jennings*, 24 Kan. 642, is cited to sustain the contention. The case cited does not apply, nor is there anything substantial in the objection. The appellant was charged with a misdemeanor, and the personal presence of the defendant during the trial upon such a charge is not absolutely required. More than that, it appears that the defendant and his counsel were informed of the verdict, as is shown by his motion for a new trial, in which he sets up grounds why the verdict should be set aside, and judgment should not be given against him. This motion was made prior to the rendition of the judgment, when the defendant and his counsel were present in court, and immediately after overruling his application the judgment was pronounced. It thus appears that the defendant was fully informed of the verdict, made his objections thereto, and has no good ground for complaint. We find no error in the record, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 87)

#### MYERS v. BOARD OF EDUCATION OF CITY OF CLAY CENTER.

(Supreme Court of Kansas. March 11, 1893.)

BANKS—INSOLVENCY—DEPOSIT OF SCHOOL FUNDS—PREFERRED CLAIM—PRESENTATION.

1. The treasurer of a board of education without authority placed the school funds in a bank of which he was manager, and the owner of which had knowledge of the character of the funds. They were wrongfully used in the business of the bank, and for the payment of indebtedness against it. Afterwards the owner of the bank became insolvent, and made an assignment of his property for the benefit of creditors. The assets which came into the hands of the assignee consisted of real property, securities, and cash. But the amount of the school money wrongfully converted, and which was impressed with a trust, was largely in excess of the cash on hand at the time of the assignment. The trust fund could not be clearly traced to any particular asset in the hands of the assignee, but it was shown to have gone into and been used for the benefit of the estate. *Held*, that the trust fund became a charge upon the entire assets with which it was mingled, and that the board of education has a preferred right to the assets over general creditors to the extent of the fund converted.

2. The taking of collateral security from the treasurer of the board for the payment of the money misappropriated will not prevent it from insisting upon its equitable lien against the assets of the estate.

3. The board of education never presented its claim to the assignee for allowance, nor was the written notice prescribed by statute ever given to the board of the time and place for the presentation of demands against the estate. *Held*, that the failure of the board to present its demand to the assignee will not pre-

vent it from maintaining an action for the recovery of the trust fund.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by the board of education of the city of Clay Center against D. H. Myers, assignee of the estate of John Higginbotham, to recover the amount of a trust fund belonging to plaintiff. There was judgment for plaintiff, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by JOHNSTON, J.:

Action brought by the board of education of the city of Clay Center against D. H. Myers, as assignee of the estate of John Higginbotham, to recover \$3,265.71, alleged to be a trust fund in the hands of the assignee, to which it was entitled. Upon the evidence submitted, the district court made the following findings of fact and conclusions of law:

Findings of fact: "(1) For several years prior to the 8th day of June, 1889, John Higginbotham was doing business as a private banker at Clay Center, Kansas, and carrying on a private bank under the name of the Clay County Bank, and H. G. Higginbotham, cashier of said bank and manager of said John Higginbotham's banking business, having full supervision and control of the same. (2) On the 8th day of June, 1889, and for ten years prior thereto, said H. G. Higginbotham had been treasurer of the board of education of the city of Clay Center, the plaintiff herein, and, as such treasurer, had received and disbursed large sums of money belonging to said board of education, and during all the time he was such treasurer he was also cashier and manager of said private bank of John Higginbotham. (3) During all the time said H. G. Higginbotham was acting as such treasurer he had an account on the books of said Clay County Bank as 'H. G. Higginbotham, Treasurer,' and all moneys which came into his hands as treasurer of the board of education of the city of Clay Center were deposited by him in said bank, and credited to said account, and mingled with the general funds of the bank, and orders drawn on him as such treasurer were paid out of the general funds of the bank, and charged to said account. No other money except such as came into his hands as such treasurer was credited to said account, nor were any payments, except such as were made on orders drawn on him as such treasurer, charged to said account. (4) During the time he was treasurer of the board of education of the city of Clay Center, and prior to the 8th day of June, 1889, the said H. G. Higginbotham, as such treasurer, had deposited in said bank, to the credit of said account, \$3,265.71 more than had been paid out and charged to said account, which said sum \$3,265.71 had been mingled with the general funds of said bank, and used in the ordinary course of the private banking business of said John Higginbotham, in the payment of the debts of the bank. (5) The last money coming into the hands of said H. G. Higginbotham, as such treasurer, which was so

deposited in said bank and credited to said account, was deposited on the 3d day of April, 1889. On the 8th day of May, 1889, the total amount of cash in said bank was \$544.15 and no more. After said 8th day of May, 1889, there was paid out of the funds of said bank, on orders drawn on said H. G. Higginbotham and charged to said account, \$1,236.02; and on the 8th day of June, 1889, when the business was closed, the total amount of cash in said bank was \$1,535.57. (6) Said John Higginbotham knew that said H. G. Higginbotham was depositing the money coming into his hands as such treasurer in said bank, and that such money was being used in the same manner as other funds of said bank, in the ordinary course of its business. (7) The board of education of the city of Clay Center never authorized said H. G. Higginbotham to deposit the funds coming into his hands as its treasurer in the Clay County Bank, and never consented thereto, but some of the members of said board of education had actual knowledge that said funds were so deposited for some time before the 8th day of June, 1889. (8) On the 8th day of June, 1889, said John Higginbotham made an assignment of all his property and assets of every kind, including said banking business, to D. H. Myers, for the benefit of his creditors, and on that day said Clay County Bank was closed, and thereafter no further business was done therein. (9) Said D. H. Myers, who is the defendant in this action, took possession, as temporary assignee, of all the property and assets of every kind belonging to said John Higginbotham; and being afterwards duly elected permanent assignee of said John Higginbotham, and duly qualified as such assignee, he retained possession of said property and assets, and still has the same in his possession, or so much thereof as have not been paid out in the due course of the administration of said estate; and there was at the time this suit was commenced in his hands, as such assignee, belonging to said estate so assigned to him, real estate of the value of \$7,000 or more. (10) At the time said assignment was made, there was in said bank cash to the amount of \$1,535.57, and no more; and said assignee has never received from the assets of said estate so assigned to him any cash other than said sum, except such as was derived from the sale of some of the assets of said estate; and all the cash so coming into his hands, including said sum of \$1,535.57, had, prior to the commencement of this action, been used in paying a dividend on claims allowed against said estate, and other legitimate charges against the same. (11) On the 12th day of June, 1889, said H. G. Higginbotham resigned the office of treasurer of the board of education of the city of Clay Center, and at the time there was in his hands as such treasurer the sum of \$3,265.71, which said sum had been by him deposited in the Clay County Bank, as heretofore stated in the fourth finding of fact, and which said sum he then, and has ever since, failed to pay over to his successor in office, or to any one authorized by said board to receive the same, except



\$210 thereof, and of said sum there is still unpaid \$3,055.71. (12) At the time said H. G. Higlinbotham resigned said office of treasurer there was not, and for a long time prior thereto there had not been, in existence, any valid bond executed by him for the faithful performance of his duties as such treasurer. (13) On the 14th day of June, 1889, said H. G. Higlinbotham, in order to secure to said board of education payment of said sum of \$3,265.71, executed to said board, pursuant to a demand made by it upon said H. G. Higlinbotham to secure the same, a chattel mortgage on certain personal property, and also a mortgage on his homestead, consisting of certain lots in the city of Clay Center, which lots were subject to two prior mortgages of \$1,200 and \$120. Afterwards said personal property so mortgaged was sold under said mortgage, and the proceeds arising therefrom, amounting to \$210, were applied by said board in part payment of said sum of \$3,265.71, and said real-estate mortgage is still in full force, and no action has been taken by said board to realize anything thereon. (14) In said real-estate mortgage H. G. Higlinbotham and Lillie G. Higlinbotham, his wife, were the parties of the first part, and the board of education of the city of Clay Center was the party of the second part, and in said mortgage the following conditions were written, to wit: 'Provided, nevertheless, and these presents are upon the following conditions expressly made, to wit: that whereas, the said H. G. Higlinbotham is justly indebted to the said party of the second part in the sum of thirty-two hundred and sixty-five and seventy-one one hundredths dollars, (\$3,265.71,) the same being the balance of the funds and moneys of the said party of the second part now remaining in the hands of said H. G. Higlinbotham, deposited with him as treasurer of the said party of the second part; and whereas, said H. G. Higlinbotham has resigned said office, and, upon legal demand made upon him for said funds and moneys by his duly-qualified successor in said office, said H. G. Higlinbotham has failed and refused to pay over and deliver said funds and moneys to his successor in office; and whereas, a claim for said funds and moneys, made in behalf of the treasurer of the said party of the second part, against the estate of John Higlinbotham and D. H. Myers, assignee thereof, is pending, and may be paid in whole or in part by said assignee: Now, if the said first parties shall, on or before the 14th day of June, 1890, pay or cause to be paid to the qualified treasurer of said party of the second part the funds and sums of moneys aforesaid, with interest thereon from the date hereof, at ten per cent. per annum, or such part thereof as shall not previous to said 14th day of June, 1890, be paid by the assignee of John Higlinbotham's estate, in that case this deed shall become void, and the premises hereby conveyed shall be released at the proper cost of the said parties of the first part or their legal representatives; and it is hereby agreed and understood that the execution and delivery of this instrument by said parties of the first part to said party of

the second part does not and shall not in any way lessen the obligation of said H. G. Higlinbotham respecting the funds and moneys of said second party heretofore delivered to him as treasurer as aforesaid, and this instrument is intended as security for the payment of said funds and moneys as aforesaid, in addition, and in no way affecting the rights of the said second party under any bond or bonds which may have been heretofore given to said party of the second part or any under any of the laws of the state of Kansas on and after June 14, 1890.' The conditions above recited are followed by a provision that, in case the parties of the first part shall fail to pay said funds and sums of money or the interest thereon or the taxes or insurance on the mortgaged premises, then the party of the second part might proceed to foreclose and mortgage and sell the mortgaged premises, and apply the proceeds of such sale to the payment of said sums of money. (15) Said D. H. Myers, as assignee of John Higlinbotham, gave notice by advertisement, published as required by law, of the time and place when he would hear and allow claims against said estate, and also notified by mail H. G. Higlinbotham, treasurer of the board of education of the city of Clay Center, as one of the creditors of said John Higlinbotham, of the time and place when he would hear and allow claims, but no notice of said time and place of hearing and allowing claims was given to the board of education of the city of Clay Center or any officer or member thereof except as above stated, and, at the time said notice by mail was given to H. G. Higlinbotham, he was not treasurer of said board of education. (16) Neither said H. G. Higlinbotham nor any one for him, nor any one acting for the board of education of the city of Clay Center, presented any claim or demand for said sum of \$3,265.71 to said assignee at the time and place fixed by him in said notices for hearing and allowing by said assignee as a claim against said estate, and said sum of \$3,265.71 was not allowed by said assignee as a claim against said estate. (17) On the 15th day of May, 1891, and before the commencement of this action, demand was made by the plaintiff upon said D. H. Myers, as assignee of John Higlinbotham, for the payment of said sum of \$3,265.71, as a trust fund in his hands as such assignee belonging to the plaintiff, and payment thereof was refused; and no other demand was ever made by plaintiff or in its behalf on said D. H. Myers, as such assignee, for the payment of said money as a trust fund or otherwise. (18) When said demand was made by plaintiff on the 15th day of May, 1891, said D. H. Myers did not have in his hands, as such assignee, any of the money which was in the Clay County Bank on the 8th day of June, 1889, when said assignment was made, and which he then received as such assignee."

Conclusions of law: "(1) That money of the board of education of the city of Clay Center deposited by H. G. Higlinbotham, while treasurer of said board, in the private bank of John Higlinbotham, was impressed with the character of trust

funds, and was held as a trust fund by said John Higginbotham; (2) that the assets of John Higginbotham in the hands of D. H. Myers, as his assignee, are subject to a charge of \$3,055.71, as a trust in favor of the board of education of the city of Clay Center; (3) that the plaintiff is entitled to a decree for the payment to it by D. H. Myers, assignee of John Higginbotham, of the sum of \$3,055.71 out of the assets of said John Higginbotham, in his hands as such assignee."

Judgment was accordingly given, and to reverse the same the assignee brings this proceeding in error.

Harkness & Godard, for plaintiff in error. C. C. Coleman, F. L. Williams, and B. B. Tuttle, for defendant in error.

JOHNSTON, J., (after stating the facts.) There is no doubt or question about the character of the moneys, amounting to \$3,055.71, sought to be recovered in this action. They were school funds, collected and held for specific public purposes, and the bank, its owners and manager, all knew of the trust character of the funds, and hence there is no excuse for their misappropriation. The treasurer of the board of education, who placed these trust funds in the bank, was its manager; and, without authority from the board of education, he mingled them with the funds of the bank, and used them in paying the creditors of that institution. At one time, subsequent to the last deposit of school money, the total amount of cash on hand in the bank was \$544.15, and subsequent to that time \$1,236.08 was drawn from the funds of the bank upon the order of the board of education. When the bank closed, the whole amount of cash on hand was \$1,535.57. It is said that no portion of this sum was the identical money received from the board of education, and that neither the money nor any specific property into which it has been converted can be clearly traced to the hands of the assignee. Under these circumstances, has the board of education a preferred right over general creditors to the assets in the hands of the assignee? It is not denied that the school funds were impressed with a trust, and, if susceptible of identity, could be followed and reclaimed from the assignee. It is also admitted that, if they could be traced into any other specific property, the cestui que trust might claim such property or a lien upon it; but it is insisted that, unless the trust funds can be traced and identified, the cestui que trust is to be treated as a simple creditor, and not entitled to an equitable preference in the distribution of the assets of the estate. The view of the plaintiff in error is not without support, and many of the older cases, while holding that a trust fund wrongfully converted into another species of property, of whatever form, will be held liable to the rights of the beneficial owner in its new form if its identity can possibly be traced, still adopt the old doctrine stated by Judge Story as follows: "The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case when the subject-matter

is turned into money, and mixed and confounded in a general mass of property of the same description." Story, Eq. Jur. § 1259. The modern doctrine of equity, and the one more in consonance with justice, is that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that, when the funds are traced into the assets of the unfaithful trustee or one who has knowledge of the character of the funds, they become a charge upon the entire assets with which they are mingled. This principle was fully recognized, and the question in the present case was substantially decided, in *Peak v. Ellicott*, 80 Kan. 156, 1 Pac. Rep. 499. In that case it was said: "As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this cannot prevent the plaintiff from following and reclaiming the fund; because, if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due." It would seem to be immaterial whether the property with which the trust funds were mingled was moneys, or whether it was bills, notes, securities, lands, or other assets. The bank which assigned in this case appears to have been engaged in a general business, and its assets consisted of moneys, securities, and lands; and, as the estate was augmented by the conversion of the trust funds, no reason is seen under the equitable principle which has been mentioned why they should not become a charge upon the entire estate. In *McLeod v. Evans*, 66 Wis. 410, 28 N. W. Rep. 173, 214, an unfaithful trustee made an assignment, and among the assets there was a small amount of cash, and it was not shown that it was a part of the proceeds of the draft or trust fund. The question was whether the owner of the trust fund stood upon the same ground as the general creditors of the trustee, or whether he had a paramount right to be first paid out of the assets of the estate. It was found that the proceeds of the trust property were used by the trustee either to pay off his debts or to increase his assets, and it was held to be unnecessary to trace the trust fund into any specific property in order to enforce the trust; and that, if it could be traced into the estate of the defaulting agent or trustee, that was sufficient. It was further decided that, whether the trust funds were used to increase the assets or to pay off the debts, in either case it would be for the benefit of the estate; and, having been so used, it was held that a trust attached to the entire estate which came into the hands of the assignee. The court in that case cites *Peak v. Ellicott*, supra, and expressly approves the doctrine of that case. In *Independent Dist. v. King*, 80 Iowa, 497, 45 N. W. Rep. 908, the treasurer of a school district, as in this case, wrongfully deposited the funds of the district in a bank which knew the character of the funds. Subsequently the bank failed, and made an assignment for the benefit of its credit-

ora. It was there insisted that, as none of the identical money deposited went into the possession of the assignee, no trust could be enforced against the estate of the assignor to the prejudice of other general creditors. Speaking of the bankers, the court said that they "were fully advised as to the material facts, and therefore could acquire no title to the deposit adverse to the plaintiff. As to them, the money deposited constituted a trust fund, which they had no right to convert to their own use; and the fact that they mingled it with other money, so that the identity of that deposited was lost, would not destroy the trust character of the deposits, nor prevent the enforcement of the trust against property to which they had contributed. To hold otherwise would be to ratify a willful violation of law, at the expense of an innocent party, and thus perpetrate a wrong. The defendant [who was the assignee] acquired no property rights, as against plaintiff, which the Cadwells [the bankers] could not have enforced, and he had no special interest which requires protection. The same is true of the general creditors. They are entitled to only so much of the estate of the insolvent as remains after liens paramount to their claims and other preferred charges are satisfied." In *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. Rep. 1049, the supreme court of Iowa considered the same question in a case where the trust funds had been used, as in the present case, by the trustee for the payment of debts. The trustee having become insolvent, and made an assignment, the assignee contended that the estate in his hands was not chargeable with the trust funds, but that the owner of the funds should be placed on an equal footing with general creditors, and only receive a pro rata payment out of the estate. The court said: "The money was used by the Globe Company in its business, and in payment of its debts. It became liable to the plaintiff to replace the trust funds with other money in its possession or with money realized out of other property. Of course the Globe Company and its stockholders can urge no equity nor reason against the enforcement of these rules. Can its creditors? We think not, for these reasons: The money was wrongfully mingled, as it were, with the assets of the company. The money did not belong to the Globe Company. The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys. If they are not permitted to do this, they are simply denied the remedy of enforcing their claims against property acquired by the use of trust money. They are deprived of no right, for the property acquired by the trust money became subject to the trust, and therefore could not have been subject to the claims." In *Harrison v. Smith*, 83 Mo. 210, where trust money was wrongfully mingled with the funds of a bank which became insolvent, and subsequently made an assignment, it was held that, although the trust money was not clearly traceable to any particular asset of the bank, the fact that it went into and swelled the volume of its assets,

gave the beneficial owner an equitable right to have his demand first paid out of the assets of the estate, and before distribution was made to the general creditors. The same court, in a later case, held that, while it might "be impossible to follow the fund in its diverted uses, it is always possible to make it a charge upon the estate or assets to the increase or benefit of which it has been appropriated. The general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund, as a preferred demand." *Stoller v. Coates*, 88 Mo. 514. This principle of equity was approved by the supreme court of the United States in *National Bank v. Insurance Co.*, 104 U. S. 54, where it was held that, "if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property." See, also, *Knatchbull v. Hallett*, 13 Ch. Div. 696; *People v. Bank*, 96 N. Y. 32; *Bank v. Hummel*, 14 Colo. 259, 23 Pac. Rep. 986; *Smith v. Combs*, (N. J. Ch.) 24 Atl. Rep. 9; *San Diego Co. v. California Nat. Bank*, 52 Fed. Rep. 59. These authorities are in line with *Peak v. Ellicott*, supra, and fully sustain the ruling of the district court in this case, making the trust fund a charge on the assets in the hands of the assignee.

The court below held that the fact that the board of education sought and obtained some security from H. G. Higginbotham, who had been the treasurer of the board, for the payment of the money which he had misappropriated, did not prevent the board from following and recovering the trust fund. In this we see no error. As treasurer of the board, he was personally liable for the wrongful conversion of the money intrusted to him. The collateral security for the payment of the money was taken soon after the assignment was made, and before it was known whether the trust money could be reclaimed; and probably it was not then known whether there were sufficient assets against which the trust might be enforced. The taking of collateral security for the whole of the trust fund which the board was seeking to find, or for that part which they might ultimately fail to recover, does not appear to us to be inconsistent with the remedy sought in this action, and should not prevent it from insisting upon its equitable lien against the assets of the estate. The rights of no creditor of the bank have been prejudiced by the taking of the security, and it does not appear that any proceeding to enforce the same has been begun.

Another point made by plaintiff in error is that the board, having failed to present its claim to the assignee for special allowance, is precluded from availing itself of its equitable lien against the assets of the estate. This contention is based on the provisions of section 21 of the assignment act. It provides that the assignee shall give certain notice to the creditors of the es-

tate of the time for the presentation and allowance of demands; and, further, that all creditors who, after being notified, fail to attend and present the nature and amount of their demands, shall be precluded from any benefit in the estate. This point cannot be sustained. Under the view which we have taken, the board of education can hardly be regarded as a "creditor," within the meaning of the statute. The funds sought to be recovered were never the property of the bank. The title and beneficiary interest in the same remained in the board of education, so that the relation of debtor and creditor never in fact existed between the bank and the board. *Bank v. Hummel*, supra. But, even if the board was to be treated as a creditor under this statute, (which we need not decide now,) it is not concluded by its failure to present a claim for the trust money to the assignee. No written notice, as required by section 21, was given to the board of education or any officer or member thereof of the time when claims would be heard and allowed by the assignee. A notice was sent to H. G. Higginbotham, but at that time he was not the treasurer of the board. If the board of education is to be regarded as an ordinary creditor, it should have been notified; and, as the notice was not given, there can be no claim that it is estopped to avail itself of the remedy which it is now seeking. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 70)

# CITY OF WINFIELD v. WINFIELD WATER CO.

(Supreme Court of Kansas. March 11, 1893.)

## MUNICIPAL CORPORATIONS—CONTRACTS WITH WATER COMPANIES—ENFORCEMENT—CANCELLATION.

1. The city of Winfield entered into a contract with the Winfield Water Company for the construction of a system of waterworks, and supplying the city and its citizens with "well-settled and wholesome water." The city contracted for certain rates for the use of hydrants in the extinguishment of fire, flushing of gutters, etc. The company agreed to furnish water to the city free at certain public places, and to furnish it to the citizens of the city at certain rates. *Held*, that it is not only the right of the city authorities, under the contract between said parties, but it is their duty, to enforce the terms of the contract as to the quality of the water supplied; not only to the city for public purposes, but also to private citizens for private uses.

2. This action was brought by the city to obtain a cancellation of the contract between the city and the water company. It is not shown that any notice or demand was ever served by the city authorities on the defendant requiring it to so perfect its system as to be able to furnish a supply of well-settled and wholesome water, as provided by the contract, within a reasonable time, or informing it of any purpose on the part of the city to annul the contract. *Held*, that before a court of equity will cancel such contract after the construction and use for a long period of time of a system of waterworks, it must appear that the defendant has been fairly notified of the defects in the system, and the demands of the city for the improvement thereof, and a reasonable time

must have been given the waterworks company to comply with its contract.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by the city of Winfield against the Winfield Water Company to cancel a contract for supplying the city with water. A demurrer to the petition was sustained, and plaintiff brings error. Affirmed.

McDermott & Johnson, for plaintiff in error. Eaton, Pollock & Love, for defendant in error.

ALLEN, J. This was an action brought by the plaintiff in error in the district court of Cowley county, to obtain a cancellation of its contract with the water company for supplying the city and its inhabitants with water. The material averments of the petition, so far as they are necessary for consideration in this case, are, in substance, as follows: That the plaintiff is a city of the second class; that the defendant is a corporation organized under the laws of Kansas; that on the 17th day of January, 1883, an ordinance was duly passed by the mayor and council of said city, entitled "An ordinance contracting for and providing for a system of waterworks for the city of Winfield, Cowley county, Kansas, for domestic, sanitary, and other purposes, and regulating the rates thereof." In said ordinance it was provided that the ordinance should be a contract between the city of Winfield and certain persons therein named, and their assigns, provided such persons or their assigns should file with the city clerk of said city of Winfield, in writing, their acceptance of such ordinance within 10 days after the taking effect thereof; commence work within 30 days after filing said acceptance; furnish fire protection for Main street, the courthouse, and public schoolhouse within six months thereafter; and have the works completed and tested within six months, unless prevented by legal proceedings, or other unavoidable circumstances. The petition alleges that within 10 days after the taking effect of said ordinance the parties named therein filed with the city clerk their acceptance in writing of the terms, provisions, etc., of said ordinance; that afterwards they filed with said clerk a notice of their assignment of said ordinance and contract to the defendant, and that the defendant at the same time, by its proper officers, filed its acceptance in writing of the terms and provisions of said ordinance. A copy of the ordinance is attached to the petition. We quote the sections thereof which are necessary for a proper understanding of the case:

"Section 1. That the right of way along the streets and alleys, and the privilege to construct, operate, and maintain a system of waterworks within the corporate limits of the city of Winfield, for supplying the city and citizens with water for domestic, sanitary, and other purposes, as well as for the better protection of the city against disaster from fires, be and is hereby granted to Frank Barclay, J. L. Horn-

ing, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, of the city of Winfield, Cowley county, Kansas, their successors and assigns, for the term of ninety-nine (99) years from the passage of this ordinance."

"Sec. 5. That in consideration of the benefit that will accrue to the city of Winfield by the construction of such a system of waterworks as contemplated herein, the city agrees to rent, and does hereby rent, from the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, and their successors and assigns, for and during the term of twenty-one (21) years, forty (40) double discharge hydrants at an annual rental of three thousand dollars per annum, payable semiannually in equal installments on the 15th day of January and July of each and every year, with legal rate of interest after maturity; said hydrants to be located at such places as the mayor and city council may determine; and, if more hydrants than forty (40) are required on the first five (5) miles and twelve hundred and seventy (1,270) feet of mains, as provided herein, the city shall pay the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, their successors and assigns, the cost of erecting such additional hydrants on the original plant of mains as above, but shall pay no rent therefor, but shall pay to the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, their successors or assigns, from time to time, any actual or necessary cost of repairs to such extra hydrants, but the penalties hereinafter stated shall not apply to these extra hydrants."

"Sec. 7. All public hydrants shall be used exclusively for the extinguishment of fires, necessary drill and practice of hose companies, and the flushing and washing of the city sewers and gutters, but in all such washing and flushings there shall not be more than two hydrants used at any one time, nor more frequently than twice in any one week, nor longer than two hours at any one time, nor discharge through an orifice greater than one and one half inch in diameter."

"Sec. 13. This ordinance shall be a contract by and between the city of Winfield, in the county of Cowley, state of Kansas, and the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, and their assigns, and shall be binding upon all parties with equal force and effect: provided, the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, or their assigns, shall file with the city clerk of the said city of Winfield, in writing, their acceptance of this contract and ordinance within ten days after it takes effect, and commence work within thirty days after filing said acceptance, and furnish fire protection for Main street, the courthouse, and the public schoolhouse within six months thereafter, and have the works completed and tested within six months thereafter, unless prevented by

legal proceedings or other unavoidable circumstances. Sec. 14. The city council shall pass all necessary ordinances, with penalties, for the protection of said works and the property thereunto appertaining, when requested to do so in writing. And the said city of Winfield hereby expressly agrees, as a part of this franchise and contract, that it will, upon the request in writing of the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, or their assigns, proceed without delay to exercise its rights of eminent domain in the matter of the condemnation of any lots, parcels, or pieces of ground, or of water, or of any water privileges that may be necessary to the proper and convenient construction and maintenance of the system of waterworks in this ordinance contemplated and provided for: provided, that the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, or their assigns, shall pay all costs and expenses incident to such condemnation proceedings, including the cost of all property so condemned: and provided, further, that the right to the free and exclusive use and enjoyment of all the property so condemned shall vest and remain in the said Frank Barclay, J. L. Horning, J. Wade McDonald, J. B. Lynn, W. P. Hackney, and M. L. Robinson, and their assigns, so long as this franchise and contract shall be and remain in force and effect."

"Sec. 17. That the following maximum rates shall be annual, and become part of this franchise: [Here follows list of rates to be charged private consumers of water. Within this list of rates occur: "Churches free," "city offices free," "schools free," "two public drinking and watering fountains, to be erected by the city, free."] The said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, and their successors and assigns, agree to keep said works always in operation, and supply in ample quantity the city and inhabitants thereof with well-settled and wholesome water. Sec. 18. That the said Frank Barclay, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robinson, or their assigns, shall submit to the city council for their approval all rates not provided for in this ordinance, and shall have the right to make all the needful rules, regulations, and provisions for the protection of said waterworks and their operation, for tapping of mains proper size of service pipe, and for shutting off water for nonpayment of water rent by private consumers, or for undue waste or any wrongful use of water by private consumers; and they shall have the right to regulate the plumbing and service-pipe charges except in houses and buildings, but such charges, together with charges for fixtures, valves, hydrants, and other appliances shall not exceed the customary charges for same class of material and labor in other places. Sec. 19. That the said Frank Barclay, J. L. Horning, J. Wade McDonald, W. C. Robinson, J. B. Lynn, W. P. Hackney, and M. L. Robin

son, and their assigns, shall be required, under the provisions of this ordinance, to do the business pertaining to said waterworks within the corporate limits of the said city of Winfield."

The petition further alleges that the city has in all respects fully discharged and performed all the obligations resting on it by the terms of its contract, and then avers as follows: "Eleventh. The plaintiff further avers that said defendant, the Winfield Water Company, has persistently failed, neglected, and refused to supply in ample quantity said city and the inhabitants thereof with well-settled and wholesome water, but has persistently, wrongfully, and in violation of the intent, provisions, conditions, and agreements of said ordinance and contract, and against the express requirements thereof, furnished said city and the inhabitants thereof with unsettled and unwholesome water; that the water now being furnished by said defendant, and which has been so furnished for a continuous long period of time is not, and has not ever been, settled or wholesome, and is and has been at all times unfit for domestic use or sanitary purposes; and said defendant has ever failed and neglected to furnish and provide said city and the inhabitants thereof with well-settled and wholesome water. Twelfth. That said defendant has also failed and refused, in violation of the express terms of said contract and ordinance, to provide and furnish the inhabitants of the said city of Winfield water for domestic and private consumption at the rate and in the manner intended and contemplated by the terms and provisions of said ordinance and contract; and said defendant, in utter disregard of the provisions and requirements thereof, and in violation of said terms and provisions, wrongfully and without any authority therefor imposed upon and required, and is now imposing upon and requiring, private consumers of water to pay exorbitant and unauthorized rates and prices for uses desired; and said defendant has wrongfully and exorbitantly imposed and attempted to impose upon private consumers of water, rates and charges for domestic and private use and uses of water other and different from the water rates and prices fixed and established by said contract, and has, without the consent and approval of the city council of said city, fixed and imposed extravagant and exorbitant rates and prices for water service, uses, and privileges not provided in said contract; and has by unjust, unauthorized, and arbitrary rules and regulations, imposed and enacted by said defendant and its agents for such purpose, refused, and persisted therein, to furnish and provide inhabitants of said city with water for private and domestic use or uses, without paying for uses not demanded or needed, thereby unjustly and wrongfully depriving citizens from enjoying the benefits and privileges of a system of waterworks as contemplated and intended by said contract; and said defendant refused and does refuse to furnish and provide the inhabitants of said city with water for domestic and private use or uses at

the rate and rates provided in said ordinance. Thirteenth. Plaintiff further says that said defendant for two years last past has failed and neglected, and now fails and neglects, to transact the business pertaining to said waterworks within the corporate limits of said city of Winfield, as provided and contemplated in said ordinance; that during said time it has failed to have a meeting of its board of directors in said city or in the state of Kansas, and has only been represented in said city by an agent inexperienced in the business pertaining to said waterworks, and incapable, for want of authority from said defendant in that respect, to manage and conduct the affairs of said waterworks in said city, and on account thereof said city and inhabitants have been prevented from making complaints or in any other way adjusting or settling any difficulties arising between said defendant and said plaintiff or the inhabitants of said plaintiff. Fourteenth. That because of the wrongs and transgressions hereinbefore stated and alleged the defendant has violated, and is persistently violating, such contract and ordinance, and on account thereof said waterworks is of no practicable benefit to said city of Winfield and the inhabitants thereof; that said city and the taxpayers therein, as a matter of justice and equity, should be relieved and absolved from further responsibility or liability under or by reason of said contract and ordinance, and the same should be canceled and annulled, and the franchises, rights, and privileges therein granted to said defendant should be forfeited, canceled, annulled, and set aside, and the city of Winfield should be relieved from the payment of any hydrant rental claimed or to be claimed by or to said defendant under or by virtue of said contract and ordinance."

The petition concludes with a prayer for the cancellation of the contract and of the privileges and franchises of the defendant. There is no averment in the petition either that the ordinance has been repealed or that notice has been given to the defendant that the contract between it and the city would be canceled or treated as annulled, unless the defendant should so improve its works as to be able to supply the city with such water as the ordinance requires, and cease its violation thereof in other respects.

This case is submitted to us with a case brought by the water company against the city for the recovery of hydrant rentals. Both cases have been argued together, and it seems to be the desire of both parties to have their rights growing out of the contract between the city and the water company fully determined by the court in these cases. While the cases are not consolidated, we are enabled to gain a more clear understanding of this case in which the court sustained a general demurrer to the petition from the record in the other case, which was tried before the court and a jury, and the whole subject of the controversies between the parties extensively investigated.

The main questions urged for our consideration in this case are (1) whether the

contract is divisible in its character, and (2) whether the city may in its corporate capacity enforce the provisions of the ordinance with reference to the quality and supply of water for private consumers, and the terms imposed on them, as well as those which relate to supplying the city with water for public purposes.

It is strongly contended by the defendant in error that, inasmuch as payment is required from the city only for the use of hydrants for extinguishment of fires and other public purposes, the city is only entitled to complain in case of a failure to supply water sufficient in quantity and suitable in quality for the public purposes of the city. In order to reach a correct consideration of the several provisions of the ordinance, it is necessary to take a comprehensive view of all its provisions, and to construe it in the light of the duty that the corporate authorities of a city owe to the individuals residing within its corporate limits. While the provision of suitable appliances, and a necessary supply of water for the extinguishment of fires, is usually made by cities at the public expense, their use is mainly for the preservation of the property of individuals. There can be no matter of higher public concern to every city than the supply of pure and wholesome water for all useful purposes, and, as population becomes more and more compact, and cities grow, the ability of the individual member of the municipal corporation to supply his individual wants in that direction constantly diminishes, and in all the larger places it becomes a matter of absolute public necessity that the city itself should, directly or indirectly, provide the supply. The preservation of favorable sanitary conditions is one of the very highest duties devolving on city authorities, and nothing else so directly and materially affects the health of a community as the character of its water supply. We think the ordinance which became a contract between the parties shows clearly that these considerations were in the minds of the parties to the contract at the time it was made. Section 1 of the ordinance grants the right of way in the streets and alleys to construct, operate, and maintain a system of waterworks for supplying the city and citizens with water for domestic, sanitary, and other purposes, as well as for the better protection of the city against disasters from fire. Section 7 provides that public hydrants shall be used exclusively for the extinguishment of fire, necessary drill and practice of hose companies, and for the necessary washing and flushing of sewers and gutters. This section, we think, merely places limitations on the consumption of water from these hydrants by the city. It in no manner conflicts with any provision contained in the ordinance with reference to the quality of water to be furnished. Section 17 contains an agreement on the part of the water company to keep said works always in operation, and supply in ample quantity the city and inhabitants thereof with well-settled and wholesome water. This section also provides for furnishing the city offices, schools, and public drinking

and watering fountains free. These supplies are clearly public,—they are supplies to public offices, public schools, and in public places, for the use of the public generally; and, while the rates mentioned are free, it cannot be said, when all the provisions of the contract are construed together, that the water furnished the public at these places is in any sense a donation or free gift by the water company to the city or to the public. It cannot be contended for a moment that the water company intended to furnish water at these places "free," irrespective of the obligation of the city to use the hydrants it contracted for, and to pay the rental provided for in the ordinance. Free water at these public places was unquestionably one of the inducements and considerations which led the city to pass the ordinance and enter into the contract with the defendant. It may be conceded that dirty, foul water will extinguish fires and flush gutters, as well as pure and wholesome water, yet this contract provides for nothing but a supply of "well-settled, wholesome water," even for the purposes for which it should be used by the city itself. We think that, even if it could be said that this contract is divisible, and that the city can only enforce the provisions of it so far as it relates to the supply furnished the city itself, still the city has a right to insist on that quality of water which the contract calls for. But when we consider that the water consumed by the city through its fire hydrants and the water consumed by the citizens for private uses must of necessity flow through the same mains, be derived from the same source, be of the same quality and character, it seems to us absurd to say that the provisions made by the city authorities for the benefit of the inhabitants of the city generally, and assented to by the water company, may not be enforced by the city in behalf of the people, but may be violated by the water company at will, and that they may furnish to the city for public purposes water of any quality that will subserve those purposes, even though their contract requires them to furnish that which is pure and wholesome. We not only think that the city may enforce the provisions of the contract in favor of its citizens, but we think it clearly the duty of the city to do so. In the case of *Mott v. Manufacturing Co.*, 45 Kan. 12, 28 Pac. Rep. 989, it was held: "Where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the taxpayers of the city, and by the terms of the city ordinance, which the water company accepts, the water company agrees 'that it will pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the water company,' there is no such privity of contract between a citizen or resident and the water company as will authorize him to maintain an action against it for injury or destruction of his property by fire, caused



by the failure of the water company to fulfill its contract." Certainly no private citizen has a right to compel the water company to perform its contract with the city. We think that not only the right exists in, but the duty rests upon, the corporate authorities of every city to see that the supply of water furnished its citizens, whether through public waterworks, or, as in this case, works constructed by a private corporation under a contract with the city, should at all times be wholesome, and free from everything that would endanger the lives or the health of the people. We conclude, therefore, so far as this branch of the controversy is affected, that this contract is entire, and that the city may and should see that all its provisions are substantially complied with.

Passing to the second proposition, we are called on to determine whether the city at the commencement of this action had done all that was required of it in order to entitle it to come into a court of equity and obtain a cancellation of this contract, and an absolute discharge from all liability thereunder. It is contended on the part of the defendant in error that a repeal of the ordinance is a necessary prerequisite to the maintenance of this action. In the case of *Farmers' Loan & Trust Co. v. City of Galesburg*, 133 U. S. 156, 10 Sup. Ct. Rep. 316, cited by counsel for the plaintiff in error, it appears that the ordinance passed by the city was repealed before suit was commenced. The facts in that case were materially different from this. Prior to entering into a contract with the water company, the city of Galesburg owned a system of waterworks. The contract between the city and the water company provided for a sale of the old system to the water company. The water company contracted to furnish the city an ample supply of water, but failed to do so. After a period of 18 months had elapsed after the completion of the works by the water company, and the company had failed to furnish water either satisfactory in quality or sufficient in quantity, the city repealed the ordinance, severed connection of the old mains with the company's works, resumed possession of that portion of the system which had formerly belonged to the city, and then brought its bill in equity, asking that all rights conferred by the ordinance and contract be annulled. The case was very fully considered by the supreme court of the United States, and the decree of the circuit court annulling the contract was sustained. It appeared in that case that the water company had never fully complied with the contract; that it had had a full opportunity to do so; and that the city, after affording the water company ample time and opportunity, had availed itself of its right to annul the contract. It will be observed in this case that the waterworks were constructed in 1883; that this action was commenced in September, 1890, and it fairly appears that the waterworks must have been in operation, whether satisfactorily or not, during all this time. In the case of *Burlington Waterworks Co. v. City of Burlington*, 43

Kan. 725, 23 Pac. Rep. 1068, the city, in the ordinance granting the franchise to the water company, reserved the right to declare it forfeited for any failure on the part of the company to perform its contract. No such provision is contained in the ordinance in this case. In view of the large outlay necessarily made by the water company, and of the disastrous consequences and great pecuniary loss that would necessarily ensue to the company by a cancellation of the contract, we think this case should be determined in accordance with sound equitable principles, and, while the city has the right, and also rests under the duty, to see that the water company furnishes such water as is required by the terms of the ordinance, yet the water company should have fair notice of all objections made by the city to the kind of water furnished, and should also be afforded a reasonable opportunity to remedy any defects either in the plan of constructing its system or in its methods of operating it. The defects claimed to exist in the system, and the objections urged by the city against the quality of the water, are more fully considered in the other case.

We do not think a repeal of the ordinance could have the effect to terminate the contract, because it is seldom possible for one party, by its own action, to relieve itself from liability under a contract mutually entered into, where no right to do so is reserved in the contract itself. We think, however, it is essential, in order to give the city the right to terminate the contract, that it should by some regular action of the city authorities directly challenge the attention of the waterworks company to any failure on its part to perform its contract, and should fairly notify the company of the action which the city intends to take in case it persists in violating its contract. There are no averments in the petition showing that any such notice has been given, nor that any resolution or ordinance has been passed by the council on this subject. We think that the petition must affirmatively show these facts before the aid of a court of equity can be invoked to obtain the city's release from all obligation under the contract.

It is alleged that the waterworks company has violated its contract by imposing upon the private consumers of water rates other and different from the rates established by the contract without the assent or approval of the city council. It would seem to us that other remedies than the forfeiture of the contract are at the command of the city and its citizens, which would be adequate for the protection of their rights in that respect. We hardly see how the water company, by any mere regulations of its own, could impose upon the citizens higher rates for the use of water, or more burdensome terms, than are provided for in the ordinance. It is charged in the petition also that the defendant has failed to transact the business pertaining to said waterworks within the corporate limits of the city of Winfield, has failed to have its directors meet there, and has only been represented in

the city by an inexperienced agent, and that the city and its inhabitants have been thereby prevented from making complaints and settling difficulties arising between the parties. We do not see that this would give the city additional ground to forfeit the contract. The whole matter depends on the question whether the water company furnishes the quantity and quality of water it has agreed to furnish, and in the manner provided in the ordinance. If it has, it makes little difference where its board of directors meet, or what title is given to the managing agent of the company. We apprehend that any notice the city did prepare to serve on the company could be served on the person in charge of the works, whether he be merely a superintendent or the president of the company, and whether such superintendent or general agent be competent or incompetent to transact business of the company. So long as the waterworks company continues to operate its system it will, of course, have some one managing its business there, and, in case it should wholly abandon the operation of its system, an entirely different question would be presented. On the whole case we find no error in the ruling of the district court sustaining the demurrer, and its judgment will be affirmed. All the justices concurring.

(8 Utah, 403)

**DUDLEY v. FACER et al.**

(Supreme Court of Utah. March 29, 1893.)

**RIGHTS TO COSTS—QUIETING TITLE—DISCRETION OF COURT.**

Code, § 904, subsec. 5, provides that costs shall be allowed to plaintiff on a judgment in his favor in a case involving a title to land. Section 906 provides that costs must be allowed to defendant in a judgment in his favor in the actions mentioned in section 904. *Held* that, in an action to quiet title, the district court has no discretion to refuse costs to the winning party, though the organic act of the territory provides that the district courts shall have original jurisdiction in all cases at law and in equity, and though one of the rules of equity is that the chancellor shall dispose of costs according to his discretion.

Appeal from district court, Weber county; James A. Miner, Justice.

Action by Oliver H. Dudley against George Facer and another and the Central Pacific Railroad Company to quiet title to a certain tract of land. There was judgment for defendants, without costs, and they appeal. Order reversed.

Evans & Rogers and Jacob S. Boreman, for appellants. Smith & Smith, for respondent.

**BLACKBURN, J.** This suit is brought to quiet the title to a tract of land, and defendants Facer and Woodland claim it, and in the pleadings and evidence their claims are set out. The court heard the case, and decided that the defendants Facer and Woodland owned the land in controversy, and dismissed the complaint, but did not give the defendants costs, and, from the order disallowing costs, this appeal is taken. The appellants insist that

this is a suit in which the title to land is involved, and that in such case the statute of the territory determines the question of costs, and no discretion is left to the judge to refuse costs to the winning party. Section 904 of the Code (page 379, Comp. Laws) provides that costs shall be allowed of course to the plaintiff on a judgment in his favor in each of the following cases; and one of the following cases is in a case where the title to land is involved. Subsection 5. Section 906 provides: "Costs must be allowed of course to the defendant in a judgment in his favor in the actions mentioned in section 904, and in special proceedings." The title to real estate is clearly involved in this case. Therefore, if the statutes are binding, the court erred in refusing costs. The question of costs is a rightful subject of legislation; only it cannot make a law in conflict with the organic act of the territory. *Hepworth v. Gardner*, 4 Utah, 444, 11 Pac. Rep. 566.

But it is claimed that because the organic act provides that the district courts of the territory shall have original jurisdiction in all cases at law and in equity, and because one of the rules of equity is that the chancellor would dispose of costs according to his discretion, therefore the provisions of the statutes of the territory above cited are nugatory. We do not think so. The regulation by the territorial legislature of costs is not such a jurisdictional question as to interfere with the full exercise of the equity jurisdiction of the district courts. In the case of *Ely v. Railroad Co.*, 129 U. S. 291, 9 Sup. Ct. Rep. 293, the supreme court of the United States said that the territorial legislature might, to some extent at any rate, regulate the jurisdiction in equity. That suit was brought by a man out of possession to have his title to real estate settled in a court of equity, claiming that he was the owner, and entitled to the possession. This suit could not have been brought in the courts of the United States under their equity jurisdiction, but the court says it was rightfully brought in the district court of the territory of Arizona, because the statutes of that territory allowed it to be done. We think, therefore, that the territorial legislature of Utah can regulate the question of costs in causes in equity. The cause is reversed and remanded, with directions to the district court to allow the defendant his costs.

**ZANE, C. J., and BARTCH, J., concur.**

(8 Utah, 406)

**MARKS et ux. v. SULLIVAN et al.**

(Supreme Court of Utah. March 29, 1893.)

**RES JUDICATA—QUESTIONS DETERMINED—TRESPASS—WHO MAY MAINTAIN.**

1. In trespass *quare clausum* against S. and others it appeared that S. removed the household goods of plaintiff from the premises occupied by her at the request of his codefendants, who offered evidence of their title to the premises. The pleadings of neither party alleged that S. was in fact the agent of his codefendants, and made the removal as such agent. *Held*, that a judgment in favor of S. would be an adjudication of his trespass, but:

not of his agency in removing the goods, and the consequent liability of the other defendants.

2. A person in possession of real estate is entitled to an action of trespass against all persons making forcible entry thereon, except the owner with the right of immediate entry.

Appeal from district court, Utah county; John W. Blackburn, Justice.

Action of trespass quare clausum by Wolf Marks and another against John T. Sullivan and others. There was judgment in favor of Sullivan, and against his co-defendants. On appeal the judgment was reversed as to the codefendants, and, their motion to file an amended answer being denied, they appeal. Affirmed.

J. G. Sutherland, for appellants. Chas. S. Varian, Geo. Sutherland, David Evans, and W. H. King, for respondents.

ZANE, C. J. This was an action of trespass in which the plaintiffs alleged in their complaint that the defendants, with force and arms, entered the dwelling house of the plaintiff Anna Marks, and forcibly ejected her from it, and tore her house down, and carried away her household furniture and other personal property. The case was submitted to a jury upon the evidence and the charge of the court, who found the defendant Sullivan not guilty, and found the other four defendants guilty, and assessed the plaintiff's damages against them at \$2,500. The court overruled the motion of the defendants found guilty for a new trial, and entered judgment on the verdict; and, upon appeal by them, this court reversed the judgment as to them, and remanded the case, with directions to the lower court to grant them a new trial. 24 Pac. Rep. 528. This being done, the court, on motion of the plaintiffs, dismissed the action as to defendant Sutherland. The defendant Culmer and the defendants Tompkins then presented a supplemental answer as follows, and asked leave of the court to file it: "Supplemental answer. Said defendants, Belle Tompkins, William H. Culmer, and Jabez G. Sutherland, by leave of court first had and obtained, file a supplemental answer, alleging the following facts, which have occurred since the commencement of this action. Said defendants, answering, allege: (1) That this action came on for trial on the 1st day of December, 1888, against all the original defendants, including John T. Sullivan, mentioned in the original complaint. That it appeared on the trial of the issues made by said pleadings that the said John T. Sullivan, acting at the request of the said defendants Belle Tompkins and Harvey K. Tompkins, and relying thereon, and upon the writ of restitution mentioned in the original answer, removed the plaintiff Anna Marks from the possession of the premises mentioned in the original pleadings, and removed her goods therefrom. That said writ was void, and his defense in said action on said trial depended on the right of said defendant Belle Tompkins, as owner and possessor of said premises, to remove said plaintiff Anna Marks therefrom, and his employment by said defendant Tompkins to effect such removal. That the employment of

said Sullivan by the said Belle Tompkins, and her request to him to remove said plaintiff Anna Marks from said premises, and to act for and in privity with her in effecting such removal, and the possession of said premises by said Belle Tompkins, and her right and title thereto, was submitted on testimony to said jury; and the court thereon instructed said jury, as the only way in which such removal of said plaintiff Anna Marks by said defendant Sullivan could be justified, in substance and to the effect, that if said defendants Tompkins were at the time of the alleged wrong in possession of the Eureka Hotel property, and that property included the ground on which plaintiff built the house in question, and the plaintiff built that house without their consent, and against their protest, they, said defendants Tompkins, had a right by employing John T. Sullivan to remove the plaintiff and her goods to preserve their possession intact, using no more force than was necessary for that purpose. That on said trial the jury impaneled to try said action found a verdict in favor of the said John T. Sullivan in the following terms, to wit: 'We, the jury, impaneled in the above-entitled action, find for the plaintiffs against the defendants William H. Culmer, Jabez G. Sutherland, Harvey K. Tompkins, and Belle Tompkins, and assess their damages at \$2,500; and no cause of action against John T. Sullivan. Peter Stubbs, Foreman.' And upon said return of said jury, as above set out, the said court entered a judgment, which was duly given and made in favor of the said John T. Sullivan, and against said plaintiffs that he go hence without day, which judgment is of record in said court in this cause, and remains unappealed from, unreversed, and in full force; and the judgment and the verdict against the other said defendants has since been reversed by the supreme court of said territory, on appeal. Wherefore said defendants, now answering, say: The plaintiffs' action is barred by said verdict and judgment, and that the same conclusively establishes that said defendant Belle Tompkins has a possessory title to said premises, and rightfully ejected said Anna Marks therefrom; that said verdict and judgment are a final determination of the issues in the original pleadings in favor of said defendants, and against said plaintiffs, and said defendants therefore ask to be hence dismissed, and that they may have judgment for their costs. J. G. Sutherland, Arthur Brown, Defendants' Attorneys." The court refused the leave asked, and this ruling the defendants assign as error.

In substance, the first allegation of the proposed plea is that it appeared on the trial of the case against Sullivan that he, at the request of Tompkins and his wife, and as their agent, removed the plaintiff Anna Marks and her goods from the premises referred to in the complaint. The allegation is not that Sullivan was the agent, and that the removal was made by him as such agent. If the plea had been allowed, the inquiry as to the agency of Sullivan would have been limited by what appeared on the first trial, and the verdict

and the judgment thereon in his favor. The inquiry would not have been as to whether Sullivan acted as the agent of Belle Tompkins and her husband. The question would have been, did the agency appear as found by the verdict of the jury, and affirmed by the judgment of the court? The plaintiffs alleged in their complaint that all the defendants committed the trespass. They did not allege that Sullivan did the acts as the agent of the other defendants or any of them; nor did Sullivan in his plea allege that Anna Marks had the right of entry, and then justify as her agent under an alleged right in her. That issue was not tendered by the pleadings. The defendants insist that the facts stated in the proposed plea, if they had been proven, would have been a good defense upon the new trial; that the verdict and judgment against the plaintiffs, and in favor of Sullivan, as set out in the plea, was an adjudication of the fact of agency, as well as the trespass. The employment of an agent is a transaction in the making of which the principal and agent each represents himself. In making it the agent does not represent the principal. But in any transaction within the scope of his employment the agent represents the principal, and all acts within his employment are regarded as the acts of the principal, and he is responsible for them; and, whether such acts or transactions are adjudicated in a suit against the agent or principal, they are established as to both. *Emery v. Fowler*, 39 Me. 326; *Bigelow, Estop.* (5th Ed.) 122. This rule of law does not apply as to an adjudication of the fact of agency. An adjudication of that fact in a suit against the agent to which the principal is not a party does not estop the principal from contesting it in a suit against him. As to that transaction, the agent did not represent his principal. He represented himself, and he is not authorized to admit it in a suit against him without special authority. We are of the opinion that the court would have erred had it denied the plaintiffs on the new trial the right to prove that the defendants to it, or any of them, were present, and that the acts constituting the trespass were done by them, or some of them, or that they or some of them assisted in doing the acts. If the plea presented, in addition to the facts it contained, had alleged that the defendants named in it did not do the acts themselves, nor aid in the doing of them, and that Sullivan committed the trespasses as their agent or the agent of any of them, we are disposed to hold that the plea would have been good, and that the court would have erred in refusing permission to file it. Inasmuch as the plea did not so allege, we think that it did not constitute a good plea in bar, and that the court rightfully refused permission to file it.

The appellants also insist that forcible entry was the plaintiffs' exclusive remedy, under the allegations of their complaint, and that trespass did not lie. At common law a person in the wrongful possession of real estate could not maintain an action of trespass for a forcible entry against the owner having an immediate right to

enter; but the statute of this territory gives a person in the wrongful possession of real estate a right to the action of forcible entry against the owner having the right to enter if he enter forcibly. In such a case, however, the statute does not give the right to an action of trespass; but it does not deny the right to such action where it exists at the common law. The person in possession has the right to such an action against all persons making forcible entry, except the owner with the right of immediate entry. This is the doctrine announced in the case of *Canavan v. Gray*, 64 Cal. 5, 27 Pac. Rep. 788. The plaintiff alleges in her complaint that the defendants trespassed on her property in which she was in the lawful possession. The judgment of the court below is affirmed.

MINER and BARTCH, JJ., concur.

(3 Utah, 412)

### PEOPLE v. DAVIS.

(Supreme Court of Utah. March 29, 1893.)

#### MURDER—INDICTMENT—FELONIOUS INTENT.

Comp. Laws, §§ 4452, 4453, declare that murder is the unlawful killing of a human being, with malice aforethought, express or implied. Section 4454 declares that every murder perpetrated by willful, deliberate, malicious, and premeditated killing, or by any act evidencing a depraved mind, regardless of human life, is murder in the first degree. Section 4930 provides that the indictment must contain a clear statement of the acts constituting the offense, with such particulars as will enable the defendant to understand the character of the offense complained of. Section 4938 provides that the indictment is sufficient if the act charged as the offense is clearly set forth, in such a manner as to enable the court to understand it, and to pronounce judgment on a conviction. *Held*, that an indictment reciting that defendant, on one D., willfully, feloniously, and with malice aforethought, did make an assault with a revolver, and with the revolver her, the said D., on the head did then and there willfully, feloniously, and with malice aforethought beat, thereby then and there inflicting on the head of D. one mortal wound of which she instantly died, and in the manner aforesaid her the said D. then and there did kill and murder, is not open to the objection that the felonious intent applies to the assault, but not to the killing, since such intent, by the use of the words "and" and "then and there," is made to attach to the allegation of killing, without the repetition of the words denoting the felonious intent. Miner, J., dissenting.

Appeal from district court, Utah county; John W. Blackburn, Justice.

Enoch Davis was convicted of murder in the first degree, and appeals. Affirmed.

Warner & Kenward, for appellant. Chas. S. Varian, U. S. Atty., for the People.

BARTCH, J. According to the record in this case the defendant was indicted on the 27th day of September, 1892, in the first judicial district, for the crime of murder. On the 29th of September, he, by his attorneys, demurred to the indictment, which demurrer was overruled, and the trial of the cause commenced on the 19th day of October. On the 26th of October, the jury returned a verdict of guilty in the first de-

gree, and on the 3d day of November, the court sentenced the defendant to be shot, he choosing that mode of death. Before sentence was pronounced, counsel for defendant moved the court for a new trial, which motion was overruled; and thereupon counsel moved the court in arrest of judgment, alleging as a ground that the indictment does not charge murder in the first degree. The court overruled the motion, and the defendant regularly appealed to this court, assigning as error the overruling of the several motions. No point appears to be made as to the regularity of the proceedings in the trial court, nor to the sufficiency of the evidence to sustain the verdict, if the indictment be sufficient. In the argument of the case before this court, counsel confined themselves mainly to one point,—the sufficiency of the indictment to charge murder in the first degree under our statutes; and the consideration of this point will dispose of all the assignments of error. The indictment reads as follows: "The said Enoch Davis, on the 6th day of June, 1892, at the county of Uintah, in said territory of Utah, in and upon one Louisa Davis, there being, willfully, feloniously, and of his deliberately premeditated malice aforethought, did make an assault with a certain revolver, by him, the said Enoch Davis, then and there had and held, with which said revolver he, the said Enoch Davis, her, the said Louisa Davis, upon the head did then and there willfully, feloniously, and of his deliberately premeditated malice aforethought, beat, bruise, and wound, thereby then and there inflicting upon the head of her, the said Louisa Davis, one mortal wound, of which the said Louisa Davis then and there instantly died; and so the grand jury aforesaid do say that, in manner aforesaid, he, the said Enoch Davis, her, the said Louisa Davis, then and there did kill and murder, contrary to the form of the statutes of said territory in such case made and provided, and against the peace and dignity of the people aforesaid."

An indictment for murder in the first degree must contain all the facts necessary to constitute that crime, in order to sustain a conviction in that degree. These facts must be precisely stated, and with sufficient certainty. It must furnish the defendant with such a description of the charge against him as will enable him to make his defense. The crime of murder is made up of acts and intent, and these must be set forth with reasonable particularity, of time, place, and circumstance. 4 Bl. Comm. 306; U. S. v. Cruikshank, 92 U. S. 542. Does, then, the above indictment set out the acts and intent—the elements which constitute the crime of murder in the first degree—with sufficient certainty? Section 4452, Comp. Laws Utah, provides that "murder is the unlawful killing of a human being with malice aforethought;" and section 4453 provides that "such malice may be expressed or implied." It is express, when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or

malignant heart. The elements which constitute the crime of murder under our statutes are—First, that the being killed is a human being; second, that the killing was unlawful; and, third, that the killing was done with malice aforethought. All these elements seem to appear in the indictment in this case. When there is a deliberate intention to take away the life of a human being, malice is express, and when a human being is killed unlawfully, without any considerable provocation, or, when the circumstances at the time of such killing show an abandoned or malignant heart, malice is implied. The term "malice" denotes a wicked intention of the mind. An act done with a depraved mind, attendant with circumstances which indicate a willful disregard of the rights or safety of others, or of social duty, indicates malice. Malice aforethought is such wicked intention of the mind previously entertained. Such intention may be inferred from the acts. 1 Whart. Crim. Law, § 117; Com. v. York, 9 Metc. (Mass.) 93. It was argued by counsel for defendant that, as used in the indictment in this case, the terms "willfully, feloniously, and of his deliberately premeditated malice aforethought" do not apply to the killing, but only to the assault; that the intent to kill is not manifest in the indictment; and that therefore the defendant was erroneously convicted of murder in the first degree. Section 4454, Comp. Laws Utah, defines the degrees into which murder is divided, and reads as follows: "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life.—is murder in the first degree; and any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree." If a person forms a specific intent to unlawfully kill another, such killing is deliberate, premeditated, and malicious, and is murder in the first degree. This was also murder at common law; and in this respect the common law is not changed by a statute which simply carves out of the common-law offense a lesser crime,—that of murder in the second degree,—which includes that class of murder under the common law wherein the specific intent, previously formed, to take life unlawfully, is wanting. 1 Whart. Crim. Law, § 393; Mitchell v. State, 8 Yerg. 514. Counsel for defendant insist that such specific intent is wanting in this case, and that the indictment will not sustain a verdict of murder in the first degree, but will at most only sustain a verdict of murder in the second degree, and that the allegations in the indictment necessary to constitute the crime of murder run only to the assault, and charge no specific intent to kill. If this conten-

tion be correct, then there is no ground on which the verdict can be sustained, even though it would reduce the grade of punishment of one who is actually guilty of the higher crime. The object of an indictment is to give the defendant precise information of the facts which constitute the criminal charge preferred against him.

In regard to the sufficiency of an indictment, our territorial legislature has provided as follows: "All forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act." Comp. Laws Utah, § 4928. Section 4930 provides that "the indictment must contain"—Second, (omitting first subdivision,) "a clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person, and property as will enable the defendant to understand distinctly the character of the offense complained of, and answer the indictment." And section 4938 provides that "the indictment is sufficient if it can be understood therefrom," (omitting all the subdivisions not material in this case,) sixth, "that the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended; and to pronounce judgment upon a conviction according to the right of the case." These sections provide how the sufficiency of an indictment must be determined, what acts must be set forth, to what extent, and that they must be set forth clearly and distinctly, "without repetition," and in such manner "as will enable the defendant to understand the character of the offense," and the "court to understand what is intended." The facts alleged in the indictment in this case, after stating the time when and the place where the acts were done, are that the defendant, with a revolver had and held, willfully, feloniously, and of his deliberately premeditated malice aforethought made an assault upon the deceased, and did, with said revolver, then and there willfully, feloniously, and of his deliberately premeditated malice aforethought, beat, bruise, and wound the deceased upon the head, thereby inflicting one mortal wound, of which she then and there instantly died, and in that manner he did kill and murder the deceased. Viewing these allegations in the light of the statutes above quoted, we think the acts of the defendant have been sufficiently described under the law. The elements which constitute the crime of murder are stated with reasonable clearness and precision, and the indictment furnished such a description of the charge against the accused as was necessary to enable him to make his defense against the crime of murder in the first degree. From the allegations the intent is manifest, and, if the facts alleged be true, it cannot be successfully contended that the appellant merely intended a severe chastisement, and did not intend to kill. The instrument used, the fierceness of the assault, the manner and place of the inflicting of the wounds, the instantly fatal re-

sult, all repel such a theory, and, from the facts alleged, one cannot reasonably conceive of any other felony which he intended to perpetrate. The allegations are sufficient to show that he intended the consequences of his acts. A person who uses a deadly weapon in an unlawful manner must be taken to intend the natural and usual consequences resulting from such use. *Keenan v. Com.*, 44 Pa. St. 55. *People v. Halliday*, 5 Utah, 471, 17 Pac. Rep. 118. Chief Justice Bigelow, in *Com. v. Hersey*, 2 Allen, 173, after commenting on the authorities as to essential averments to the validity of an indictment, says: "There can be no doubt that in every case, to render a party responsible for a felony, a vicious will or wicked intent must concur with a wrongful act. But it does not follow that, because a man cannot commit a felony unless he has an evil or malicious mind or will, it is necessary to aver the guilty intent as a substantive part of the crime, in giving a technical description of it in the indictment. On the contrary, as the law presumes that every man intends the natural and necessary consequences of his acts, it is sufficient to aver in apt and technical words that the defendant committed a criminal act, without alleging the specific intent with which it was done. In such case the act necessarily includes the intent." The word "intent" is not used in the indictment in this case, but, as has already been observed, it is incorporated in the term "malice aforethought," and so also the acts described include the intent. The words "and" and "then and there" are used in connection with each allegation, and the allegation "willfully, feloniously, and of his deliberately premeditated malice aforethought" applied to the assault, as shown in the indictment, and to the beating, bruising, and wounding ran also, through the words "and" and "then and there" to the killing, and therefore, it was not necessary to repeat the terms "willfully," "feloniously," etc., in connection with the allegation "did kill and murder." A further repetition would neither have rendered the charge more clear or certain, nor would it have brought the indictment nearer to the requirements of our statute. *State v. Owen*, 4 Amer. Dec. 571; 2 Bish. Crim. Proc. (3d Ed.) § 547; *People v. Davis*, 73 Cal. 355, 15 Pac. Rep. 8. Counsel for appellant placed much stress on the decision in *State v. Brown*, 21 Kan. 38, and it appears to sustain their view of the case, but we do not think that decision is sustained by the weight of authority. The facts concerning the unlawful acts of the defendant were set out with sufficient clearness and certainty in the indictment to give him precise information regarding the degree of the crime for which he was required to answer, and there appears to be no good reason why the majesty of the law should not be vindicated. The judgment of the court below is affirmed, and the case is remanded for further proceedings in accordance with law.

ZANE, C. J., concurs. MINER, J., dissents.

(21 Nev. 409)

## NEVADA CENT. R. CO. v. DISTRICT COURT OF LANDER COUNTY. (No. 1370.)

(Supreme Court of Nevada. April 14, 1893.)

PRACTICE IN JUSTICE'S COURT — ADJOURNMENT — BOND — NOTICE OF APPEAL — DISMISSAL — MANDAMUS — CERTIORARI.

1. Where, by consent of parties, a case in a justice's court is adjourned for more than 10 days, the undertaking provided for by section 3565, Gen. St., is not required, and a dismissal of the action for the reason that such undertaking has not been given is error.

2. Where the notice of appeal properly describes the judgment from which the appeal is taken, the addition of other words indicating that the appeal is taken from the order dismissing the action, on which order the judgment is founded, should be treated as surplusage, and they do not invalidate the appeal. *Murphy, C. J., dissenting.*

3. Where a justice has dismissed an action, a writ of mandamus will not lie to compel him to proceed and try the action, although such dismissal was error.

4. A writ of certiorari will not lie where there is an appeal.

5. An appeal will lie from a judgment rendered in a justice's court on an order improperly dismissing the action. Especially is that the case where both issues of law and issues of fact had been made in the justice's court.

(Syllabus by the Court.)

Application for writ of prohibition by the Nevada Central Railroad Company against the district court of Lander county to prohibit defendant from trying a certain case in which the petitioners were defendants, and which was, as alleged, improperly appealed to the district court. Writ dismissed.

D. S. Truman, for petitioner. James F. Dennis, for respondent.

BIGELOW, J. In the action of J. F. Dennis v. The Nevada Central Railroad Company, pending in the justice's court of Austin township, Lander county, the justice, being of the opinion that he had lost jurisdiction of the case, by reason of having granted, although by consent of both parties, a continuance for more than 10 days without requiring the undertaking provided for in Gen. St. § 3565, dismissed it, and rendered judgment against the plaintiff for costs. It is sufficient upon this point to say that this was error, because, when both parties consent to an adjournment of the trial, no undertaking is required. A motion by the plaintiff to relax the costs was overruled by the justice, and the plaintiff appealed to the district court of Lander county. The notice of appeal stated that the appeal was taken from the judgment, properly describing it, and then added: "This appeal is taken on the order dismissing the action on the motion of defendant that the said court had lost jurisdiction of the same, on questions of both law and fact. An appeal can only be taken in a justice's court from a final judgment, and, as this was properly done here, the words quoted should be treated as surplusage, and they do not invalidate the appeal."

In the district court a motion to dismiss the appeal was overruled, and the petitioner asks in this proceeding that that court be prohibited from trying the case upon the appeal. The application is based upon the ground that there can be no appeal from a case in a justice's court until it has been tried upon the merits; and it is said that, if the justice improperly dismissed the action, the plaintiff should apply for a writ of mandamus to compel him to go on and try it. But the justice having acted in the matter by dismissing the action, no matter how erroneous the order, mandamus will not lie to compel him to proceed with the trial. *State v. Wright, 4 Nev. 119; Floral Springs Water Co. v. Rives, 14 Nev. 431.*

It is also contended that the plaintiff's remedy is to apply for a writ of certiorari to annul the order of the justice dismissing the action. But, under our statute, certiorari will not lie where there is an appeal; so, if there is an appeal permitted in this case, certiorari would be no remedy. *Conner v. Swift, 9 Nev. 39.* To affirm one is to negative the other. In all the cases cited from California where the writ was issued to annul orders improperly dismissing actions or appeals, there could have been no appeal from the judgment of dismissal. Then, was an appeal authorized in this case? Gen. St. § 3603, provides that any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court of that county. No limitation is placed upon this right of appeal, and it cannot be denied that, under this section, the right existed here. The only condition is that a judgment shall have been rendered with which the party is dissatisfied; and that was the case with the plaintiff here. That the dismissal of a case is a final judgment, from which an appeal will lie, has so often been decided that a citation of authorities seems almost superfluous. *Zoller v. McDonald, 23 Cal. 136; Dowling v. Polack, 18 Cal. 625; Bowle v. Kansas City, 51 Mo. 454; Gill v. Jones, 57 Miss. 367.* But in section 3604, Gen. St., it is provided that upon the appeal the case shall be tried "anew;" and, upon the theory that this case was not tried in the justice's court, it is said that it cannot be tried anew; and, as that is the only method of disposing of an appeal, it follows that, notwithstanding the broad language of section 3603, there can be no appeal here. I am of the opinion, however, that no such narrow and technical construction should be placed upon this section. To do so is not only to override the language of the preceding section, but is to upset a whole harmonious system, by placing too much stress upon the strict literal meaning of the one word "anew,"—a meaning that it is apparent the legislature never intended it to have. This, it seems to me, an examination of the whole statute makes clear. After granting, by section 3603, the unlimited right of appeal already mentioned, it, of course, became necessary to determine how the appeal should be disposed of in the district court. Should that court be given the power to affirm or modify the judgment, or, if errors were found, to reverse it for a new trial in the justice's court, or, without regard to whether er-



rors had or had not been committed in the lower court, should it be tried anew in the district court? The latter course was decided upon. No matter how just the judgment of the justice may be, or how free from errors, the case is to be tried anew in the appellate court. It was clearly the intention of the lawmakers that, after the appeal, the case should be entirely disposed of in the district court, without returning it again to the justice's court, and without regard to how the previous judgment had been reached. Section 3604 was intended to deal alone with the mode of procedure upon the appeal, and it seems unreasonable to suppose that it was intended therein to place a limitation upon the right of appeal so freely given by the preceding section. So far as the justice's court is concerned, although the merits of the action have not been passed upon, this cause has been tried. The justice has tried all that in his judgment there was to be tried. He has disposed of it by rendering judgment for the defendant. That is the end of the case in his court. After that the right of appeal exists, and, if exercised, the cause is then entirely in the district court. By this method of procedure one appeal disposes of the whole controversy, when, if we were to adopt the petitioner's views, a writ of certiorari would first be necessary to annul the erroneous order of the justice, after which would follow a trial in that court, and then, without regard to the result there, an appeal to the district court would still be in order. If a correct and proper judgment will not bar an appeal, to be followed by another trial, common sense requires that an erroneous one should not have that effect. In my judgment, the view that an appeal will lie in such a case is not only supported by the statute, but is required by every consideration of expediency and economy.

Owing to the difference between the California statute and ours, the cases from that state are but little in point, but, as far as they are, they support the views here expressed. In that state appeals from a justice's court are allowed either upon questions of law or questions of fact. If taken upon questions of law, the appellate court can affirm or modify the judgment, or reverse the case for a new trial in the justice's court; but, if taken upon questions of fact, the only method of disposing of the appeal is to try the case anew. Under this statute it is held that there can be no appeal upon questions of fact until they have first been tried in the justice's court. This is, perhaps, in accordance with the intention of their statute; for, until a question of fact has been tried, there can be no occasion to appeal from it, and all errors of law are to be corrected by an appeal upon questions of law. But not so with us. Our statute allows but one appeal, and by that one appeal both questions of law and questions of fact are to be taken to the higher court, and then all errors are to be disposed of by retrying the case. Under the California statute, in such a case as the one in hand the error would be corrected by an appeal upon a question

of law. The courts of that state have never held, as petitioner's counsel seems to suppose, that there can be no appeal in such cases, but only that there can be no appeal upon questions of fact. *Ketchum v. Superior Court*, 65 Cal. 494, 4 Pac. Rep. 492; *Myrick v. Superior Court*, 68 Cal. 98, 8 Pac. Rep. 648. Nothing contrary to the conclusion here announced was decided in *Martin v. District Court*, 13 Nev. 85. It was there held that, where the defendant had made default, where no issue either of law or fact was made in the justice's court, there could be no appeal, because there was nothing to try upon the appeal. But here an answer was filed, and issues of fact made in the justice's court, besides the issue of law as to whether the action was properly dismissed. In fact, to some extent that case is against the position of the petitioner that there can be no appeal until after the merits have been tried in the justice's court, for it was expressly stated that a party could appeal upon issues of law, and those issues would be triable in the district court. While for these reasons it is unnecessary to consider the case further, it may well be doubted as to whether a too contracted view of the statute was not there taken. An appeal is the most direct, expeditious, and simple remedy for any errors in the justice's court, that can be suggested; and, unless the statute clearly prohibits it, such a construction should be adopted as will advance that remedy, instead of unnecessarily hampering it, to the end that cases may be disposed of upon their merits, instead of upon technicalities. These considerations have compelled the California courts, contrary to their first rulings, (*People v. County Court*, 10 Cal. 19,) to hold that other issues than those made in the justice's court, may be made and tried in the appellate court. *Kitts v. Superior Court*, 62 Cal. 203; *Ketchum v. Superior Court*, 65 Cal. 494, 4 Pac. Rep. 492. If our statute will not permit of such construction, it should be so amended that it will; for frequently, without this right, the merits of a case can never be reached or determined. The writ must be dismissed. It is so ordered.

MURPHY, C. J. I concur in the judgment of dismissal. The fact that a court might act irregularly in matters in which it has jurisdiction over some of the questions involved in the appeal will not warrant the issuance of the writ of prohibition. Such a writ cannot be used to prescribe what a court shall or shall not consider in a matter before it. To do so would be to interfere with the judicial functions of the court. *High, Extr. Rem.* § 772. I cannot concur in the conclusion reached by Justice BIGELOW that certain words written in the printed form of the notice of appeal should be disregarded,—the court acquires its jurisdiction through the notice of appeal,—nor that the district court can proceed and try the case on any other issues except such as were passed upon in the justice's court. For the foregoing reasons, I concur in the judgment of dismissal, but dissent from the views expressed on the other points.

(13 Mont. 152)

**CREEK v. McMANUS et al.**

(Supreme Court of Montana. April 10, 1893.)

**NONSUIT—DIRECTING VERDICT—INJUNCTION BOND—DAMAGES—ATTORNEYS' FEES.**

1. A direction to the jury, in a civil case, to find for defendant, is in effect a nonsuit. *McKay v. Railway Co.*, (Mont.) 31 Pac. Rep. 999, followed.

2. On dissolution of an injunction, attorneys' fees paid in the injunction suit by defendant therein are recoverable as damages in an action on the injunction bond.

3. In an action on an injunction bond to recover the attorney's fee paid by plaintiff (defendant in the injunction suit) for services therein, it appeared that no other relief was asked in such suit than the injunction, and that the temporary injunction was dissolved on the trial, and not on a separate motion. Plaintiff testified that she employed the attorney "to dissolve the temporary injunction, and to resist the perpetual injunction." Held, that plaintiff need not show how much of the attorney's fee was paid "to dissolve the temporary injunction," and how much "to resist the permanent injunction," as the right to the injunction was the only cause of action. *Campbell v. Metcalf*, 1 Mont. 373, distinguished.

4. Where a demurrer to a complaint is overruled, it is error for the court, on subsequently concluding that the ruling on the demurrer was wrong, to exclude evidence in support of the complaint, unless plaintiff is first given an opportunity to amend.

Appeal from district court, Gallatin county; Frank K. Armstrong, Judge.

Action by Rachel E. Creek against John McManus and others on an injunction bond. There was a judgment for defendants, and plaintiff appeals. Reversed.

The other facts fully appear in the following statement by DE WITT, J.:

The plaintiff brought this action to recover against the defendants damages for the alleged wrongful issuance of an injunction. McManus, defendant herein, brought an action for an injunction against this plaintiff, and, in such action, gave the statutory undertaking, with Cline and Davis, the other defendants herein, as sureties. That action was for an injunction only. In that action the plaintiff herein and defendant therein recovered judgment for costs, and for the dissolution of the injunction. Now, in the case at bar she seeks damages occurring by the issuance of that injunction. The judgment in this case was for defendant, and plaintiff herein appeals. The case was tried to a jury. At the close of the evidence for the plaintiff, the defendant moved the court "to instruct the jury to bring in a verdict for the defendant, on the ground of a failure of proof by plaintiff." This motion was granted, and the court instructed the jury accordingly. In pursuance to the instruction, the jury found for the defendants, and judgment was thereupon entered. From this judgment the plaintiff appeals.

E. P. Cadwell, for appellant. Luce & Luce, for respondents.

DE WITT, J., (after stating the facts.) Appellant contends that the granting of the motion to instruct the jury to find for the defendants was error. This action by the court in a civil case was practically, in effect, the granting of a nonsuit, and

must be classified and treated as a nonsuit. That this is the proper view of that action by the court was so fully, and, to my mind, satisfactorily, treated in the recent case of *McKay v. Railway Co.*, (December term,) 31 Pac. Rep. 999, that it would not be profitable to add to the remarks made in that case. In reviewing the judgment rendered upon the sustaining of that motion for a nonsuit, all facts will be considered as proved which the evidence tends to prove. *Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463. Does the evidence in this case tend to prove any cause of action? The cause of action was for damages occurring by reason of the injunction action of defendant herein against plaintiff herein. One item of the alleged damages is pleaded in the complaint in this case as follows: "That, in order to defend said suit, and to procure the dissolution of said writ of injunction, this plaintiff (defendant therein) was obliged to, and did, employ an attorney at an expense of one hundred dollars, which sum so paid was a reasonable sum for said services." We think that there was evidence tending to sustain this allegation. That action of *McManus v. Creek* was for an injunction only. The injunction was not asked for in connection with any other cause of action; nor were any damages claimed; nor was any other relief than the injunction asked. Nothing was obtained by plaintiff in that action except a temporary injunction. That temporary injunction was dissolved on the trial of the action, and not upon a separate motion made for that purpose. Plaintiff testified on her examination as a witness as follows: "I am the plaintiff in this case. I was the defendant in the case of *John McManus v. Rachel E. Creek*, that was tried about a year ago; and in that case I employed a person to resist the injunction which had been served on me in that case. I employed Judge Liddell to dissolve the temporary injunction, and to resist the perpetual injunction, and that was the only purpose for which I employed him in that case." Respondent contends that the fee paid to the attorney for "dissolving the temporary injunction," and "to resist the perpetual injunction," is not by the evidence apportioned between these two services, and that the jury could not determine what portion of the one hundred dollars was paid for dissolution of the injunction. *Campbell v. Metcalf*, 1 Mont. 373. But in that case the fees paid to the attorneys were in an action brought to recover possession of a mining claim. In that action an injunction was procured. The fees were paid to the attorneys in a gross sum for their services in determining the title to the property, and in procuring a dissolution of the temporary injunction. It appeared in the evidence that there were these two separate and distinct services. It did not appear what portion of the fees were paid for dissolving the injunction, and what portion for determining the title to the property. The court said: "As there was no evidence to show how much money had been paid to procure the dissolution of this injunction, it was improper for the court to give any

instruction which would lead the jury to consider the matter." But in the case at bar the right to an injunction was the only cause of action set up or litigated, and no services could have been rendered for any other purpose. Upon the trial the temporary injunction was dissolved, and a perpetual injunction denied, at one strike, and by one service of the attorney. The damages caused the plaintiff herein were caused by the action of *McManus v. Creek*, and the issuance of the temporary injunction on the complaint therein. The defendant employed an attorney to resist that injunction. Instead of attacking the temporary injunction, which was in force, by a distinct motion for that purpose, the attorney dissolved it by another sort of attack. He assaulted the very foundation of the injunction,—that is, the action in which it was granted,—and demolished the whole structure by one effort. These facts render applicable the case of *Miles v. Edwards*, 6 Mont. 180, 9 Pac. Rep. 814, in which case, as in the case at bar, the only cause of action was the injunction; therefore *Miles v. Edwards* and the case now before us are distinguishable, as above noted, from *Campbell v. Metcalf*, supra, and also from *Allport v. Kelsey*, 2 Mont. 343, and *Parker v. Bond*, 5 Mont. 14, 1 Pac. Rep. 209, in which latter cases, as well as in *Campbell v. Metcalf*, there was a main cause of action involving the title to property, and the injunction, as remarked in *Miles v. Edwards*, was only ancillary thereto. It therefore appears herein that the fee paid the attorney was paid wholly on account of the injunction and for services as to no other cause of action than the injunction. We are therefore of opinion that there was evidence tending to prove damages occurring to plaintiff by reason of being obliged to pay attorneys' fees in the injunction action. Such damages may be recovered in an action upon the undertaking given in the injunction suit. See cases above cited in this opinion.

We will notice the error claimed in exclusion of testimony. The complaint alleges that, by the said wrongful issuance of the injunction, the plaintiff sustained damages in the loss of crop, which she says are particularly set forth, as follows: "That the loss of crop caused by this plaintiff, [defendant therein,] not being able to secure water through said irrigating ditch, so commenced, to properly irrigate them, by reason of her stopping work thereon, by reason of said injunction being so wrongfully issued and served, in the sum of one hundred and fifty dollars." A demurrer by defendant was directed at this paragraph of the complaint, as follows: "That said complaint does not state facts sufficient to constitute a cause of action for the damages alleged in paragraph 8 thereof." The district court overruled this demurrer, thereby declaring its view, and the law of the case for the time, that this paragraph of the complaint was a sufficient allegation of damages. Upon the trial, plaintiff offered evidence tending to show in detail the destruction of her crop of grain by reason of the deprivation of the water, and the value of the same, and the damages. The court refused to

admit this evidence, on the ground that the allegation of special damages in the complaint was not sufficient. It may be that the allegation of damages to the crop, as set out in the complaint, should have been more complete in alleging the kind and quantity of the crop, and the amount of profits of which plaintiff was deprived. *Carron v. Wood*, 10 Mont. 507, 508, 26 Pac. Rep. 388. The infirmity in the allegation is probably not of such vital character, however, that it could have been urged by defendant after he had answered, if verdict and judgment had followed for plaintiff. But the court, on demurrer, had held this allegation of the complaint sufficient. Then, on the trial, when it excluded plaintiff's proffered evidence, it, in effect, held the allegation to be insufficient. Plaintiff, after the court had told her that her complaint was good, went into the trial rightfully relying upon that ruling. If the court had obtained further light upon the subject, and had concluded that its ruling upon the demurrer was wrong, it should have given plaintiff an opportunity to amend her complaint before ruling out all her evidence; for, as the trial went, the plaintiff, by relying upon the first ruling of the court as to the sufficiency of her complaint, was defeated in offering her evidence to sustain the complaint, because the court had in the mean time concluded that the complaint was insufficient. We are of opinion that this was an error. These remarks also apply to other exclusions of evidence specified by appellant on the ground that the complaint was insufficient, whereas the court had, on demurrer, held that in these respects the complaint was sufficient. The judgment is reversed, and the case is remanded for a new trial.

PEMBERTON, C. J.; and HARWOOD, J., concur.

(24 Or. 2)

#### MARQUAM v. SENGFELDER et al.

(Supreme Court of Oregon. April 4, 1903.)

CHATTEL MORTGAGES—WHAT CONSTITUTES—PLEDGE—FRAUDULENT CONVEYANCES.

1. A chattel mortgage in Oregon does not merely give a lien on the property, but conveys the title and right to possession.

2. An agreement in a lease that the personal property on the premises shall be at all times liable for the rent, and that the lessor may hold it therefor on violation of the lease by the lessee, does not constitute a chattel mortgage, since title to the property is not transferred, but creates an equitable lien, enforceable against the property in the hands of the lessee, or his voluntary assignees, purchasers, or incumbrancers with notice.

3. Nor does the agreement constitute a pledge, since possession of the property is not delivered.

4. An agreement in a lease of premises for a restaurant, that all "personal property, including furniture and household goods of every description," shall be liable for the rent, is sufficient, under the description "furniture" and "household goods," to create an equitable lien on all chattels which contribute to the use or convenience of the lessee, or the ornament of the house, and every article of a permanent nature which is not consumed in its enjoyment, but not on wines, liquors, and groceries.

5. The fact that a debtor is in failing circumstances, to the knowledge of a creditor who takes a chattel mortgage on all his property to secure a debt, and takes possession to foreclose, does not render the mortgage fraudulent as against a subsequent attaching creditor.

Appeal from circuit court, Multnomah county; George H. Burnett, Judge.

Suit by P. A. Marquam against Charles Sengfelder, Wilson Thompson, F. C. Barnes, and others. From the decree, defendants Thompson and Barnes separately appeal. Modified.

The other facts fully appear in the following statement by MOORE, J.:

This is a suit to establish and foreclose a lien on certain personal property for the payment of rent. The material facts are as follows: That on November 10, 1891, the plaintiff entered into a written contract with the defendant Sengfelder, under their hands and seals, whereby he leased to the latter stores numbered 125 and 127, on Morrison street, in the Marquam block, Portland, Or., to be used as a restaurant and confectionery store, for the term of three years, at a monthly rental of \$250 for the first year, \$300 for the second, and \$400 for the third, payable in advance. Said lease contained the following clause: "All personal property, including furniture and household goods of every description, to be at all times liable for rent of said premises. In case of violation of any of the provisions of this lease by the lessee the lessor may terminate this lease, and hold any property found thereon for any arrears of rent or damages." This lease was not filed or recorded, and neither the subsequent mortgagee nor attaching creditors of Sengfelder had any notice or knowledge thereof. On December 3, 1891, the lessee went into possession of the demised premises, paid the installments of rent to January 31, 1892, and operated a restaurant and confectionery store there until February 17, 1892. That on January 22, 1892, Sengfelder was indebted to the Portland National Bank, of Portland, Or., in the sum of \$1,700, and on that day he executed and delivered to said bank a promissory note for the amount, which was signed by himself, Mary A. Sengfelder, his wife, and Wilson Thompson, his stepfather-in-law. That on said 17th day of February, 1892, the bank assigned said note to Thompson, before the maturity thereof, and took a note for said amount in lieu thereof, signed by Wilson Thompson only. That Sengfelder, on the same day, executed and delivered to Thompson his note, payable on demand, for the amount due the bank, and other indebtedness to Thompson, amounting in all to \$1,910.40, and, to secure the payment of the same, he executed and delivered to Thompson a chattel mortgage upon all the personal property in said stores, particularly describing the same. This mortgage was duly filed on the day of its execution, and, about two hours after such filing, Thompson demanded payment of said note, and in default thereof took possession of said goods and chattels. After Thompson had taken possession of the goods, the defendant Barnes commenced an action against Sengfelder, in a justice's court of Mult-

nomah county, to recover the sum of \$134, and at the same time caused a writ of attachment to be issued and delivered to a deputy sheriff for execution, and on the same day, between 10 and 11 o'clock in the evening, that officer appointed a person to take charge of the restaurant, and on the next day took possession of said goods and chattels, and thereafter other creditors levied writs of attachment upon the same property. That, after the officer had executed Barnes' writ, Thompson consented that the help which had been employed by Sengfelder might take some of the attached property in payment of the amount due them from the latter. That some of the goods were removed from the store rooms for that purpose, but were returned by the officer. That on February 2, 1892, plaintiff commenced this suit for the rent then due, and a receiver was duly appointed, who, by order of the court, took possession of and sold the furniture and household goods for \$1,300, the wines and liquors for \$120, and the groceries and canned goods for \$43.75, which several amounts were deposited in court. Separate answers were filed by Sengfelder, Thompson, and Barnes, but the other attaching creditors made default. After the issues were completed, Sanderson Reed was appointed referee, who took and reported the testimony, together with his findings of fact and conclusions of law thereon. This report was in the main confirmed by the court, which decreed that plaintiff's lease created a lien upon said personal property, and upon the fund arising from the sale thereof; that the fund be applied—First, to the payment of plaintiff's claim and costs; second, to the claim of the defendant Thompson; and, third, to that of the defendant Barnes,—from which Thompson and Barnes each appeal, and contend that plaintiff had no lien upon said goods, or upon the fund, while Barnes also contends that Thompson's mortgage was fraudulent, and made to hinder and delay the creditors of Sengfelder.

W. M. Cake, for appellant Wilson Thompson. Frank V. Drake, for appellant F. C. Barnes. U. S. Grant Marquam, for respondent.

MOORE, J., (after stating the facts.) The respondent contends that the clause of the lease above quoted created a lien upon all the personal property on the leased premises, which in equity should be treated as a chattel mortgage. The said clause does not create a chattel mortgage, because the title to the property was not transferred; nor does it create a pledge, because possession thereof was not delivered. It was formerly held in this state that a chattel mortgage only created a lien upon personal property. *Chapman v. State*, 5 Or. 435; *Knowles v. Herbert*, 11 Or. 240, 4 Pac. Rep. 126. But in *Thrashing-Machine Co. v. Campbell*, 14 Or. 465, 13 Pac. Rep. 324, this court, by Thayer, J., in our judgment, announced the correct doctrine, and held that a chattel mortgage created more than a lien, and that the mortgagee, after condition broken, has a right to the thing, which he may main-

tain in an action, in the nature of replevin, to recover it, if, upon demand, delivery thereof be denied. In a clause of a written agreement which provided that in case of default the parties were authorized "to take immediate possession of all goods, wares, and merchandise, lumber and shingles, and the personal property, now in our possession and belonging to us," it was held that it was nothing but a naked power, not coupled with any interest, and could not operate to give any right to the property itself until reduced to possession. *Holmes v. Hall*, 8 Mich. 66. In a stipulation of a lease which provided that "all goods, wares, and merchandise, household furniture, fixtures, or other property which are or shall be placed on said premises, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property to secure the rent due, or to grow due on this lease," the court held that it did not create a mortgage. *Dalton v. Laudahn*, 27 Mich. 529. In a covenant of a lease which contained the following: "And the said parties of the second part hereby pledge and bind all improvements and machinery which they may put on said premises for the payment of the rent aforesaid, and for the due performance of all other covenants herein contained," the court held that it did not create a mortgage, nor purport to mortgage after-acquired property; that it was simply a contract for a lien whenever the rent became in arrear, and would constitute a lien in equity. The highest claim which can reasonably be made for the stipulation in the lease in the case at bar is that it created an equitable lien. It is an express executory agreement in writing, whereby the lessee indicated an intention to make the property therein described a security for the rent, which is enforceable against the property in the hands of the lessee, and of his voluntary assignees, purchasers, and incumbrancers with notice. 3 Pom. Eq. Jur. § 1235.

The claim being a lien, and creating no property right, nor interest analogous to property, but only a mere personal right and obligation, by means of which the plaintiff is entitled to follow the identical thing, and to enforce the defendants' obligation by a remedy which operates directly upon the thing itself, (*Id.* § 1234,) can this remedy be enforced against one who has acquired the thing without notice of the plaintiff's claim? In the case of *Fejvary v. Broesch*, 52 Iowa, 88, 2 N. W. Rep. 963, *Seever*, J., in construing a similar clause in a lease which provided that the lessor should have a perpetual lien upon certain personal property, as security for rent, says: "Technically, it is said the instrument in this case cannot be regarded as a mortgage, because it does not contain a grant or conveyance of the property. But clearly it creates a lien or equitable charge; and the right of a party to execute it, and its validity, must depend on the same principle as a mortgage." The law which determines the validity of a chattel mortgage must be applied with equal force and like effect to such equitable liens. In *Marks v. Miller*, 21 Or. 317, 28 Pac. Rep. 14, it was held that under our

statute, when a chattel mortgage has not been filed, a presumption of fraud is created from the retention of possession of the mortgaged property by the mortgagor, which may be rebutted by showing that it was made in good faith, and for a valuable consideration. We think it unnecessary to quote the testimony offered upon this branch of the question, since, in our judgment, it conclusively shows that the lien was created in good faith, and for a valuable consideration.

Was the specification in the lease of "all personal property in said premises, including furniture and household goods of every description," sufficient to create a lien? Mr. Jones, in his work on *Chattel Mortgages*, (section 54,) says: "A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient." "The identity of the property is not, in such cases, ascertained by any specific description which distinguishes it from other property of the same kind or species, but by its locality." *Lawrence v. Evarts*, 7 Ohio St. 194. "Apparently, it seems a more bald description to say, 'All my household furniture,' than to enumerate the articles, and describe them as 'two dozen of chairs, five tables,' etc.; but in reality the latter will require extrinsic evidence to identify the property, as much as the former would." *Harding v. Coburn*, 12 Metc. (Mass.) 333. Thus it would appear that the description, "furniture and household goods," was sufficient, (*Beach v. Derby*, 19 Ill. 617,) and, from their locality, the several articles thereof might be identified by extrinsic evidence; but could the articles described as "all personal property" be identified in this manner from the lease? In *Morrill v. Noyes*, 56 Me. 458, *Davis, J.*, clearly enunciates the rules for determining what property should be included in similar descriptions, as follows: "(1) The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, if the sale is absolute, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value. (2) The vendor or mortgagor must have a present, actual interest in it, or concerning it. As is said in illustrating rule 14 of *Bacon's Maxims*, 'The law doth not allow of grants, except there be the foundation of an interest in the grantor.' There must be something in present, of which the thing in futuro is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract." Applying these rules to the case at bar, can it be said that the contract or specification in the lease included all the personal property, or that the minds of the lessor and lessee met and agreed upon what it should be? We think it could not, but this would not render the contract void as to such property as could be identified thereby. *Jones, Chat. Mortg.* § 74. The word "furniture" means all per-

sonal chattels which may contribute to the use or convenience of the householder, or the ornament of the house, (Rep. Leg. 269;) and the term "household goods" means every article of a permanent nature which is not consumed in its enjoyment, (Id. 253.) The wines, liquors, and groceries are not "furniture," and they cannot be considered as "household goods" and hence the lease did not create any lien thereon. The return of the receiver shows that the wines and liquors were sold for \$120, the groceries and canned goods for \$43.75, and that the restaurant furniture and household goods, upon which plaintiff had a lien, brought \$1,300.

There was some testimony taken before the referee which tended to prove that the defendant Sengfelder, with the knowledge of plaintiff, sold, in the ordinary course of business, articles of personal property, consisting of stock in trade; but, the pleadings having raised no issue upon this question, it was properly held irrelevant.

The defendant Barnes contends that Sengfelder's mortgage to Thompson was fraudulent. It is true that Sengfelder was in failing circumstances, and no doubt Thompson had a better knowledge of this fact than any other creditor; but would this make the transaction fraudulent? If Sengfelder had given his mortgage to the bank to secure the note it held against him, no one would contend that such act would have been fraudulent. A debtor in failing circumstances may prefer a creditor, and appropriate his property to the satisfaction of such creditor's claim. *Kruse v. Prindle*, 8 Or. 154; *Burrill, Assignm.* 218; *Bump, Fraud. Conv.* 314. When Thompson secured the assignment of the note from the bank, he had a bona fide claim against Sengfelder; and, since the latter could have preferred the bank, he could, in like manner, have preferred Thompson. When the mortgage was executed and filed, Thompson demanded payment of the note, and upon default took immediate possession of the chattels. This gave him a conditional title to the goods and the possession thereof, for the purpose of foreclosing his mortgage, and such possession was taken before any attachments were levied. Some testimony was taken for the purpose of showing that Sengfelder's mortgage to Thompson was executed for a fraudulent purpose. The officer who levied the writ of attachment for Barnes swears that, when he went to the restaurant for that purpose, Sengfelder requested him not to close up the place, while the latter swears that such request was made upon the levy of a former writ. Admitting that he made this request at that time, this does not, in our judgment, necessarily prove that there was any secret trust existing between him and Thompson. He had an interest as mortgagor, and may have entertained a hope that he could adjust the matter. Sengfelder swears, in relation to the attempt to remove the goods to pay the help, that G. W. Hazen, the agent of the bank, who had known Mr. Thompson for several years, told the latter that the law required attaching cred-

itors to pay the help, and that Mr. Thompson was trying to observe Mr. Hazen's advice. *Sess. Laws 1891*, p. 81, provide that when goods are attached the laborers in defendant's employ shall have a preferred claim, within certain limits as to time and amount; but, while the attached goods could not have been appropriated in this summary manner, we do not think Thompson's act indicated an intent to protect Sengfelder. The mortgage given to secure \$1,910.40 included all of Sengfelder's property; but, when it was sold by the receiver, \$1,463.75 was the full amount received therefor. This, in our opinion, purges the transaction of every badge of fraud. The decree of the court below will be modified in accordance with this opinion.

(24 Or. 16)

### ODD FELLOWS' HALL ASS'N OF PORTLAND v. HEGELE.

(Supreme Court of Oregon. April 4, 1903.)

PARTY-WALL AGREEMENT—EQUITY—RESCISSION OF CONTRACTS—CORPORATIONS—CONTRACTS.

1. The easement of an adjoining lot owner created by a party-wall agreement ceases when the wall becomes unfit either from age or accident.

2. The provision in a party-wall agreement that the rights of the parties shall continue "so long as the wall shall stand" does not mean so long as any portion of the wall itself shall remain, but so long as the wall shall remain fit for use as a party wall, and therefore it does not violate a provision in the agreement that "no perpetual right or easement shall be thereby acquired."

3. Where a corporation acquiesces for 15 years in a party-wall agreement made by its directors, on the faith of which the other party makes expensive improvements, from which the corporation derives commensurate benefits, and by the contract is relieved from burdensome obligations, a court of equity will not cancel the agreement at its suit merely because it was in excess of the powers of the corporation.

4. A private corporation (Odd Fellows' Association) with power to buy and hold real estate and erect buildings thereon "for the use and occupation of the several lodges and encampments of the Independent Order of Odd Fellows in the city of P., \* \* \* and of doing any and all other things necessary and essential to carry on said business, or to advance the good of said order in said city," having purchased a lot, and agreed to erect a party wall on the line of the adjoining lot, and having erected a building which did not reach such line, has the power to agree with the adjoining lot owner to allow him to use the wall as it stands as a party wall.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Suit by the Odd Fellows' Hall Association of Portland, Or., against Charles Hegele, to rescind and cancel a party-wall agreement. From a decree for defendant, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by LORD, C. J.:

This is a suit for the rescission and cancellation of a party-wall agreement, in writing, entered into by the plaintiff and the grantors of the defendant on the 15th day of May, 1876. The plaintiff is a private corporation, incorporated under the laws of this state, and, among other things, is authorized and empowered to

buy real estate, and erect buildings thereon suitable "for the use and occupation of the several lodges and encampments of the Independent Order of Odd Fellows in the city of Portland, as well as such other buildings as may be erected for the benefit of said lodges and encampments, and of doing any and all other things necessary and essential to carry on said business or to advance the good of said order in said city." The facts substantially are these: That on the 10th day of April, 1869, the plaintiff purchased of G. W. Vaughn, and the said Vaughn, by deed of bargain and sale, but without covenants of warranty, conveyed to the plaintiff, all of lot No. 1, in block No. 15, in the city of Portland, Or. That the consideration of said deed was \$22,000, and an agreement on the part of the plaintiff to erect during the year 1869, and forever maintain, certain walls in said agreement described on the line between said lot 1 and lot 2, and on the line between said lot 1 and lot 8, in said block 15, so that one half of the walls should rest upon lot 1, and the other half upon lots 2 and 8; and by the said agreement the said G. W. Vaughn, his heirs and assigns, were granted the right and perpetual privilege and license to use said walls for the construction and support of any brick or stone buildings which the said Vaughn, his heirs or assigns, might thereafter erect on said lots 2 and 8, or either of them. The lot is 100 feet long, and 50 feet wide. The plaintiff shortly thereafter procured plans and specifications for a building 50 feet wide and 95 feet long, and erected the building now standing upon said lot 1, according to said plans and specifications. The wall of said building, for a distance of 95 feet from the east line of said lot 1, rests upon the line between lots 1 and 2; but the plaintiff never erected a wall upon the remaining 5 feet along the line between lots 1 and 2, nor along the line between lots 1 and 8, but did erect a wall running the whole width of said lot, parallel with and 5 feet east of the line between lots 1 and 8. That on the 10th day of August, 1875, C. A. Allisky and the defendant purchased the east 20 feet of lot 8, in block 15; and on the 25th day of March, 1882, the said Allisky conveyed all his interest therein to the defendant, who now owns the whole thereof. That on the 15th day of May, 1876, the said Allisky and the defendant, then owning lot 2 and the east 20 feet of lot 8 in said block, as parties of the first part, entered into an agreement with the plaintiff, as the party of the second part, wherein and whereby the said Allisky and Hegele agreed to remove the water-closets then on the west end of said lot 1, and erect them on lot 2, near the southwest corner of lot 1, "with good and convenient passageways leading to the first and second floors of the building on said lot one, block fifteen; said passageways to be so located as to leave an alleyway in the rear of the west end of said building, the whole width of said building on the ground thereof, and five feet wide, said alleyway to be kept in repair by the said parties of the first part, their heirs and legal representatives and assigns, and said

alleyway and water-closets to be used in common, so long as the present west wall on said building on lot one shall stand, by the said parties of the first part and second part, their, and each of their, successors, heirs, and assigns;" and by the said agreement the parties of the first part further covenanted and agreed to erect and keep in repair a "passageway from the door now in the west wall of the building on said lot one, in the second floor of said building, to the water-closet to be erected on the premises of said parties of the first part, near the southwest corner of said lot one, and level with the second floor of said building on said lot one; said passageway to occupy in width the distance between the west wall of the building now on said lot one and the west line of said lot one, and to extend south from the doorway aforesaid to said water-closet, said passageway to be used in common, as long as the west wall of said building on said lot one shall stand, by said parties of the first part and second part, and each of their successors, heirs, and assigns. Upon the said considerations, the said parties of the first part do further covenant and agree, as aforesaid, to so construct the said improvements, and the improvements on their own premises, as not to cut off the light from the south side of the room in the southwest corner of the second floor of said building on lot one, nor from the west end of the stores on the ground floor thereof, and do covenant and agree to put in a skylight sufficient to throw light through the glass door in the west end of the hall on the second floor of said building on lot one; and, lastly, the parties of the first part, upon the consideration aforesaid, do covenant and agree, as aforesaid, to accept the walls as now erected and completed upon said lot one in full satisfaction of the said agreement between Vaughn and plaintiff, concerning the division and party walls, and to relinquish and cancel any and all claims and rights thereunder to any and all walls not already constructed upon the lines of said lots mentioned in the agreement last mentioned." That plaintiff, on its part, among other things, covenanted and agreed that the parties of the first part should have an easement and right to use the west wall of the building on lot 1 as a party wall, and to occupy in common with the party of the second part the said alleyways and passageways; that the parties of the first part should have the right of ingress and egress to the building about to be erected west of the said building on lot 1, and through the main entrance and stairway and hall in the building on lot 1, and through the door in the west wall of said building on the second floor; that the part of lot 1 lying north and west of said doorway to be used exclusively by the parties of the first part,—all rights and privileges as granted to continue no longer than said wall shall stand. That after the execution of the said agreement, and during the year 1876, the said Allisky and Hegele erected a building upon lot 2 in said block, and so erected it as "not to cut off the light from the south side of the



room in the southwest corner of the second floor of said building on lot one," and did remove the water-closets mentioned in said agreement, the one on the ground floor, onto lot 2, according to said agreement, but that the water-closet on the second floor was not removed from lot 1 on to lot 2, as specified in said agreement, but was removed to the south end of the alley or passageway leading from the west door to the second story, and placed on lot 1, just north of the south line thereof. That the hall committee and the board of directors of plaintiff had knowledge of, and acquiesced in, without objection, and assented to, the location of the said closet where it now stands. In all other particulars the said Alisky and Hegele complied with and performed the said contract. Instead of having only a five-foot hall or passageway to said closet in the second story, Alisky and Hegele left and made a hallway about eight feet wide, and made the said closet larger than it was originally, and larger than they were required to do by said contract. The plaintiff and its tenants have had the use and benefit of said hallway and closet ever since its removal as aforesaid. That, by the erection of said closet where it now stands, it in no manner cut off or obstructed the light to the window in the south side of the southwest room in plaintiff's building; whereas, if said closet had been placed in the location designated in said written agreement, it would to some extent, in the afternoons, have obstructed the light to said window, and thereby darkened said room.

L. L. McArthur, for appellant. C. A. Dolph, for respondent.

LORD, C. J., (after stating the facts.) The complaint contains an allegation to which no reference is made in the statement of facts, to the effect that the original agreement between the plaintiff and Vaughn was subsequently modified by a verbal agreement; but there is no evidence disclosed by the record to sustain such allegations, nor to show, if there was, that either Alisky or the defendant, Hegele, the grantees of Vaughn, had notice of any modification of such agreement, so that we are not required to consider the effect of that allegation as a feature of the case. The facts, as stated, show that the original agreement provided for the erection of party walls on lot 1, which lot was 100 feet long and 50 feet wide, so that one half of such walls should rest upon lot 1 and the other half upon lots 2 and 8; that shortly thereafter the plaintiff erected the building now standing upon lot 1, 95 feet long, and thereby left a strip of ground 5 feet in width from east to west, and 50 feet in length from north to south, between the rear wall of the building and western boundary of lot 1; and the facts also disclose the modifications which were effected in the original contract by the agreement of 1876 between the plaintiff and Alisky. The contention for the plaintiff is that the provision in the last agreement, "so long as the west wall of said building, shall stand," when construed with refer-

ence to the provision that "no perpetual right or easement shall be thereby acquired" in the land of either party, implies or gives the right to the plaintiff to remove the wall whenever, in the opinion of its directors, the convenience or necessities of the association may demand or require it; for the reason, it is argued, that, if the expression "so long as the west wall shall stand" shall be construed by the court to mean until such wall shall be destroyed by fire or flood or the ravages of time, the effect will be to create in the defendant a perpetual easement, contrary to the provisions of the contract. This result is based on the assumption that we will construe the expression "so long as the west wall shall stand" to mean, as counsel thinks, that if, after the destruction of the buildings, any fragment of the wall or the wall itself remains, though unfit for use, it still stands charged with the burdens and benefits of the easement. But we shall not so construe the phrase, as we think such construction would be inconsistent with its meaning, as well as the doctrine of property rights in land. Under the agreement there was no grant of any easement in the land. By its terms each party possesses the right to a reasonable use of the wall, or to an easement of support to his building in it "so long as the west wall shall stand;" but it is equally plain by its terms, also, that such use or easement is not a perpetual party-wall easement. The agreement is binding on the parties during the existence of the wall, or, as it is phrased, "so long as it shall stand." An explanation of this phrase may be aided by understanding the nature of an easement in a party wall, and the purpose it is designed to serve and accomplish. A party wall is a wall built partly on the land of another for the common benefit of both. The adjoining owners are not joint owners or tenants in common of the party wall. "Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other to the end that it may afford a support to the wall and buildings of such other." *Hoffman v. Kuhn*, 57 Miss. 746. The purpose of the wall is to support the timbers of the contiguous buildings. The easements are mutual, and relate to the wall only, and necessarily continue no longer than the wall remains safe and fit for the purpose it was intended to serve. As long as the wall remains, fit and suitable for use, the easements of support exist. When the wall becomes unfit, either from age or accident, the easement in it ceases. In *Campbell v. Mesier*, 4 Johns. Ch. 334, the opinion is indicated that the easement is a grant in fee, and that the right of support continues longer than the existence and fitness of the old wall. But in *Sherred v. Cisco*, 4 Sandf. 480, it was held that, if the wall be destroyed by fire or accident, the adjoining owners are not bound to rebuild it. The land becomes freed from all servitude in relation to the party wall, as in the case of two adjoining lots without

buildings. Sandford, J., said: "It was argued that the fact of there having formerly been a partition wall gives the right to have it continued for all time to come. To test this argument fairly, we will assume what is not proven, but may, perhaps, be fairly inferred, that the old wall was built by mutual agreement, and at the expense of the proprietors of the two lots. It is not disputed that each proprietor remained the owner in severalty of the ground on which half of the wall rested, and of course each owned in severalty one half of the wall. Neither party had a right to pull down the wall without the other's consent; and to that extent the agreement upon which it was erected controlled the exclusive dominion which each would otherwise have had over half of the wall, as well as over the soil on which it stood." The object of the wall is to support the houses of which it forms a part, and so long as it stands, and answers that purpose, it cannot be changed or removed or rebuilt without an agreement therefor; but when that state of affairs occurs which renders the party wall useless, whether from fire or flood, the ravages of time or accident, though it may still stand, "the mutual easements," as Denio, C. J., said, "have become inapplicable, and each proprietor may build as he pleases on his own land, without any obligation to accommodate the other." So long as the wall stands fit and suitable for the original purpose for which it was erected, the right of support continues; but when, after the destruction of the buildings, it remains or stands dilapidated or useless,—unfit and unsafe to be used as a party wall,—it does not stand, in legal contemplation, as a party wall. As illustrative of the general doctrine involved, we may further refer to *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. Rep. 841; *Phillips v. Bordman*, 4 Allen, 147; *Miller v. Brown*, 33 Ohio St. 547; *Automarch's Ex'r v. Russell*, 63 Ala. 359; *Hoffman v. Kuhn*, 57 Miss. 746; *Glenn v. Davis*, 35 Md. 219. As we do not think the phrase "so long as the wall shall stand" is susceptible of the construction assumed, it does not violate the agreement by creating a perpetual party-wall easement. In *Hoffman v. Kuhn*, supra, the court, after observing that each owner is bound to permit his portion of the wall to stand, and to do no act to impair or to endanger the strength of his neighbor's portion, so long as the object for which it was erected, to wit, the common support of the buildings, can be served, proceeded to say: "But the obligation ceases with the purpose for which it was used, namely, the support of the houses of which the wall forms a part. If these houses or either of them are destroyed, without fault upon the part of the owner, he is not bound to rebuild in exactly the same style and exactly in the same spot because his neighbor demands it. That this is true where the wall itself is swept away is settled by authority. It must be equally so where the wall alone remains. A wall is but a portion of the house, and the one is valueless without the other. To hold that, so long as the wall stands, the owner whose house has been destroyed is compelled to

lose his lot, or to replace the destroyed building with another of exactly the same pattern, is to sacrifice the greater to the less, and to impose in perpetuity a servitude which was assumed only for a specific purpose."

It is next claimed that the agreement is ultra vires or voidable, for the reason that the plaintiff was thereby divested of the right to the exclusive use of the five feet of ground off the west end of the land owned by it, which, although not necessary for the purposes of the association when the agreement was made, became so, as it is claimed, by reason of the organization of new lodges since that date. The facts show that Alisky and Hegele performed the covenants contained in their agreement to the satisfaction of the plaintiff, the board of directors and stockholders. The claims made by them under the agreement of 1869 were understood by the association when the proposed agreement modifying it was submitted. The matter was then fully considered, and the agreement made, which for many years, so far as the evidence discloses, was entirely satisfactory to all the parties. There is no pretense of any fraud or misrepresentation. In fact, the association desired to obtain relief from the agreement of 1869. It imposed burdens which, to say the least, were inconvenient for it to perform, and from which it sought to be relieved by the subsequent agreement. The rights surrendered by Alisky and Hegele, in the light of all the circumstances, were fully equal in value to all that were surrendered by the plaintiff. The improvements were made by Alisky and Hegele in pursuance of plans submitted to plaintiff's board of directors before the agreement was entered into, and they were made under the supervision of a committee of the plaintiff's board of directors. The buildings were constructed to correspond with plaintiff's building at an extra expense of \$2,000, and so as not to cut off the light, from the rooms of the association. All these improvements were made during the year 1876, and accepted in full satisfaction and in compliance with the covenants on the part of Alisky and Hegele contained in the agreement. The agreements were recorded, and the buildings have been standing since their construction; so that, in both ways, there has been a continuing notice to every one interested of the terms upon which the rights of the respective parties under the agreement of 1869 had been modified and adjusted. Nor is it within the power of the plaintiff to place the other parties in the position they were before the agreement. Under such circumstances a court of equity does not listen with much satisfaction to the complaint of a company that transactions were illegal, or in excess of its powers, which it had approved, which were essential to its protection, and the benefits of which it received. "The rule is a wholesome one," said Harlan, J., "that requires the court, in case of merely voidable contracts, to withhold relief from those whom, with knowledge of the facts, or with full opportunity to ascertain the facts, unreasonably postpone application for relief. Seasona-

ble resistance cannot be predicated of a case of a merely voidable contract, where the party complaining has not simply been silent for twenty years, but, with knowledge of the facts, or with full opportunity to ascertain them, has enjoyed the fruits of the contract, and treated it as valid." *Jesup v. Railroad Co.*, 43 Fed. Rep. 483-503. And, again, in *Gas Co. v. Berry*, 113 U. S. 322, 5 Sup. Ct. Rep. 525, the same distinguished judge said: "But it is not necessary to rest our judgment of affirmance of the decree of the court below upon any consideration of the character of these transactions. After seven years' acquiescence in the lease, something more must be shown than that it was executed in excess of the power of the directors before the lessee can be required to surrender the profits he has made under it. The lease expired June 1, 1874. The disposition of the property was settled by the agreement of March 15, 1876, and the release is an answer to all claims for the profits made by the defendants. The release is of itself sufficient to justify the dismissal of the bill. There is no evidence that it was obtained upon any fraudulent representations. Nothing was kept from the parties when it was executed. Indeed, all the transactions between the defendants and the company, from the time they took from Frost an assignment of the lease, were open and well known. There was no concealment had or attempted of anything that was done, and no just reason can be given for disturbing the settlement made." And the same may be said here. In view of these considerations, it is manifest that after the parties have acquiesced for more than 15 years in the settlement made by the agreement of 1876, upon the faith of which large expenditures were incurred and improvements made, and from which the plaintiffs have received commensurate benefits, and been relieved from some burdensome obligations, something more must be shown than that such contract was executed in excess of the powers of the corporation, or that the character of the transaction was such that it might have been avoided when it was made.

Thus far we have proceeded upon the hypothesis that the agreement of 1876 was voidable by the plaintiff, for the purpose of showing that, from the facts disclosed by the record, it is not entitled to avoid the contract, or to the relief asked; but we are not convinced that the agreement was in excess of the powers of the corporation. The plaintiff and the lodges are independent organizations. The plaintiff is a private corporation, and the lodges, which occupy a part of the building, are simply its tenants. The lower part of its building is occupied with stores. An alley, such as this, may be essential to the better enjoyment of the buildings and needful to it, and the fact that a right to use it may be given to an adjoining owner for reciprocal benefits does not necessarily imply an excess of power. We are inclined to the opinion that the agreement is valid, and that the parties are bound thereby; so that in any view, as we regard the case, there was no error, and the decree is affirmed.

(23 Or. 576)

## HAHN v. GUARDIAN ASSUR. CO.

(Supreme Court of Oregon. March 28, 1893.)

## INSURANCE — CONDITIONS OF POLICY — WAIVER — ACTION ON POLICY — EVIDENCE.

1. Where an insurance agent solicited insurance on property in an adjoining state, assuming to act with full authority of an unrestricted agency, and a person contracted for insurance with him, and paid him the premium, and the company received it, and issued a policy, the jury are warranted in finding that the agent was a general agent, and not a special agent without authority to make the contract.

2. Whether or not a change in the use of insured premises from a general merchandise store, with coal-oil lamps, to a variety theater, with electric lights, increased the risk, in violation of a provision that the policy should be void if the hazard should be increased by any change in the possession, is a question for the jury, and expert testimony is inadmissible; the determination of the question involving simply matters of common knowledge or observation.

3. Where an insurance adjuster refuses to adjust a loss, and, after the approval of his action by the company, tells the assured that the loss will not be paid, this is a waiver by the company of a provision of the policy requiring proofs of loss.

4. Where an insurance company, in good faith, after its adjuster has, with its approval, notified the assured that his loss will not be paid, and a considerable time before expiration of the time for furnishing proofs of loss, sends blank forms to the assured's attorney in reply to a letter from him asking why the loss will not be paid, and states that if the assured will present proofs of loss, in accordance with the policy, it will consider the matter, this amounts to a withdrawal of its waiver of proofs of loss by refusal to pay the loss in the first place; and if the assured fails to present proofs, as required by the policy, he cannot recover.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by George W. Hahn against the Guardian Assurance Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Joseph Simon, for appellant. Geo. H. Williams, for respondent.

LORD, C. J. This is an action brought to recover the sum of \$1,000 upon a policy of fire insurance issued by the defendant to the plaintiff upon his two-story frame building, situated in Ellensburg, in the state of Washington. The verdict and judgment were for the plaintiff. The facts show that on the 10th day of December, 1888, the plaintiff insured with the defendant, through its agent, Henry Ackerman, the above premises, against loss or damage by fire, for the period of one year, and that defendant issued to the plaintiff its policy of insurance upon the same, for which he duly paid the premium therefor at the rate of 10 per cent., or \$100; that on the 4th day of July, 1889, a general conflagration occurred in Ellensburg, which destroyed a large portion of the town, including the building so insured and owned by the plaintiff; that at the time the said building was insured, and the policy issued, it was occupied for the purposes of a general merchandise store, and so continued to be occupied until some time during the month of April preceding the fire, when the character of the occupation of

the building was changed from a general merchandise store to a variety theater; that, a few days after the fire, W. L. Chalmers, an adjuster, went to Ellensburg, in the employ of several companies, including the defendant, to adjust and settle their losses, but that he refused to adjust the loss of plaintiff's building, on account of the change in its occupancy. The defendant refused to pay the loss, and denied liability therefor, mainly upon three grounds: First. That Mr. Ackerman, the agent at Portland, was a special agent, with limited powers, and with no authority outside of Multnomah county, state of Oregon. Second. That there had been a change in the character of the occupation of the building, which increased the hazard and avoided the policy, by its express terms. Third. That there had been a failure to furnish the proofs of loss required by the terms of the policy.

The conditions of the policy issued to plaintiff, relied upon to defeat the recovery, are as follows: "This entire policy \* \* \* shall be void if the hazard be increased \* \* \* by any change \* \* \* in the possession of the subject of insurance," etc. " \* \* \* If fire occur the insured shall give immediate notice of any loss thereby, in writing, to this company, and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to the company, signed and sworn to by said insured, \* \* \* as to the time and origin of the fire; the interest of the insured, and of all others, in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon," etc. The testimony for the plaintiff shows that Ackerman represented himself to be the agent of the defendant, and solicited the insurance of plaintiff's property; that he negotiated the insurance of his property in the state of Washington with Ackerman, and with no other person; that he left the matter of the insurance wholly with Ackerman, and left for New York, supposing that he had full authority to act as agent for the company in the state of Washington, and without knowledge or information of any limitation on his powers; that he received the policy from Ackerman, and paid him the premium for it. Upon the part of the defendant, the record discloses that it accepted the risk, issued the policy, received the premium without objection, and treated the policy as valid until after the fire. Upon this state of the case the plaintiff contends that the defendant, by its conduct, held Ackerman out as its duly-accredited agent, and he was justified in assuming that he had full authority to effect the insurance. The defendant, by its testimony, sought to limit the authority of Ackerman to that of a local agent, whose jurisdiction was confined to Multnomah county, and, consequently, that he had no authority to write policies or take risks on buildings in the state of Washington, nor to speak for or bind the company in relation to any risk outside of his territory. Upon the issue thus presented, relative to Mr. Ackerman's powers as agent in the premises, the decision rested with

the jury, under proper instructions from the court. As the jury found a general verdict for the plaintiff, it must be conceded that Ackerman's authority as agent is established, unless the facts and circumstances to sustain the plaintiff's side of the issue are insufficient for that purpose. The acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal. It is enough if, under all the circumstances, he had apparent authority in the matter, although in fact his authority was limited. "Persons dealing with them in that capacity," says Mr. Wood, "are not bound to go beyond the apparent authority conferred upon them, and inquire whether they are in fact authorized to do a particular act for the company. It is enough if the act is within the scope of their apparent power, and beyond this third persons are not bound to make inquiry." 2 Wood, Ins. § 408. In *Hardwick v. Insurance Co.*, 20 Or. 547, 26 Pac. Rep. 840, Bean, J., says: "Where insurance companies deal with the community through a local agency, persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are as valid as if they proceeded directly from the company." In *Insurance Co. v. Splers*, 87 Ky. 297, 8 S. W. Rep. 453, the court says: "As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. Under this rule an agent who solicits the insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, by his conduct or acts, bind his company. \* \* \* in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted." The assured has the right to rely upon the agent's apparent authority, and, unless the circumstances are such as to put him upon inquiry, he is not bound to inquire as to his special powers. Nor can the authority of an agent be questioned, when the acts of the company have been such as to amount to a recognition of his agency. *Swan v. Insurance Co.*, 52 Miss. 704. And Mr. Wood says: "Where an agent is authorized to take risks in one place, it is presumed that he had authority to take them anywhere, and a risk taken by him outside of his real jurisdiction will be binding upon the company." Wood, Ins. § 529; *Lightbody v. Insurance Co.*, 23 Wend. 18; *Insurance Co. v. Maguire*, 51 Ill. 342. In the light of these principles of the law, assuming the testimony for the plaintiff to be true, the jury was authorized to find that Ackerman was a general agent, and empowered to effect insurance upon property located in the state of Washington. There was nothing in the circumstances, as indicated by the testimony, to excite inquiry as to the extent of his agency. He did not inform the plaintiff that his jurisdiction was confined to Multnomah county, Or., nor that his application must be forwarded to the general agent at San Francisco, for his approval. He represented himself

as the agent of the company, and solicited the insurance of the property located in the state of Washington. He assumed to act with the full authority of an unrestricted agency. By his conduct the plaintiff was led to believe that he was vested with full powers to act for the company, and bind it by his engagements, and on this account he put the whole matter of insuring his property in the agent's hands, and left for other parts of the country, to which his business called him. He dealt wholly with Ackerman. He paid the premium to him, and the company received it, and issued the policy, and sent it to him, who delivered it to the plaintiff. By his acts, coupled with the acts of the company, the jury, who were to decide as to the extent of his agency, were authorized to find that Ackerman was vested with the powers of a general agent.

The next assignments of error relate to the competency and admissibility of certain expert testimony, sought to be introduced by the defendant, which was disallowed by the court. The defendant claims that it should have been permitted to prove, by the testimony of experts, that the change in the character of the occupation of the building materially increased the risk, and also to prove by such testimony how the change in the occupation of the building was regarded generally by underwriters. The building insured was occupied as a general merchandise store, insured at 10 per cent. premium, and lighted by coal-oil lamps. Upon the change of occupancy, electric lights were substituted. Whether the change of occupancy increased the risk was a question for the consideration of the jury. The general rule is that expert testimony is not admissible as to matters of common knowledge or observation, of which the jury can judge as well as the witness. When the subject of a proposed inquiry is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, the opinion of an expert is not admissible. *Railroad Co. v. Kellogg*, 94 U. S. 472; 1 Smith, Lead. Cas. 286, cases. It is competent for an insurance company to prescribe the terms and conditions upon which it will assume risks. It may decide what risks are hazardous or extrahazardous, or what are not so, and if they are specified and named in the policy, and prohibited, a violation of the condition avoids the policy. This policy contains no provisions inhibiting or forbidding the writing of policies on variety theaters. The plaintiff was entitled to make the change, unless it increased the risk. The question was whether the change in the occupation of the building increased the risk. Its determination involves no question of science or skill, but simply matters of common knowledge or observation, which the jury is as competent to judge and determine as the witnesses offered as experts. It is only in reference to matters upon which the uneducated mind is incapable of forming a judgment that experts are permitted to give their conclusions. Hence "it is not competent," as Mr. Wood says, "to inquire of a witness what the effect

is upon a risk, by leaving a house unoccupied, or whether a risk has been increased by certain alterations therein, nor whether certain facts would have influenced the rate of premium, or were material to the risk. Nor is it competent to show what is generally understood among insurance men respecting the hazardous or non-hazardous character of a certain trade or business; or whether a loss resulted from negligence; or whether, if certain facts had been known to the witness, he would have taken the risk; or whether he would, under a certain state of facts, have consented to additional insurance; whether putting an additional number of stoves into a building would have increased the risk; whether, if certain facts had been known to the agent, he would have issued a policy, or would have communicated them to his principal." 2 Wood, Ins. § 534, and cases cited. And in all cases it may be said that, unless the matters upon which the witness is called to give his opinion are properly matters of skill or science, the facts must be shown, and the jury determine the result from them.

The next objection is to the failure of the plaintiff to furnish the proof required by the policy. The record discloses that W. L. Chalmers was an adjuster, who was employed by several insurance companies, including the defendant, to adjust and settle their losses. The testimony indicates that he was a man of wide experience in such matters, and in whom confidence was reposed by the companies employing him. He went to Ellensburg to adjust and settle the loss sustained by the companies he represented. Mr. Landers, the general agent of the defendant, testifies that Chalmers was employed to examine into plaintiff's claim,—the time being a few days after the fire,—but that no instructions were given to him not to appraise or adjust plaintiff's loss. In the discharge of his duties, he obtained an estimate of the value of the loss; but, when he was informed of the change in the use and occupation of the building, he refused to proceed and adjust the loss. He at once wrote to the general agent of the company, informing him of the change, and of his conduct in the premises, which the agent approved. Subsequently, plaintiff testifies that Chalmers told him that he could not adjust the loss, because he had notice not to do so; that adjustments on other property belonging to the plaintiff were all right, but that this loss would not be paid by the company. The plaintiff also testifies that he had conversation with Ackerman about the 1st of August, who told him that the loss would not be paid, on account of the change of occupancy. Substantially upon this state of facts, the plaintiff claims that Chalmers, also, was an agent of the defendant, and authorized to bind it, within the scope of his employment, which included the authority to waive the preliminary proof of loss. Hence the plaintiff contends that when Chalmers, and also Ackerman, stated to the plaintiff that the loss would not be paid, on account of the change in the occupancy of the building, it was a denial on the part of the defendant of its liability

ty, and operated as a waiver by it of the requirement to furnish proof of the loss. Their is some diversity of opinion as to whether an adjuster has authority to waive preliminary proof of loss, but it seems to us, as Judge Elliott said, that "the better reason is with the cases that hold that he has; for a company that sends an agent to ascertain the nature, cause, and extent of the loss, and employs him in that particular line of duty, may well be deemed to have invested him with a general authority in all such matters." *Insurance Co. v. Shryer*, 85 Ind. 363. The rule is well settled, and supported by numerous authorities, that a denial by a defendant of liability, or refusal to pay, is a waiver of proof of loss. "The denial by the defendant," said Shipman, J., "of all liability, expressly conceded there was a loss, and was a notice to the plaintiffs that they would not be bound in any event, though formal proofs were furnished. Presentation of proofs, under such circumstances, was of no importance to either party; and the law rarely, if ever, requires the observance of an idle formality, especially after the party for whose benefit the original stipulation was made has rendered conformity thereto unnecessary, and practically superfluous." *Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co.*, 34 Conn. 570. "It is well settled," said the court in *Dibrell v. Insurance Co.*, (N. C.) 14 S. E. Rep. 787, "that if, instead of extending the time for filing the proofs of loss, the adjuster who is charged with examining them informs the assured, before the expiration of the sixty days, that he denies the justice of his claim, and will not pay it, such conduct, by implication, renders it unnecessary to make out a statement of loss, and is held to be a waiver of the requirement to furnish it."

It may be admitted that, within the principle announced by these adjudications, the facts to which we have alluded were sufficient to authorize the jury to find that the defendant had waived the requirement to furnish proof of the loss; and, if the case stood alone upon such facts, it may be conceded that it would be unnecessary to further prosecute our investigation. The record, however, discloses that subsequently, and quite a while before the time had elapsed within which the plaintiff was required to furnish a statement of his loss, the eminent counsel who then and now represents the plaintiff wrote to Mr. Landers, the general agent of the defendant at San Francisco, saying, among other things, that if "the defendant will state expressly why payment of Mr. Hahn's policy is refused, pointing out the clause or clauses in the contract upon which such refusal is based, and the reason or reasons which support it, we will suggest what seems to us the error, if any, on the part of the company." To this letter the general agent wrote in reply that he begged leave "to suggest that your client (Mr. G. W. Hahn) present to this office proof of loss claimed by him in connection with our policy No. 1,655,955, in strict accord with the printed terms thereof, and thereupon we will give the whole

matter our full attention. In order to avoid technical errors in the form of proof, we inclose herewith two blanks, one of which you may retain, causing the other to be fully executed, and forwarded to the undersigned." It is clear, from the letter of the general agent, that the defendant either did not understand that the proof of loss had been waived, or, if it had been waived by the conduct and declarations of its agents, that the defendant intended to withdraw the conclusion of waiver inferred from such conduct and declarations. Nor do counsel now, nor did the trial court, question the right of the defendant to withdraw such conclusion. In its charge the trial court expressly instructs the jury "that the company had the right to withdraw this conclusion if made within sixty days," but added "that if the jury believed that after the transactions aforesaid the general agent notified plaintiff or his counsel that they now required the formal proofs, informing him at the same time that when these were received they would give the matter their attention, such a notice, if made in good faith, and with the intent to give the matter a fair and just examination, and allow plaintiff to enter upon negotiations regarding it, and not made to catch plaintiff by hasty admissions, that then defendant should be deemed to put itself in the position of accepting proofs of loss, and the obligation devolved on plaintiff to furnish them." We are unable to find the evidence that indicates any want of good faith, or design to entrap the plaintiff into any hasty admissions, by the request that he should furnish the proof of loss. Nor does it seem to us that the circumstances, viewed in any light, are susceptible of such inference. There was plenty of time before the expiration of 60 days for the plaintiff to furnish the proof of loss; and its requirement is admitted to be a prerequisite to the plaintiff's right of recovery, unless the same had been waived by the defendant. The letter of the general agent was a simple request that the proofs required by the terms of the policy should be furnished him, and that, for convenience in preparing the same, he had inclosed two blank proofs,—one to be filled out, and the other to be retained as evidence of the fact that such proofs had been made; and it contained an assurance that, upon the receipt of such proofs, he would give "the whole matter his full attention." What "matter" is this to which the agent refers, and to which he will give his "full attention," except the "matter" suggested by the letter of plaintiff by his counsel? That "matter," he assures the plaintiff, or his counsel, shall receive his "full attention," when the proofs of loss are furnished. Why, then, not make such proofs? There was ample time. The blanks were furnished upon which to make the statement of loss to avoid any errors. No possibility of any harm could result to the plaintiff. His interests were guarded by eminent counsel, whose ability is an assurance that their client would not be entrapped into any admissions. We do not think, therefore, there was anything in the circumstances to justify the

inference of bad faith, or calculated to throw doubt upon the good faith of the request for proof of loss, and, consequently, that it was error to submit to the jury whether such proof of loss was made in good faith or not. Except in this particular, the charge is exceptionally able and clear, but for the reason suggested the case must be remanded for such further proceedings as are not inconsistent with this opinion.

(23 Or. 571)

### LOVEJOY v. CHAPMAN.

(Supreme Court of Oregon. March 28, 1893.)

#### COSTS IN EQUITY CASES—MORTGAGEE—ASSIGNMENT OF LAND CONTRACT.

1. Hill's Code, § 554, providing that costs shall be allowed to the prevailing party in equity cases, unless the court otherwise directs, invests the trial court with a discretion in the taxation of costs, and its action will not be reviewed on appeal except for an abuse of such discretion.

2. The assignment of a contract for the sale of land to secure a loan is a mortgage, which the assignee cannot convert into an absolute transfer without the assignor's consent.

Appeal from circuit court, Multnomah county; James A. Fee, Judge.

Suit by Elizabeth Lovejoy against W. S. Chapman to redeem a contract of sale of real property, assigned to defendant to secure a loan. From a decree for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by MOORE, J.:

This is a suit to redeem a contract of sale of real property made by the Oregon & California Railroad Company to plaintiff, which she assigned to the defendant. She alleges that said assignment was made to secure the payment of \$250 loaned to her by the defendant. She also alleges that, as additional security, she mortgaged to the defendant a large quantity of goods and canning tools, of the value of \$960, which he sold, and converted the proceeds to his own use; that defendant refused to permit her to redeem the contract; and that the amount due from her to him was fully paid by said proceeds of sale. The answer practically admits that the certificate evidencing said contract was assigned as security for a loan; that defendant agreed to reassign the same to plaintiff upon the payment thereof; and that, plaintiff having failed to redeem within the time prescribed, the assignment had become absolute. He denies that the amount loaned was not more than \$250, and alleges that the several sums loaned to her, and paid on her account, together with interest thereon, amounted to \$1,322.43, and credits her with \$150 on account of the sale of said goods and canning tools. After the issues were completely, the cause was referred to R. G. Morrow, who took the testimony, and reported his findings of fact and conclusions of law thereon. The court affirmed this report, and decreed that defendant, within 30 days, reassign said certificate to plaintiff, upon the payment to him of \$392.90, and awarded costs and disbursements to plaintiff, from which decree the defendant appeals.

A. H. Tanner, for appellant. J. F. Watson, for respondent.

MOORE, J., (after stating the facts.) The evidence shows that on June 16, 1886, the defendant, by W. E. Mulhollan, his agent, loaned \$100 to the plaintiff, and that to secure the payment thereof she executed and delivered to said Mulhollan a chattel mortgage upon some goods and canning machinery; that on June 30th the defendant, by his said agent, loaned \$45 more to plaintiff, and to secure the payment thereof she executed and delivered to said Mulhollan a chattel mortgage for \$145 upon the same property; that the debt secured by the first mortgage was merged in the second; that on August 17th the defendant, by his said agent, loaned more money to the plaintiff, and she executed and delivered to said Mulhollan another chattel mortgage, for \$200, upon the same property, which several mortgages were duly assigned to defendant. The evidence in relation to the amount of money loaned to plaintiff on August 17th is quite conflicting. The plaintiff testifies that she received a sum which, added to the \$145 she owed the defendant, made \$200, and that the former debts were merged in this mortgage, while the defendant testifies that he loaned her at that time \$200, and that this was in addition to the \$145, and in this he is corroborated by the testimony of W. E. Mulhollan. The evidence further shows that plaintiff had a contract with Messrs. Mason, Ehrman & Co., of Portland, by which they agreed to purchase canned goods from her, and to further secure the defendant she issued an order on Messrs. Mason, Ehrman & Co., whereby she requested them to pay to W. E. Mulhollan one dollar per case for the first 200 cases of canned goods shipped to them by her. This order they duly accepted, and agreed to pay upon said conditions. That plaintiff failed to deliver any goods to them upon said contract, but on September 13th she delivered to Messrs. E. S. Larsen & Co. 200 cases of canned Bartlett pears, which they shipped to San Francisco on her account, and gave her a statement thereof, which she, on October 8th, duly assigned to said W. E. Mulhollan, who commenced an action against said Messrs. E. S. Larsen & Co. for the amount due thereon, and judgment having been rendered against him for costs, amounting to \$71.95, he paid the same, and on July 25, 1887, reassigned said statement to plaintiff. That plaintiff on April 12, 1887, for the expressed consideration of \$225, and in order to further secure the defendant, duly executed and delivered to him said land certificate, and he executed and delivered to her a writing in which he agreed to reassign said certificate upon the payment of the amounts due, and interest. The plaintiff testifies that at that time a settlement was had, and that \$225 was the whole amount due from her to him, while he testifies that he loaned her this \$225 in addition to the former amounts. It appears that, on the next day after the execution of said assignment, defendant loaned plaintiff \$25, and since said assignment of the certificate has paid



to the railroad company \$83.85 as installments due thereon. The conflict in the testimony as to the amount due the defendant renders the true account between the parties difficult of ascertainment. There are, however, some circumstances which seem to illustrate the dealings of the parties, and no doubt aided the referee in reaching a conclusion that the plaintiff's theory was correct: (1) When the second loan was made, of \$45, a new mortgage was taken, for \$145, and this would appear to indicate that, when each loan was made, it was added to the previous amount loaned, and a new mortgage taken to secure the whole sum; (2) when the order was given upon Messrs. Mason, Ehrman & Co. for \$200 if there had in fact been \$345 due, the order would probably have been for more than the amount named therein; and (3) the consideration of \$225 expressed in the assignment of the certificate, would appear to indicate that this was the amount then due. The referee had the advantage of seeing the witnesses, and of hearing them testify, and from this fact he is better able to pass upon the weight of the evidence than any court can be, from an inspection of the record; and, since there are circumstances which tend to corroborate the plaintiff, we must conclude that his findings are correct, and that the defendant has inadvertently overlooked or forgotten that each mortgage or other security embraced all the preceding loans.

Appellant contends that the costs should not be taxed to him. It is true that the plaintiff did not tender any sum to the defendant for the redemption of the certificate; but the defendant did not allege that he held the property as security for a loan, or that he was ready or willing to reassign said certificate upon the payment of the amount due. Section 554, Hill's Code,<sup>1</sup> invests the trial court with a discretion in the taxation of costs in equity cases, and this discretion will not be reviewed, except in cases of an abuse thereof.

That the certificate was assigned as a security, there can be no doubt. That such a transfer is a mortgage, and this fact may be established by parol, is the settled law of the state. *Stephens v. Allen*, 11 Or. 188, 3 Pac. Rep. 168. The assignment having been executed as a mortgage, the defendant could not convert it into an absolute transfer without the consent of the plaintiff. *Marshall v. Williams*, 21 Or. 268, 28 Pac. Rep. 137.

The decree will be affirmed.

(23 Or. 587)

#### PORTLAND & F. R. CO. v. SPILLMAN.

(Supreme Court of Oregon. March 28, 1893.)

CORPORATIONS—ORGANIZATION—SUBSCRIPTIONS TO STOCK.

1. Subscriptions to the capital stock of a corporation, made on conditions that cannot be

<sup>1</sup>Hill's Code, § 554, provides that, "in a suit, costs and disbursements shall be allowed to a party in whose favor a decree is given, in like manner and amount as an action, without reference to the amount recovered, or the value of the subject of the suit, unless the court otherwise directs.

performed by the corporation until after its organization, cannot be considered in determining whether the requisite one half of the authorized capital stock has been subscribed to entitle the corporation to organize.

2. Under the law of Oregon, by which articles of incorporation are to be filed and a charter obtained before any stock is subscribed, and one half of the authorized capital stock is required to be subscribed before the corporation can organize, a person may subscribe conditionally, and such conditions will not be held void, and the subscription held unconditional, in determining whether the requisite half of the stock has been subscribed. *Putnam v. Railroad Co.*, 16 Wall. 396; *Caley v. Railroad Co.*, 80 Pa. St. 367; *Boyd v. Railway Co.*, 90 Pa. St. 172.—distinguished.

3. Since, under Hill's Ann. Laws, § 3222, after the filing of articles of incorporation, one half of the capital stock of a private corporation must be subscribed before the corporation can be organized, a subscriber is not liable on his subscription where the requisite half of the stock was not unconditionally subscribed before organization.

4. If, however, a subscriber, with knowledge that the requisite one half of the capital stock has not been taken, attends the meetings of the company and participates in its organization, or does other acts indicating a consent to become a shareholder, and acts as such before the statutory conditions have been complied with, he waives the implied conditions of his subscription, and cannot afterwards refuse to become a shareholder on the ground that the company was not legally organized.

5. There is no such waiver from the fact that a subscriber, without knowledge that the requisite amount of stock has not been taken, on several occasions consents to and waives notice of a stockholders' meeting, and on one occasion votes by proxy at a special meeting.

6. The fact that a company is a corporation de facto, and entitled to sue as such, does not entitle it to recover a subscription which is repudiated by the subscriber because the implied conditions of his subscription, such as the required subscription of half of the amount of the authorized capital stock, were not complied with before organization.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by the Portland & Fairview Railroad Company against Thomas Spillman. There was a judgment for defendant, and plaintiff appeals. Affirmed.

W. E. Thomas, for appellant. F. D. Chamberlain, for respondent.

BEAN, J. This action is brought to recover from defendant \$200 upon a subscription made by him to the capital stock of plaintiff, after the articles of incorporation were filed, and prior to the organization of the company. The defense set up by the defendant is that the attempted organization of the plaintiff was had before one half of its capital stock had been subscribed. The amount of the capital stock of plaintiff, as provided in its articles of incorporation, is \$50,000. On June 29, 1891, the date of the attempted organization, the total amount of subscriptions for stock was \$29,265, but of this amount \$5,000 was upon the condition that the amount of stock subscribed, exclusive of this subscription, be not less than \$25,000; another \$5,000 was on condition that a certain tract of land, owned by the subscriber, should have a 5-cent

fare; and \$3,683.33 of the remaining stock was subscribed on condition that the proposed road of plaintiff should be located on a certain route. It will thus be observed that one half of plaintiff's stock had not been subscribed unconditionally at the time of its attempted organization, but it is argued by counsel for plaintiff that the conditional subscriptions, having been made before an organization was effected, must be considered absolute and unqualified, and the conditions attached thereto void. In support of this conclusion we are cited to *Putnam v. Railroad Co.*, 16 Wall. 396; *Caley v. Railroad Co.*, 80 Pa. St. 367; and *Boyd v. Railway Co.*, 90 Pa. St. 172. These decisions were made under the statutes of Pennsylvania and Indiana, which require, as a condition precedent to the granting of a charter for a railroad corporation, that a certain amount of the capital stock shall be subscribed, and upon the faith of which the charter is issued or granted. 2 Brightly, *Purd. Dig.* 1412; *Rev. St. Ind.* § 3885. Under these statutes, any conditions attached to the subscription are held void as a fraud upon the state, upon corporate creditors, and upon the other subscribers. *Railroad Co. v. Biggar*, 34 Pa. St. 455. It is thus apparent that these authorities can have no application to a corporation organized under our statute, which provides that the articles of incorporation shall be filed, and a charter obtained, before any stock whatever is subscribed. In fact, there is no person authorized to receive subscriptions to the stock of the corporation until the articles of incorporation are filed and the charter obtained, and then the subscription is only an agreement to take stock in a corporation thereafter to be organized with the power and authority conferred by the articles of incorporation. This agreement or offer may have attached thereto any lawful condition, and will be regarded as nothing more than an offer to become a shareholder or take shares when the condition shall be performed, and, if made prior to the organization of the company, it is at most only an offer to become a shareholder upon the terms indicated, and the offer can be accepted only by the proper agents of the company after organization. It would seem clear, therefore, that such subscription cannot be counted in determining whether the requisite amount of stock has been subscribed to authorize the organization of the corporation, as conditional subscribers cannot become shareholders until the conditions upon which the subscription was made have been performed, and these conditions cannot be accepted until after the organization of the company. *Mor. Corp.* §§ 81, 141; *Cook, Stock, Stockh. & Corp. Law*, § 180; 1 *Spelling, Corp.* § 380; *Agricultural Works v. Parkhurst*, 54 Iowa, 357, 6 N. W. Rep. 547; *Corporation v. Valentine*, 10 Pick. 142; *Railway Co. v. Newton*, 8 Gray, 596; *Proprietors, etc., v. Chapin*, 6 Cush. 50. It follows, then, that at the time of the attempted organization of plaintiff the requisite amount of stock had not been subscribed to enable it to effect an organization. By the statute of this state one half of the capital stock of a private corporation

must be subscribed before the corporation can be organized or an assessment lawfully made upon its subscribed stock. Section 3222, *Hill's Ann. Laws*. This is an implied part of every contract of subscription, and the contract is not binding or enforceable against the subscriber until one half of the capital stock has been subscribed, and the company legally organized. It is a rule of law too well settled to be now questioned that subscribers to the capital stock of a corporation prior to its organization cannot be required to pay assessments upon their shares until the company is authorized by law to begin the prosecution of its enterprise. *Mor. Corp.* § 187; *Thomp. Liab. Stockh.* § 120; *Cook, Stock, Stockh. & Corp. Law*, § 176. Until the company is organized, a subscription for stock is a mere proposition or agreement to take a specified number of shares in a corporation thereafter to be formed, on condition that the requisite number of shares for the organization of the company shall be filled up by subscription, and the company legally organized, and is not a binding promise to pay. Until this condition is fulfilled, the obligation of the subscriber is inchoate merely. This is a condition, however, the subscribers may waive, and with their assent the corporation may not only organize, but do all other things incident to and necessary for the prosecution of the particular business or enterprise for which it was organized. If, with knowledge of the fact that the requisite amount of stock has not been taken, they attend the meetings of the company, participate in its organization, or do other acts indicating a consent to become shareholders, and act as such before these conditions have been complied with, they cannot afterwards refuse to perform their contract upon the ground that the company was not legally organized, or that the implied conditions of their subscription have not been complied with. 2 *Mor. Corp.* §§ 741-743; *Cook, Stock, Stockh. & Corp. Law*, § 181; *Thomp. Liab. Stockh.* § 120; *Proprietors, etc., v. Chapin*, 6 Cush. 50; *Railroad Co. v. Wilson*, 22 Conn. 435; *Hager v. Cleveland*, 36 Md. 476; *Road Co. v. Clemens*, 16 Mo. 359; *Insurance Co. v. Sherwood*, 72 Mo. 462; *Dam Co. v. Gray*, 30 Me. 547; *Hunt v. Bridge Co.*, 11 Kan. 412; *Sharp-ley v. Railway Co.*, 2 Ch. Div. 663.

But no such facts appear in this case. By looking into the record we find that on three several occasions defendant consented to and waived notice of a stockholders' meeting, and on one occasion he voted by proxy at a special meeting of stockholders, called "for the purpose of definitely locating the terminal of the railroad to be constructed, and to authorize the making and filing of supplementary articles of incorporation in accordance with the action of the stockholders at such meeting." It does not appear, nor is it claimed, that at the time of such waiver of notice, or participation in the stockholders' meeting, he knew that the required amount of stock had not been subscribed; and without such notice it is not perceived how he can be said to have waived the condition of his subscription. A waiver is "the intentional relinquish-

ment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it." *And. Law Dict.* tit. "Waiver;" *Hoxie v. Insurance Co.*, 32 Conn. 40, Butler, J.; *Shaw v. Spencer*, 100 Mass. 395, Foster, J. "There is no better settled principle," says the court in *State v. Churchill*, 48 Ark. 445, 3 S. W. Rep. 360, "than that to hold one bound by any word or act as a waiver it must be shown that he so spoke or acted with a knowledge of all the facts and circumstances attending the creation of the right he is alleged to have waived." It was the duty of the corporation, after the articles of incorporation were filed, to open books and receive subscriptions to the capital stock of the corporation, and they were authorized, as soon as one half of the stock was subscribed, and not before, to give notice to the subscribers to meet and elect directors. Section 8222, *Hill's Ann. Laws*. In waiving formal notice of such meeting, defendant had a right to assume that the law had been followed, and the requisite amount of stock had been subscribed, and voting by proxy at the stockholders' meeting, in view of the object of such meeting, it is not in any way inconsistent with the contract of subscription, and does not indicate an intention to waive the conditions upon which it was made. It seems to us clear that the facts shown by the record are not sufficient to estop the defendant from insisting as a defense to this action that the conditions upon which his subscription was made have not been complied with, and that the company was not lawfully organized. *Livesey v. Hotel Co.*, 5 Neb. 50; *Railroad Co. v. Veasle*, 39 Me. 571.

It was insisted at the argument that plaintiff is at least a corporation de facto, and that its existence cannot be questioned in a collateral way. Conceding this to be true, there is a wide difference between a question of the existence of the company as a corporate body and the liability of defendant for his subscription to its capital stock. It may be a corporation de facto, and entitled to maintain actions as such, but it cannot recover against a subscriber to its capital stock until it shows that the conditions upon which such subscription was made have either been complied with or waived by the subscriber. These are conditions precedent to the right to enforce the obligations of its subscribers, and in any action brought for that purpose the subscriber may insist upon their performance before a recovery can be had. *Hager v. Cleveland*, 36 Md. 476; *Swartwout v. Railroad Co.*, 24 Mich. 389. From these considerations we conclude that the judgment of the court below should be affirmed, and it is so ordered.

(8 Utah, 442)

**POYNTER v. CHIPMAN et al.<sup>1</sup>**

(Supreme Court of Utah. March 13, 1893.)

**ACCRETION ON NAVIGABLE LAKES—ESTOPPEL.**

1. The owner of land which is described in a patent from the government as bounded on the meander line of any inland lake, though navigable, except the Great Lakes, is entitled to

the accretion lying between the meander line and the edge of the waters.

2. Where a person occupies and makes improvements on such land, under a claim that it belongs to the government, and relying on a statement of the owner that he did not claim below the meander line, the former cannot invoke the principle that the owner, having misled him as to the ownership of the land, is thereby estopped to claim it; since the occupant, when he made the improvements, knew that he had no title to the land.

Appeal from district court, Utah county; John W. Blackburn, Justice.

Action of ejectment by Charles Poynter against James Chipman and others. There was judgment for plaintiff, and defendants appeal. Affirmed.

John W. Judd, for appellants. Rawlins & Critchlow, for respondent.

MINER, J. In March, 1887, David Count obtained a patent from the United States for lots 3 and 4, section 35, Salt Lake Meridian, Utah T. This land is admitted to join Utah lake on the north, and the south line thereof is admitted to run to the meander line running along the old shore of Utah lake. It is also admitted that the patent from the United States to Count called for the meander line on the lake as the southern boundary of the lots. In June following, Count conveyed to Poynter, the plaintiff, a portion of this land, by full covenant warranty deed. The land so conveyed adjoins Utah lake on the north. Plaintiff's deed describes the land as running to the waters of Utah lake, and along the north side of the lake, etc. On the trial, plaintiff introduced testimony tending to show that the United States survey, upon which the patent was granted to Count, was made in 1857, and at that time the water's edge was a few feet north of two buildings, called a "Pavilion" and "Saloon," erected by the defendant in 1886, and being south of the meander line; that in 1862 there was a very high rise in the water of the lake, because of heavy snow in the mountains; and that after that year the water receded to its former position. It was conceded by both parties that the water line of Utah lake fluctuated from year to year, being sometimes higher and sometimes lower; that the fluctuations and recessions of the water were gradual and by degrees, being imperceptible, and not sudden. The defendant introduced proof tending to show that Utah lake was a body of fresh water, about 30 miles in length, by about 12 miles in width; that it was navigable for boats of 600 tons' capacity, and was navigated by both freight and passenger, steam, and sail pleasure boats; that in the year 1886 the defendant built these houses, designated on the map as "Saloon," "Pavilion," and "Bath House," and that they were used as a place of public resort for bathing and social purposes; that, at the time the houses were built, they were built in the waters of the lake, the water then being about 24 feet north of the pavilion and saloon, which were located south of the government meander line, referred to in the Count patent; that in 1888 the waters of the lake fell to a point south of the

<sup>1</sup>Rehearing pending.

saloon; that the water fluctuated from year to year, standing sometimes south and sometimes north of the pavilion and saloon; that at the time this suit was brought, the waters had receded, and these houses built by defendant were left on dry land, between the meander line and the waters of the lake. The plaintiff brought this action of ejectment to recover possession of the land between Utah lake and the "meander line," and claims a right to follow the water line, and have title to the land to the water's edge. This claim is denied by the defendants, who claim that the same is public domain of the United States, and that they are occupying it as such. This is the principal question in the case.

The court instructed the jury, in substance, as follows: In this case the law is: "If it be true, if you find by a preponderance of the evidence, that Mr. Poynter, the plaintiff, owns the land down to the meander line of lake— That meander line is established by the government, and is supposed to be the water's edge. Indeed, that is the water's edge, and the abutting land owner, who owns down to that, owns to the water's edge. If the water's edge moves, he has the right to move with it. If it recedes from the shore, he has the right to follow it up clear to the water's edge. If it comes back on him, he has to go back,—he loses that much; but he has the right to follow it to its edge, and no man has the right to get between him and the water's edge; and any man who settles between him and the water, either after it recedes or before it recedes, is there as a trespasser, and he has no more rights there than a trespasser. If you find from the evidence, by a preponderance, that Poynter owns the land to the meander line from the government, he is entitled to all the dry land that is made between him and the water's edge by recession of the waters, or by adding alluvium so as to make an accretion. Whether that is perceptible or not makes no difference. He is entitled to the occupation of the land continuously to the water's edge. Whether he owns by an absolute title in fee or not, he is entitled to the possession of it. And, if you find from the evidence that these are the facts, then it is your duty to find for the plaintiff, and give him possession of this land." Under the instructions, the jury found a verdict for the plaintiff. The nature of the verdict does not appear from the abstract. From this verdict the court is asked to presume that an appeal was taken, although the abstract does not show whether an appeal was taken or not. Nor has rule 6 (27 Pac. Rep. viii.) of this court been followed in the preparation of the abstract. No objection having been made, we will consider the case as presented by the abstract.

The controversy here is not between adjoining owners or riparian proprietors, but between the plaintiff, as riparian owner, and a party claiming land under the water in front of him, which water had receded, and left dry land between the meander line of the riparian owner and the lake itself. In the case of *Palmer v.*

*Dodd*, 64 Mich. 474, 31 N. W. Rep. 209, the court says "that when the United States grant, by patent, land described by a legal subdivision, the grantee is entitled to all the lands embraced within that subdivision, and is not limited by the number of acres specified in the patent or upon the government plat. The meander lines have no significance as boundaries, and are not intended as such, but are run simply to afford a means of computing the area contained in the fraction which the government requires payment for on sale of the public domain." In *Clute v. Fisher*, 65 Mich. 48, 31 N. W. Rep. 614, the court says "that the soil under the water of an inland lake does not belong to the general government or to the state, \* \* \* and that private ownership of lands bounded on navigable fresh water is not restricted to the meander line." *Webber v. Boom Co.*, 62 Mich. 626, 30 N. W. Rep. 469. In *Lincoln v. Davis*, 53 Mich. 375, 19 N. W. Rep. 103, the court holds that the paramount rights of the public to be preserved in the Great Lakes are those of navigation and fishing, and this is best accomplished by limiting the grants of land bordering on the Great Lakes to low-water mark; and that, while the riparian owner on the Great Lakes is entitled to occupy the land to low-water mark, he also has the right to construct warehouses or piers in the water in front of his premises, in aid of, and not obstructing, navigation. In *Railroad Co. v. Schurmeir*, 7 Wall. 288, the court says: "The court does not hesitate to decide that congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be decided to be and remain public highways. 3 Kent, Comm. (10th Ed.) 562, and note. In *Hardin v. Jordan*, 140 U. S. 380, 381, 11 Sup. Ct. Rep. 808, 838, the court says: "If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the state, extending either to the margin or center of the stream, according to the rules of that law. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of the upland granted, no charge being made for the lands under the bed of the streams or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. \* \* \* It has never been held that the lands under water, in front

of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of water." *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840. "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fisheries,—and cannot be retained or granted out to individuals by the United States." Where the title is in the state, the land is held subject to state regulations and control, subject, however, to the regulations which may be made by congress with regard to public navigation and commerce; and it depends upon the law of each state as to what waters and to what extent the power of the state over the land under water shall be exercised. In *Barney v. Keokuk*, 94 U. S. 324, following the settled law of Iowa, it was held that the riparian proprietor on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as also the bed of the river, belonged to the state. The same rule was held under the laws of California. *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210. In Illinois and Mississippi a different doctrine prevails. There it is held that the title of the riparian proprietor extends to the middle of the current, in conformity to the rule of common law; that the beds of all streams, whether navigable or not, above the flow of the tide, belong to the proprietors of the adjoining land. *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337. In the case of *Middleton v. Pritchard*, 3 Scam. 510, it is held that where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation,—such as platting or surveying,—the grant must be construed most favorably to the grantee. As to what will pass by a grant bounded by a stream of water or a lake, at common law, depends upon the character of the water. If it were a navigable stream or lake, the rights of the riparian proprietor extended only to the high-water mark. If the stream was not navigable, the rights of a riparian proprietor extended to the thread of the stream. But, at common law, only arms of the sea and streams where the tide ebbs and flows are deemed navigable. Streams above tide water, although navigable in fact, were not deemed navigable in law. *Walker v. Shepardson*, 4 Wis. 486. Chancellor Kent, in the third volume of his Commentaries, (pages 562, 563, note,) lays down the rule that all

grants of the United States bounded upon a river not navigable at common law entitled the grantee to all islands lying between main land and the center thread of the stream. The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon, the terms of ordinary conveyances which they use; but these are left to the principles of the common law and the rules adopted by each local government where the lands may lie. Section 2476, Rev. St. U. S., providing that all navigable waters shall be public highways, does not change the rule. 3 Kent, Comm. (10th Ed.) 560-564, and note.

The rights of the plaintiff in this case depend entirely upon the doctrine of riparian proprietors. Practically the common law has prevailed in this territory, and the Code, without this basis to rest upon, would not only fail to provide for the great mass of affairs, but would lack the means of a safe construction. There is no tide water in this territory, and therefore no water which, by the technical meaning of the term "navigable" at common law, would come within it. The general rule of the common law is applicable to inland lakes which are not of such a size or importance as to be classed with the great navigable lakes of the country, and we do not consider that we should depart from that rule in this case. The fact that Utah lake is navigated or navigable does not change the rule in this case. *Smith v. City of Rochester*, 92 N. Y. 463; *Cobb v. Davenport*, 32 N. J. Law, 369; *Loruan v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Mich. 125; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. Rep. 686; *Ridgway v. Ludlow*, 58 Ind. 248; *Beckman v. Kreamer*, 43 Ill. 447; *State of Indiana v. Milk*, 11 Biss. 197, 11 Fed. Rep. 389; *Stoner v. Rice*, 121 Ind. 51, 22 N. E. Rep. 968; *Moore v. Robbins*, 96 U. S. 530; *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; 3 Kent, Comm. (10th Ed.) 560-570; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *New Orleans v. U. S.*, 10 Pet. 717; *Banks v. Ogden*, 2 Wall. 67; *Jeffers v. Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337; *The Daniel Ball*, 10 Wall. 557; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840. We think the court made no mistake in charging the jury that if the plaintiff owned the land to the meander line along the old shore of the lake, by patent from the United States, he would be entitled to recover all the dry land made by recession of the water between such meander line and the water's edge. This case comes clearly within the rule laid down in *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840, and *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838.

The record shows that, while there was a slight rise and fall of the water in the spring of the year for several years prior to the commencement of this suit, yet the recession of the water was gradual and by degrees, being imperceptible, and not sudden. The plaintiff's title to the meander line along the old shore of the lake was conceded. The record does not show that

any damages were allowed the plaintiff. Therefore the exceptions to the charge of the court on the subject of the rapid recession of the water, as to the plaintiff's right to recover, whether he owned the absolute title in fee or not, and upon the subject of damages, are not important to be considered in this case, as the charge was harmless so far as these questions were concerned.

The defendant requested the court to charge the jury that, "if you believe from the evidence that in 1887 the plaintiff stated to the defendants that he had no claim on the land below the 'meander line,' and that the land in dispute is below the meander line, and that he had no objections to their occupying such land, and the defendants, upon the faith of such statements made by the plaintiff, rebuilt their pavilion, and made other improvements thereon, and continued to use and occupy such land, then your verdict should be in favor of defendants in this case." This request was refused, and the defendants excepted. It must be remembered that the answer filed in this case, as shown by the abstract, simply "denies plaintiff's title and ownership, and also his right to recover." No other defense is set up as against the plaintiff's right. No license, lease, or estoppel is pleaded. The whole defense was based upon the claim that the land in question belonged to the United States. The principle invoked by this request is that one should be estopped from asserting a right to property upon which he has, by his own conduct, misled another, who supposed himself to be the owner, or to have a right to make expenditures thereon. "But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none." *Brant v. Iron Co.*, 93 U.S. 326; *Henshaw v. Bissell*, 18 Wall. 255; *Steel v. Refining Co.*, 106 U.S. 456, 1 Sup. Ct. Rep. 389. It cannot be contended that the defendant did not know all about the title to the land at this time. He claimed then, and for a long time prior, that the title was in the government. His whole defense was based upon that claim. This was the theory upon which the case was tried, and the pleadings do not present any other issue. 2 *Estee*, Pl. & Pr. §§ 3760, 3772, 3774. Upon the whole record, we find no reversible error. The judgment of the lower court is affirmed, with costs.

ZANE, C. J., concurs.

(8 Utah, 420)

# ARMSTRONG v. OREGON SHORT LINE & U. N. RY. CO.

(Supreme Court of Utah. March 13, 1893.)

## INJURY TO EMPLOYE — NEGLIGENCE OF FOREMAN.

The foreman of a railroad switching crew is not a fellow servant with one of the "helpers," who is subject to his orders, and the railroad company is liable for injuries received by the "helper" through the negligence of the foreman.

Appeal from district court, Salt Lake county; Thomas J. Anderson, Justice.

Action by George C. Armstrong against the Oregon Short Line & Utah Northern Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Williams & Van Cott, for appellant. Dey & Street, for respondent.

ZANE, C. J. This is an action by the plaintiff to recover damages in consequence of an injury to him, caused, as alleged, by the negligence of the defendant, while in its employ as a helper in its yards at Pocatello, Idaho. It appears from the evidence that the plaintiff was between an engine and some cars, in the night, uncoupling them, when 14 or 15 other cars came from the west, without warning, and without any light upon their front, and struck the ones that plaintiff was uncoupling, and knocked them east a considerable distance; that the plaintiff was thrown down, and the wheels passed over his leg and hand, which he lost. While the foreman should have known that the defendant was at work about the standing cars, those moving upon the same track in their direction passed him about 60 feet way, and no warning was given to the plaintiff. There were a large number of tracks in the yard in which plaintiff was injured, upon which there were at all times numerous cars, in the moving of which four switch engines were used in the day time and three at night. With each there were an engineer, fireman, and two helpers under the direction of a foreman. The foreman received general orders from the yard master before commencing work, and afterwards he directed the crew in their execution. We must conclude that the foreman under whom plaintiff was at work, as well as the foreman who sent the cars down at such a rapid rate without signal or warning, was guilty of negligence, and also that the yard was not sufficiently lighted, and that such negligence caused the injury to the plaintiff.

The defendant insists that there cannot be a recovery in this action, because the plaintiff and the negligent foreman were co-operating as fellow servants at the time of the injury. The definitions given of the term "fellow servants" by the courts differ materially. The tendency of later decisions has been towards a narrower application of the term. The rule relied on by the defendant appears to be based upon the presumption that employees with equal authority of the same grade, working together, should, by their watchfulness, their suggestions, skill, care, caution, and example, exercise an influence on each other promotive of diligence, care, and caution in all; that careful employees of the same grade, associated together in the performance of common duties, ought to stimulate like behavior in each other. To hold that fellow servants can recover damages against the common master for injuries from the negligence of each other, it is presumed would not be promotive of such diligence and care as their safety and the safety of the public demands. Therefore the negligence of the one causing the injury is regarded as the fault of the other

to the extent of preventing a recovery against the common master. From such considerations some of the later and more carefully considered cases deduce the rule of law relieving the employer from damages in consequence of injury to one fellow servant from the negligence of another. That the reason of the rule should limit its application is regarded as axiomatic. So far as its application goes beyond this it is unreasonable. Therefore the rule will not prevent a recovery against the master for an injury to an employe in consequence of the negligence of a superior, or because of the negligence of an employe not so associated with the injured party as to be subject to the influence of his example, advice, care, and diligence. While it may be reasonable to infer that men laboring together with equal authority will by their watchfulness, their suggestions, prudence, and their example, influence each other, it would be unreasonable to presume that they will so influence the men in authority over them, and to whose orders they are subject. And it would be quite as unreasonable to require employes, by their care and suggestions and example, to stimulate and prompt caution, watchfulness, and diligence in those with whom they are not associated, whom they have no opportunity of advising or of influencing by their example of skillfulness, diligence, and prudence. They should not be held responsible for those outside of the range of their influence. We are disposed to hold that the term "fellow servants" should not include the man in authority with those subject to his orders,—the one that orders with those required to obey him; nor should the term include those not so associated in their employment as to be within the range of, and subject to the influence of, each other while about their work and in the actual discharge of their duties. It follows that the foreman was not a fellow servant of the plaintiff, who was his helper, and subject to his orders. *Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. Rep. 186; *Daniels v. Railway Co.*, (Utah,) 23 Pac. Rep. 762; *Railway Co. v. Moranda*, 108 Ill. 576; *Openshaw v. Railway Co.*, 6 Utah, 132; *Reddon v. Railway Co.*, 5 Utah, 344, 15 Pac. Rep. 262; *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184; *Railroad Co. v. Kelly*, 127 Ill. 637, 21 N. E. Rep. 203. While there are numerous decisions of English and American courts in conflict with those cited, there are many that we have not referred to, entitled to great weight, that support them. This disposes of the point principally relied on by counsel for appellant in their argument. We do not feel called upon to consider this record further, as we find no error in it. The judgment appealed from is affirmed.

BLACKBURN and MINER, JJ., concur.

(8 Utah, 424)

BARTCH, Probate Judge, et al. v. MELOY, County Clerk.

(Supreme Court of Utah. March 13, 1893.)

COUNTY SELECTMEN—TERM OF OFFICE.

Comp. Laws 1888, § 177, provides that two selectmen shall be elected at the general

election in 1889, and biennially thereafter, and their term of office shall be two years. Sess. Laws 1892, p. 27, provides that the election of selectmen shall be in November, 1892, and that they shall hold their office for two years, and enter on the duties of their office on the 1st day of January next succeeding their election. Held that, as the enactments were repugnant, the later one would govern, and the terms of office of selectmen elected in 1891 for two years expired on the 1st of January, 1893.

Mandamus by George W. Bartch, probate judge, and others, against H. V. Meloy, county clerk, to compel him to recognize the title to office of certain selectmen. Writ denied.

Brown & Henderson and Frank Hoffman, for plaintiffs. Loofbourow & Kahn and O. W. Powers, for defendant.

BLACKBURN, J. This is a proceeding in mandamus to compel the defendant, the county clerk, to act as clerk for and recognize the county court of Salt Lake county, composed of G. W. Bartch, probate judge, Harvey Hardy and John Butter and J. F. Cahoon, selectmen. The defendant claims that the terms of Harvey Hardy and John Butter have expired, and they are no longer members of the county court, and that Herman Bamberger and Joseph R. Morris, along with said Bartch and Cahoon, constitute the lawful and only county court of Salt Lake county. The controversy arises in this way: Section 177 of the Compiled Laws of 1888 provides, among other things, "that at the general election to be held in the year 1889, and biennially thereafter, two selectmen shall be elected in each county of this territory, whose term of office shall be two years." In 1891, Hardy and Butter were duly elected and qualified as selectmen, and have served as selectmen since their election and qualification. In 1892, the legislature passed a law (Sess. Laws 1892, p. 27) providing (section 1) "that on the Tuesday next after the first Monday in November, 1892, and biennially thereafter, a general election shall be held throughout the territory for the election of territorial, county, and precinct officers, who are by law herein or may be made elective; and all such officers so elected shall qualify and enter upon the duties of their respective offices on the 1st day of January next succeeding their election, and continue in office two years, and until their successors are duly elected and qualified," etc. Section 2: "That the official term of the present incumbent of any of the offices mentioned in the foregoing section, except county collectors, (whose term shall continue to June 1, 1893,) shall extend to the 1st day of January, 1893, and until their successors are duly elected and qualified, but not longer." Section 5: "That all acts and parts of acts, in so far as they provide for the holding any election to fill any of the offices mentioned in this act, (other than special elections to fill vacancies,) or in any manner fixing the tenure of such offices, otherwise than in this act provided, are hereby repealed." Hardy and Butter claim they were elected under the law of 1888, and claim they are entitled to hold their offices for the term



(8 Utah, 428)

of two years, which time has not expired. Bamberger and Morris claim that the law of 1892 abrogates the law of 1888, and that they were duly elected under the law of 1892, and were entitled on the 1st day of January, 1893, to qualify and assume the duties as selectmen of Salt Lake county; and this suit is brought to determine whether Hardy and Butter or Bamberger and Morris are the legal selectmen of Salt Lake county.

If the law of 1892 repeals, by implication or substitution or by express words, the law of 1888 in that case, Bamberger and Morris are the legal selectmen of Salt Lake county. I think the law of 1888 is repealed by the law of 1892.

1. When a law is passed as a substitute for a prior enactment, covering the whole subject of the former law, the former one is repealed, without expressed words. *Suth. St. Const.* § 143. And the law of 1892, by its very terms, covers the election of select men and their tenure of office.

2. Where a subsequent statute is so repugnant to a former one that the two cannot be construed reasonably together, the former one is repealed by implication. I think that these two statutes—the acts of 1888 and 1892—are so repugnant on the question of the election of selectmen, and when their term of office shall terminate, that they cannot be construed together, and the former one is repealed. The statute of 1888 provides that two selectmen, at the general election to be held in the year 1889, and biennially thereafter, shall be elected, whose terms of office shall be two years. The election of selectmen under the law of 1892 shall be in November, 1892, at the general election, and they shall hold their offices for two years. These provisions are in direct conflict. Under the former law, the election is to be held in odd years; in the latter law, in even years. If the selectmen elected in 1891 hold two years under the former law, those elected under the late one cannot be installed until more than a year after they are elected. The two enactments are wholly inconsistent, and repugnant, and therefore the former one is repealed by the latter.

3. We need not resort to substitution or repeal by implication, for the act of 1892 contains a repealing clause expressly repealing the act of 1888. The repealing clause is as follows: "That all acts or parts of acts, in so far as they provide for holding elections to fill any of the offices mentioned in this act, or in any manner for fixing the tenure of such offices, otherwise than as in this act provided, are hereby repealed." All that part of the law of 1888 that provides for the election of selectmen and their term of office is expressly repealed. Therefore we hold that the law of 1888, that provides for the election of selectmen and their term of office, is repealed; and, there being no law in existence under which Hardy and Butter can continue in office, their term of office has expired; and that Bamberger and Morris are the selectmen de jure of Salt Lake county. The peremptory writ of mandamus is denied.

ZANE, C. J., and MINER, J., concur.

## UNITED STATES v. GOUGH.

(Supreme Court of Utah. March 20, 1893.)

### ORAL INSTRUCTIONS—WAIVER OF OBJECTIONS.

Under Comp. Laws 1888, § 5033, providing that if the charge of the court to the jury is not given in writing it must be taken down by the phonographic reporter, an objection that an oral charge was not taken down by the reporter, being to a mere formal requirement of the statute, was waived where the complaining party and his counsel were present when the charge was delivered, and failed to call the attention of the court to the omission till after verdict.

Appeal from district court, Utah county; John W. Blackburn, Justice.

Josiah Gough was convicted of adultery, and, his motion for a new trial being denied, he appeals. Affirmed.

Dudley & Wood, for appellant. Chas. S. Varian, U. S. Atty.

ZANE, C. J. The defendant was accused of the crime of adultery, and a jury found him guilty. He appealed from the order of the court overruling his motion for a new trial, and from the judgment on the verdict.

The court gave an oral charge to the jury which was not taken down by a reporter, and this defendant assigns as error. The last clause of section 5033, Comp. Laws Utah 1888, is as follows: "If the charge be not given in writing, it must be taken down by the phonographic reporter." It appears from the record that the defendant and his counsel were present when the charge was given, and it does not appear that the attention of the court was called to the omission now complained of, or that any objection was made or exception taken. It does appear that counsel for the defendant first called the attention of the court to the fact that its charge had not been taken down two or three days after the trial, upon his motion for a new trial. If objection had been made to the oversight when it occurred the court would have reduced the charge to writing, or would have ordered it taken down by the stenographic reporter. In the case of *Gibson v. State*, (Fla.) 7 South. Rep. 376, the court said: "In regard to the alleged error of the court in delivering a portion of the charge to the jury orally it does not appear from the record that any exception was taken to this at the time. Under the practice of this court in construing the statutes in relation to oral and written charges, such error, being as to a merely formal requirement, is considered waived if not excepted to before retirement of the jury. Even if alleged as error on a motion for a new trial, it comes too late. The statute which authorizes a party to embody in a motion for a new trial mistakes of the court not before excepted to, gives that privilege as to substantial matters charged, but not as to formal matters connected with the delivery of the charge." With respect to an alleged error in the selection of the jury, in the case of *Alexander v. U. S.*, 138 U. S. 353, 11 Sup. Ct. Rep. 350, the court used the following language: "But the decisive answer to this assignment is that the attention of the court

does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and, in case of an adverse ruling, to note an exception." The failure of the court to require the stenographic reporter to take down its charge was undoubtedly an oversight, and, relating as it does, to matter of form, and the defendant and his counsel being present, we must regard the defendants' right to insist upon the error as waived by the failure of his counsel to object until after the verdict was rendered. The judgment of the court below is affirmed.

BARTCH, J., concurs.

(8 Utah, 481)

**WARNER v. UNITED STATES MUT. ACC. ASS'N.**

(Supreme Court of Utah. March 13, 1893.)  
REVIEW ON APPEAL—ACCIDENT INSURANCE—GENERAL AND SPECIAL VERDICT.

1. Where the record on appeal does not contain the testimony the court will consider only the exceptions taken to the charge, and whether the general verdict is consistent with the special findings.

2. In an action on an accident insurance policy which insures against death from external, violent, and accidental means, not suicidal, a general verdict for plaintiff, and special findings that the insured was killed by a bullet penetrating the heart, establishes the fact that death was caused by external violence within the policy.

3. Special findings that the jury "don't know" whether the wound was inflicted by the insured, nor whether the shot was fired by an assassin or burglar, are not inconsistent with the general verdict where they find that death was produced by a bullet wound, as suicide and murder cannot be presumed.

4. A question whether the wound found on the insured was produced by a pistol fired by him, if answered in the affirmative, would not show suicide by the insured, nor would such answer be inconsistent with the general verdict.

5. If such findings are fairly open to a double construction, that construction will be adopted which upholds the general verdict.

Appeal from district court, Salt Lake county; Thomas J. Anderson, Justice.

Action by M. Rush Warner, administrator of J. Harley Warner, deceased, against the United States Mutual Accident Association, on an accident insurance policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Baldwin & Tatlock, for appellant. Powers & Hiles, for respondent.

MINER, J. This action was brought to recover \$5,000 on a policy of insurance issued by the defendant to J. Harley Warner. By the terms of the policy the defendant agreed to pay \$5,000 to Warner, or his survivor, if death result from external, violent, and accidental means, but does not extend to cover accidental injuries or death resulting from fighting, sui-

cide, felonious, or otherwise, sane or insane. The plaintiff, in his complaint, claims that on March 5, 1891, while this policy was in force, the assured was accidentally shot and killed, the ball passing through his body in the region of the heart. This allegation in the complaint is denied by the defendant, and the further defense is made that the death of the assured was suicidal, or the result of his own carelessness and negligence. The jury rendered a verdict for the plaintiff for the sum of \$5,000 and interest, and at the same time returned into court their special findings, as follows: "(1) Was the death of J. Harley Warner caused and produced on or about March 5, 1891, by a bullet penetrating the heart of the said J. Harley Warner, deceased? Answer. Yes; that is, the region of the heart. (2) Do you find from the evidence that the death of the said J. Harley Warner was caused or produced by a gunshot wound? A. Yes. (3) Was the wound found in the region of the left nipple of the said J. Harley Warner produced by a pistol fired by the said J. Harley Warner? A. Don't know. (4) Do you find from the evidence that J. Harley Warner was shot on or about March 5, 1891, by an assassin or burglar? A. Don't know. (5) Do you find from the evidence that J. Harley Warner was of a cheerful and buoyant disposition, and in good health, physically and mentally, just prior to March 5, 1891? A. Yes, as to disposition. Don't know as to health. (6) Do you find from the evidence that J. Harley Warner had been afflicted by a disease called 'la grippe' and neuralgia just shortly before his death? A. Yes, slightly; a week or ten days before his death. (7) Had not J. Harley Warner been taking medicine and narcotics shortly before his death? A. Yes, a few days before his death. Don't know as to narcotics. (8) Do you find from the evidence that any effort was made by the heirs of J. Harley Warner, or any of them, to conceal or suppress the facts connected with his death? A. No." And thereupon the defendant moved for judgment in his favor on such special findings, claiming "(1) that special findings of fact numbered 3 and 4, which special findings are part of the record, and are made part of this motion, are and each of them is inconsistent with the general verdict; (2) the general verdict is contrary to the special findings in the said cause, and is not supported thereby." Which said motion of the defendant the court on the 28th day of April, 1891, overruled, and entered judgment on the general verdict in favor of the plaintiff and against the defendant for the sum of \$5,323.33, and for the cost of the said suit, to which defendant duly excepted.

The testimony taken on the trial of this case is not embraced in the record here, hence we do not know whether the allegations of the complaint were sustained by proof or not. The presumption in such case is that every fact necessary to sustain the allegations of the complaint and to justify the verdict of the jury was proved on the trial. Resting upon this presumption, we shall not consider any

matter embraced in the exceptions, except the question as to whether the general verdict of the jury is consistent with their special findings and those arising upon the charge of the court. The two principal facts to be established by the plaintiff were external violence and accidental means causing death. As we have seen, the verdict of the jury, in the absence of any testimony in the record, is conclusive upon this question. It cannot be presumed as a matter of law that the accused took his own life, or that he was murdered; the presumption of law is against either murder or suicide. *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. Rep. 1360; *Richards v. Insurance Co.*, 89 Cal. 173, 26 Pac. Rep. 762; *Utter v. Insurance Co.*, 65 Mich. 545, 32 N. W. Rep. 812. By the general verdict and special findings Nos. 1 and 2 it appears that Warner's death was caused by a bullet from a gun penetrating the heart. These findings establish the fact that death was caused by external violence within the meaning of the policy.

The next inquiry is as to whether the death was accidental or intentional. If the deceased was killed by the accidental discharge of a gun in his own hands, it was accidental, within the meaning of the policy. If he committed suicide, the plaintiff cannot recover in this action, as under the terms of the policy it did not extend to cover self-destruction, whether the insured was sane or insane. Nor does this policy contain the clause retained in some policies, and referred to in *Insurance Co. v. McConkey*, *supra*, that no claim shall be made under it where the death of the insured was caused by intentional injuries inflicted by the insured or any other person. Therefore, if the deceased came to his death by a gunshot wound inflicted by an assassin or burglar, it must be deemed accidental to the deceased within the meaning of the policy, and under the presumptions spoken of. The jury do find in the third and fourth special findings that they "don't know" whether the wound found on Warner's body was produced by a pistol fired by Warner, nor whether the shot was fired by an assassin or burglar. The defendant claims that the findings are inconsistent with the general verdict, but we cannot concur in this view. The jury find that death was produced by a gunshot wound; the presumption of law is that Warner did not suicide, and was not murdered. No testimony is presented in the record of any kind to rebut these presumptions. The fact must stand admitted that Warner came to his death by external violence and accidental means. With these facts admitted, how does it matter whether a burglar or assassin shot him, or whether he shot himself.

The third question answered by the jury does not embrace the question as to whether Warner fired the shot with suicidal intent or not, so that an answer in the affirmative to the question propounded would not have shown any suicidal purpose on the part of Warner, nor would such answer have been inconsistent with the general verdict.

The jury were instructed by the court that if the deceased committed suicide the

plaintiff could not recover. They were also instructed that before the plaintiff could recover, the jury must be satisfied by a fair preponderance of evidence that the deceased came to his death by external, violent, and accidental means, and that his death was accidental; and upon the issue thus presented the jury found against the defendant in their general verdict. The most that can be claimed from the answers to the third and fourth special findings is that the jury could not determine from the evidence submitted to them whether Warner came to his death from an accidental discharge of the pistol in his own hands, or whether he was shot by an assassin or burglar. Now, if these findings were fairly open to a double construction, the general rule is held to be that, where special findings are fairly susceptible of two constructions, the one upholding, and the other overruling, the general verdict, that construction will be adopted which upholds the general verdict. *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. Rep. 614. So in *Mallory v. Insurance Co.*, 47 N. Y. 54, it is held that where, from the facts of the case, it appeared that a violent death was either the result of accidental injury or of a suicidal act of deceased, the presumption of law is against the latter, and upon that ground a verdict for the plaintiff was sustained. So, where the evidence leaves it in doubt as to whether the death of an insured was caused by a fall or by a blow struck by a third person; yet in either case the death is caused by "accidental means," within the general terms of a policy providing against injuries or death caused "through external, violent, and accidental means." *Richards v. Insurance Co.*, 89 Cal. 170, 26 Pac. Rep. 762; *Utter v. Insurance Co.*, 65 Mich. 545, 32 N. W. Rep. 812.

Exceptions are taken to the several instructions given by the court to the jury, and numbered 1, 6, 7, 8, 9, 12, 15, 16, and 17, respectively, and to the refusal of the court to charge as requested by the defendant. We have given these matters careful attention, and find that the court fairly covered all the questions presented by the pleadings in this case, and presented the law of the case fairly to the jury. Upon the whole record as presented we find no error. The judgment of the court below is affirmed, with costs.

ZONE, C. J., and BLACKBURN, J., concur.

(8 Utah, 455)

CEREGHINO v. THIRD DISTRICT COURT OF UTAH et al.

(Supreme Court of Utah. March 22, 1893.)

CERTIORARI TO DISTRICT COURT — APPEAL FROM JUSTICE'S COURT — JURISDICTION — DISMISSAL OF SUIT — COSTS OF APPEAL.

1. 1 Comp. Laws, p. 104, § 3, (act of congress,) relating "to courts and judicial officers in the territory of Utah," provides that an appeal shall be allowed to the district courts of their respective districts from all "final judgments" of justices of the peace. 2 Comp. Laws, § 3659, (a territorial act,) provides that any party dissatisfied with a judgment rendered in a justice's court may appeal the same to the

district court. *Held*, that an appeal would lie from the judgment of a justice of the peace rendered against defendants in an action of trespass in which he had no jurisdiction because defendants filed a verified answer putting in issue plaintiff's right of possession and title to the lands trespassed upon, and was the proper remedy. *Saunders v. City Nursery*, 24 Pac. Rep. 532, 6 Utah, 431, followed.

2. Where, on an appeal of such action to the district court, the suit is dismissed by the court for want of jurisdiction by the justice, the former has jurisdiction to render judgment against plaintiff for costs of the appeal.

Proceeding by Giovanna Cereghino against the third district court of Utah territory and George W. Bartch, judge thereof, for a writ of certiorari to review the proceedings of such court in a certain action of trespass appealed from a justice's court, wherein the district court dismissed the suit, and adjudged the costs of the appeal against plaintiff. Writ denied.

Chas. S. Varian, for plaintiff. James A. Williams, for defendants.

ZANE, C. J. This is an application for a writ of certiorari. In her petition the plaintiff alleges that on the 25th day of June, 1892, she commenced an action of trespass against the defendants before a justice of the peace; that they filed a verified answer putting in issue plaintiff's right of possession and title to the lands trespassed upon, and moved the court to certify the cause and the papers therein to the district court; that the justice refused to certify the same, and proceeded to try it, and rendered judgment against the defendants for \$100 and costs; that they appealed to the district court; that the district court dismissed the action for want of jurisdiction in the justice, and against the objection of the plaintiff adjudged the costs of the appeal against her. The plaintiff insists that the district court exceeded its jurisdiction in entering judgment against her for the costs of the appeal.

The first question presented for our consideration and decision is, did an appeal lie to the district court? "An act" of congress "in relation to courts and judicial officers in the territory of Utah" provides that an appeal shall be allowed to the district courts of their respective districts from all final judgments of justices of the peace. 1 Comp. Laws, Utah, 1888, p. 104, § 3. A territorial enactment also provides that any party dissatisfied with a judgment rendered in a justice's court may appeal the same to the district court. 2 Comp. Laws, Utah, § 3659. The judgment from which the appeal was taken was final. "According to the common-law rule, by a final judgment is to be understood, not a final determination of the rights of the parties, but merely of the particular suit. Therefore a judgment of nonsuit, or of dismissal without prejudice, or in favor of plaintiff or defendant upon a plea in abatement, or in an action of ejectment where the law denies to a judgment in that action the effect of res judicata, because each terminates the action in which it is entered, is final, though the parties may, in a subsequent action, be permitted to relitigate issues presented

in the former action which has gone to judgment." 1 Freem. Judgm. § 16. A justice of the peace should refuse to assume jurisdiction of a cause of action which on its face is clearly not within his jurisdiction. He should refuse to act, and then there could be no judgment to appeal from. But if he assumes jurisdiction and enters judgment dismissing the action, an appeal lies, as we have seen; or if he wrongfully decides that he has jurisdiction, and tries the case, and enters judgment, an appeal lies from that. When the case on appeal is presented to the district court, the first question for it to decide is, had the justice's court jurisdiction of the subject-matter of the suit? If not, the suit should be dismissed. If it had, the district court should proceed to try the case. The justice of the peace had jurisdiction of the subject-matter of the suit in question as the plaintiff described it to him. The want of jurisdiction was shown by the answer subsequently filed. The court denied the motion of the defendant to certify the case to the district court, and proceeded to try it and to enter judgment. From this the defendants appealed.

The case of *Ducheneau v. House*, 4 Utah, 363, 10 Pac. Rep. 427, is cited, in which it is stated that the court, in the case of *Golding v. Jennings*, 1 Utah, 135, said: "When the court in which the cause sought to be reviewed is pending has no jurisdiction of the subject-matter, a writ of certiorari is proper, notwithstanding the statute gives the party the right of appeal, for the appeal in such a case would not be an adequate remedy." It was intimated on the argument of this cause that a writ of certiorari or prohibition should have been resorted to by defendants, and that an appeal from the justice was not the proper remedy because inadequate. In the case cited the court conceded the right of appeal. The statement in the quotation that an appeal is not an adequate remedy is incorrect. 1 Comp. Laws Utah 1888, p. 104, § 3, declares that such appeal shall vacate the judgment appealed from, and the dismissal of the cause by the appellate court is as complete a remedy as certiorari or prohibition. Inasmuch as the reason given for the issuance of the writ of certiorari where an appeal lies does not exist, its issuance in such a case is unauthorized. Whether the judgment is vacated by an appeal, and the suit is annulled upon certiorari, or its execution is forbidden by prohibition, the plaintiff should have the right to institute a suit in a court having jurisdiction of its subject-matter.

Reference has been made to the case of *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. Rep. 570. In it the court said: "It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. That may be true where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger—as he may in England—applies for the writ of prohibition. But where that court has clearly no jurisdic-

tion of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right." The writ of certiorari and the writ of prohibition are extraordinary remedies, and are not allowed when the ordinary remedy is adequate. An appeal, where it is given, is the ordinary remedy, and must be resorted to where it is adequate. We reaffirm the case of *Saunders v. City Nursery*, 6 Utah 431, 24 Pac. Rep. 532, in which this doctrine upon the subject is clearly announced.

An appeal having been properly taken, it was the duty of the district court to decide whether the court from whose judgment it had been taken had jurisdiction of the subject-matter of the action, and, if it had not, to dismiss it, which it appears from the petition it did. Having authority to decide the question and dismiss the case, had it authority to adjudge the costs of the appeal against the plaintiff? The order dismissing the suit was a final judgment. After the justice's court had lost jurisdiction, the plaintiff insisted that the case should be tried, and upon a judgment against the defendants they were compelled to appeal to get rid of it. A refusal of the district court to act and to dismiss the suit would have been the refusal of an ordinary remedy to the defendants, in effect to decide that there was no appeal, and that the judgment of the justice should remain. The right to dismiss the suit gave the right to tax the costs of the appeal against the party decided against. The case of *Langford v. Monteith*, 102 U. S. 145, was commenced before a justice of the peace, and defendant's verified answer involved a question of title to land, and the justice refused to certify the cause to the district court, and tried the cause, and an appeal was taken to the district court. The cause finally came before the supreme court of the United States. In deciding the case the court said: "We are of opinion that the justice of the peace had no jurisdiction to try the case after the sworn answer of the defendant was filed, and that it was his duty to certify it for primary trial to the district court. When removed there on appeal, it should have been dismissed, because there could have been no lawful trial before the justice." This affirms the right of the district court to dismiss the appeal.

In *Bradstreet Co. v. Higgins*, 114 U. S. 262, 5 Sup. Ct. Rep. 880, the court said: "Here, however, the question is not as to the right of the defendant in error to recover his costs in the suit, but only such as are incident to his motion to dismiss. It has been decided that the writ of error was wrongfully sued out by the plaintiff in error. To get rid of the writ and the supersedeas which had been obtained thereunder, the defendant in error was compelled to come to this court, and move to dismiss. That motion we had jurisdiction to hear and decide. The right to decide implies the right to adjudge as to all costs which are incident to the motion." In this case the writ of error had been wrongfully sued out, and the court was without

jurisdiction, but the court held that, to get rid of the writ and the supersedeas obtained thereunder, a motion to dismiss was necessary, and that the court had jurisdiction to hear and decide it, and that the right to decide implies the right to adjudge as to all costs which were incident to the motion. Other cases cited hold that when the want of jurisdiction appears on the face of the papers the court in which suit is brought should refuse to take jurisdiction, and that when such papers have been filed the court should strike them from the files. In such cases costs should not be taxed, because there is no adjudication. They have no application to a case of which the court has assumed jurisdiction, and rendered judgment, and an appeal has been taken, and the appellate court has jurisdiction to dismiss the suit. In such a case the right to adjudge the costs of the appeal is implied. The court holds that the costs of the appeal complained of were properly adjudged against the plaintiff. The writ of certiorari is denied.

BLACKBURN and MINER, JJ., concur.

(8 Utah, 452)

NEPHI IRRIGATION CO. v. JENKINS  
et al.

(Supreme Court of Utah. March 15, 1893.)

SUPREME COURT—QUORUM—POWER OF JUSTICES.

Under 25 U. S. St. at Large, p. 203, providing that the supreme court of Utah shall consist of a chief justice and three associate justices, any three of whom shall constitute a quorum, but no justice shall act as a member of the supreme court in any action appealed from a decision rendered by him as a judge of the district court, a justice who tried the case below may sit for the purpose of making a quorum of the supreme court, but cannot act or participate in the proceedings.

Appeal from district court, Utah county; John W. Blackburn, Justice.

Action by the Nephi Irrigation Company against Richard Jenkins and another to determine priority rights to the use of the waters of a certain creek. An incomplete decree in favor of defendants was reversed on appeal, and the case remanded, with directions to refer it to a master. Defendants move to recall remittitur. Motion denied.

For decision on appeal, see 31 Pac. Rep. 986.

Chas. S. Varian, for appellant. Jacob Johnson, for respondents.

PER CURIAM. This case was submitted to the court on briefs, Chief Justice Zane presiding, who, together with Justices Miner and Anderson, constituted the court at the time of such submission. Justice Blackburn having tried the case below, did not sit in this case. Chief Justice Zane rendered the opinion of the court, Justice Miner concurring. The opinion was handed down at a time when Chief Justice Zane and Justices Miner and Blackburn were sitting as a court, and constituting a quorum thereof. The objection is made that Justice Blackburn

would not count as a member of the court, so as to constitute a quorum when the decision was rendered. "The supreme court consists of a chief justice and three associate justices, any three of whom shall constitute a quorum; but no justice shall act as a member of the supreme court in any action or proceeding brought to such court by writ of error, bill of exceptions, or appeal from a decision, judgment, or decree rendered by him as a judge of the district court." 25 U. S. St. at Large, p. 203. Under this act any three of the justices constitute a quorum for the transaction of business, and a justice who tried the case below may sit for the purpose of making a quorum, but such justice cannot act or participate in such proceeding. This must have been the intention of congress in passing this act; any other construction would render the court powerless to act in many cases brought before it. Under the contention claimed by respondent the sickness or absence of one of the justices would render it impossible to obtain a quorum so as to transact business, although it would be competent for two concurring justices, when three constitute a quorum, to render an opinion. If the disqualified justice cannot constitute one of the quorum without acting, the two remaining justices would be powerless to act. The motion to recall remittitur is denied.

**BLACKBURN, J., did not sit in this hearing.**

(98 Cal. 42)

**PIEPER v. PEERS et al. (No. 14,523.)**

(Supreme Court of California. March 29, 1893.)

**STAY OF EXECUTION — ACTION ON BOND — PLEADING.**

In an action on a bond given to stay, pending appeal, execution on a justice's judgment for the return of personal property or its value, where the appeal has been dismissed by the superior court, the complaint need not allege that execution was issued and returned unsatisfied, or that notice of the dismissal of the appeal was given, or that demand was made before the action was brought, or that a delivery of the property could not be had, or that appellant has refused to obey an order of the superior court, unless a recovery is sought on such order.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action by Charles H. Pieper against Alexander Peers and others on a bond given to stay execution pending appeal. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. H. Campbell, for appellants. W. P. Veuve, for respondent.

**FITZGERALD, J.** This was an action against the defendants, as sureties upon an undertaking given to stay execution of judgment pending appeal. The defendants demurred to the complaint on the ground of insufficiency, and the demurrer was properly overruled. They then answered, and plaintiff had judgment, from which the defendants appeal upon the judgment roll alone.

It is substantially alleged, and the court finds, that one Marie Albert obtained a judgment in a justice's court against one Lucas for the delivery of a certain lot of hay, or the value thereof in case delivery cannot be had; that Lucas thereafter filed and served notice of appeal therefrom to the superior court, and that thereupon the defendants executed and filed in the justice's court their written undertaking and justification on appeal, conditioned in pursuance of the provisions of section 978, Code Civil Proc.; that the appeal was thereafter dismissed by the superior court; that no part of the hay has ever been delivered, nor any part of its value or the costs ever been paid pursuant to the judgment, and that the judgment was duly assigned to plaintiff. It was not necessary to the sufficiency of the complaint to allege the issuance and return of the execution unsatisfied, (*Nickerson v. Chatterton*, 7 Cal. 573; *Tissot v. Darling*, 9 Cal. 285;) or that notice of the dismissal of the appeal by the superior court was given, (*Murdock v. Brooks*, 38 Cal. 604;) or that demand was made prior to the commencement of the action, (*Coburn v. Brooks*, 78 Cal. 443, 21 Pac. Rep. 2; *Murdock v. Brooks*, supra;) or that a delivery of the property could not be had; or that any order was made by the superior court, which the appellant in that case failed or refused to obey, unless a recovery is sought upon such order, when made, which is not the case here, for the obvious reason that the undertaking on appeal, which is the basis of this action, is an independent and absolute contract on the part of the defendants, by the terms of which they expressly promised and agreed, in consideration of a stay of the execution of the judgment appealed from, "that the appellant will pay the amount of the judgment so appealed from and all costs, and will obey the order of the court made therein if the appeal be withdrawn or dismissed." In *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. Rep. 296, which was an action upon an undertaking on appeal to a superior court, it was said by Justice Harrison: "By their undertaking the defendants promised and agreed that, 'if the appeal be withdrawn or dismissed,' the appellant would pay the amount of the judgment so appealed from. This was an original and independent agreement on their part, (*Tissot v. Darling*, 9 Cal. 278,) and in legal effect was entered into by them with the plaintiff. By virtue of the provisions of section 979 of the Code of Civil Procedure, upon the filing of the undertaking staying proceedings all proceedings under the execution are to be stayed. \* \* \* The consideration recited in the undertaking was the 'staying of the execution of the judgment appealed from,' and, as this undertaking was filed, it became an executed obligation on their part, and, whenever the contingency upon which the obligation was to depend arose, their liability became fixed. This liability could not thereafter be defeated by an act or omission on their part or on the part of their principal. Their agreement to be bound in case the appeal should be dismissed extended as well to a dismissal resulting from their failure to justify as

to a dismissal resulting from a failure on the part of their principal to prosecute the appeal. \* \* \* We do not think that it was competent for the defendants, after they had executed the undertaking, to avoid their liability thereon by any act of their own, or any failure to comply with a provision which is intended solely for the protection of the respondent." Upon the dismissal of the appeal the defendants became liable for the amount of the judgment appealed from, and all costs. To discharge themselves from this liability, they must show as a matter of defense that the judgment has been satisfied by the return of the property, or that the amount of the judgment and costs have been paid. As this does not appear to have been done, it follows that the judgment should be affirmed, and it is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

(98 Cal. 10)

**BROWN v. JENKS. (No. 14,914.)**

(Supreme Court of California. March 27, 1893.)

**STREET-PAVING CONTRACT—PROVISION FOR REPAIRS BY CONTRACTOR.**

1. A requirement in a street-paving contract that a contractor shall keep the street in repair for five years imposes an additional burden on the property owners, and therefore violates the assessment made under it, unless such requirement is authorized by the statute providing for the letting of contracts for street improvements.

2. The objection as to the additional burden is not removed by testimony of the contractor that the requirement did not enhance the amount of his bid, as others might have bid a less sum if the contract had not contained such requirement.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Gratz K. Brown against C. L. Jenks on an assessment for street paving. There was a judgment for plaintiff, and defendant appeals. Reversed.

C. L. Jenks, for appellant. Shaw & Holland and C. T. H. Palmer, for appellee.

TEMPLE, C. This appeal is from the judgment, and presents two questions: (1) Whether the court properly overruled defendant's demurrer to plaintiff's complaint; (2) whether the court properly struck out a defense from the answer. Respondent confesses error in striking out the defense, and consents that the case be reversed on that ground. He says the point made by defendant on the demurrer is radical and important, and will be argued when the case is again here in such form as to require its determination. The question as to the correctness of this ruling is properly presented on this appeal from the judgment, and the consent of respondent to a reversal on some other ground, which does not dispose of the demurrer, cannot deprive appellant of his right to have it determined. The ques-

tion there raised is whether defendant can be put to the labor and expense of a trial on the merits, or not. Naturally, it is the first point to be determined, and, as the city of San Diego may have an interest in the question beyond this case, it is to be regretted that we have not the advantage of the views of its counsel upon the subject.

The action is brought upon an assessment for street work. It appears that the city council passed a resolution to the effect that it was its intention to order the following street work done: "That D street, from the east line of California street to the east line of Front street, \* \* \* be paved with hard porphyry rock macadamizing, and cross-walked with granite and guttered with granite, all in accordance with the general specifications and the special specifications No. 1 for business streets," etc. The notices required were duly given, a resolution in due form passed, the proper time requiring the work to be done; and the work was contracted to be done, in accordance with the resolution of intention, to a contractor, who has done the work as required, which has been duly accepted by the proper officers of the city. The specifications referred to required the contractor to give a bond, with sureties, conditioned "for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract. Payment in full of the contract price shall not release the contractor or sureties on said bond until five (5) years shall have expired. The necessity of such repairs shall be determined by the street commissioner and ex officio superintendent of streets and the street committee of the city of San Diego." The specifications are attached to the complaint, and make a part of it, and it is averred that the bond was given by the contractor as required. It is contended that this requirement in the contract vitiated the assessment. The work was done under the provisions of an act of the legislature passed March 18, 1885, (St. 1885, p. 147.) This act contains no grant of authority to the city council to contract for keeping a street in repair. Section 2 authorizes the council to contract for different kinds of street work. In all cases the work authorized is such as is necessary to make and complete a street, or to repair existing defects. The bond is not only unauthorized by the words of the statute, but the requirement changes, and may increase, the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite; and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required. And then they are assessed upon a different basis from that provided by the statute. Section 13 provides that needed repairs



shall be made by the owners of the frontage where the repairs are required. Under the contract all the owners of frontage along the entire line are assessed in proportion to frontage. As to some of them, no repairs may ever be required, or such as would be much less costly than repairs at other places along the line covered by the contract. From the argument of appellant, I gather that it was suggested in the lower court that this requirement in the specifications was intended as a guaranty that the work would be well done, and would not require repairs for that period of time. If so, the provision is equally unauthorized. The lot owner cannot be made to pay for such a guaranty, which may become worthless before the time has elapsed. Officers are provided and vested with the power, and charged with the duty, of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty. Besides, it is for all repairs, and not such as may result from defects in the work. It covers repairs for defects from unforeseen causes, or from wanton abuse of the street by individuals.

If the contractor is willing to testify that the anticipated cost of repairing did not enhance the price, such testimony would not help the matter. Others might have bid for the work a less sum, if this requirement had not been made. I think the case should be reversed, with directions to the court below to sustain the demurrer.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to sustain the demurrer.

BURNETT v. LLEWELYN. (No. 19,038.)  
(Supreme Court of California. March 28, 1893.)

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Burnett against Llewelyn on an assessment for street paving. There was a judgment for plaintiff, and defendant appeals. Reversed.

Hunsaker, Britt & Goodrich, for appellant. Wellborn, Stevens & Wellborn, for respondent.

PER CURIAM. The court erred in striking out the second defense in the answer of the defendant. (Brown v. Jenks, 32 Pac. Rep. 701, No. 14,914, this day decided,) and upon the authority of that case the judgment is reversed, and the cause remanded.

(97 Cal. 647)

PARSONS v. SMILIE. (No. 19,135.)  
(Supreme Court of California. March 25, 1893.)  
BREACH OF CONDITION SUBSEQUENT IN DEED —  
EQUITABLE RELIEF FROM FORFEITURE.

1. In an action to compel a reconveyance of land on which plaintiff had entered for breach of a condition subsequent, that defendant (plaintiff's grantee) should maintain a lumber yard on the premises conveyed, for five years, the trial court found that the conveyance was made at a time of great excitement in the real-estate

market, and both plaintiff and defendant believed that large quantities of lumber would be required for building, as represented by plaintiff, but that there was little, if any, demand for lumber when defendant discontinued the lumber yard, and has not been any since. *Held*, that equity would not relieve defendant from the forfeiture, as the damage to plaintiff by the breach of the condition could not be ascertained, and it was immaterial whether or not the price paid by defendant for the land was its full value at the time of the conveyance.

2. Under Civil Code, § 1109, providing that, on breach of a condition subsequent in a grant, "the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors," a grantor, on entry for breach of condition in a recorded deed, may sue to compel a reconveyance, as the record of the deed shows the legal title to be in the grantee notwithstanding the entry.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Ephraim Parsons against Robert Smilie to compel a reconveyance of land for breach of condition subsequent. There was a judgment for defendant, and plaintiff appeals. Reversed.

Graves, O'Melveny & Shankland, for appellant. Metcalf & Metcalf and Chas. L. Batcheller, for respondent.

HAYNES, C. Appeal from judgment and order denying plaintiff's motion for a new trial. On the 21st day of November, 1887, plaintiff was the owner of four certain lots in North Pomona, Los Angeles county, and on that day executed and delivered to the defendant a deed of conveyance of the same for the consideration, therein expressed, of \$1,073.60, then paid by defendant. The granting part of the deed was in the usual form, following which was this clause: "This deed is given and accepted on the following conditions, which are to be binding on the party of the second part, his heirs and assigns, forever, to wit: The party of the second part shall put and maintain thereon a good lumber yard for a period of not less than five years, said yard to be opened for business within 120 days from this date. It is further stipulated that no intoxicating drinks shall ever be made or sold or given away on the above premises; and the party of the second part binds himself, his heirs, and assigns, to the above covenants, and, in case the above-described premises are transferred to other party or parties, they are to be bound by the above-named conditions, and a failure to comply with same will render this conveyance null and void, and said premises shall revert to said first party." This deed was duly recorded. Plaintiff entered for a breach of the condition to maintain a lumber yard on said premises, and notified defendant thereof, and demanded a reconveyance, and brought this action to compel such reconveyance, and remove the cloud caused by the record of defendant's deed. A general demurrer was interposed to the complaint, which was properly overruled. The defense to the action will sufficiently appear from the findings of the court. The findings were 27 in number, and can only be outlined in this opinion. The court found the condition as above

rected; that defendant erected an office upon one of the lots for the sale of lumber, and maintained a lumber yard for less than a year; that plaintiff entered for condition broken, and notified defendant thereof, and demanded a reconveyance; that, at the date of said conveyance, plaintiff owned a large tract of land in the immediate vicinity of the lots conveyed to defendant; that defendant was a contractor and dealer in lumber, and was desirous of establishing a lumber yard in that locality, which plaintiff also desired, for the purpose of affording facilities to the purchasers of land, and to himself, for procuring lumber; that said lots were not at the time of the sale of the value in the market of \$2,500, as alleged in the complaint, but were of the value of \$1,073.60, and no more, and are now worth not exceeding \$1,000. It was also alleged in the answer, and found by the court, that this transaction occurred during a period of great excitement in the real estate market regarding values and prospects of improvement, and the laying out of new towns on unoccupied land, and particularly in that vicinity; that plaintiff represented that large quantities of lumber and other materials would be required by plaintiff and others for building houses, and other purposes; that defendant relied on these representations, but that they were not false or fraudulent, as alleged in the answer, and were not intended to deceive the defendant, but they were believed to be true both by plaintiff and defendant, and both plaintiff and defendant were deceived thereby; that large quantities of lumber were not required, either by plaintiff or other persons, and that very little lumber or other materials were sold by defendant from said lumber yard; and that, at the time the lumber yard was discontinued, there was very little, if any, demand for a lumber yard on the said premises, and has not been since that time. The court further found "that defendant offered to make full compensation to plaintiff for whatever detriment had been occasioned to plaintiff by reason of the failure, if any, of defendant to comply with the provisions of said deed," but that no detriment had been occasioned to plaintiff by reason of such failure, and "that the defendant has not committed any grossly negligent or negligent or willful or fraudulent, breach of duty, nor any breach of duty," and "that he had fulfilled and performed all of the conditions in said deed, except as in these findings stated;" that on the 23d day of March, 1891, the defendant offered to reconvey to the plaintiff the said premises upon the repayment by the plaintiff of the sum of \$1,073.60, together with legal interest thereon from the date of the deed; that defendant also offered to compensate plaintiff for any detriment he had sustained, but that plaintiff had not been injured by the breach of the condition. Many of these findings are immaterial, unless, as respondent contends, the defendant, under the facts so found, is entitled, in equity, to be relieved from the consequence of his breach of the condition upon which the property was conveyed to him.

Near the close of his brief, respondent states the case as follows: "In the present case, defendant has not asked to be excused from performing on account of difficulty or expense or hardship, or because he was deceived by the plaintiff, but practically admits the breach at least of the condition that he shall maintain a lumber yard for five years, and, in case the court thinks that the complaint and conditions are sufficient, asks the court to relieve him by allowing him to make compensation for any injury he has caused." The complaint is clearly sufficient, nor can there be any doubt or room for construction as to the condition in question. Counsel say the expression, "a good lumber yard," is ambiguous and indefinite; but that question is not involved. If defendant had maintained a lumber yard of some kind for the whole period, that question might have arisen; but, if he did not keep any, he did not keep a good one.

I do not in the least controvert the general doctrine that equity will not render its aid to enforce a forfeiture for breach of condition subsequent in a deed, but the question presented is how far equity shall interfere to defeat a forfeiture for the violation of such condition. At common law, two things were required to revest the estate in the grantor, viz. a breach of the condition, and an entry for condition broken. Here both of these things occurred. It is conceded by defendant that he failed to perform the condition, and it is found by the court that plaintiff entered upon the premises, notified the defendant of the breach, and that he claimed the premises, and demanded a reconveyance. If it be true, therefore, that a re-entry after condition broken revests the estate in the grantor, it would be necessary to show, in order to sustain respondent's contention, that equity has the power to defeat the operation of the law and the acts of the parties, and take away from the plaintiff the estate which has become revested in him, and again vest it in the defendant. The conveyance upon condition was voluntarily accepted by the defendant; it was not unlawful, nor impossible of performance; and, in case of a contract thus entered into, equity would not relieve him from his obligation to perform it. There are cases in which equity has relieved against a forfeiture of the estate, but none, I think, under the circumstances, nor of the character, here involved. In the case of *Bethlehem v. Annis*, 40 N. H. 39, the principle is stated that wherever a conveyance of land upon a condition which is in equity regarded as a mortgage, or as a security for a loan of money, equity may relieve, and that this doctrine applies to cases generally where conditional deeds are made as security for the performance of a contract. After stating these general principles the court in that case said: "But, upon consideration, it will be seen that this principle, though generally true, can have no application to any other contracts than such as by their nonperformance create a debt, or a demand in the nature of a debt, against the delinquent party. Wherever the condition, when broken, gives rise to no claim

for damages whatever, or to a claim for liquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law." In *Henry v. Tupper*, 29 Vt. 358, it was said, (syllabus:) "A court of equity may grant relief from forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases." So there are numerous cases arising under leases, and in contracts where time is not of the essence of the contract, in which courts of equity will relieve against a forfeiture. The general doctrine is that equity will relieve where the thing may be done afterwards, or compensation can be made for it, but that unless a full compensation can be given, so as to put the party in precisely the same situation, a court of equity will not interfere, for such jurisdiction would be arbitrary. Washburn (2 Real Prop. p. 23) says: "And the only cases where equity interposes as to such conditions are where the failure of performance has been the effect of accident, and the injury is capable of compensation in damages which the court has the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time. But where the condition is for the performance of a collateral act the rule is different, as the court has no standard by which to measure damages." *Livingston v. Tompkins*, 4 Johns. Ch. 415, 431; *Bacon v. Huntington*, 14 Conn. 92; *Hill v. Barclay*, 18 Ves. 56; *Henry v. Tupper*, 29 Vt. 358, 372. The same author again says, (page 28:) "But if the act be willfully done, or one for which the court has no certain rule by which to measure the damages, beyond their own arbitrary judgment in the matter, equity will not relieve." See, also, *Descarlett v. Dennett*, 9 Mod. 22; *Wafer v. Mocato*, Id. 112; *Northcote v. Duke*, 2 Eden, 322. In *Elliott v. Turner*, 13 Sim. 485, it is held that "willful," in such a case, is the same as a voluntary act of the party.

Counsel for respondent relies strongly upon section 3275 of the Civil Code, which is as follows: "Whenever, by the terms of an obligation, a party thereto incur a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." This section has never, so far as I have been able to find, been construed by this court. Appellant contends that it has no application to conditions either precedent or subsequent, but applies to covenants or other obligations capable of direct enforcement by action. I do not think it necessary to determine that question. Assuming that it applies to cases of

forfeiture for breach of conditions subsequent, it closely follows the principles stated in the cases above cited. Compensation will only be made where there is some measure or standard by which it can be estimated; nor can I see anything in this section requiring the word "willful" to be given a different meaning from that expressed in the cases upon the subject of relief from forfeiture, which is the ordinary meaning of the word. In *Elliott v. Turner*, supra, the chancellor said it meant the same as "spontaneous" or "voluntary." Lord Eldon, in *Hill v. Barclay*, supra, does not define the word, but uses it in connection with the words "neglect" and "omission," as well as in connection with acts performed. Redfield, C. J., in *Henry v. Tupper*, 29 Vt., at page 373, said: "In cases where the condition is for the payment of money, or for the performing of a certain value of services expressed in currency, as one hundred dollars of necessary repairs upon buildings leased, it has been, I think, the more general practice of the court to grant relief as matter of right, without reference to the inquiry whether the default was accidental or willful; but in all cases where the thing to be done was something collateral, where the issue, quantum damnificatus, must be sent either to a jury or masters before the court could grant relief, they have pretty generally, I think, required to be satisfied that the omission to perform was not willful, but accidental and by surprise, and it has been held, always, in such cases, to depend very much upon the circumstances of the particular case." Black's Law Dictionary defines the word "willful" as follows: "Proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious." The court, however, made a finding that the breach of the condition by defendant was not "grossly negligent or willful or fraudulent." Unless the word "willful" was understood by the court, in that connection, to mean "malicious," or with intent to injure the plaintiff, the finding cannot be sustained from the evidence. For a period of about two months defendant kept a man in charge of the lumber yard, afterwards left it in care of the railroad station agent for some time, and, within a year from the time it was started, removed the lumber remaining unsold to his lumber yard at the town of Pomona, two miles or more from the premises in question. It is impossible to conclude that his removal of the lumber yard was not intentional or voluntary, or that it was not the act of his will to do so; nor can I conceive of any possible measure of damages, or mode of estimating or determining the extent of the injury to plaintiff, by defendant's breach of this condition, even if it were material to do so. The authorities clearly show that the cases where compensation has been allowed were of an entirely different class from the case at bar, and where, as was said by Chief Justice Redfield, it would not be necessary to send the issue of the amount of damages either to a jury or masters before the court could grant relief. In *Wafer v. Mocato*, 9 Mod. 112, it was said: "For this

court never relieves but in such cases where it can give some compensation in damages, and where there is some rule to be the measure of such damages, to avoid being arbitrary." And in a note to *Descairett v. Dennett*, Id. 22, it was said "that the court of chancery will not relieve against a covenant where on the performance or nonperformance of the act to be done, if omitted, the party is to pay a sum by way of liquidated damages." The court found that plaintiff had not sustained any injury from defendant's breach of the condition, and that the price paid by the defendant for the lots was the then market value. I do not think it material whether it was or not. The plaintiff may have been unwilling to sell, even at the fair market value, except for the purpose of having a lumber yard conducted upon these lots. There must have been a purpose on the part of the grantor in inserting that condition in the deed, and this purpose must have been understood and considered by defendant in accepting the condition. That the establishment and maintenance of such business was beneficial to the plaintiff is beyond question, but the quantum of such benefit in dollars and cents is absolutely incapable of computation or estimation, and for that reason the injury sustained by the breach in question cannot be ascertained by any rule or measure of damages known to the law.

While not undertaking to decide what exceptions there may be to the general rules stated by the authorities upon the subject of relief against forfeiture, I think it clear that this case is not an exception to those rules, and that the circumstances insisted upon by respondent will not justify this court in affirming the judgment. A court of equity cannot undertake to set aside the deliberate contracts or obligations of parties, fairly and freely assumed, because time may show that the obligation was onerous or unprofitable. Equity was not intended to subvert the law, nor has it any authority to set aside or disregard the positive, legal obligations voluntarily assumed by parties, except under those special circumstances recognized, though not always clearly defined, by the authorities. If it be said that the plaintiff has come into a court of equity, and that the judgment is right because equity will not enforce a forfeiture, the reply is that the Civil Code permits it. The deed from plaintiff to defendant is shown to have been recorded by the record, and under our recording acts the legal title to the premises, notwithstanding the entry for condition broken, appears to be in the defendant. Section 1109 of the Civil Code provides as follows: "Where a grant is made upon conditions subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors by grant duly acknowledged for record." In *Liebrand v. Otto*, 56 Cal. 248, the action was to remove a cloud from plaintiff's title. The defendant had never been in possession. The action there, as here, was based upon a forfeiture. The court there said that the case thus far had

been treated as a proceeding in equity to remove a cloud from plaintiff's title, but that it might also be considered as a suit brought under section 1109 of the Civil Code; that, if the grantee had failed to perform the conditions upon which the grant was made, it was its duty, under that section of the Code, to reconvey the property to the grantor. This being a duty required and enjoined by the statute, and one essential to show plaintiff's title upon the record, the case is taken out of the ordinary proceedings in equity, and the action is one based upon a statutory right. The plaintiff, if he were not in possession, might have brought ejectment, and recovered, but that would not have cured the defect apparent upon the record in his title; and our Code procedure will not require, even if the plaintiff be not in possession, that he should bring two actions,—one to establish his title at law, and the other to compel a conveyance. The form of action is, I think, proper, showing the facts which establish the plaintiff's legal title, and at the same time compelling the conveyance under the Code provision. In the view I take of the case, the finding that the plaintiff is not now the owner in fee, or at all, of said premises, is not sustained by the evidence, nor do the findings support the judgment, and the judgment and order appealed from should be reversed, and I so advise.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

(98 Cal. 1)

WILMINGTON TRANSP. CO. v. O'NIEL.  
(No. 14,872.)

(Supreme Court of California. March 27, 1893.)  
CONTRACT—CONSTRUCTION—LIQUIDATED DAMAGES  
—VALIDITY OF STIPULATION.

1. In an action on a contract the complaint alleged that defendant hired plaintiff's lighter, and agreed to return the same in good condition, and, if lost or damaged to the extent that it could not be put in the same good condition as when received, to pay \$3,500 for the lighter; and that while in his use it was lost, whereby defendant became indebted to plaintiff for \$3,500. Defendant answered that the lighter was destroyed by the act of God and the elements; that the actual worth of the lighter was only \$1,800, and that he has been and is now willing to pay plaintiff \$2,500. *Held*, that the answer failed to set up any defense, the cause of the loss being immaterial.

2. The \$3,500 mentioned in the contract should be regarded as liquidated damages, and not as a penalty.

3. Under Civil Code, §§ 1670, 1671, providing that every contract which determines in advance the amount of damages to be paid in case of a breach shall to that extent be void, except where it would be extremely difficult from the nature of the case to fix the actual damages, the contract set out in the complaint is void so far as it attempts to fix such amount.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Wilmington Transporta-

tion Company against Patrick O'Neil on a contract. There was judgment for plaintiff, and defendant appeals. Reversed.

John Roberts, A. M. Carpenter, and Roberts & Robinson, for appellant. D. P. Hatch and John D. Bicknell, for respondent.

VAN CLIEF, C. On November 3, 1890, the respondent, (plaintiff,) a corporation, as party of the first part, and the appellant (defendant,) as party of the second part, executed the following agreement: "That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by said party of the second part, does covenant and agree unto the chartering and letting to hire of its coal lighter Wilmington, her anchor and chain, unto the said party of the second part for the term of one month from the date hereof; said lighter to be exclusively employed during the term of this charter party in transporting rocks from Santa Catalina island to Wilmington bay, for use on the government breakwater. The said party of the second part, in consideration of the foregoing and the use of said lighter Wilmington, does hereby covenant and agree to and with the said party of the first part to pay for the chartering and use of said lighter Wilmington, under the aforesaid conditions, at the rate of fifty dollars (\$50) per month, payable in advance, and to return the said lighter Wilmington to said party of the first part in the same good condition as when received, ordinary wear and tear not excepted, upon twenty hours' notice being given by the said party of the first part, and to deliver said lighter alongside the Southern Pacific Co.'s wharf at San Pedro; and should said lighter Wilmington be lost or damaged to the extent that it cannot be put in the same good condition as when received, the party of the second part to pay the party of the first part the sum of thirty-five hundred dollars (\$3,500) for said lighter Wilmington. Wilmington Transportation Co. By its secretary, W. G. Halstead. Patrick O'Neil." The action is based upon the agreement to pay \$3,500 in case the lighter should be lost, and it is averred in the complaint that the lighter Wilmington was delivered to defendant according to the agreement; "that on or about the 12th day of November, 1890, said coal lighter Wilmington, while in the use and occupation of the defendant, was lost and damaged to the extent that it cannot be put in the same good condition as when received from plaintiff by defendant, said coal lighter Wilmington being totally lost and destroyed; that under and by virtue of the terms and conditions of said agreement the defendant became indebted to the plaintiff in the sum of \$3,500, as provided in said agreement, no part of which sum has been paid; that the plaintiff demanded payment of the said defendant of the sum of thirty-five hundred dollars, but said defendant at all times, and still does, refuse and neglect to pay said sum, or any part or portion

thereof." The prayer is for judgment against defendant for the sum of \$3,500, "with interest thereon from November 12, 1890, (date of the loss,) until paid, with costs of this action." The complaint contains no averment as to the value of the lighter, nor as to the "twenty-hours notice" mentioned in the agreement. Defendant demurred to the complaint on the general ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled by the court, and defendant answered. The answer admits the execution of the agreement, and alleges "that the lighter was not injured, lost, or destroyed by any act, negligence, or default of the defendant, but by act of God and the elements," and proceeds to state particularly the manner and causes of the loss during a storm; further alleges that the value of the lighter at the time it was delivered to defendant, or at any time thereafter, did not exceed \$1,800; and further alleges that the defendant at all times has been, and now is, willing "to pay to the plaintiff the sum of \$2,500, which, he avers, is more than the value of said lighter and the damages sustained by plaintiff." In this state of the pleadings the plaintiff moved for judgment on the pleadings according to the prayer of the complaint, which motion was granted, the judgment being for \$3,717.81, with interest thereon until paid. This includes interest on \$3,500 from the date of the loss of the lighter. The defendant appeals from the judgment and contends—First, that the answer raised a material issue as to whether the lighter was lost by inevitable accident; second, that the sum to be paid (\$3,500) in case the lighter should be lost or damaged, etc., was not intended to be fixed as liquidated damages, and that such intention does not appear from the agreement, properly construed; and, third, that if the sum of \$3,500 was intended as liquidated damages, the agreement to that extent is made void by sections 1670 and 1671 of the Civil Code.

1. I think the first point cannot be sustained by the authorities. The defendant expressly promised to pay in case the lighter should be lost, without any provision or qualification in the contract as to the manner or cause of such loss. Where a party has expressly undertaken without any qualification to do anything not naturally or necessarily impossible under all circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause over which he had no control, but against which he might have provided in his contract. Whart. Cont. §§ 311, 314, and authorities there cited, particularly, *School Dist. v. Dauchy*, 25 Conn. 530; *Harmony v. Bingham*, 12 N. Y. 99; *Tomkins v. Dudley*, 25 N. Y. 272. It is to be observed, however, that the contract here is not merely to return or to redeliver the lighter to plaintiff, but also to pay \$3,500 in case the lighter should be lost; and that there is no pretense that such payment has been rendered impossible or impracticable by any cause, so that the alleged

casus can apply only to the promise to redeliver the lighter; while the action is based solely upon the alleged breach of the promise to pay in case the lighter should be lost. If I am not mistaken in this view of the nature of the case, the issue as to the cause of the loss is wholly immaterial. The possibility of a loss was foreseen, and provided for in the agreement, whereby the defendant unqualifiedly obligated himself to pay in the event of a loss from any cause; and the only qualification or limitation of this obligation by the law is that it would not bind the defendant in case the loss had been caused by the culpable negligence or other wrongful act of the plaintiff, of which there is no pretense.

2. Is the agreement susceptible of the construction that the parties intended the \$3,500 as a penalty within which the actual damages for the loss or injury might be assessed, and not as fixed liquidated damages? If such is a proper construction of the agreement, the plaintiff should have alleged and proved the actual damage; and the answer of the defendant that the value of the lighter did not exceed \$1,800 would have been material as a partial defense to the action. "The weight of authority," says Mr. Field in his work on Damages, (section 136,) "seems to support the position that the sum fixed upon will be regarded as a penalty, or as liquidated damages, according to the intention of the parties, and that this intention may be gathered from the whole instrument, the subject-matter of the contract, and extraneous facts and circumstances." See, also, Sedg. Dam. § 396. The only circumstance that can be said to indicate that the parties intended the sum of \$3,500 as penalty, and not as liquidated damages, is that the same sum is required to be paid in case the lighter should "be damaged to the extent that it cannot be put in the same good condition as when received," as in case the lighter should "be lost," though the damage in the former case might be less than in the latter. The rule in cases of this kind, deduced from the cases cited by Mr. Sedgwick, is stated by him at section 413 as follows: "A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." But upon examination of the cases referred to, it will be seen that this rule has often been applied where it was admitted that the parties intended stipulated damages, and not a penalty; so that the application of the rule does not always depend upon the intention of the parties. Yet where it is otherwise doubtful whether penalty or stipulated damages was intended, the circumstances that the sum agreed upon greatly exceeds the actual damage for a breach of any one of the several stipulations tends, in a greater or less degree, according to the disparity between the stipulated sum and the actual damage, to prove that such sum was intended as a penalty, and not as stipulated damages. In this case it is

not clear what extent of damage to the lighter was meant by the language used, viz. "damaged to the extent that it cannot be put in the same good condition as when received," and therefore the difference between the actual damage meant, and the stipulated compensation therefor, cannot be determined. It seems to me that the damaged condition of the lighter, intended to be expressed or described by the language employed, was nearly equivalent to a total loss. I therefore think the sum of \$3,500 was not intended as a penalty, but was intended as stipulated damages, unless the agreement may be construed to be a sale of the lighter on the condition that it should be lost, which seems absurd. The agreement is certainly a contract of bailment, giving the bailee only a special property in the lighter during the agreed term of the bailment, the general property remaining in the bailor. In the case of *Westcott v. Thompson*, 18 N. Y. 363, the facts were that a brewer sold 67 barrels of ale to a retailer, upon an agreement that the barrels should be returned after the ale should be drawn from them, but, if any were not returned, the retailer should pay \$2 apiece for them. Held, that the property in the barrels remained in the brewer, and that the agreement to pay \$2 apiece for them if not returned was intended to fix the damages for the loss of such as the retailer should be unable to return. If the property in the lighter remained in the plaintiff until it "was lost and destroyed," how could it pass to the defendant after the lighter was totally lost,—sunk to the bottom of the ocean, or totally consumed by fire? If it could pass under such circumstances, I think the agreement fails to express an intention to that effect. Reading the whole instrument together, it appears to be a contract of bailment, with a stipulation on the part of the bailee to indemnify the bailor against loss of the property from any cause; and, though the stipulation to indemnify in case of loss partakes of the nature of insurance, it is not a contract of insurance in the legal or commercial sense of the word, even conceding that the defendant was authorized by the insurance commissioner to transact insurance business, as required by section 596 of the Political Code. It does not specify the rate of premium, nor the risk or peril insured against, nor the period during which the insurance is to continue, as required by section 2587 of the Civil Code. But, conceding it to be a policy of insurance, it cannot be deemed a "valued policy," since it does not state the value of the property insured, (Civil Code, § 2596,) and therefore the damages to be recovered can only be estimated by proof of the value of the property. It is not claimed, however, by counsel for respondent that the agreement contains either a contract of sale or a contract of insurance.

3. Having determined that the stipulation for the payment of \$3,500 is a "contract by which the amount of damage to be paid" or "compensation to be made" for the loss of or injury to the property bailed was determined in anticipation of such damage, in the sense of section 1670

of the Civil Code, it only remains to be considered whether or not, "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage," in the sense of section 1671 of the same Code. These sections are as follows: 1670: "Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in the next section." 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Section 1671 has been construed by this court in several cases. In *Eva v. McMahon*, 77 Cal. 467, 19 Pac. Rep. 872, it was held that it is not impracticable nor extremely difficult to fix the actual damage sustained by the breach of a contract to deliver the possession of land; and if no actual damage is sustained none can be recovered, though a stated amount was stipulated for in the contract. In *Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. Rep. 890, it was held that a stipulation in a building contract, by which the contractor agreed to pay the owner a certain sum as liquidated damages for each day's delay in finishing the building after the time appointed in the contract, was within the rule of section 1670, and not within the exception stated in section 1671, and therefore void. In *Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. Rep. 36, there was a contract between plaintiff and defendant, whereby the defendant agreed to deliver to plaintiff on demand between certain dates, 187,500 grain bags, to be sold by plaintiff on commission of 1 per cent., and not to sell said bags to any other person than plaintiff; and further agreed to pay plaintiff 3 cents for each of said number of bags which he should refuse or neglect to deliver to plaintiff, as liquidated damages. The action was to recover such liquidated damages. A breach of the contract by nondelivery of the bags being admitted by the answer, the plaintiff rested its case without other evidence of damage than the agreement to pay three cents per bag as stipulated damages. Held, that a nonsuit was properly granted on the ground that the agreement for stipulated damages was void under sections 1670 and 1671 of the Civil Code. Held, further, that an averment in the complaint that "it was understood and agreed between the plaintiff and defendant at the time of making the contract that, owing to the nature of the case, it would be impracticable and extremely difficult to fix the actual damage," was immaterial, and required no answer. I think "the nature of the case" at bar cannot be distinguished from that of the cases above cited, and that the plaintiff is entitled to recover only his actual damages proximately resulting from the loss of its lighter, which should have been alleged, and, if denied, proved, since the contract fixing the damages at \$3,500 is void. I therefore conclude that the judgment should be reversed, and the cause remand-

ed for a new trial, with leave to the parties to amend their pleadings, if so advised.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings, if so advised.

(38 Cal. 19)

DAVES et al. v. SOUTHERN PAC. CO. et al. (No. 14,653.)

(Supreme Court of California. March 27, 1893.)

INJURY TO EMPLOYEE—NEGLECT OF FELLOW SERVANT—LIABILITY OF LATTER.

1. Where the section crew of a railroad company side track a hand car with which they are working to clear the main track for an approaching train, and the section foreman, who has unlocked the switch, negligently fails to close it, and the train enters on the side track, and kills a section hand, the section foreman is personally liable in damages for his death.

2. The railroad company is not liable, though the section foreman had power to employ and discharge the men working under him, since the negligence of the foreman in leaving the switch open was, notwithstanding his superior rank, the negligence of a fellow servant, within the meaning of Civil Code, § 1970, providing that an employer is not liable to his employee for losses suffered in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Mrs. Daves and her daughter against the Southern Pacific Company and one Bresnahan for causing the death of James Daves, husband and father of plaintiffs. There was judgment against both defendants, and they appeal. Reversed as to the railway company, and affirmed as to Bresnahan.

John D. Bicknell, for appellants. P. C. Tonner and Hutton & Swanwick, for respondents.

FITZGERALD, J. This action is brought by the widow and minor daughter of James Daves, deceased, to recover damages for loss suffered by his death through the alleged negligence of the defendants. The case was tried by a jury, and a general verdict rendered against the defendants, the Southern Pacific Company and Bresnahan, for \$9,000. It was also specially found by the jury that the defendant Bresnahan did not close the switch after he opened it to let the hand car upon the side track. This appeal is taken by both defendants from the judgment and the order denying their motion for a new trial.

It appears that the corporate defendant owns and operates a line of railroad between the cities of Los Angeles and Colton, in this state. That the defendant Bresnahan was its section foreman, and, as such, had charge of a portion of its track, with power to employ and dis-



charge the men employed to work under him. That James Daves, the deceased, was a section hand employed by Bresnahan to work under him, and was engaged in the performance of his duty as such at the time of the accident which caused his death. That on the morning of the accident, and shortly before it occurred, Bresnahan, with eight of the section men, one of whom was Daves, placed a hand car on the main track for the purpose of going to a point on the section to make repairs. The hand car was then run by them some 300 feet to a switch, which was unlocked and thrown open by Bresnahan, and the hand car passed on to the side track to clear the main track for the west-bound passenger train, then nearly due, and in sight. That immediately thereafter Daves was engaged in doing something about the hand car, and was under the west end of it, when the train came up, and the switch being open, the train ran onto the side track, colliding with the hand car and killing Daves. Whether the switch was closed after it was opened by Bresnahan was a controverted point at the trial, and was submitted specially to the jury. The jury found that he did not close the switch, and, as there is evidence to support the verdict, it follows that the accident was caused by the negligence of Bresnahan, and the verdict against him cannot be disturbed.

As to whether the verdict will be permitted to stand as to the defendant corporation depends upon whether Bresnahan and Daves were fellow servants within the meaning of section 1970 of the Civil Code, which reads as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." This section was construed by this court in *Collier v. Steinhart*, 51 Cal. 116, and in *McLean v. Mining Co.*, 1d. 255. In the latter case it appears that the defendant was engaged in blasting rock in its mine. Plaintiff was in its employ as a workman, and one Kegan was its "foreman of all work," with authority to employ and discharge the men working under him. Plaintiff was injured while at work by being struck with a rock thrown from a blast, through Kegan's negligence in failing to notify him that the blast was to be fired. The court, in the application of this section to these facts, say: "The injury to the plaintiff was caused by the negligence of Kegan, the foreman of defendant, who was a fellow servant with the plaintiff,—'another person employed by the same employer in the same general business,'—that is, the business of working the mine of the defendant, Kegan being in the blasting, and the plaintiff in the hydraulic department of the 'general business.' The section of the Civil Code already cited declares that to such a case the rule of respondeat superior shall not apply, unless there has been want of ordinary care upon the part

of the defendant in the selection of the culpable employee. But the fact was, as found by the court below, that there had been no such want of ordinary care on the part of the defendant; Kegan, the 'foreman' being found to be 'skillful, competent,' and a proper person to perform the duties with which he was charged. 'The law of this state respecting this subject,' as set forth in the Code referred to, recognizes no distinction growing out of the grades of employment of the respective employees; nor does it give any effect to the circumstance that the fellow servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged; and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands. *Collier v. Steinhart*, supra.

In *Congrave v. Railroad Co.*, 88 Cal. 360, 26 Pac. Rep. 175, it was said by Justice McFarland that section 1970 "not only restates the rule first established by judicial decision as to injury received through the negligence of a fellow servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of 'fellow servants.' It declares them to be those employed 'in the same general business.'" And in citing with approval *McLean v. Mining Co.*, supra, he uses the following language: "It is clear that in deciding this case the court determined that the Code swept away the distinctions which appear in some of the 'adjudged cases' on the subject of fellow servants. *Collier v. Steinhart*, 51 Cal. 116, referred to in the opinion, is still stronger to the point decided. Both of these cases were approved in *McDonald v. Hazeltine*, 53 Cal. 35, which was also a case where an employee was injured through the carelessness of a foreman. These cases were again followed and approved in *Stephens v. Doe*, 73 Cal. 26, 14 Pac. Rep. 378, where it was held that 'the foreman of a mine and a miner employed to work under his directions are fellow servants; and the owner of the mine is not liable for injuries caused to the latter through the negligence of the foreman, unless he failed to use ordinary care in the selection of the foreman.' The same doctrine was announced in *Brown v. Railroad Co.*, 72 Cal. 523, 14 Pac. Rep. 133, and *Fagundes v. Railroad Co.*, 79 Cal. 97, 21 Pac. Rep. 437."

In the *Fagundes Case*, just cited, plaintiff's intestate was a laborer employed by the defendant to work on its track. The offending servants were, respectively, the conductor of a train and a track walker, whose duty it was "to see that the track was clear of obstructions, and to signal when they existed." The deceased lost his life through the track walker's negligent interference with a switch and the conductor's negligence "in not being sufficiently on the alert to prevent" such interference. In that case the court held that, as "there is nothing in the evidence tending to show any negligence on the part of the defendant in the selection of the employees whose carelessness caused

the casualty," it could not be held responsible.

The principle declared in the section of the Code referred to, and upon which the decisions in the foregoing cases rested, was settled by the highest judicial authority in this country long before the adoption of the Code, but the remarkable contrariety of judicial decisions upon the subject in other states has arisen out of the great difficulty met with in the application of it to the facts of the particular case to be decided. But in the consideration and application of this principle to the case before us we do not propose to enter into a discussion of the relation which the section foreman of a railroad corporation sustains towards his employer with respect to the duties pertaining to his employment, except in so far as the subject of such relation is necessary to be considered in connection with the character of the particular act itself by which the accident was caused, for the purpose of determining whether such act was a personal duty which the defendant corporation owed to the deceased as its employee, or whether the loss caused by the act complained of was "in consequence of the negligence of another person employed by the same employer in the same general business." This must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or agent of his employer, for which the employer is responsible; if it was not, then they were fellow servants, and the offending servant is alone responsible.

The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employes as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant, so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employe by his contract of employment. Was, then, the act or omission which caused the injury a personal duty which the defendant corporation owed to the deceased while he was engaged in the performance of his duties as its employee? If it was, and the deceased was not at fault, then the corporate defendant is liable; otherwise not. It appears that Bresnahan, through whose negligence it is clear that Daves was killed, was the section foreman of the defendant corpora-

tion, and, as such, had charge of about eight miles of its track, including that portion of it where the accident occurred. It was his duty to keep the track and switches in repair and order, and free from obstructions, so as to practically insure the safety of trains passing over it. He had undisputed control of the section men employed to work under him, and was vested with authority to employ and discharge them. As to whether he was the representative of the employer, with respect to the performance of these duties, we are not called upon, in view of the facts, to decide, for the reason that the act which caused the injury out of which this action arises, is clearly not embraced within them. It is not claimed that the corporation did not exercise ordinary care in the selection of Bresnahan as foreman, or that the switch which he negligently left open, and by which the loss was suffered, was unsuitable or defective. But it is insisted that the corporate defendant violated a duty which it owed to Daves by not providing him with a reasonably safe place to perform his work; that the place was not safe because "a train was coming when the switch was open," in consequence of which he lost his life. The place, as we have seen, where the accident occurred, was the side track on which the hand car had been run from the main track to avoid the passenger train, then almost due, and in sight. The place was, of itself, in the first instance, a reasonably safe one, and was resorted to, under the circumstances, for that very reason. The track and switches on Bresnahan's section, in so far as anything appears to the contrary, were in good condition, and so was the hand car, with the exception of some disarrangement in the brake, which, however, had nothing to do with the injury. The servants were sufficient in number, and competent for the purposes of the employment. It is plain, therefore, that the death of Daves was not caused by the violation of any duty which the master owed to him, but by the negligent act of Bresnahan, who, with respect to the performance of that particular act, was the fellow servant of Daves. If a brakeman or trainman, who it appears were intrusted with keys to the switch, or one of the section men, had been guilty of the negligent act complained of, we do not think that it would be seriously contended here that such act was the act of the master; and such would undoubtedly be the case if a switchman had been regularly employed to attend that switch, and he negligently performed the act referred to, instead of Bresnahan, for a switchman in using and operating a switch is no more the agent of the master than is an engineer who is engaged in running a locomotive. It is the duty of the master to provide a suitable switch and competent servants for its operation. When he has done this his duty is at an end, and his liability ceases. The keeping of it in position and its use and operation is a duty belonging to the servant, the negligent performance of which, to the injury of another servant employed in the same general business, is a risk which the injured servant assumed

when he took the employment, and for which the master is not liable. It is not denied that Bresnahan was a competent and experienced foreman, so that there was no neglect of duty by the master with respect to his selection. But the negligent act complained of was performed by him in the course of the work upon which they were all engaged, and by one who, so far as the particular act was concerned, was clearly not the agent of the master, but the fellow servant of Daves. The place was therefore made dangerous by the culpable negligence of a fellow servant, and this, notwithstanding the fact that his grade or rank at the time happened to be superior to that of Daves. It therefore follows that the consequences flowing from a place made unsafe under such circumstances are not chargeable to the master. The duty violated did not relate to the place of work, but to the negligent use of an appliance or instrumentality which was proper and suitable for the purpose for which it was furnished by the master, and such use of it was simply a detail of the work or management of the business; therefore a duty of the servant, which he, and not the master, was bound to perform. From these views it is clear that the negligence of Bresnahan in leaving the switch open in the manner and with the unfortunate result indicated was, notwithstanding his superior rank, the negligence of a fellow servant, within the meaning of section 1970 of the Civil Code; therefore a risk impliedly assumed by Daves when he took the employment, for which the corporate defendant cannot be held responsible. As this disposes of the controlling question in the case, the others discussed in relation to the instructions are not necessary to be considered. Let the judgment and order be affirmed as to the defendant Bresnahan, and reversed as to the corporate defendant, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DEHAVEN, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; PATERSON, J.

(97 Cal. 637)

**McSHERRY v. PENNSYLVANIA CONSOLIDATED GOLD-MIN. CO. et al.** (No. 15-113.)

(Supreme Court of California. March 25, 1893.)

**CHANGE OF VENUE—APPLICATION—AFFIDAVIT OF MERITS—JUSTIFICATION OF SURETIES IN INJUNCTION BOND.**

1. A motion for a change of venue, on the ground that it was not brought in the proper county, will not be denied on the ground that an impartial trial could not be had in the proper county, or that the convenience of witnesses and the ends of justice would be promoted by the retention of the action in the county where it was brought, as it would require a premature decision on such questions. *Cook v. Pendergast*, 61 Cal. 72, followed.

2. All the defendants need not join in an application for a change of venue. *Rathgeb v. Tiscornia*, 4 Pac. Rep. 987, 66 Cal. 96, followed.

3. On an application for a change of venue, the affidavit of merits made by one of the defendants recited that he made it for himself

and for all the defendants, at their request, and that he and the other defendants fully stated the facts of the case to their attorneys, who advised them that they had a good defense on the merits, which all of them believed to be true. The affidavit was used on the hearing on behalf of all of the defendants. *Held*, that it was not subject to the objection that it was made by one of the defendants only.

4. The complaint in an action against a corporation alleged that the principal office was in S. county, where the action was brought. The affidavit of merits made by defendant's president, on an application for a change of venue on the ground that the action was brought in the wrong county, stated that defendant's principal office was in N. county. Plaintiff, who had been general manager, a director, and owner of a majority of the stock of defendant, in his opposing affidavit, did not notice such statement in the moving affidavit. *Held*, that the averment of the complaint that the principal office was in S. county would be treated as sham.

5. Code Civil Proc. § 529, provides that, when the sufficiency of sureties in an injunction bond are excepted to, the sureties, "upon notice to the defendant of not less than two nor more than five days, must justify." *Held*, that notice of justification must be given not less than two, nor more than five, days after filing and service of the notice of exception to the sufficiency of the sureties.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by William B. McSherry against the Pennsylvania Consolidated Gold-Mining Company and others. There was an order denying defendants' motion for a change of the place of trial, and an order denying their motion to dissolve an injunction, and defendants appeal. Reversed.

Kitts & Bowman, for appellants. Joseph P. Kelly, (H. I. Kowalsky, of counsel,) for respondent.

**FITZGERALD, J.** The record in this case contains two appeals: One from an order denying defendants' motion for a change of place of trial, the other from an order denying defendants' motion to dissolve an injunction. The action was for an accounting, and for the recovery of certain shares of the capital stock of the defendant corporation, alleged to have been illegally sold for delinquent assessments to the said corporation, who thereafter declared a stock dividend, and distributed 30 per cent. of plaintiff's stock to its stockholders, the individual defendants herein, who, it is alleged, fraudulently conspired together, and in pursuance of such conspiracy did fraudulently deprive plaintiff of his stock so sold and distributed as aforesaid. Plaintiff also obtained an order restraining and enjoining all of the defendants from disposing of any of said stock, and from levying any further assessments upon the outstanding capital stock of the defendant corporation, until the termination of this action. The application for a change of place of trial was made by each and all of the defendants at the time of filing their demurrer, and before answering, on the ground "that the county designated in the complaint, viz. the city and county of San Francisco, is not the proper county." The affidavit upon which the application was based shows

that at the time of the commencement of the action, and afterwards, the principal and only place of business of the defendant corporation, and the place of residence of each of the other defendants, was in Nevada county, except the defendant Rhodes, whose place of residence was in Sacramento county. The application was related by opposing affidavits on the grounds (1) that an impartial trial of the case could not be had in Nevada county; (2) that the convenience of witnesses and the ends of justice would be promoted by the retention of the case; (3) that the defendant Rhodes did not join in the application for the reason that he was never served with process, and never appeared or authorized any one to appear for or represent him, in this action; (4) insufficiency of the affidavit of merits; and (5) that the complaint, which is verified, shows that the principal place of business of the corporate defendant is in the city and county of San Francisco.

The first and second grounds of objection are disposed of by the case of *Cook v. Pendergast*, 61 Cal. 72, in which it was held that, "independent of an express provision of the statute, the superior court ought not to be called on, before issues of fact have been joined, to decide that the convenience of witnesses will be promoted by a change of the place of trial, or that a case cannot be fairly and impartially tried in the county in which it is pending. The Code of Civil Procedure does not require a decision which, in the nature of things, must ordinarily be premature. \* \* \*

If the motion to change the place of trial is brought to a hearing before he has answered, the plaintiff cannot by cross motion demand the retention of the action in the county where it is pending, on the ground of convenience," etc. See, also, *Heald v. Hendy*, 65 Cal. 321, 4 Pac. Rep. 27. With reference to the objection that Rhodes was never served with process, and that he never appeared or authorized any one to appear for him, it is sufficient to say that the record shows that the demand for a change of place of trial was signed by him, and that the attorneys herein, whether authorized to do so or not, did appear for and represent him. But, let us concede that he was never served, and that he never appeared, and that the attorneys who appeared for him did so without authority, and that these facts were shown in the proper way, which, of course, is not the case. Still the claim that, when a demand for a change of venue is made, all the defendants must join in the demand, cannot be sustained. This point was expressly decided adversely to plaintiff's contention in *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. Rep. 987. Nor is the contention that the affidavit of merits is insufficient because it was made by one of the defendants, only, well founded. The affidavit, it is true, was made by Wilhelm, the president of the defendant corporation, and one of the individual defendants in the action. But it is expressly stated in the affidavit that he makes it for himself, and for all and each of the defendants, and at their request, and, further, that he and the other defend-

ants have fully and fairly stated the facts of the case to their attorneys herein, who, upon such statement, advised each and all of them that they had a good and substantial defense upon the merits of the action, which each and all of them verily believed to be true. The affidavit was used at the hearing of the motion in behalf of each and all of the defendants, and was in all respects sufficient. *Rowland v. Coyne*, 55 Cal. 1; *Palmer v. Barclay*, 92 Cal. 199, 23 Pac. Rep. 226; *People v. Larue*, 66 Cal. 238, 5 Pac. Rep. 157.

The allegation in the complaint that "plaintiff is informed and believes that the defendant corporation has its principal office in San Francisco," is not only immaterial, but when viewed in connection with plaintiff's previous relations with the corporation, having been general manager, director, and owner of a majority of its capital stock, and the positive and direct statement to the contrary made by the president of the corporation in the affidavit of merits, of which no notice was taken by plaintiff in his opposing affidavit, entitles it to be treated as, we think it really is, a sham allegation. The claim, therefore, that there is a conflict on the question as to the place of residence is without any foundation whatever. The place of residence of a corporation is in the county where its principal place of business is situated, (*Jenkins v. Stage Co.*, 22 Cal. 538; *Cohn v. Railroad Co.*, 71 Cal. 488, 12 Pac. Rep. 498; *Buck v. Eureka City*, [Cal.] 31 Pac. Rep. 845;) and that is the proper county, within the meaning of section 395, Code Civil Proc., where actions against it of this character must be tried, subject, however, to the other grounds of this and the following section, and of the provisions of section 16, art. 12 of the constitution; also to the power of the court to change the place of trial as provided in the Code. Upon the showing thus made the defendants were entitled, as a matter of right, to have the place of trial changed to Nevada county, and the court erred in denying their motion to change the place of trial to that county. The order appealed from is therefore reversed, and the court below directed to make an order granting defendants' motion for a change of the place of trial of this action to Nevada county.

The motion to dissolve the injunction was made on the ground that plaintiff's sureties failed to justify within a reasonable time, or at all, after notice of exception to the sufficiency of sureties was given. It appears that the injunction was served on February 29, 1892, and the notice of exception on the 5th day of March following. But no notice of justification was served or filed up to the 20th day of the last-named month, or at all. The notice of motion to dissolve was thereafter served and filed, and on the 1st day of April the motion was heard and denied by the court. Section 529 of the Code of Civil Procedure provides, among other things, that, when the sufficiency of sureties is "excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same man-

ser as upon bail on arrest, and, upon failure to justify at the time and place appointed, the order granting an injunction shall be dissolved." This section, in view of the damages that may result from the improper issuance of an injunction, must be construed to mean that notice of justification must be given to the defendant of not less than two nor more than five days after the filing and serving of the notice of exception to the sufficiency of the sureties; and the plaintiff's sureties must justify within five days after said notice of exception is given, or the injunction will upon motion be dissolved. But, as it is possible that the respondent may have been misled by correspondence had between his attorney and the attorneys for appellants as to the time agreed upon between them when the sureties should justify, the order will be reversed, with directions to the court below to make an order granting the motion to dissolve the injunction unless plaintiff's sureties shall justify, upon proper notice to the defendants, within five days after the filing of the remittitur.

So ordered

We concur: McFARLAND, J.; DE HAVEN, J.

(97 Cal. 659)

VEJAR et al. v. MOUND CITY LAND & WATER ASS'N et al. (No. 19,100.)

(Supreme Court of California. March 24, 1893.)

**DESCRIPTION IN DEED — PAROL EVIDENCE—LAND CONVEYED.**

1. In 1837 the Mexican government granted P. and V. a tract called the "San Jose Rancho," and in 1840 regranted the same land and an additional league to P., V., and A. In 1846 partition was made, and, in proceedings thereafter for confirmation of the grants, separate patents were issued for each tract. In 1864 V. conveyed his interest in the Rancho San Jose, the description being the "rancho known as 'San Jose,'" and referring for further description to the Mexican government grant, the confirmation thereof by the United States land commission and district court, and the government survey. In such grant the parties were declared owners of one league "in augmentation of the place called 'San Jose.'" In proceedings before the land commissioners the entire tract was called "San Jose;" and the deed of confirmation to V. declared that the land confirmed is a portion of the place called "San Jose." The record in the confirmation proceedings contained a map compiled from exhibits on file in the office of the United States surveyor general, purporting to give the boundaries of the Rancho San Jose, Rancho Azusa, and addition to Rancho San Jose as fixed by the United States surveyor. *Held*, that there was such ambiguity in the description of the land conveyed as to warrant the admission of extrinsic evidence to show what was intended to be conveyed by the words "Rancho San Jose."

2. On an issue as to whether V. intended to convey his interest in the additional league, it appeared that some years prior to such conveyance he had made a lease to the grantees in such conveyance, wherein the property was described as the "Rancho San Jose," being the same land conveyed to V., P., and A. by the Mexican government. In a mortgage by V. and wife the property was described as the "Rancho San Jose," being the same originally

granted to V. and P., and afterwards regranted to V., P., and A., with an addition of one league. There was only one grant of land to V., P., and A. by the Mexican government. A nephew of P. testified that he had known the Rancho San Jose since the grant was made by the Mexican government, and that the two tracts were considered one rancho. Other witnesses also testified that the two tracts were known as the "Rancho San Jose." *Held*, that V. intended to include his interest in the additional league in such conveyance.

3. P. devised to his wife "the land of the rancho," and in the probate proceedings a decree was entered giving the widow 3,335 acres in the Rancho San Jose. *Held* to show that P. understood that he had an interest in only one rancho,—the "San Jose,"—and that included whatever interest he had in the additional league.

4. In 1875 separate patents were issued to the Rancho San Jose, and to the additional league, under the name of the "San Jose addition;" and in 1877 V.'s widow executed a conveyance of her interest in the "Rancho San Jose." A nephew of P. testified that, after the grant of the original league, it was always considered one rancho. Other witnesses testified that they had never heard the additional league spoken of other than San Jose addition until 1881. *Held*, that at the time the widow made such conveyance the two tracts were not well known by different names, and that the widow must be deemed to have included in the tract conveyed the additional league.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Partition by Ramon Vejar and others against the Mound City Land & Water Association and others. There was judgment for defendants, and plaintiffs appeal. Affirmed.

A. J. King, R. Dnnnigan, Shirley C. Ward, and Anderson, Fitzgerald & Anderson, for appellants. Chapman & Hendrick and Walter J. Hughes, for respondents.

PATERSON, J. The plaintiffs brought this action to partition a tract of land now known as the "Rancho San Jose Addition," a Mexican grant, containing one league of land. The defendant San Jose Ranch Company has succeeded to all the rights of the Mound City Land & Water Association, and the only contest herein is between it and those claiming under Ricardo Vejar and Ygnacio Palomares. On April 15, 1837, Alvarado, governor ad interim of California, granted to Palomares and Vejar a tract of land known by the name of "San Jose," and juridical possession thereof was given to them August 3, 1837. The same tract was on March 14, 1840, regranted to them and one Luis Arenas, together with a square league of land in addition to the former grant. This second grant was made in accordance with an arrangement entered into by the three grantees, upon suggestion of the governor, who had promised Palomares and Vejar that, if they would admit Arenas into partnership with them, he would give the three an additional league adjoining the San Jose. In his petition to the prefect, setting forth the understanding above stated, and praying for the additional league promised by the governor, Arenas spoke of the land as "the part called 'Azusa,' in the direction of the Mission San

Gabriel." The prefect consulted Palomares and Vejar, and they replied that they had agreed to admit Arenas as a partner in the Rancho of San Jose, in consequence of the recommendation of the governor, by a letter sent to them, "offering for their so doing to grant a league or more of land in addition out of the place, towards the direction called 'Azusa,' in the direction of the Mission of San Gabriel, that being the part most proper for said extension." Juridical possession of the land was given to the three grantees on May 7, 1840. In 1846 a temporary partition of the lands covered by the two grants was had between the three parties above named. After due proceedings had before the board of land commissioners and the United States district court, for the confirmation of the grants, separate patents were issued for each tract of land. By deed dated April 30, 1864, Ricardo Vejar conveyed all his interest in the Rancho San Jose to H. Tischler and I. Schlesinger. The descriptive language of this deed is as follows: "All that certain rancho, tract, and parcel of land situate, lying, and being in the county of Los Angeles, state aforesaid, known, called, and described as the 'Rancho of San Jose,' for a more particular and accurate description reference being had to the grant of the same by the Mexican government, the confirmation thereof by the United States land commission, and the district court of the United States for the southern district of California, and the survey of the same by the government of the United States, containing two leagues, be the same more or less." It is claimed by the respondent therein,—the San Jose Ranch Company,—that this deed conveyed all of Ricardo Vejar's interest both in the San Jose ranch and in the one league additional thereto now known as the "San Jose addition." Plaintiffs and other appellants claim, however, that the deed passed only Vejar's interest in the original grant of the Rancho San Jose, and that the description named in the deed as the "Rancho of San Jose," when read in the light of the language of the documents referred to in the deed for "a more particular and accurate description," viz. the grant, the confirmation, and the survey, is certain and unambiguous, and that the court below erred in not limiting the introduction of evidence in explanation of the description to the documents referred to in the deed; that the court should not have allowed extraneous evidence to be introduced to show what was intended to be conveyed by the use of the words "Rancho San Jose." It must be conceded that, if the ambiguity of the description found in the deed is removed by the language of the documents referred to therein, the contention of the appellants is sound, for the grant, the confirmation, and the survey are as much a part of the deed as if they had been fully set forth therein. It becomes necessary, therefore, for us to look at these documents.

In their original petition to the governor, Palomares and Vejar asked him to grant the place known by the name of 'San Jose,' distant some six leagues from

the Ex-Mission of San Gabriel. The committee on vacant land reported favorably, and on April 15, 1837, they were declared to be the owners "of the place called 'San Jose,'" and juridical possession of the "place or rancho called 'San Jose'" was given August 14, 1837. The three grantees were declared to be "the owners in property of the said place called 'San Jose,' with the addition of one league." Again, the governor, in directing the issuance of title to the property, stated: "Ygnacio Palomares, Ricardo Vejar, and Louis Arenas are declared owners in property of one league (de ganado mayor) as an augmentation to the place called 'San Jose,' which was adjudicated to the two first named. Let the title in property of the said place with the augmentation referred to be again issued in favor of the three individuals mentioned." The decree of confirmation to Vejar states that "the land of which confirmation is hereby made is a portion of the place called 'San Jose,' \* \* \* and is bounded and described as follows, according to the map or diagram of the same annexed to the testimonial, showing a partition of the place called 'San Jose' between Ygnacio Palomares, Henry Dalton, and Ricardo Vejar;" and in his certificate the secretary of the board certified that the transcript of the record contained a copy of the evidence on file in case No. 338, wherein Vejar is a claimant against the United States for "the place known as 'San Jose.'" In their opinion in Dalton vs. The United States the board of land commissioners state that the claimant has presented two grants: First, one in which the property granted is designated by the name of "San Jose;" second, a grant made to Palomares, Vejar, and Arenas, dated March 14, 1840, which grant covers the land conceded by the first grant, "together with one square league more of land in addition to the former grant." In some of the proceedings the additional league granted to the three grantees named is called "Azusa." There is in the record a map compiled by Thompson in 1877, from maps and exhibits on file in the office of the United States surveyor general, which purports to give the boundaries of the Rancho San Jose, Rancho Azusa, and addition to Rancho San Jose, as fixed by United States deputy surveyors. In the proceedings for the confirmation before the board of land commissioners the entire tract is uniformly referred to as the "Rancho San Jose." The only evidence we have of the district court decree is in the recitals of the patent, a copy of which is set forth in the transcript. These recitals refer to the petitions for confirmation, the basis thereof, the action of the land commissioners, with a description of the land, the appeal to the district court, and the decrees of the latter that the decision of the board be affirmed, the further adjudication by said court that the petitioner was entitled to an equal, undivided third part of the lands granted by the governor on April 15, 1837, and regranted in March, 1840; and the patent closes with a grant to the three owners and their heirs of the tract of land known by the name of "addition to San Jose;" but this patent was

issued on the 4th day of December, 1875, and we have been unable to find such a designation of the place anywhere in the proceedings from the inception of the title down to the issuance of the patent.

Now, what is meant by the terms "addition to Rancho San Jose," and "augmentation to the place called 'San Jose'?" The term "augmentation" is defined to mean "the act of increasing or making larger by addition, expansion, or dilation; the act of adding to or enlarging; the state or condition of being made larger." Cent. Dict. A thing increased is the same thing made larger, and, in speaking of the territory which augmented the San Jose rancho, no simpler language could have been used than "addition to the Rancho San Jose," and thus it is designated by the United States surveyors in their maps. Appellants contend it is shown that the "league in augmentation" did not become a portion of the Rancho San Jose as understood by the Mexican government, because after the "league in augmentation" of the grant of the Rancho San Jose had been made to the three grantees, and juridical possession given to them of it under the name of "Azusa," a grant was made to Arenas personally of another league, which used the language in "augmentation of the place called 'Azusa,'" which latter place was owned by the three; that no one would for a moment suppose the personal grant to Arenas was the same grant that was made to the three, or a portion of the same, simply because spoken of as being "in augmentation" of it. But here appellants' counsel goes beyond the bounds of legitimate argument upon the question under consideration, which is confined to a discussion of the effect of the three documents above referred to in construing the meaning of the term "Rancho of San Jose," as used in the deed. If the subsequent grant to Arenas can be used in determining the question as to what Vejar intended to convey, it must be conceded that the ruling of the court in receiving other evidence debors the deed was correct. It was proper for the court to consider this point now made by appellants in determining upon all the evidence—the deed, the three documents referred to, and the evidence received debors the record—what Vejar intended to convey by his deed of the Rancho San Jose, and we presume it was considered in that connection.

Appellants also claim that a conclusive reason why the two tracts "were not and cannot be treated as all a part of one grant is that the original grant of 1837 of the place called 'San Jose' was a complete and perfect grant under the Mexican law, and thereby the entire title of the government in such land had become extinguished, and therefore as to such tract of land no title whatever passed by the regrant of 1840, in connection with the grant of the additional league." It is doubtless true, as a matter of law, that the original grant to Palomares and Vejar, the confirmation by the departmental assembly, and the juridical possession which was given prior to the making of the grant of 1840, made the grant a perfect

one, and no additional title was acquired by Palomares and Vejar to the land therein included; but the question is not to the legal effect of the original grant, but as to what lands Vejar intended to include within the language used in his deed of April 30, 1864, viz.: "Known, called, and described as the 'Rancho San Jose.'" A rancho made up of several grants may acquire a name, and pass by a deed under the same.

We do not think that a reference to the documents referred to in the deed removes the ambiguity of the description of the contract. The court did not err, therefore, in admitting extrinsic evidence, and we pass to a consideration of the question whether such evidence supports the finding of the court.

The names "place called 'San Jose,'" "Rancho San Jose," "place called 'Azusa,'" and "Rancho Azusa," are used very indefinitely in the proceedings. The board of land commissioners, in *Dalton vs. The United States*, referring to the two grants, say that neither of them designates "the land granted by the name of 'Azusa,'" and that name seems to have been applied to the place occupied first by Arenas, and then by Dalton, his grantee, and to have comprised both the portion of San Jose and the additional league of land which was covered by the grant made to said Arenas alone." The defendants read in evidence a lease made by Vejar to Tischler and Schlesinger, dated April 19, 1861, (three years prior to the execution of the conveyance to them,) in which he described the property as the "Rancho San Jose, being the same that was granted to the party of the first part, Ygnacio Palomares, and to Luis Arenas, by Governor Alvarado, March 14, 1840, and confirmed by decree of the United States district court for the southern district of California, February 25, 1856." As there never was more than one grant by Gov. Alvarado to the three grantees named, it is certain that Vejar in this description included the property in controversy here,—the addition to the Rancho San Jose. On August 19, 1861, Vejar and wife executed and delivered to Tischler and Schlesinger a mortgage upon "that certain tract of land known as the 'Rancho of San Jose,' being the same that was originally granted by Juan B. Alvarado, governor of California, to Ricardo Vejar, one of the parties of the first part, and Ygnacio Palomares, on the 15th day of April, A. D. 1837, \* \* \* and which was regranted by the said Governor Alvarado to said Vejar, Palomares, and one Luis Arenas on the 14th day of March, A. D. 1840, together with an addition of one league of land on the west, \* \* \* and being the same land which was confirmed to Ricardo Vejar by decree of the United States district court for the southern district of California, on February 25, 1856." These two instruments we think show very clearly that Vejar understood that all the land in controversy was included within the Rancho San Jose. In their petition to the judge and first alcalde, Vejar and Dalton represented themselves as owners of the Rancho San Jose, and said "that, the property in said rancho be-



ing in three individual shares, one of which belongs to Don Ygnacio Palomares, and it being for the interest of those which we represent to make a partition of the lands of said rancho," they hope an order will be made to partition the same. The partition prayed for, however, was for the whole place, including the additional league. Palomares was notified that such an application had been made, and, "when informed of its contents, said that he was not opposed to the partition of the Rancho of San Jose, as a joint owner, he receiving the part which might belong to him," but was opposed to paying his share of the expenses, "on account of having already made greater payments in patenting the said rancho." The judge referred to the land to be partitioned as the "Rancho San Jose," and, speaking of his proceedings, said that Vejar and Dalton "were satisfied with their portions as the third part of the Rancho of San Jose, and remained in possession thereof," but Palomares "rudely and disrespectfully went away saying that he would not agree to it." One Francisco Alvarado testified on behalf of the defendants that he had known the Rancho San Jose ever since and before it was granted by the Mexican government; that Palomares was his uncle; that the two tracts of land were always considered as one ranch; that, after the grant of the additional league, they considered the ranch so much larger, and he never heard his uncle speak of the addition as being a separate ranch, but only that the ranch was larger. Ygnacio Alvarado testified that he was acquainted with the lands prior to 1837; that he lived on the Rancho San Jose in 1865, and for many years prior thereto; that he never knew of any other ranch than the Rancho San Jose. W. R. Rowland testified that he had a conversation with Vejar subsequent to his conveyance to Tischler and Schlesinger and while he lived on the Puente ranch, and that in said conversation Vejar stated that he had no other lands, and wanted to remain there during his lifetime, and the witness gave him permission to do so. J. M. Fears testified that he had known the San Jose ranch for about 25 years, and had just recently heard of the San Jose addition,—in the last year or two. Louis Phillips testified that Vejar died in 1880 or 1881; that no administration on the estate of Vejar was ever had; that Vejar left the San Jose ranch in 1864, after his conveyance to T. and S.; that he never heard Vejar speak of the San Jose addition; that neither Dalton nor Palomares, both of whom showed him the boundaries of the lands which they claimed under the whole partition, ever said anything to him about the San Jose addition. M. F. Coronel testified that he knew Vejar and Palomares in their lifetime, and the San Jose ranch on which they resided; "that the San Jose ranch included where Vejar and Palomares lived and the additional league; that it was all called 'Rancho San Jose,' but it had different names,—'San Jose de Palomares,' and 'San Jose de Penascoso,' and 'San Jose de Vejar;'" that the first he knew of the San Jose addition was when Dalton informed him about it.

It is impossible to believe that Vejar, in his straitened circumstances from 1864 down to the time of his death, would have remained away from the lands in controversy under the circumstances if he had believed that he still retained an interest therein. He had several children, but none of them ever attempted to take possession of the land, or, so far as the record shows, to claim any interest therein. Vejar was claiming land in the Nogales and Puente ranches, and, when the decision in the controversy went against him, he begged permission of Rowland to remain on the premises he had so long occupied, and stated that he wanted to remain there during his lifetime because he had no other lands. The conduct of the parties subsequent to the making of a deed is competent and often very material evidence in determining in case of an ambiguity what was intended to be conveyed. *Mulford v. Le Franc*, 26 Cal. 88. Upon all the evidence in the case, we fail to see how the court could have found in accordance with the contention of the appellants.

It remains to be considered whether the claimants under Palomares—some of whom are plaintiffs and some defendants, and all are appellants—have been divested of their interest in the San Jose addition, as heirs of Ygnacio Palomares, one of the three original grantees. The court below, in its opinion, (a copy of which is printed in the briefs,) did not consider this question. Whether it was deemed conceded by appellants, or whether it appeared too clear for argument that there was no merit in their claim, does not appear. But the fact is that the court found against their contention. The evidence, however, on this branch of the case is not so clear and convincing as it is with respect to the claim of other appellants. Ygnacio Palomares died in 1864, and left a will in which he devised to his wife "the land of the rancho," excepting therefrom certain portions. The will was duly admitted to probate. The inventory, properly authenticated, described the real estate as 3,335 acres "of the Rancho de San Jose." No other reference is made to the Rancho San Jose, nor does the name "Rancho San Jose addition" appear anywhere in the proceedings. The final decree was entered in the matter of the estate, distributing the property under the same description, viz. 3,335 acres in the Rancho San Jose, and also any other property, to the widow, whether then known or not known. It is claimed by appellants herein that no part of the addition to the Rancho San Jose passed by said will and the proceedings had thereon. This contention cannot be sustained. The will refers to the "Rancho,"—a general term for the land held and occupied by him,—and which he desired his wife to take; and the evidence quoted above shows that he understood that he had an interest in but one rancho, viz. the San Jose; that the latter included whatever interest he had in the San Jose addition. Appellants insist that the construction which we have placed above upon the term "San Jose addition" cannot be applied to instruments which were executed and delivered after the issuance

of the patent to the San Jose addition in December, 1875. It is claimed, therefore, that the deed of the widow Concepcion Palomares, of October, 1877, by which she conveyed to Francisco Palomares all her right, title, and interest in and to the "Rancho de San Jose," cannot be held to have included in the tract conveyed the San Jose addition. The determination of this contention again depends upon the solution of the question as to what the grantor (the widow) meant and intended to convey by the use of the description employed in the deed. It is true her conveyance was executed two years after the patents had issued for separate tracts, one under the name of "San Jose," and the other under the name of "San Jose addition;" but we cannot agree with counsel for appellants in saying that both tracts "were then well known by said respective names." The evidence, we think, fails to show this, and sufficiently establishes the conclusion of the court that the grantor intended to convey, not only her interest in the San Jose rancho, but in the addition thereto. Francisco Alvarado, a nephew of Ygnacio Palomares, testified that, after the grant of the additional league, it was always considered as one ranch; that his uncle never spoke of it as a separate ranch; and that he never heard that the league was a separate ranch until he came into this case. Ygnacio Palomares never heard about what is called the "addition" or "augmentation" until two or three years before the trial. Mr. Rowland, who has lived on an adjoining ranch since 1846, never heard of the San Jose addition until after Mr. Slausson had commenced suit for partition in 1891 or 1892. The witness Fears stated that he had heard of the San Jose addition—just heard it spoken of; that there was such a thing—within a year or two before the trial. The only evidence offered in rebuttal of this testimony were certain deeds and agreements between Dalton and others, and to which neither Mrs. Palomares nor her son Francisco were parties, and the testimony of the witness King, tending merely to show that Dalton always treated the San Jose as one tract, and the San Jose addition as another.

Judgment and order are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(3 Colo. App. 223)

BOARD OF COM'RS OF PITKIN COUNTY  
v. ASPEN MINING & SMELTING CO.

(Court of Appeals of Colorado. March 27, 1893.)

STATUTES—TITLE—AMENDMENTS—CONSTITUTIONAL LAW—STATUTORY PENALTY—ACTION TO RECOVER—SUFFICIENCY OF EVIDENCE.

1. The clause, "and for other purposes," when used in the title of an act, following a specific statement of the purposes of the act, is meaningless, and conveys no idea of the legislative intent.

2. By Act April 2, 1887, entitled "An act to amend section 29 of chapter 95 of the General Statutes of the State of Colorado, entitled 'Roads and Highways,' and to repeal sections 30, 31, 32, and 33 thereof, and for other pur-

poses," a new section was substituted for section 29 of the original act, sections 30-33 were repealed, and a new section, numbered 3, was interpolated in the General Statutes, requiring persons and corporations having 10 or more persons in their employ liable to pay taxes to furnish the overseer with their names, and prescribing penalties for failure to comply therewith, etc. *Held*, that the interpolation of such new section was not permissible under Const. art. 5, § 24, providing that "no law shall be revived or amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted, and published at length."

3. Such new section provided that "all persons, corporations, companies, and individuals are hereby required, on application of the road overseer of his, her, or their road district, to furnish to said road overseer the names of persons in his, her, or their employment, when employing ten or more of such, who are or may be liable to the payment of a road tax under the provisions of this chapter; and, in the event of a willful refusal, failure, or neglect so to do within ten days after such application, shall forfeit and pay to the county the sum of \$100 for each refusal, failure, or neglect so to do, such sum to be recovered by said county as in other civil actions brought and maintained in any court of competent jurisdiction," and, when collected, paid into a special fund, etc. *Held*, that the subject-matter of such section was not germane to the act it was intended to amend, and could not be incorporated therein as an amendment.

4. In an action by the board of county commissioners against a mining and smelting company to recover the penalties prescribed for failure to furnish names of employees as provided by such section, there was no proof that any of the 100 men employed by defendant outside the limits of a certain city were liable to pay road tax, were between the ages of 21 and 50, or resided outside the limits of such city. *Held* that, though such statute be valid, the evidence was insufficient to entitle plaintiff to recover, since, the act being penal, strict and specific proof was required, as in criminal cases.

Error to Pitkin county court.

Action by the board of county commissioners of Pitkin county against the Aspen Mining & Smelting Company to recover a statutory penalty. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by REED, J.:

The action was brought by the plaintiff in error (plaintiff) against the defendant to recover \$100, a penalty prescribed by section 29, c. 95, of General Statutes, as amended by an act of April 2, 1887, entitled "An act to amend section 29 of chapter 95 of the General Statutes of the State of Colorado, entitled 'Roads and Highways,' and to repeal sections 30, 31, 32, and 33 thereof, and for other purposes." By such amendatory act a new section was substituted in the place of section 29 of the original act, and sections 30-33 were repealed, and a new section (3, of the amendatory act) was enacted and interpolated in the General Statutes, as follows: "Sec. 3. All persons, corporations, companies, and individuals are hereby required, on application of the road overseer of his, her, or their road district, to furnish to said road overseer the names of persons in his, her, or their employment, when employing ten or more of such, who are or

may be liable to the payment of a road tax under the provisions of this chapter; and, in the event of a willful refusal, failure, or neglect so to do within ten days after such application, shall forfeit and pay to the county the sum of one hundred dollars for each refusal, failure, or neglect so to do, such sum to be recovered by said county as in other civil actions brought and maintained in any court of competent jurisdiction, and when collected such moneys shall be paid into the said special fund, to be used in the same manner as moneys collected in said judgments for tax." Under the provisions of this section, in the year 1888, the road overseer made a demand upon the general manager of the defendant to furnish a list of employees as required. The demand was refused, and this action was brought to recover the prescribed penalty. The suit was originally brought before a justice of the peace. There were no written pleadings. On appeal it was tried to the court without a jury, a judgment for the defendant, to which this writ of error was taken.

Wilson & Stimson, for plaintiff in error.  
W. W. Cooley, for defendant in error.

REED, J., (after stating the facts.) It is contended that section 8 of the amendatory act is not germane, not embraced in the title, and void under section 24, art. 5, of the state constitution.<sup>1</sup> The act is entitled "An act to amend section 29, \* \* \* and to repeal sections 30, 31, 32, and 33 thereof, and for other purposes." The last clause, "and for other purposes," may first be disposed of. It is, in such connection, meaningless, of no legal significance, conveys no idea of any legislative intention whatever. It is said by Judge Cooley in his excellent work on Constitutional Limitations, (5th Ed. p. 175:) "The words, 'and for other purposes,' must be laid out of consideration. They express nothing, and amount to nothing as a compliance with this constitutional requirement. Nothing which the act could not embrace without them can be brought in by their aid." See *Ryerson v. Utley*, 16 Mich. 269; *Town of Fishkill v. Plank-Road Co.*, 22 Barb. 634; *St. Louis v. Tiefel*, 42 Mo. 578. It will be observed that in the title the specific changes are designated,—the amendment of section 29, and the repeal of the four enumerated sections. Had the act been entitled, generally, as an act to amend chapter 45, any amendment germane and pertinent might have been made, but, being specifically limited to the sections designated, the interpolation of a new and different section was not permissible. Any further changes than those designated were precluded by the specific enumeration of those named. See *Woodson v. Murdock*, 22 Wall. 351; *State v. Bowers*, 14 Ind. 195. In *Cooley, Const. Lim.* (5th Ed.) 179, it is said: "As the leg-

islature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so." See *Mewherter v. Price*, 11 Ind. 199; *State v. Young*, 47 Ind. 150; *Jones v. Thompson*, 12 Bush, 394; *State v. Kinsella*, 14 Minn. 524, (Gil. 395;) *Ryerson v. Utley*, supra; *Town of Fishkill v. Plank-Road Co.*, supra. The subject-matter of the new section was not germane to the act it was intended to amend. It is a penal statute, imposing onerous duties and new responsibilities upon parties in no way legally connected with the administration of county affairs; an attempt to delegate to outsiders duties cast by law upon certain officials, who were to receive the pay, and imposing a penalty of \$100 upon the parties who should refuse or decline to accept the responsibility and perform the services. It is sufficient that the subject-matter introduced as an amendment was not germane. If within the legislative power, it should have been the basis of a new act,—could not be incorporated as an amendment. The statute being penal, and the action brought for the penalty for a refusal to comply with its provisions, strict and specific proof was required, as in criminal cases, to warrant a conviction. The evidence failed to make a case. The statute, if valid, required the appellee to furnish to the road overseer, when employing 10 or more men, the names of those who are or may be liable to a road tax under the provisions of the chapter. There was proof that from 150 to 170 men were employed in the various mines of the defendant; that the mines, where they were employed were outside of the limits of the city of Aspen. There was no proof that any of the employees of the defendant were liable to pay road tax, that any were between the ages of 21 and 50, or that any of them resided outside the corporate limits of a city or town. The fact of being employed outside the city limits fixed no residence; every individual might have resided within the city. The prosecution must have shown that some of them were legally liable to a road tax, otherwise no violation of the statute could be established. The words of the statute are, "who are or may be liable," etc. The words "may be" can only be construed as meaning "in the future," and imposes an impossibility. How can any employer, in the changes, shifting, and mutations of miners, say who may be at any subsequent time liable to taxation at any particular place? If an attempt at compliance was made, those words would

<sup>1</sup>Const. art. 5, § 24, is as follows: "No law shall be revived or amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted, and published at length."

have to be disregarded. If, under the statute, the employer assumed the duties imposed, and at the end of 10 days made his report, not one of those returned might be accessible when the overseer attempted to collect. The statute is an indirect attempt to make an employer liable for the road tax of his employees, and, in case he fails to respond, to collect \$100 in lieu of the taxes. If the law is not invalid, it is and must remain of no value to achieve the end sought; is ineffectual, and is open to severe criticism. The judgment of the county court must be affirmed.

(3 Colo. App. 273)

FIST et al. v. FIST.

(Court of Appeals of Colorado. March 27, 1893.)

REVIEW ON APPEAL — CONFLICTING EVIDENCE — EFFECT OF RECEIPT — NEWLY-DISCOVERED EVIDENCE.

1. Where the evidence is conflicting, but the record on appeal discloses sufficient evidence on which the verdict could have been predicated, the judgment will not be reversed.

2. In an action to recover a balance due for services, where defendant avers payment in full, which plaintiff claims was a part payment, it is proper to refuse a request to charge that if plaintiff signed a receipt in full, believing it was only a receipt for a part payment, then, as soon as plaintiff discovered his mistake, it was his duty to rescind it, and to return the money received, and a failure to do so would prevent a recovery.

3. In such action, where the replication alleges that plaintiff would not have signed the receipt but for his ignorance of the English language, defendant is not entitled to a new trial because of newly-discovered evidence, where his affidavit therefor avers that he was surprised by plaintiff's testimony of his ignorance of English, and could not at that time introduce any evidence except the witnesses who testified, as it is impeaching testimony. *Christ v. People*, 3 Colo. 394, followed.

Appeal from district court, Montrose county.

Action by Jacob Fist against Emanuel Fist and Julius Fist, copartners as Julius Fist & Co., to recover for work and labor done. From a judgment for plaintiff, defendants appeal. Affirmed.

Gerry & Campbell, Goudy & Sherman, and Wm. E. Beck, for appellants. Gray & Selig, for appellee.

RICHMOND, P. J. The plaintiff, Jacob Fist, appellee herein, brought this action to recover the sum of \$2,000 from the appellants, Emanuel and Julius Fist, as partners, for work and labor done. The defendants, by their answer, deny the indebtedness and set up a settlement which they allege was made September 5, 1890, averring that at the time of the settlement they paid to the plaintiff the sum of \$300, and took from him a receipt in full of all demands and accounts existing between the parties. In the replication to the answer, plaintiff admits that he was paid the sum of \$300, and that the sum was credited on the account of the defendants, leaving a balance due him of \$2,000, denies that he made a receipt in full of all demands, and avers that he supposed the receipt contained simply an acknowledg-

ment of the receipt of the sum of \$300; that he could neither read nor write the English language; and that, if the receipt purports to be in full of all demands, it was fraudulently obtained, and without his knowledge of its actual contents. On this state of facts, trial was had to a jury, and resulted in a judgment for plaintiff in the sum of \$1,146.25. Motion for a new trial overruled; exceptions reserved to the judgment which was entered, to reverse which the copartners prosecute this appeal. The errors assigned are that the verdict is unsupported by the testimony; that the court erred in its instructions to the jury, and in refusing to give instructions asked by the defendant, and in overruling the motion for a new trial.

We find that all the errors alleged are without support in the record. It would avail nothing for us to recite the testimony in full, for the purpose of sustaining the conclusion we have reached regarding it. Such is not the usual practice of courts of review, when, after a careful reading of the testimony, it appears that there is sufficient evidence upon which the verdict of the jury could have been predicated. The plaintiff testifies to the employment, and to the fact that no sum was agreed upon between the parties as compensation for his services as a bartender for the defendants. He fixes the value of his services for one year at \$50, for another year at \$75, and for the third and fourth years at \$85, per month, and he fortifies this by the testimony of other witnesses. He distinctly testifies that he went to the city of Pueblo for the purpose of settling with the defendants, at the suggestion of one of them; that they went over the accounts between them, made some figures, and thereupon the defendant Emanuel Fist gave him a check for \$300, which he receipted for, supposing it to be a simple receipt for that sum; that he did not understand the English language, and could not read or write; that upon his return to Montrose, through papers showing the condition of the accounts between them, which he had received from Emanuel Fist, he learned that he had receipted in full; that he then and there repudiated the transaction, and on the day subsequent quit the service of the defendants. The defendants, in their testimony, corroborate the plaintiff so far as he testifies that no sum had been agreed upon for the services to be rendered, but positively swear that at the time of the payment of the \$300, and the execution of the receipt, plaintiff understood thoroughly what he was doing, and that it was a complete and absolute settlement between them; that thereafter the plaintiff returned to Montrose from Pueblo for the purpose of entering into the employment of the defendants, as before, for an agreed sum. This issue thus made by the pleadings and the testimony was submitted to the jury, after instructions given by the court, resulting in the above verdict. By the rule of the supreme court of this state as well as by this court, there can be no reversal of this judgment on the ground that the evidence does not support the verdict, as we think it does.

It is also urged that the court erred in its instructions. If it did, the error was one of which the defendants cannot complain. The question of a settlement, and the giving of the receipt, was fairly and squarely submitted for the consideration of the jury, by the instructions given at the request of defendants. A review of the entire charge, to our mind shows, that, if any error was committed, such error was favorable to the defendants. The instruction asked and refused should not have been given. It practically takes the case from the jury. It was in these words: "The jury are instructed that if they find that the plaintiff signed and gave the receipt introduced in evidence under a mistake, believing that said receipt was only a receipt for \$300, that, as soon as he discovered his mistake, it became his duty to rescind the same, and to return the \$300 received by him, and a failure to do so will prevent his recovering herein." There is nothing in this record which would warrant the court in giving such an instruction. If the plaintiff received the \$300 as part payment on account, he had a right to retain it, and was under no obligation to return it. It was the character of the receipt of which he was complaining and impeaching. Why he should have repudiated the contract which he declares he never entered into is beyond our comprehension.

The next and last contention of appellants is that they are entitled to a new trial because of newly-discovered evidence, and in support of this they file an affidavit wherein they aver that they were not advised from the pleadings, or from any other source, that the plaintiff would testify that he could not read and write the English language; that they had known him for many years, and knew that he could both read and write the English language; and that they were surprised at the testimony, and could not at that time introduce any evidence save and except witnesses who testified upon this point; that since the trial of said cause they have ascertained that there are witnesses who could testify upon this point. There is some mistake here. In the abstract furnished to this court, it is distinctly set forth that plaintiff, by his replication to the answer, directly attacks the character of the receipt, and alleges his lack of knowledge of the English language; that he could not read or write the English language; that he would not have signed the receipt if he had known that it was other than a receipt for the sum of \$300; and that, if it contained or mentioned anything else, it was fraudulently done, and signed by plaintiff without knowledge of its actual contents. With that replication as part of the pleadings, how can it be said that the defendants were uninformed concerning the contention of plaintiff regarding his knowledge of the English language? Besides, this is impeaching testimony, and comes within the rule recited in *Christ v. People*, 3 Colo. 394, wherein it is said: "It is a well-settled rule that newly-discovered evidence, going only to impeach the credit or character of a witness, is not sufficient ground for a new trial." There is no error in this rec-

ord which would warrant a reversal of the judgment.

The judgment must be affirmed.

(3 Colo. App. 253)

### MITCHELL v. ARKELL

(Court of Appeals of Colorado. March 27, 1893.)

#### TAX DEED—ACTION TO SET ASIDE—REPAYMENT OF TAXES.

In an action to set aside a tax deed, where defendant has paid the taxes, it is error to adjudge the property to plaintiff without decreeing the payment of the taxes advanced and the statutory interest, as such payment of taxes is an equitable lien on the property.

Appeal from Pitkin county court.

Action by Edwin Arkell against Walter C. Mitchell to set aside a tax deed. From a judgment for plaintiff, defendant appeals. Reversed.

Wilson & Stimson, for appellant.

RICHMOND, P. J. Appellee brought this suit to obtain possession of a lot in the city of Aspen, alleging in his complaint ownership in fee by a conveyance of December 1, 1887, from the judge of the county court, successor to a former county judge, who had taken the title in trust from the United States government. By acts of congress of 1867 and 1874, (Rev. St. U. S. § 2387,) the judge of the county court is allowed "to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests," etc. It would seem that the title vested in the judge of the county court only in trust for the occupants; hence that some sort of occupancy was necessary, as a condition precedent, to obtain a conveyance. No occupancy or improvement of any kind is shown or any right whatever to the lot in controversy. It appears by undisputed evidence that from and after June, 1884, August Ruff was in the possession, having a house partly upon the lot in controversy, and that he retained such possession, had it at the time of the trial, and that no other possession had ever been held. How, under such circumstances, a title could have passed to Arkell we are not informed; but the regularity of that proceeding does not appear to have been challenged. Consequently there is no question for review here.

Appellant claims the property in fee by virtue of tax title, having paid the taxes from 1884 to 1889, both years inclusive, and having purchased it, and received a deed from a tax sale by the county treasurer, also by a purchase and quitclaim from Ruff, who had the possession. The evidence by the plaintiff (appellee) is inconclusive and unsatisfactory. The case upon the part of the plaintiff appears to have been loosely tried. The court found for the plaintiff, but upon what grounds does not appear; nor can we see how the conclusion could have been reached from the evidence; but it is impossible for this court, from the data presented, to review the case upon its merits.

One error is palpable, and must cause a reversal. Whether or not the tax title was valid and superior to the title of the plaintiff, it appears to have been conceded that he (plaintiff) had never paid any taxes, and appellant had, during all the years mentioned. If plaintiff was found to have the title, such payment of taxes inured to his benefit, was an equitable lien upon the property, and it was error to adjudge the property to him without decreeing the payment of the taxes advanced and the statutory interest. *Sess. Laws 1885, p. 320; Morris v. Bank, 17 Colo. —, 29 Pac. Rep. 802.* The judgment is reversed, and the cause remanded.

(3 Colo. App. 183)

**THORNE et al. v. SCHUMAKER PIANO CO.**

(Court of Appeals of Colorado. March 27, 1893.)

**APPEAL—REVIEW OF EVIDENCE.**

Where there is evidence, though conflicting, to support the judgment, and no errors committed on the trial are pointed out, the judgment will be affirmed.

Appeal from district court, Arapahoe county.

Action by the Schumaker Piano Company against N. H. Thorne and J. E. Griff, copartners as Thorne & Griff, to rescind a sale. Plaintiff had judgment, and defendants appeal. Affirmed.

Ross & Dewese, for appellants. Norris & Howard, for appellee.

**BISSELL, J.** After a somewhat extensive correspondence, the Schumaker Piano Company shipped two pianos from their salesrooms in Philadelphia to themselves as consignees. When the terms and conditions of the transfer to the appellants, Thorne & Griff, were completed, they received the firm acceptances at four months from the 21st of August, 1889, and indorsed the bill of lading over to them. Thorne & Griff received the pianos. About the time of the maturity of the acceptances the company became satisfied that Thorne & Griff had obtained the pianos by misrepresentations, which entitled the vendors to rescind the sale. The corporation brought this suit on that basis, and, by apt averments, charged that the defendants represented themselves as intending and desirous to assume the agency for the piano in Denver, and held themselves out as persons competent to influence and procure a very considerable trade for such instruments. It would subserve no useful purpose to state the substance of the complaint, or the contention of the parties, other than to state in general that the dispute between the parties springs from the company's assertions in respect of this matter on the one side, and Thorne & Griff's denials on the other. The complaint was sufficient in substance and in form, and, if it has been sustained by adequate and competent proof, warrants the judgment which the court rendered. The law applicable to the controversy is not challenged by the appellants. It is con-

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ceded that if the evidence supports the judgment, and is ample for the purpose, the law justifies the recovery. The only question thus really left for the court to pass on is whether the case comes, by reason of the absolute insufficiency of the proof, within the rule so long established in this state. At the outset it may be premised that it is exceedingly doubtful whether any question concerning the admissibility of testimony has been saved by a sufficient objection to warrant its consideration. Whatever might be the conclusion on that question, the court committed no error in refusing testimony offered on behalf of the defendants, and its interlocutory disposition of questions of evidence infringed no established rules. In the direct conflict presented by the proof, it would be entirely easy to suggest many reasons and arguments in support of a different conclusion from that reached by the court, and equally possible to present cogent ones supporting its judgment. This being true, and there being evidence on which the case can properly rest, we are not at liberty to disturb the judgment. There is no such complete want of testimony to support it as will warrant this court in reviewing the conclusions arrived at by the trial judge. This disposes of all the considerations urged by counsel in their brief, and, since they point to no error committed in the trial of the case, the judgment will be affirmed.

(3 Colo. App. 185)

**AMTER v. CONLON.**

(Court of Appeals of Colorado. March 27, 1893.)

**QUIETING TITLE—SUFFICIENCY OF COMPLAINT.**

In a suit to remove a cloud from plaintiff's title, an allegation that defendant claims an adverse estate or interest in the land is sufficient without showing the nature of such claim or its invalidity.

Appeal from district court, Arapahoe county.

Action by Anna Conlon against Marks Amter to remove a cloud from title. Plaintiff had judgment, and defendant appeals. Affirmed.

Sullivan & May, for appellant. Coe & Freeman, for appellee.

**BISSELL, J.** This litigation sprang out of the attempt by Marks Amter, the appellant, to subject certain real property which stood in the name of the appellee, Mrs. Conlon, and of which she claimed to be the owner, to the payment of a judgment which Amter had recovered against Daniel Conlon, the appellee's husband. Counsel suggest but two considerations in support of their contention that the judgment should be reversed. One rests solely upon the insufficiency of the complaint, and the other on the inadequateness of the testimony to support it. This removes the necessity otherwise than in the briefest manner to state the case made by the record. In March, 1889, Mrs. Conlon was the grantee by deed from the then owner of the premises which are the subject-matter of the suit. Subsequently Amter re-

covered a judgment against Daniel Conlon, indemnified the sheriff, caused his execution to be levied on the property, had it sold, and became the purchaser. To remove the apparent cloud upon her title, Mrs. Conlon brought this action against Amter; and substantially stated that she held the fee-simple title; that the defendant claimed an interest and an estate in it adverse to her; and alleged that his claim was without right, and that he was without estate or interest. Her complaint closed with the usual and requisite prayer. The defendant demurred on the general ground of insufficiency. When this demurrer was overruled, he answered, setting up the recovery of his judgment, the levy of the execution, and sale of the property, and averred that Daniel, the husband, was really the owner of the estate, and that the title was taken in Mrs. Conlon's name to hinder and delay his creditors. This statement is sufficient to indicate the points made and the basis of the decision.

With reference to the error based on the inadequacy of the proof to support the decree, it is enough to say that with this contention we have no concern. There is enough evidence in the record to support the finding of the court, and to justify the decree. There are very few exceptions to the general rule that appellate tribunals will not disturb judgments because of the insufficiency of the proof, where the decree rests upon conflicting testimony, and there is enough in the record to support the conclusion.

There is little more trouble with the second proposition. Under our statute an action may be brought by any person in possession against another who claims an estate therein adverse to him. The appellant contends that, to entitle a plaintiff to maintain an action under this statute, it is incumbent on him to set forth in his complaint the claim or the estate asserted by the defendant, and to show by proper averments, not only the nature of that claim, but the facts which demonstrate its invalidity. Some of the earlier decisions doubtless held this to be the rule, and required the pleader, as in ordinary equitable actions, to set out what the estate was, and what the defendant's claims might be. The later authorities, which seem to have more carefully regarded the intent and the purpose of the statute, have adjudged these allegations to be totally unnecessary. A complaint almost identical in form, and certainly identical in substance, has been sustained by several well-considered cases. In the case of *Ely v. Railroad Co.*, cited below, the court said: "An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee, is sufficient without setting out matters of evidence, or what have been sometimes called 'probative facts,' which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a disclaimer, or to allegation and proof of the estate and interest which he claims, the nature of which must be known to him, and may

not be known to the plaintiff." This decision accords with the intent and purpose of the act which is to compel the defendant to make a showing of the title which he asserts, and enable the plaintiff, while the evidence is still in existence, to establish the validity of his title, and free it from the apparent cloud with which the defendant's claim covers it. *Ely v. Railroad Co.*, 129 U. S. 291, 9 Sup. Ct. Rep. 293; *Mining Co. v. Marsano*, 10 Nev. 370; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. Rep. 804. The judgment cannot be disturbed for lack of proof, and the complaint stated a cause of action. The contention in respect of these matters not being well founded, and no other error being called to the attention of the court, the judgment will be affirmed.

(3 Colo. A. 255)

**FARMERS' INDEPENDENT DITCH CO. v. AGRICULTURAL DITCH CO. et al.**

(Court of Appeals of Colorado. March 27, 1893.)

IRRIGATION—DITCH COMPANIES—ACTION TO ENJOIN APPROPRIATION OF WATER—SUFFICIENCY OF COMPLAINT.

1. In an action by a ditch company, brought 25 years after its incorporation, for itself and its stockholders in, and the users and consumers of water from, a certain irrigating canal, against another ditch company and certain public officers, to enjoin defendants from appropriating the water of a certain stream, and for damages, on the ground that plaintiff had made a prior legal appropriation of the same, the complaint did not state the number or names of, or the quantity of land owned by, such stockholders and users of water, nor show, except by general averment, the necessity for the quantity of water claimed to have been acquired by prior appropriations. *Held*, that the complaint was insufficient.

2. Though there was a decree of court relative to the rights of plaintiff so far as the appropriation of water was concerned in a certain district, the assertion of plaintiff's rights to the use of the water under such decree is insufficient, in the absence of any averments that defendant ditch company was a party to the proceeding in which it was rendered, or of any facts by which it is precluded thereby from using the water of such stream.

Error to district court, Jefferson county.

Action by the Farmers' Independent Ditch Company against the Agricultural Ditch Company, James P. Maxwell, state engineer, Isaac H. Batchelor, superintendent of irrigation for water district No. 1, and J. G. Hartzell, water commissioner of water district No. 7, to enjoin defendants from appropriating the water of a certain stream, and for damages for past appropriations. There was a judgment sustaining a demurrer to the complaint, and plaintiff brings error. Affirmed.

Thomas, Bryant & Lee and Jas. W. McCreery, for plaintiff in error. C. J. Hughes, Jr., for defendants in error.

RICHMOND, P. J. The plaintiff in error, the Farmers' Independent Ditch Company, filed its complaint October 23, 1890, alleging "its existence as a corporation, and that for a long time last past it has been, and now is, in the lawful possession, control, and management of that



certain irrigating canal in Weld county known as the 'Farmers' Independent Ditch,' and by virtue of such possession, control, and management is required to carry and distribute, and has carried and distributed, water from the Platte river to its stockholders and others entitled to the use of the same, for irrigation and other beneficial purposes. That this suit is brought by plaintiff for itself and on behalf and for the use of its said stockholders in, and the users and consumers of water from, said ditch. That the rights of plaintiff and the rights of its said stockholders, and the users and consumers of water for irrigation and other purposes as aforesaid, accrued to them, and each of them, by reason of the construction of said canal, and the taking of water by the means thereof from the Platte river, and the distribution and beneficial use of the same upon lands lying thereunder, at and of the date of November 20, 1865, whereby an appropriation of the use of the water from the Platte river was made and perfected according to the then existing laws of the land by and for the use of the consumers and users of water from said ditch. That the amount so taken, used, and appropriated as aforesaid, as of the 20th day of November, 1865, is sixty-one and sixty one-hundredths cubic feet of water, standard measurement, per second of time. That the use of said amount has continued without interruption from the said 20th day of November, 1865, up to the present irrigating season of 1890, and until interfered with by the defendants, as hereinafter set forth. That said amount of sixty-one and sixty one-hundredths cubic feet is necessary to supply said users and consumers of water in the irrigation of their crops, and in carrying on their agricultural operations upon the lands lying under and irrigated from said ditch, at all times during the irrigating seasons of the year. That heretofore, to wit, on the 28th day of April, A. D. 1883, a decree was entered in the district court of the county of Arapahoe, and in and for water district No. 2, which provided, inter alia, that the users and consumers of water, for irrigation and other purposes, from the said the Farmers' Independent ditch, were entitled to the priority of the use of the water not theretofore appropriated flowing and to flow into the Platte river during the irrigating season each year, and to an amount not to exceed sixty-one and sixty one-hundredths cubic feet per second, as of the date of November 20, 1865. \* \* \* That afterwards, to wit, about the 21st day of December, 1874, the defendant the Agricultural Ditch Company, and its predecessors in interest, built and constructed that certain ditch in Jefferson county known as the 'Agricultural Ditch,' and thereby claimed to have appropriated one hundred and one and 54-100 cubic feet. That the said the Agricultural ditch is taken from Clear creek, in Jefferson county. That said stream known as 'Clear Creek' is one of the main tributaries of the said Platte river aforesaid, and empties into the Platte river in the county of Arapahoe, state of Colorado, and at a point in said river

above the headgate of the said the Farmers' Independent ditch. That the said alleged appropriation of the Agricultural ditch, and its claim of right to the use of water, if any it has, is wholly subsequent and junior to the appropriation of the plaintiff company, and the users and consumers of water from its said ditch. That the waters flowing in said Clear creek, as well as in the other tributaries of the Platte river, are necessary to supply the said appropriation of the plaintiff and others senior to it, and the use of the same belongs of right to said plaintiff, to the extent of its said appropriation, subject only to the rights of senior appropriations. That defendant the Agricultural Ditch Company has interfered with and taken the water flowing in Clear creek, appropriated as aforesaid by plaintiff, and has wrongfully turned, and caused to be turned, the same into its said ditch, and so deprived plaintiff and the users and consumers of water from its said ditch of the waters so flowing through the said Clear creek into said river, and of its appropriation and use of the same for irrigation and other beneficial uses. That, during the large part of the irrigating season of 1890, plaintiff has been illegally deprived of its use of water and the benefits of its appropriation thereof by means of said wrongful acts and doings of said defendant company, whereby the crops and agricultural products of the farmers and others as aforesaid, dependent on the water of the said the Farmers' Independent ditch, have been in a large measure lost and destroyed, to its damage and the damage of users of water from its said ditch, for whom it sues, in the sum of fifty thousand dollars. That the said James P. Maxwell is state engineer. That said Isaac H. Batchellor is superintendent of irrigation for water district No. 1. That said J. G. Hartzell is water commissioner of water district No. 7. That they, and each of them, have allowed and permitted the said the Agricultural Ditch Company to take and divert the waters flowing through Clear creek into the Platte river, and appropriated by this plaintiff, into the said the ditch of the Agricultural Ditch Company, and have permitted the said the Agricultural Ditch Company, without any right or authority of law whatsoever, to interfere with the rights and appropriations of plaintiff as aforesaid, to its great damage as aforesaid. That defendants are now taking, and threatening to continue during the present irrigating season and further seasons to take and use, the water so appropriated as aforesaid by plaintiff, and plaintiff has therefore no adequate remedy at law for the redress for such injury and damage. That the result of said taking and continued taking and use of water as aforesaid, in denial of the right of plaintiff, will result in irreparable and continuing damage and injury to plaintiff." Prayer for injunction and damages. To this the following demurrer was interposed: "(1) That said complaint does not state facts sufficient to constitute a cause of action against said defendant. (2) That said complaint does not state facts sufficient to entitle said

plaintiff to the relief asked, or any relief whatever, against said defendant, either alone or jointly with the other defendants in said action. (3) There is a defect of parties plaintiff in said complaint, in this, to wit: That the alleged stockholders and users of water through and from the ditch alleged to belong and to be in the possession of the said plaintiff are not joined with or made parties plaintiff in said suit. (4) Because said complaint is uncertain and insufficient, in this, to wit: That it does not state the facts showing the appropriation and continuous use by the said plaintiff and its alleged stockholders and consumers of the water, and the acts by means of which they acquired priorities attempted to be set up in said complaint. (5) The said complaint does not state facts sufficient to constitute a cause of action against this defendant, or against this defendant jointly with its co-defendants herein, in this, to wit: That it does not state facts sufficient to show that the said defendants, or any of them, were parties to, or in any manner affected or concluded by, the alleged decree of priorities referred to and relied upon in said complaint. (6) Because said complaint is uncertain, ambiguous, and unintelligible, in this, to wit: That it fails to set up the whole of the alleged decrees mentioned therein, or a sufficient portion thereof to show any right or rights thereunder accruing to the said plaintiff, or any binding force thereunder of the same against this defendant or any of the defendants herein. (7) This court has not, and cannot have, jurisdiction to inquire into and determine the matters sought to be the subject of litigation in said complaint in this cause, for the reason that, as appears in and by said complaint, there is now pending, and has been an adjudication concerning the same subject-matter. (8) That there is a defect of parties defendant in said suit, in this, to wit: That the parties using and consuming water in said district No. 7 are not joined with the other defendants herein. (9) That there is a misjoinder of parties defendant herein, in this, to wit: That this defendant is improperly joined and united with the other defendants herein, to wit: James P. Maxwell, as state engineer; Isaac H. Batchellor, as superintendent of irrigation for water district No. 1; J. G. Hartzell, as water commissioner for district No. 7. (10) And that said complaint is otherwise uncertain, unintelligible, and ambiguous, and insufficient to be answered unto by this defendant." The demurrer was sustained, and plaintiff elected to stand by the complaint, and prosecute this error.

The only question for our consideration is whether or not the court erred in sustaining the demurrer. A determination of this question is not without difficulty. The increase in the agricultural interests of the state, the necessity for water to irrigate lands devoted to this purpose, and the scarcity of water in various of the streams in the state, render it absolutely essential that caution should be exercised by the courts in reaching conclusions involving such rights. In our opinion, it is absolutely necessary that, when one seeks

to enforce an alleged right to the use of water as against others, the complaint should contain every essential averment necessary to show the existence of such right under the provisions of the constitution of the state, the statutes, and the various conclusions reached by the supreme court, wherein provisions are made and interpretations given concerning such right or rights. In order that a thorough understanding of our conclusion may obtain, we have deemed it prudent to incorporate into the opinion the complaint and demurrer, believing a careful examination of them will make our position more intelligible.

In the case of *Reservoir Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, a similar question was presented for the consideration of the court. It is true in that case there is seemingly a conflict of opinion between the justices then composing the bench, but we think sufficient can be gathered from each of the opinions to demonstrate the fact to be that the demurrer to the complaint in this particular case was properly sustained. In the opinion of Justice Hayt, in commenting upon the case of *Thomas v. Guiraud*, 6 Colo. 583, and other cases, this language is used: "In the light of these decisions, it seems clear that, at least under some circumstances, different users of water, obtaining their supply through the same ditch, may have different priorities of right to the water; that the appropriations do not necessarily relate to the same time. \* \* \* It is well established that no mere diversion of water from a stream will constitute the constitutional appropriation. To make it such, it must be applied to some beneficial use, and, in case of irrigation, it must be actually applied to the land before the appropriation is complete." Let us apply the principle thus announced to this complaint. It is alleged that the suit is brought by plaintiff for itself, and on behalf and for the use of its said stockholders in, and the users and consumers of water from, said ditch. The names of the stockholders are not mentioned; the number is not given; the quantity of land owned by such stockholders is not set forth; the necessity for the quantity of water claimed to have been acquired by prior appropriations for the purpose of irrigation is not shown. It is averred in a general way. If as is said that, under some circumstances, different users of water, obtaining their supply through the same ditch, may have different priorities of right to the water, and that the appropriations do not necessarily relate to the same time, then, if the contention of plaintiff in error be correct, it should appear by averment in the complaint that the ditch company, as well as the consumers and stockholders, have a prior right to those of the defendant in error. It may be, and it can fairly be assumed to be true, that the stockholders of the company, at the time of the institution of this suit, are not the same as those existing as early as 1865. They may be less; they may be more. Some of the land irrigated in the earlier day may have been abandoned; other lands may have been acquired along

the line of the ditch subsequent to the admitted date when the Farmers' Independent Ditch Company was incorporated. We are at a loss to see how the defendant company could have answered the complaint without supplying, by its answer, this defect of parties and details. In the opinion of Justice Helm, he says: "The act of turning water from the carrier's canal into his lateral cannot be regarded as a diversion, within the meaning of the constitution; nor can this act of itself, when combined with the use, create a valid constitutional appropriation. There is therefore no escape from the conclusion hitherto announced by this court that in cases like the present the carrier's diversion from the natural stream must unite with the consumer's use, in order that there may be a complete appropriation, within the meaning of our fundamental law." If this be true, how can it be said that a general allegation that the Farmers' Independent Ditch Company is entitled to the use of a certain quantity of water for the purpose of supplying its stockholders and users of water, or that the water so claimed is being appropriated for what is now understood to be a beneficial use, to wit, irrigation of lands, is sufficient. If we understand this conclusion of Justice Helm, it means that the diversion of water from the natural stream by the ditch company does not constitute a constitutional appropriation, but that it must appear that this diversion must have united with the consumer's use, in order that there may be a complete appropriation. If we are correct in this interpretation of the language, it certainly follows that the names of the individuals, the land to be served by the use of the water, must be set forth in the complaint, in order that the defendant can properly and intelligently attack the claim of plaintiff. It is important to aver whether all of the water diverted from its natural channel by the ditch company is not so diverted for the purpose of irrigating the land of a few, rather than many. In other words, we think that, before a court can be called upon to enter a decree in conformity with the prayer of the complaint, the number of consumers who unite their use with the "carrier's diversion" must appear. The mere fact that the ditch company has a decree within a certain district, for a certain amount of water, and its right to the use of that water is by a certain decree declared to be prior to others in another district, and further down or up the stream, does not, under the conclusion reached by all the justices, constitute an appropriation for which a final decree could be entered. The names of the individuals, the date of their appropriations, the amount and quantity of land for which water is needed, must appear, in order to show that the diversion and the consumption necessary to constitute the appropriation is prior to any rights acquired at any time by the defendant company. By Justice Elliott, in his opinion, it is held that a general averment of priority to the use of water through the ditch of the defendant company for the irrigation of his lands

antedating the priorities of the other defendants is not sufficient; that the complaint must contain an averment of the fact that the plaintiff has been accustomed to take and apply the water without waiver or abandonment, or at all, to the irrigation of his crops. *Combs v. Ditch Co.*, 17 Colo. 146, 28 Pac. Rep. 966.

It is a well-recognized rule that a statement of legal conclusions does not constitute a cause of action. The facts upon which the cause of action is based must be stated; and we think that the complaint in this case comes clearly within the rule above recited; in other words, that the assertion of plaintiff's rights to the use of water is but a conclusion of law. Conceding that there was a decree of a court relative to the rights of the plaintiff company so far as the appropriation of water was concerned in a certain district, yet such a decree cannot go so far as to conclude the rights of individuals who were not parties to that proceeding; and it is nowhere alleged or averred that the defendant company was ever made a party to the previous proceeding, nor is it shown by what means, by what facts or circumstances, they are precluded from using water from the Platte river, or other stream tributary thereto, by virtue of the decree. We think that the complaint fails to state a cause of action. The demurrer was properly sustained.

The judgment must be affirmed.

(3 Colo. App. 186)

# RIO GRANDE SOUTHERN R. CO. v. DEASY.

(Court of Appeals of Colorado. March 27, 1893.)

## GENERAL AND SPECIAL VERDICT—INCONSISTENCIES.

Where, in proceedings to condemn land for railroad purposes, the jury, by their general verdict, find the value of the land to be \$350, and the damages otherwise sustained by the owner to be \$170, and by their special verdict find that the owner sustained no damages as to the balance of the land not taken, and that the value of what the railroad had appropriated was not diminished by any collateral benefits to the owner, the special finding must control; and the judgment will, on appeal, be modified by setting aside that part of the judgment awarding \$170 damages.

Appeal from district court, La Plata county.

Petition by the Rio Grande Southern Railroad Company against John Deasy to condemn land of defendant for plaintiff's railroad line. The petition was allowed on payment by plaintiff of a certain sum assessed as damages, and plaintiff appeals. Modified and affirmed.

Russell & McCloskey, for appellant.

BISSELL, J. In 1890 the Rio Grande Southern Railroad Company was constructing its road through La Plata county. The line, as laid out and built, crossed a part of the northwest quarter

of section 3, which was owned by the appellee, John Deasy. To acquire title to what was required for railroad purposes, the corporation filed its petition to condemn a way through Deasy's land. Under these proceedings a trial was had, and the petition to condemn was allowed on payment of the damages, which the jury assessed at the sum of \$500. From this judgment the company appealed to the supreme court, from which, under the statute, the case came here for consideration. In one part only is the judgment attacked. The jury rendered a verdict of which the company does not complain, otherwise than as to the discrepancy between it and the special findings of the jury on the questions submitted to them. By their general verdict the jury found that the value of the land was \$330, and that the damages which Deasy had otherwise sustained amounted to \$170. The general verdict, however, does not express all the items which the jury is bound to find to make it conform to the statute. Under some circumstances it would undoubtedly have to be set aside for the want of these statutory requisites. But the special findings remove all difficulty in this direction, and by them the jury undoubtedly declared that the defendant had suffered no damages as to the balance of the land not taken, whether it lay north or south of the road, and that the value of what the railroad had appropriated was not diminished by any collateral benefits accruing to the owner. Their conclusions in respect of these matters are clear, definite, and unmistakable. Under these circumstances their special findings must control, and the judgment ought to have been entered in conformity with these established facts. It is quite true that, in a sort of a summary of the items of which their verdict was composed, the jury stated that they allowed Deasy \$100 for general inconvenience, and \$70 for some other elements of damage, which they specified. This general summarization cannot be permitted to overcome their specific declaration that no damage had come to the owner, or benefit been received by him, by reason of the construction of the road through the land. It is thus quite possible to modify and uphold the judgment, and evidently do substantial justice between the parties. The record does not disclose the evidence, but there is enough contained in it to lead us to the conclusion that there would be no want of equity to modify and sustain it, and that, therefore, it should not otherwise be disturbed. We conclude that that part of the judgment awarding Deasy \$170 damages should be set aside, and that the finding of \$330 for the value of the land should be confirmed. Under these circumstances the usual order concerning the costs ought not to prevail, and they should be divided between the parties. It is therefore ordered that the judgment be reduced to the sum of \$330, and that as thus modified it should be affirmed, and that the costs of this appeal should be borne equally by the respective parties.

(5 Wash. 799)

## CHARVAT v. MEYERS.

(Supreme Court of Washington. Feb. 24, 1893.)

## CONTRACT—CONSIDERATION.

Plaintiff made improvements on defendant's land, being induced to do so by defendant's representations that the land belonged to a railroad company, and that by improving it plaintiff might acquire title thereto from the company. *Held*, that these facts constituted a sufficient consideration for a subsequent promise by defendant to pay plaintiff for the improvements.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Vincenc Charvat against Peter E. Meyers. Plaintiff obtained judgment. Defendant appeals. Affirmed.

Jones, Voorhees & Stephens, for appellant. David Herman and James Dawson, for respondent.

SCOTT, J. This was an action brought by the plaintiff against the defendant to recover the sum of \$268 for improvements made by him on lands owned by the defendant. The plaintiff obtained judgment, and the defendant appealed. The complaint alleges that on the 20th day of November, 1890, the defendant represented to the plaintiff that a certain piece of land (describing it) was vacant and unoccupied, and that the plaintiff could acquire title thereto from the Northern Pacific Railroad Company by settling thereon, improving the same, and making application to purchase from said company; that the plaintiff, relying on said statements, and in ignorance of the true location of the said land, settled thereon, and made valuable and permanent improvements, in the way of erecting a dwelling house, digging a well, and clearing several acres of the land; that said land was not situated as the defendant represented it to be, but in fact was, and now is, owned by the defendant in fee; that, after the making of said improvements, the defendant claimed the tract of land, together with the improvements; that thereafter the plaintiff and defendant effected a compromise, and the defendant undertook to pay to plaintiff the just and reasonable value of said improvements; and all damages sustained by the plaintiff, but that he thereafter refused to do so. The defendant's answer was a general denial, with a counterclaim for the use and occupation of the land, and for cutting timber thereon. Appellant alleges that the complaint does not state facts sufficient to constitute a cause of action, and that the evidence was insufficient to sustain a recovery. He alleges that no consideration was pleaded for the alleged promise of the defendant; that the amended complaint simply pleaded a promise for past consideration, upon which no liability can be based; that there was no controversy between the parties upon which the said pretended compromise could be based.

We think there were sufficient facts proven to show a controversy between the parties as to the misrepresentations of the defendant and his liability therefor. Ac-

ording to the plaintiff's testimony, the defendant sought the plaintiff, and advised him to settle on the land, and pretended to show him where the lines were, but did not show him the true location thereof. The facts testified to by the plaintiff were sufficient to support a promise to pay, regardless of whether the misrepresentations of the defendant were or were not fraudulent. The defendant assumed to know the location of the land, and he owned the land adjoining the tract owned by the railroad company. The action was properly brought upon the promise to pay.

It sufficiently appears that, upon the payment of the amount, the defendant was to have all of the improvements, and this would naturally result from the situation. The plaintiff testified that it would be impracticable to remove the buildings, and, of course, it was impossible to move the other improvements. The defendant reaped the benefit of the plaintiff's labor and money performed and expended as aforesaid by reason of the acts of the defendant. There was no error in not permitting the defendant to show that the value of the land was not enhanced by the improvements, for the plaintiff sought to recover upon the promise of the defendant to pay the cost of the improvements. The issues of fact were settled by the jury in favor of the plaintiff.

The defendant complains of an instruction given by the court, which he claims was not warranted by the pleadings or evidence. He points out no particular otherwise than this wherein he claims that it was erroneous. The instruction was directly pertinent to the issues made.

Judgment affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

(5 Wash. 759)

MEEKER et ux. v. CITY OF PUYALLUP.  
(Supreme Court of Washington. Feb. 17, 1893.)

#### DEDICATION OF PARK—CHANGE OF GRANTEE.

Where a person conveys land to a town, to be used for a public park, and, the town corporation being invalid, a city corporation is effected, which accepts the grant on the conditions named therein, the conveyance is valid, since the evident intention of the grantor was not to convey the land to any particular corporation, but to dedicate it to the public, and since, in such case, the grant would be valid, though no grantee whatever was named therein.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Ezra M. Meeker and wife against the city of Puyallup to declare plaintiffs the owners of certain lands which they had dedicated to the public. There was judgment for defendant, and plaintiffs appeal. Affirmed.

Pritchard, Stevens, Grosscup & Seymour, for appellants. W. W. Gaskill, City Atty., and Thos. Carroll, for respondent.

HOYT, J. In 1889 appellants executed and delivered to the town of Puyallup a

deed conveying the land in question to said town for the purpose of a public park. Such deed was accepted by the town, and placed on record in the auditor's office, and an ordinance was duly passed agreeing to all of the conditions set out in said deed. Thereafter said town, by its properly constituted authorities, took possession of the land, and exercised full control of the same as a public park. The grantors fully recognized the right of said town so to do, and in many ways encouraged and acquiesced in the use and control of said land as such public park. Subsequent to the making of this deed the attempted incorporation of said town was declared invalid by this court. Some time thereafter the city of Puyallup was duly incorporated under the laws of the state of Washington, with substantially the same boundaries as those included in the attempted incorporation of the town of Puyallup. After the incorporation of the said city of Puyallup the authorities thereof exercised acts of ownership over the land in question as a park, in the same manner as had the acting authorities of the former attempted incorporation. The said city of Puyallup also duly passed an ordinance accepting all the conditions in the deed to the said town of Puyallup. This ordinance was not passed until after the action was commenced, and could not aid the title of respondent under the deed in question; but as it was a fact in the case at the time the decree was rendered it could properly be taken into account in determining the relief to be granted. The above-stated facts appear clearly from the record, and there is some testimony tending to show acts on the part of the grantors in said deed since the incorporation of said city affirmatively recognizing the use of the land in question as a public park. But upon this point the proof is not satisfactory. There is, however, proof that for some months after the new incorporation the appellants stood by, and, with knowledge that the property was being used and controlled by the city as a park, said nothing in opposition to its being so used and controlled.

Appellants sought by this action to obtain a decree that the city of Puyallup has no rights to the land in question, and that said appellants are the owners thereof, discharged of and from any claim of the public growing out of the facts above set forth. That the acts of the appellants outside of the making of said deed were insufficient to constitute a dedication of the land is clear, and, if such deed can have no force in aiding the contention of the respondent that the same has been dedicated to public use, the claim of appellants must be sustained. The important question, then, is as to the construction of this deed. Appellants claim that it is absolutely void for the reason that at the time it was executed there was no grantee to take the title. If it is to be construed as a conveyance for private uses, such would be the undoubted effect of the want of a grantee; but if the grant is such that it can be construed as a dedication to the public, such would not be the necessary result. A grant of this kind may

be perfectly valid, and such as the courts will fully enforce, even although no grantees whatever be named therein. This distinction grows out of the necessities of the case, and has always been recognized by the courts. In the case of *City of Cluclunati v. Lessees of White*, 6 Pet. 431, this rule was announced, and a large number of cases cited to sustain the same. Before this decision there had been some claim that, although such rule existed as to streets and highways, it did not exist as to grants to the public for other uses. The court, however, refused to recognize any such distinction, and applied the rule to a public use similar to that sought to be conferred in the case at bar. This same doctrine was again announced by the supreme court of the United States in *New Orleans v. U. S.*, 10 Pet. 662; by the supreme court of Ohio in *Brown v. Manning*, 6 Ohio, 298; and by the supreme court of Illinois in *Maywood Co. v. Village of Maywood*, 6 N. E. Rep. 866. In the latter case a dedication to the public was sustained, though the grantee to hold the title for the benefit of such public did not have an existence until about 10 years after the date of the dedication. Such being the rule as to dedications to public use, it follows that if the deed in question can be construed as such dedication, instead of as a private grant, it can be sustained, though at the time of its execution there was no grantee to take the title. In determining this question the intention of the parties must control. What was the intention of the grantors in making said deed? We think it was to dedicate to the public the land in question for its use as a park, and the supposed incorporation was made the nominal grantee as an aid in the accomplishment of the purposes of the dedication. The principal thing in the mind of the grantors was not as to the particular incorporation which represented the public, but the public itself. And the grant would, under the circumstances, have had full effect at the date of the execution of the deed had there been no conditions attached to the dedication. But, there being conditions which required action on the part of the representatives of the public, the grant could not take full effect until the public had so organized that it could bind itself to the performance of the conditions required on its part by the terms of the grant; and as soon as the public had thus organized, and the organization had acted, the dedication became fully effectual. In what we have said above we have given no weight whatever to the fact that there was a corporation in form answering the description of the grantee in the deed, and that the present incorporation might be held to be substantially the successors in interest of such incorporation. There might be a grave question as to whether or not, under all the circumstances of this case, appellants could attack the capacity of the grantee which they themselves had named. But this question is of no importance in view of the conclusion to which we have arrived as above stated. In our opinion, the deed was, in effect, a dedication to the public; that the public to whom it was

dedicated is now represented by the city of Puyallup; that said city, as the representative of such public, has sufficiently complied with the conditions of the dedicatory grant, and that the same is of full force and effect. The decree of the lower court must be affirmed.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

(5 Wash. 677)

#### HEALD v. HODDER et al.

(Supreme Court of Washington. Feb. 6, 1893.)

#### MECHANICS' LIENS—INTENTION OF CLAIMANT—NOTICE.

1. In an action to foreclose a mechanic's lien for work done the proof was unsatisfactory as to whether plaintiff kept a correct account showing how many days he worked on the buildings against which the lien was claimed, and there was evidence that he was regularly employed for a year or more by the contractors, and worked for them indiscriminately on such buildings and other buildings, as they directed. Held, that the trial court properly found that the work for which the lien was claimed was done on the credit of the contractors, and with no intent to claim a lien therefor, though plaintiff testified that he intended to claim a lien.

2. A mechanic's lien notice must state either that the work for which the lien is claimed was done at the direct instance of the owners, or that those for whom the work was done occupied such a relation to the owners as made them their agents within the lien law. *Warren v. Quade*, (Wash.) 29 Pac. Rep. 827, followed.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Zachary Heald against Mary Hodder, John Hodder, and others to foreclose a lien for work and labor by plaintiff on defendants' buildings. Judgment for defendants. Plaintiff appeals. Affirmed.

Claypool & Haight, for appellant. Snell & Bedford, for respondents.

HOYT, J. This action was brought to foreclose a lien for labor alleged to have been performed by the plaintiff on two certain houses which were being erected for the defendants Hodder by the other defendants. The court below found as a fact that the labor for which the lien was claimed was performed upon the sole credit of the contractors who were erecting the buildings, and with no intent to claim a lien thereon. Taking all the testimony in the record together, we think it justified this finding. It is true that there were some isolated statements in the testimony of the plaintiff which tended to show that he at all times intended to claim a lien upon the buildings for his labor, but some of his own testimony is inconsistent with this theory, and, when all of it is investigated in the light of facts sufficiently established by other proofs in the case, we think it does not sustain his contention that he so intended to claim a lien. The proof is unsatisfactory as to whether or not he kept any correct account showing just how many days he worked upon these particular buildings. His time book, offered in evidence, shows that the labor for which he claimed a lien was more than half of it performed in December, while the

testimony, taken as a whole, conclusively shows that the buildings upon which he sought to enforce his lien were not commenced until some time in January; the contract for their erection not having been entered into until after the 1st of January. From this it will be seen that his testimony as to the amount of labor which he had performed upon these particular buildings was very unsatisfactory, and, when taken in connection with the conceded fact that he was regularly employed for a period extending over a year or more by the firm who had the contract for erecting these buildings, and worked for them indiscriminately upon these or other buildings as they directed, it seems clear that the conclusion of the lower court was right.

Besides, there is no attempt by him to definitely specify as to how much of the work for which he claimed a lien was done upon each of the two buildings owned by said defendants Hodder, nor is there any attempt to show such a state of facts as would justify a joint lien for the whole amount upon both of said buildings. There is a claim made only for a separate lien as against each of the buildings for half of the amount due for such labor, upon the general allegation and proof that the work proceeded upon said buildings together, and that he thinks he performed about as much labor upon the one as on the other. The fact that he failed to keep any separate account of the work done upon each separate house, though not, in itself, conclusive, tends very strongly to sustain the finding of the court that he did not intend at the time he so performed such labor to look to the buildings at all, but, instead thereof, relied entirely upon the credit of the firm by which he was employed.

Another matter tending strongly to support such finding was the fact, conceded by the plaintiff in his testimony, that in the settlement between him and the firm for which he was working there was a request on the part of such firm that he wait eight months for his pay, to which request he without objection agreed. This fact alone would tend very strongly to show that at that time he did not intend to claim a lien upon the buildings; and if this agreement to give such credit had been reduced to legal form, so as to be binding upon the plaintiff, there would be much force in the argument that by giving such credit he had waived his right to a lien upon the buildings, even although at all times he had intended to rely upon, and, if necessary, enforce, the same. The decree of the court below should be affirmed for the reason assigned by the superior court.

However, there is another reason why this lien cannot be maintained. It is not claimed that the work was done at the direct instance of the owners of the buildings, nor is there any allegation or claim in the lien notice which shows that those for whom the work was done occupied such a relation to such owners as made them their agents within the meaning of the lien law. The case is therefore brought directly within the ruling of this court in the case of *Warren v. Quade*, (Wash.) 29

Pac. Rep. 827, in which it was held that without such an allegation the lien could not be enforced. Appellant practically concedes that this lien is within the ruling in that case, but contends that the decision therein was wrong. We have re-examined the question, and, though it is true that there are some cases which hold that, if the lien notice contains the allegations specially required by the statute to be set out therein, it is *prima facie* valid, and the other facts necessary to its enforcement can be shown upon the trial, and the lien sustained, such decisions do not so well harmonize with our views as those which hold that there must be sufficient facts set out in the lien notice to *prima facie* show that the lien can be enforced. If such is not to be the construction of our statute, every beneficial purpose would have been accomplished by a provision that the lien notice need only contain an allegation of the fact that the person claimed a lien for a certain amount upon certain property therein described. If the only object of the lien notice is to put persons upon inquiry, such a notice would fully accomplish its purpose. This construction of our law would make a large number of provisions, therein fully set out, of no practical utility whatever, and, this being the effect of such interpretation, we do not feel inclined to adopt it. We prefer to adopt an interpretation which makes the lien notice in itself of some practical utility, and enables a searcher of the title to ascertain from such notice whether or not the facts exist which will warrant the enforcement of the lien for which the claim is filed. For these and many other reasons which might be given, we are satisfied with the decision in the case above cited, and an adherence thereto will result in an affirmation of the decree rendered in this action. For the two reasons above set forth the judgment and decree of the lower court must be affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur. ANDERS, J., concurs in the result.

(5 Wash. 729)

FAIRHAVEN LAND CO. et al. v. JORDAN et al.

(Supreme Court of Washington. Feb. 14, 1893.)

REFERENCE—MECHANICS' LIENS — NOTICE—VERIFICATION — FOR WHAT LIEN MAY BE OBTAINED — ASSIGNMENT.

1. Where the court, in an equitable action, orders the referee's report to be set aside, and the cause to be retried before the court, the admission on such retrial of evidence which adds nothing material to plaintiff's case is not prejudicial to defendant, even if error.

2. A recital in a notice of lien filed by material men, that the contractor, as agent of the owner, ordered the material, sufficiently alleges the existence of the relation of principal and agent between the owner and contractor to subject the building to the lien.

3. A notice of lien, containing a bill for "merchandise," is not a sufficient indication of the character of the material, though the claimant states, and the bill, by its printed heading, shows, that he is a dealer in rough and dressed lumber, sash, doors, shingles, and blinds.

4. Where the contract for furnishing mate-



rial fixes no time or method of payment, the notice of lien need not set forth the terms on which the material was furnished, as required by Gen. St. § 1687.

5. A lien notice stating merely a balance due the claimant, without stating the total amount of material furnished, is fatally defective.

6. Material furnished while the contractor's bondsmen are completing the work, after its abandonment by the contractor, is as much the subject of a lien as if delivered to the contractor personally.

7. Where a mechanic's lien is assigned after suit to foreclose is commenced, the assignee is properly made a party.

8. Where a lien notice shows a certain amount due after deducting all "just" credits and offsets, a verification reciting that the lien notice is "true" is a sufficient compliance with the statutory requirement that the verification state that the claim is "just."

9. The introduction in evidence of the original lien notices, with the auditor's certificate of recording, and an additional certificate that they are "as the same appear of record," proves the fact and date of record. *Jewett v. Darlington*, 1 Wash. T. 601, and *Cowie v. Ahrenstedt*, 25 Pac. Rep. 458, 1 Wash. St. 416, overruled.

10. The fact that the owner has himself bought the materials, and promised to pay for them, is no reason for sustaining a defective notice of lien.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by the Fairhaven Land Company and others against R. C. Jordan, Carmi Dibble, and James P. Demattos to foreclose mechanics' liens. From a judgment in plaintiffs' favor, defendants appeal. Reversed.

Bruce & Brown, for appellants. Cole & Romaine, (Kerr & McCord, of counsel,) for respondent Fairhaven Land Co.

**STILES, J.** This action was brought to foreclose five mechanics' liens upon the property of the defendant Demattos. The lien claimants joined in their complaint, which set out each claim in a separate cause of action. The cause was referred, by the consent of the parties, under the provisions of chapter 5, tit. 7, Code Proc. The referee took the proofs, and made his report upon the testimony, and his findings of fact and conclusions of law. To this report the defendant excepted on the ground that the findings of fact were contrary to the evidence, and the conclusions of law were not warranted by the findings of fact. These exceptions the court sustained, and ordered that the report be in all things set aside, and held for nothing. The same order set the case for trial before the court at a future day. Before the trial the plaintiffs were allowed to file an amended complaint, and the parties stipulated that the testimony taken before the referee should stand as though it had been taken before the court at the hearing ordered by it. The cause proceeded to judgment, and errors are assigned on the ground that the court permitted other testimony than that reported by the referee to be introduced, and that the court allowed the amended complaint to be filed. The most that can be said on this point is that the action of the court was apparently irregular, in permitting additional evidence to be taken without

some showing of its having been inadvertently omitted. The statute evidently contemplates that the court, after the reference, shall only revise the findings of fact and conclusions of law upon the testimony produced before the referee; and to bring about the admission of further testimony there ought, certainly, in such a case, to be a showing made by the party desiring to produce such testimony to authorize any such proceeding. But in this case the order of the court, setting aside the report of the referee, and ordering the same to be retried, was unobjected to; and inasmuch as the subsequent testimony produced nothing that was really material to plaintiffs' case, in addition to what had been testified to before the referee, we think the error, if any, was without any prejudice to the defendants. Besides which, this was an equity cause; and, although section 389 of the statute provides that the conclusions of the referee's report shall be deemed and considered as the verdict of a jury, it may well be questioned whether the report of a referee in an equitable action is entitled to any greater consideration than the verdict of a jury in an equitable action, viz. that of an advisory finding.

A great number of objections are made to plaintiffs' lien notices, and it is claimed that in many particulars the statements of the liens do not accord with the evidence produced in their support.

1. It is said that the liens do not show that the materials were furnished to be used in the building, but only that they were so used. But this point is not well taken, since, upon reference to the liens, we find that although, in the preamble, it is only alleged that the subcontractor furnished material actually used in the construction of the building, a subsequent portion of the liens alleges that the contract was for materials for the building.

2. Each lien alleges that "R. C. Jordan is the name of the contractor who, on a given date, as such contractor and agent of said owner, entered into an oral contract with the claimant," etc.; and there was no further allegation of the existence of such a relation between defendant and Jordan as the statute makes sufficient to charge a building with a lien. The lien accrues for materials furnished, whether furnished at the instance of the owner of the building "or his agent." We have held that the naming of one person as the owner of the land, and the statement that another person was the contractor, without any allegation of contractual relation between the two, did not satisfy the statute. *Warren v. Quade*, 3 Wash. St. 750, 29 Pac. Rep. 827. But where the statutory requirement is so squarely met as it is here, by the recital that Jordan, as agent of the owner named, contracted for the materials, we think further particularity was unnecessary. Upon the trial it developed that Jordan's agency was by reason of his having a contract for the erection of the building, so that the statement in the lien notice was made good.

3. Each lien notice contained the following clause: "And the following is a statement of the articles so furnished under

said contract, hereto itemized and annexed, marked 'Exhibit A,' and made a part of this notice." The exhibits contained bills of items sufficiently definite, except in the case of the Fairhaven Land Company. This company filed two lien notices, in which it was set out that the claimant was a "dealer" in rough and dressed lumber." Its exhibits were the usual merchants' bill heads, reciting: "Bought of the Fairhaven Land Co., manufacturer and dealer in rough and dressed lumber, sash, doors, shingles, and blinds." Then followed, in regular bill form, a number of items, each in form like the following: "1890. Aug. 14. To Mdse., \$93.90." There was no other indication of the character of the materials in the notices; but the proof showed that the entire bill, amounting to upwards of \$1,600, was for lumber, which had been furnished at the agreed price of \$12 for rough, and \$22.50 for dressed, per 1,000 feet. Counsel for respondent says this charge for "Mdse." shows a charge for lumber; but why might it not represent sash, doors, shingles, or blinds, in each of which the respondent dealt? The knowledge of the owner that lumber was furnished can make no difference. The lien claimant is required by the statute, to set out a statement of his demand, which it has been frequently held, in the case of material men, means a reasonable bill of items, (*Gates v. Brown*, 1 Wash. St. 470, 25 Pac. Rep. 914; *Warren v. Quade*, supra); and there is no reason under the sun why a claimant should not have complied with so plain a provision.

4. An objection is made by appellants that none of the notices state the terms of payment, while the evidence shows that there were terms. If there were terms, it was incumbent for the lien claimant to set them forth; for the statute (Gen. St. § 1667) says that the "terms, \* \* \* if any," are to be contained in the notice. But the evidence here shows no agreement whatever as to the time or method of payment. It is true that several of the witnesses said they "understood" or "expected" that cash would be paid at the end of each month for what had been furnished during that month, or at least upon the architect's making the usual certificate to the owner, and payment by the latter to the contractor; but when pursued it appeared that in each case the expectation was based upon the usual course of business pursued by the party testifying, and not upon any agreement made with the contractor. It is urged, however, that if there was not an express agreement the law implied payment on delivery, and that was a term or condition which ought to have been stated; but we do not think the statute was intended to provide for notice to the owner of a universal rule of law which he ought to infer, if no exceptional terms were stated.

5. Frizell filed his claim for \$302.60, and the proof shows that this was only a balance of account. He had furnished more than twice the amount of materials he claimed for, and must fail for that reason. *Gates v. Brown*, supra.

6. Austin's claim is bad for the same reason as Frizell's.

7. Estabrook's contract was to furnish all the brick wanted for the building. He delivered a quantity at the ruling price in the market, and when the price fell he threw off 50 cents a thousand. This was a mere modification of the original contract, and not a different one. The facts sufficiently appeared in the notice. The brick delivered at the building while the contractor's bondsmen were undertaking to proceed with the work, after their principal had left the country, were delivered under the contract with Jordan as much as though he had been there still. The original lien notice, which is in evidence, has written along the margin what appears to be an assignment of the lien to A. E. Estabrook, who was the claimant's mother. The evidence showed that this assignment was made to secure a loan, and was made after the suit to foreclose was commenced. Therefore, if the rule laid down in *Davis v. Erickson*, 3 Wash. St. 654, 29 Pac. Rep. 86, that the payee of a promissory note could not sue upon the note while it was held by a third person as collateral, be applicable to any case like this, the facts here avoid it. The court permitted the assignee to be made a party, though she was not fully substituted, as we think she should have been, inasmuch as the whole lien was assigned to her.

8. It is objected that the Mechanics' Mill & Lumber Company's lien notice was not properly verified. The verification is that the affiant, who was president of the claimant company, "has read the foregoing statement of notice of lien, and knows the contents thereof, and that said statement is true, as he verily believes." The statute requires that the verification be "to the effect that the affiant believes the same to be just." The body of the notice contains a statement of the necessary facts, and shows a certain amount due after deducting all just credits and offsets. If this be true, then the effect of the verification is that the claim is just. Other matters urged against this lien are not made clear enough in the record to justify notice here.

9. The original lien notices were put in evidence, with the auditor's certificate of recording, and an additional certificate that they were "as the same appear of record," etc. We think this proved the fact and date of record, notwithstanding *Jewett v. Darlington*, 1 Wash. T. 601, and *Cowie v. Ahrenstedt*, 1 Wash. St. 416, 25 Pac. Rep. 458.

Much of the respondents' evidence, and of the argument here, was devoted to showing that the appellants had knowledge of the fact that materials were furnished for their building, and that they in some instances, perhaps, promised to pay the bills, wherefore the liens ought to be sustained. But under the law there is no greater reason for sustaining a bad lien because the owner has himself bought the materials, and promised to pay for them, than there is under any other state of circumstances. If he binds himself personally, a case may be made against him, but it is not the case presented here.

The decree will be set aside, and the cause

remanded, with directions to the superior court to enter a new decree in favor of A. E. Estabrook and the Mechanics' Mill & Lumber Company for the amounts claimed, with \$1.50 and \$3.25 respectively paid out for filing liens; \$75 to each as an attorney's fee, and the costs of both courts. As against the other plaintiffs, the complaint will be dismissed, with costs in both courts to appellants.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

(5 Wash. 769)

FREEBURGER et al. v. CALDWELL<sup>1</sup>

(Supreme Court of Washington. Feb. 18, 1893.)

REPLEVIN—PLEADING—HUSBAND AND WIFE—APPEAL—JURISDICTION—RECORD.

1. In replevin by a married woman, where the complaint alleges that she is owner of the property, she need not show in her pleadings that she acquired her title through one of the channels by which a married woman is allowed to acquire separate property.

2. Where a complaint in replevin demands the return of property worth \$200, and damages for its detention, amounting to \$500, the supreme court has jurisdiction of the case on appeal, since the amount in controversy is \$700.

3. The omission from the record on appeal of papers which have no relation to the questions involved in the appeal is not prejudicial error.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by W. A. Freeburger and Fannie Q. Freeburger, copartners under the firm name and style of W. A. Freeburger & Co., against Samuel Caldwell, to recover property taken by defendant under a writ of attachment. Defendant obtained judgment on the pleadings. Plaintiffs appeal. Reversed.

W. I. Agnew and M. J. Gordon, for appellants. C. W. Hartman, for respondent.

STILES, J. Action to recover the possession of personal property alleged to be of the value of \$200, and \$500 damages for its detention. Plaintiffs alleged that they were partners, under the firm name of W. A. Freeburger & Co. The defendant justified his taking by answering that he was a constable, and had levied a lawful writ of attachment, issued by a justice of the peace, upon the goods as the property of G. W. Freeburger. He also set up that Mrs. Fannie Q. Freeburger was a married woman, wife of G. W. Freeburger. Upon this state of facts the court rendered judgment for the defendant, on the ground that, since one of the alleged partners was a married woman, there was, on the pleadings, a want of legal capacity to sue in the plaintiffs, for the reason that it was not pleaded that the wife acquired her interest in the alleged partnership property through one of the channels by which the statutes of this state provide that a married woman may have separate property. The allegation of the complaint was that plaintiffs "were lawfully possessed" of certain chattels, and that

<sup>1</sup>Rehearing denied.

defendant "wrongfully took" them from their possession. There was no allegation of ownership, nor does the law require ownership to be alleged in such an action; but the case is presented here as though ownership had been alleged, and it will be better to pass upon it accordingly.

The presumption runs with a conveyance by purchase of real property to a married woman that it is community property, (Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. Rep. 398;) and the presumption may be that personal property in her possession is the property of the community, and therefore subject to the husband's debts; but, under the liberal provisions of our statutes concerning the right of married women to do business for themselves, we do not think that when they sue for the possession of property, and allege ownership, they should be required to deraign their title. To allege that one is owner of property in a pleading is, of course, a conclusion of law; and yet it has been so generally sanctioned that, even in an action to recover real estate, it is all that is required, excepting a further conclusion that the pleader is entitled to possession. Hemmingway v. Matthews, 10 Tex. 207, does not assist the respondent, for the opinion in that case shows that not only could not the wife dispose of the community property, but she was under the same disability as to her separate property, except under special circumstances; and it will be found to be much the same way in all of the states having the community system, except Washington, where married women enjoy greater freedom of contract and disposal of their separate property than in any of the other states.

The amount in controversy was \$200, the value of the goods, and \$500, damages for their detention. This court therefore has jurisdiction of the case.

Respondent suggests that the record is defective because there is no transcript of the replevin bond, nor of a certain execution and the return thereon; but he fails to point out wherein the determination of the case of appeal, whether in favor of appellants or respondent, could be affected by the presence of either of the papers mentioned. The judgment is reversed, and the cause remanded for trial.

DUNBAR, C. J., and HOYT, ANDERS, and SCOTT, JJ., concur.

(5 Wash. 772)

FREEBURGER et al. v. GAZZAM et al.<sup>1</sup>

(Supreme Court of Washington. Feb. 18, 1893.)

ATTACHMENT—INTERVENTION—PLEADING—HUSBAND AND WIFE—SEPARATE ESTATE.

1. Where a married woman intervenes in an attachment suit, alleging in her affidavit that the attached property belongs to her, the affidavit need not set out the evidence of ownership, so as to show that she owns the property as her separate estate. Freeburger v. Caldwell, (Wash.) ubi supra, followed.

2. Where a married woman buys goods in Washington, with money which had accumu-

<sup>1</sup>Rehearing denied.

lated in another state, subject to her disposition, and which was not there liable for her husband's debts, the goods are not community property, and are not subject to the husband's debts.

Appeal from superior court, Mason county; Mason Irwin, Judge.

This was an intervening action by William A. Freeburger and Fannie Q. Freeburger, alleged to be copartners under the firm name and style of W. A. Freeburger & Co., against W. L. Gazzam and D. M. Duckworth, sheriff of Mason county, for the recovery of certain property taken by the defendant Duckworth on attachment against the property of one Geo. W. Freeburger the father of said W. A. Freeburger, and husband of said Fannie Q. Freeburger. Defendants obtained judgment on the pleadings. Plaintiffs appeal. Reversed.

W. I. Agnew and M. J. Gordon, for appellants. C. W. Hartman, for respondents.

STILES, J. This was a case similar to Freeburger v. Caldwell, (Wash.) 32 Pac. Rep. 732, except that the proceeding was initiated by affidavit under Code Proc. c. 4, tit. 8. The first affidavit was sufficient to try the case upon. It stated that the property belonged to the claimants, and was verified by one of them. Section 491 does not require the evidence of ownership to be pleaded, as was attempted in the subsequent amended affidavits, and all that was attempted was surplusage. Everything that was necessary to sustain the allegation of ownership could be shown under either of the affidavits; and, if it was true that Mrs. Freeburger had funds accumulated in the state of Kansas, which were there subject to her own disposition, and were not liable for her husband's debts, and she brought them to this state, and invested them in these goods, the goods are not community property, or subject to the husband's debts here. Whatever the property may have been called in Kansas, it was, in effect, her separate property, and the laws of this state do not undertake to change the status or liability of such property merely by its coming across our border.

Having alleged in the amended affidavit that Mrs. Freeburger was a married woman, the only proper additional matter was that the interest which she had was her separate property. Thomas v. Desmond, 63 Cal. 426. The value of the property was laid at \$218, which gives this court jurisdiction. The judgment must be reversed, and a trial had. So ordered.

DUNBAR, C. J., and HOYT, ANDERS, and SCOTT, JJ., concur.

(5 Wash. 654)

WILSON v. MORRELL et al.<sup>1</sup>

(Supreme Court of Washington. Feb. 2, 1893.)

APPEAL—BOND—RECORD—VENDOR AND VENDEE—EXECUTORS AND ADMINISTRATORS—EQUITABLE TITLE.

1. Under a statutory direction to courts to look at the substance rather than the form in

<sup>1</sup>Rehearing denied.

interpreting appeal bonds, the fact that such an instrument is in the form of an undertaking instead of that of a bond, does not invalidate it.

2. Although the statute requires a transcript of the statement of facts to be sent to the supreme court, the fact that the original statement is sent up, instead of a transcript, is no ground for dismissing the appeal.

3. An administrator, who was sole heir of his intestate, agreed to sell land belonging to the estate, the agreement providing that, if the deferred payment on the land was not made, the rights of the vendee should be forfeited. He afterwards gave the vendee an administrator's deed, which was sufficient in form to pass the title, but which had not been authorized by the probate court. Default was made on the deferred payment, and the administrator mortgaged the land to a third person. Held, that the administrator's deed, though ineffectual to convey the legal title, passed to the vendee an equitable title, which the administrator could not forfeit by giving the subsequent mortgage.

4. In such case, the mortgagee, as succeeding to the rights of the administrator, was entitled to a lien on the land to secure the deferred payment.

5. The vendee of the administrator, having only an equitable title, could not convey the land so as to free it in the hands of his grantee from the lien for the deferred payment.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Ejectment by John H. Wilson against Benjamin G. Morrell and H. E. Simmons. Plaintiff obtained judgment. Defendant Simmons appeals. Reversed.

James Wickersham, for appellant. C. W. Hartman, for respondent.

HOYT, J. Respondent seeks to have this appeal dismissed for the reason that no such bond on appeal has been filed as the statute requires, and also for the reason that the statement of facts is brought here in the original form instead of by copy. Respondent concedes that an instrument with sufficient sureties and properly conditioned has been duly filed, but claims that because such instrument is in the form of an undertaking, instead of that of a bond, it is ineffectual for the purposes for which it was given. Were it not for several provisions of our statute which make it the duty of courts in the interpretation of instruments of this kind to look at the substance, rather than the form, there would be much force in this position of respondent; but in view of such provisions we think that the intention of the parties to secure the respondent upon proper conditions fully appearing from the instrument, it should be given force; and that, by reason of this want of form, appellant should not be deprived of the benefits of his appeal. We have passed upon the other objection several times, and have uniformly held that, though the statute requires a transcript of the statement of facts or bill of exceptions to come here instead of the original, yet when the original is here we are so possessed of the case that we can hear and determine the merits of the controversy; and that, such being the case, it is our duty to disregard the form in which the facts have reached

us. The motion to dismiss must be denied.

The record in this case shows the pleadings to be in a somewhat anomalous condition, and some technical questions might have been raised as to the manner in which the case was so brought into the lower court that the respective rights of the respondent and appellant could be determined. But the parties to the appeal have not raised any of these questions. They have presented the case from their respective standpoints upon the merits, and, such being the case, we shall likewise disregard all technicalities growing out of the pleadings, and determine the rights of the parties upon the facts disclosed by the record. Upon such record it appears that the rights of the respective parties largely depend upon a certain contract made by one Benjamin G. Morrell to one John Gillespie for the sale of the land the title to which is in question. For the purposes of this case the appellant must be held to have been subrogated to whatever rights the said Morrell had in the lands at the date of the execution of the mortgage to the appellant, and the respondent to be entitled to the rights of the said Gillespie by virtue of the contract above mentioned. By the terms of said contract said Morrell, as sole heir of his wife, contracted to convey the said land to said Gillespie for the sum of \$520, of which \$300 was to be and was paid down, and \$220, with interest thereon at 10 per cent. from April 23, 1885, was to be paid in three years. There was a clause in said contract which required that said Morrell should obtain leave from the probate court to make to said Gillespie a proper deed to said land. There was also a provision that upon failure by the said Gillespie to pay the deferred payment at the time it became due, all his rights under the contract should be forfeited, and the amount paid thereon retained by the said Morrell as liquidated damages; and a further provision which made time the essence of the contract. The proofs show that said Morrell, as administrator of the estate of his said wife, executed an administrator's deed sufficient in form to convey to the said Gillespie the interest of his said wife in the property in question; but the proof does not show such proceedings on the part of the probate court as would authorize the execution of such deed. There is no proof whatever that the necessary steps to give the probate court jurisdiction to order a sale of the property were ever taken. It further appears from the proof that the deferred payment of \$220 has not been paid by said Gillespie, or any one representing him, and that no interest thereon has ever been paid. Just before the execution of the respondent's mortgage there was an attempt made to declare the contract in question forfeited by the action of the probate court and said Morrell, but there is no proof whatever that any notice of such intention or of such forfeiture was ever given to said Gillespie, or those representing him. The only attempt at giving notice was by the indorsement by the auditor on the margin of the contract, which was on record in

his office, of a statement that the same had been canceled by order of the probate court and of said Morrell for noncompliance with the conditions thereof; but it is evident that this indorsement was entirely unauthorized, and could have no force whatever.

Under these circumstances it is contended on the part of the appellant that said administrator's deed, being void for the purposes for which it was given, can have no force whatever, and that the contract, having been violated by said Gillespie in failing to make the deferred payment, was, at the date of his mortgage, forfeited by lapse of time, or was, by the act of making such mortgage, so far forfeited by said Morrell as was necessary to protect the appellant's rights. That a contract containing the provisions above mentioned may be forfeited for failure to comply with the conditions, without notice to the other party, by a conveyance of the land, is, we think, established by the authorities. We so held in *Drown v. Ingels*, 3 Wash. St. 424, 28 Pac. Rep. 759, and see no reason to change the views expressed in the opinion rendered in said cause. And if the administrator's deed can have no force whatever in determining the rights of the parties, we should be disposed to agree with the contention on the part of the appellant; but, in our opinion, said deed, although void for the purposes for which it was made, cannot be disregarded in determining the rights of the respective parties to said contract. It is evident from all the proofs in the case that such deed was executed by said Morrell and delivered to said Gillespie in pursuance of the provisions of said contract, and it is clear that at the time it was so executed the said Morrell intended thereby to pass title to the land in question to said Gillespie, and, such being his intention, the said Gillespie had a right to receive it as a declaration on the part of said Morrell that thereby he intended to concede that the contract in question had been fulfilled. Under these circumstances, if the contract had in fact been so fulfilled, a perfectly good equitable title would have passed to the said Gillespie as between him and the said Morrell, and thereafter it would not have been within the power of said Morrell to have declared any forfeiture of said contract. But, the said deferred payment not having been paid at the time of the delivery of said deed, such equitable title passed to said Gillespie, subject to a lien in favor of said Morrell for the amount remaining unpaid upon said contract. It would follow that a court of equity, in directing a transfer of the legal title to said Gillespie, would require, as a condition to such transfer, payment by him of the amount due; and as we have seen that the appellant, for the purposes of this case, has all the rights which the said Morrell would have had, it follows that, as a condition to the setting aside of his mortgage, the court should have required such payment, and that the decree rendered herein by the court below must be modified to that extent, unless the respondent stands in a better condition than would said Gillespie if he had never conveyed the land. If the said Gillespie

had had the legal title, even though it was charged with an equitable lien in his hands, his grantee, without knowledge of such equitable lien, would have taken a perfect title. But at the time Gillespie conveyed to the respondent he had only an equitable title, and under the well-settled rule that the grantee of an equitable title gets no better title than his grantor, the title conveyed to respondent was subject to such equitable lien; hence the respondent has no greater rights than Gillespie would have had. There is in the case a deed to the respondent from said Morrell, sufficient, probably, to convey to him any title which said Morrell had at the date of its execution; but the same was not executed until long after the execution of appellant's mortgage, and could confer no rights as against it. The decree of the lower court must be reversed, and the case remanded, with instructions to enter a decree releasing the lien of the mortgage of the appellant upon the land upon the payment to the appellant, or into court for his use, of the sum of \$220, and interest thereon from April 23, 1885; and that, in default of such payment, the appellant's lien upon said land to the amount thereof be enforced by proper proceedings as in a suit to foreclose a mortgage. The appellant to recover costs of both courts.

DUNBAR, C. J., and ANDERS, SCOTT, and STILES, JJ., concur.

(5 Wash. 736)

**ELWOOD v. STEWART et al.<sup>1</sup>**

(Supreme Court of Washington. Feb. 14, 1893.)

**REFORMATION OF DEED—MISTAKE.**

1. Where an agreement for the sale of land is made between the vendor and a person who pays the entire consideration, and, at the latter's request, the deed is made out to a third person, the grantee may have the deed reformed on proof of mutual mistake in the original agreement, although he took no part in making such agreement.

2. Where mortgagor and mortgagee agree that the mortgaged property shall be conveyed in payment of the mortgage debt, it being mistakenly supposed at the time that the land intended to be mortgaged was correctly described in the mortgage, such mistake is sufficient ground for reforming the deed so as to make it describe the land intended to be mortgaged.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Suit by John Elwood against Abraham W. Stewart, Jurtia Stewart, Charles H. Spinning and Mildred Spinning, to reform a deed. Plaintiff obtained a decree. Defendants appeal. Affirmed.

Judson & Sharpstein, for appellants. Elwood Evans and H. A. Fairchild, for respondent.

HOYT, J. This action was brought to reform the description in a deed made by two of the appellants to the respondent. Two principal questions are presented: First, has the plaintiff shown that there was a mistake in the description such as

would authorize a court of equity to amend the same as between the parties thereto? and, secondly, does the proof show that the appellants Spinning occupied such a relation to the land in question that they will be protected as innocent purchasers? The pleadings and proofs show that the mistake in the description originally occurred in a certain mortgage made by the appellants Stewart to one James E. Murne. The fact that there was in said mortgage a mistake in the description, as set out in the complaint, is clear from the proofs. Some time after the making of said mortgage such negotiations were had between said appellants Stewart and said Murne that he agreed to take that part of the land covered by the mortgage, situated at Tacoma, and \$500 in cash, as full payment and satisfaction of the mortgage debt. That such was the arrangement is shown by undisputed proofs; but it is contended on the part of the appellants that, at the time the deed to that portion of the mortgaged premises was executed, it was understood by the grantors therein that one Eisenbelse of Port Townsend was to be named as grantee, and that they never, in pursuance of said arrangement, understood that they were to execute, or did execute, a deed to the respondent Elwood. Assuming such to be the fact, appellants argue with much force that, since they never had any contract relations whatever with the respondent beyond the execution of said deed, there could be no mistake in the description as between them and the said respondent, since the deed itself constituted and evidenced the entire transaction between them. This contention loses its force when we consider the relation of all the parties to this transaction. At all times the entire negotiations were between appellants Stewart and said Murne, and it could make no difference whatever to such appellants as to who was named as the grantee in the deed executed as a part of such transaction. The entire consideration for the land deeded was paid by said Murne to the grantors, and it was never intended that any part of such consideration should come to said grantors from any other person. Such being the fact, the rights of the parties must be determined by the same rules as though the entire transaction, including the making of the deed as a part of the consideration for the satisfaction of the mortgage, had been with said Murne. We are therefore of the opinion that the contention that the deed embodied the entire contract, which can be looked to by the court in the determination of the cause, is untenable. Appellants make a further contention that the deed to Elwood was absolutely void, and therefore not subject to reform, for the reason that, at the time it was executed and delivered, there was no grantee named in it. There are some parts of the proof tending to establish this state of facts, but, taking all the testimony together, in connection with the presumptions which prevail in favor of a sealed instrument, we think it sufficiently appears that the deed was fully filled out before its execution and delivery. The rights of

<sup>1</sup>Rehearing denied. See 32 Pac. Rep. 1000.

the respondent, then, are the same as would have been those of the said Murne if the deed had been made directly to him, and as the proofs clearly show that, as a part of the transaction for the satisfaction of the mortgage, the property covered by the mortgage was to be conveyed, and as at the time such agreement was entered into it was supposed that the property intended to be mortgaged was correctly described therein, it must be held that the property which was contracted to be conveyed was in equity not the property actually described in the mortgage, but, instead thereof, the property which should have been so described to carry out the intention of the parties at the time said mortgage was executed.

As against the appellants Stewart, then, the respondent is entitled to the relief prayed for in his complaint; and, if the other appellants are in no better situation than they would have been if they had not conveyed, the decree of the lower court must be affirmed. Such appellants Spinning assert that for two reasons they are entitled to be protected as innocent purchasers of the land: First, for the reason that, at the time the land was conveyed to them by the other appellants, they had not such full knowledge of the mistake in the description contained in the mortgage and deed as charged them with knowledge of the equities of the grantee in said deed. We are satisfied, however, from the proofs that they had at least sufficient knowledge to put them upon inquiry and, this being so, they must be held to have had such knowledge as would have resulted from such inquiry; and, under all the circumstances of the case, it is clear that, had such inquiries been prosecuted with reasonable diligence, full knowledge of all the facts would have been obtained. The fact of such knowledge is shown by extrinsic proofs, and is further evidenced by the deed under which said appellants hold. The consideration therein named is nominal, and, though there is an attempt to meet that fact by showing other consideration than that recited in the instrument, we are not satisfied that such additional consideration was to be paid except in the event that it could be made out of the property, after the rights of said Murne under said mortgage, or the grantee in the deed which had been executed as a part of the consideration for the satisfaction thereof, had been fully protected. The other ground, upon which such appellants claim that they hold as purchasers in good faith is that the property was sold under execution against the appellants Stewart, and was bid in by one D. B. Hannah, and that they now hold the title as acquired by him at such sale; but they cannot assert any right thus derived against the respondent, for the reason that, at the time the land was so bid off by said Hannah, both he and said appellants had full knowledge of the mistake in the mortgage and deed. The judgment of the lower court must be affirmed.

STILES, SCOTT, and ANDERS, JJ., concur. DUNBAR, C. J., did not sit at the hearing.

(5 Wash. 773)

## STATE v. PLACE.

(Supreme Court of Washington. Feb. 12, 1893.)

## ASSAULT—SODOMY—EVIDENCE—TRIAL—SEPARATION OF JURY.

1. Pen. Code, § 22, provides punishment for assaults with intent to commit certain crimes, sodomy among others; and Code Proc. § 1185, declares that for all common-law offenses not defined by statute the offender may be tried in the superior court. *Held*, that an assault with intent to commit sodomy is punishable under said section 22, although the statutes provide no penalty for the completed crime.

2. Where an assault is committed on a moving train, evidence of a previous assault made on the same person before the train reached the county in which the second assault was committed is admissible to show the intent with which the second assault was made.

3. Under Code Proc. § 1311, which declares that "juries in criminal cases shall not be allowed to separate except by consent of the defendant and the prosecuting attorney," it is reversible error to allow a jury to separate, and mix with the crowd in the court room, where the testimony is such that it cannot help producing disgust and indignation against the defendant, even though the separation lasted only a few minutes, and though the prisoner and his counsel, who were both present, made no objection at the time. Hoyt, J., dissenting.

Appeal from superior court, Lewis county; Edward F. Hunter, Judge.

Information against H. C. Place for assault with intent to commit sodomy. The assault took place on a train coming from Oregon into Washington. Defendant was convicted, and he appeals. Reversed.

Code Proc. § 1185, referred to in the opinion, reads as follows: "For all offenses at common law which are not hereinafter defined by statute the offender may be tried in the superior courts of this state." Section 1311, also referred to in the opinion, provides that "juries in criminal cases shall not be allowed to separate except by consent of the defendant and the prosecuting attorney." Pen. Code, § 22, under which the information was brought, declares that "an assault with intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or grand larceny shall subject the offender to imprisonment in the penitentiary for a term not less than one year, nor more than fourteen years."

Langhorne & Langhorne and M. J. Gordon, for appellant. G. T. Swasey, Pros. Atty., for the State.

STILES, J. The information against appellant stated facts sufficient to constitute an offense under Pen. Code, § 22. It is true that the crime against nature, punishable as a felony at common law, (1 Bish. Crim. Law, § 503,) is not so punishable in this state, because no penalty has been fixed by statute; but under Code 1881, § 782, all common-law crimes were indictable, and we think the change of the phraseology of the section made by the legislature of 1891 (Code Proc. § 1185) does not restrict the meaning of the section to the jurisdiction of the superior court only.



That the legislature has seen fit to allow the completed offense to escape with no punishment, and to inflict a severe penalty for an assault committed with intent to commit the substantive crime, is not ground for the court's refusing to sustain a prosecution.

Counsel appeal to us to review the evidence, and say that it was insufficient to sustain a conviction; and, if we were to accede to the proposition that only what happened in Lewis county should be considered, it would be difficult to say that the case had been made out, because the facts in evidence would leave it doubtful what the appellant was trying to do when he made the second assault upon the complaining witness. But it was entirely legitimate for the court to allow the state to show what occurred while the train was yet in Oregon, for the purpose of assisting the jury to come to a conclusion as to what appellant's real intention was in making the second assault; and from what had happened only an hour or two before we do not see how the jury could have well found otherwise than that the second assault was with the same intent as the first one, where the intent was very clear.

But the case must be reversed for the error of the court in permitting the jury to separate, without the consent of the appellant, during the progress of the trial. Code Proc. § 1311, is mandatory, and must be obeyed. *Anderson v. State*, 2 Wash. St. 183, 26 Pac. Rep. 267. It was especially important in such a case as this, where a large number of spectators were attracted to the trial, and where the testimony given could not help producing disgust and indignation. To let a jury, under such circumstances, scatter among the crowd, was to subject them to chances of outside influence which they could not avoid, and which the accused had a right to have them kept free from. Judgment reversed, and cause remanded.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

HOYT, J., (dissenting.) I am unable to agree with the majority of the court in the reversal of the judgment. The record shows that the separation of the jury during the progress of the cause was but for a few minutes, and that, at the time such separation was allowed by the court, the defendant and his attorney were present, and made no objection whatever to such separation. Under these circumstances, I think it should be held that they had consented thereto. I see no reason whatever for holding that a person charged with crime should not be allowed to waive any of his rights the same as he could in a civil action. If he can waive all of his rights to a trial, and be adjudged guilty upon his own plea to that effect, (as he can in the case of all crimes not capital,) I see no reason whatever for holding that he cannot waive any of the formalities to which he might be entitled as a part of his trial. If he can thus waive his rights, he should be held to have done so when his conduct is such that it appears clearly that he had

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knowledge that such formality was to be dispensed with, and made no objection thereto. In civil actions it is universally held that if a jury separate, even after a case has been submitted to them, the verdict will not be set aside without proof that such separation has been prejudicial to the rights of the party against whom the verdict was rendered. There is no reason why the same rule should not obtain in the case of one convicted of a crime. In a capital case the defendant cannot waive his right to a trial, even by a plea of guilty; and it may well be held in that class of cases that he cannot waive any formality which is at all essential to a full and fair trial. It seems to me that in all other criminal cases it is something like a travesty upon justice to hold that because the jury, for ever so brief a time, left their seats without being kept together by an officer, a verdict thereafter rendered by them should, on motion of the defendant, be vacated, even although, at the time the jury thus acted, he was present in court with his counsel, and saw them thus behaving, and made no protest or objection whatever. So far as I know, the rule is universal that in criminal, as well as in civil, cases, the defendant, if aggrieved by a ruling or decision of the court, must preserve his exception thereto, in order that he may get relief in this court against such ruling, if erroneous. This same principle, applied to the case at bar, will, I think, preclude the defendant from getting relief here against something that was improperly done during the progress of the trial, with his full knowledge; for the reason that it was his duty, if he desired to take advantage of such wrongful conduct, to preserve an exception thereto. I think the judgment should be affirmed.

(5 Wash. 644)

# TINGLEY v. BELLINGHAM BAY BOOM CO.

(Supreme Court of Washington. Feb. 2, 1893.)

LOGS AND LOGGING—BOOM COMPANIES—DAMAGES—CORPORATION—RATIFICATION—STATUTE OF FRAUDS.

1. Act March 17, 1890, (Sess. Laws 1890, p. 470,) declares that it shall be the duty of any corporation operating a boom at the mouth of any river to catch, hold, assort, boom, and raft all logs not in charge of the owner. *Held*, that such a company that allows logs floating down the river to escape into the sea and be lost is liable to the owner for the damage naturally resulting therefrom, but not for damages caused to the owner by reason of his being obliged, from want of logs, to close his logging camp, to the injury of his credit, where there is no contract between the log owner and the boom company in regard to anything except the marketing of the logs. *Lumber Co. v. Cole*, 26 Pac. Rep. 535, 1 Wash. St. 330, distinguished.

2. Where a corporation, in a sworn pleading, admits its execution of a contract, signed by its assumed agent, such admission constitutes a ratification of the contract.

3. Where a contract by a corporation is written by its agent, and the name of the corporation is written in the body of the instrument, the contract is signed by the corporation, within the meaning of the statute of frauds,

requiring contracts not to be performed within one year to be "signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by F. C. Tingley against the Bellingham Bay Boom Company for alleged breach of contract. Plaintiff was nonsuited at the trial, and he appeals. Reversed.

Harris, Black & Leaming, for appellant. Thos. G. Newman, for respondent.

STILES, J. We are not advised upon what ground the court below sustained the defendant's motion for a nonsuit, but, whatever may have been the ground, we think the facts in this case, as they appear from the testimony, should have been submitted to a jury under proper instructions. The complaint contains two causes of action, which were improperly united, but no objection was made to the complaint upon that ground, and no criticism can now be made of the course of the plaintiff in making the improper joinder. The defendant was a corporation organized in pursuance of the act of March 17, 1890, (Laws, p. 470,) entitled "An act to declare and regulate the powers, rights, and duties of corporations organized to build booms, and to catch logs and timber products therein." It appears that the boom of the defendant was built at the mouth of the Nooksack river, in Whatcom county. At a point higher up the river, a rival concern, known as the "Nooksack River Boom Company," had constructed another boom. The defendant, in order to fully secure the patronage of certain loggers up the Nooksack river, procured from several of them, on the 24th day of June, 1890, a written document, which in the case has been termed a "contract." The plaintiff was one of the signers, and the instrument took the form of a mutual agreement. The preamble of this document recites that the signers are in the business of driving logs down the Nooksack river; that there are no proper facilities at the present time for cutting and taking care of logs at the mouth of the river; and that the defendant proposes to erect a boom at the mouth of the said river for the purpose of catching, handling, and securing logs; and then proceeds as follows: "Now, therefore, in order to encourage and assist the construction of the said boom by the said company, and to ensure the safe and economical handling of such logs as we may run down the Nooksack river, we, the undersigned, hereby undertake and agree that so soon as the said Bellingham Bay Boom Company may construct a boom, and notify us that it is ready to receive and take care of our logs, we will consign to said company all of the logs which we may put into the Nooksack river for the purpose of being run into Bellingham bay; and it is further agreed upon the part of the said boom company that it will, as soon as practicable, construct said boom, receive and take care of the said logs, in all manner complying

with the laws of the state of Washington in that respect, and that it will make such boomage charges to the persons to this agreement as is common and customary with other loggers consigning logs to booms, and no other or further charges." This instrument was not signed by the defendant, or by any person upon its behalf, but it was delivered to one who claimed to act as and who certainly was in fact the authorized manager of the defendant, and it was by him transmitted to his company, and it was undoubtedly acted upon by all parties for many months. A great deal of force was expended by the plaintiff in proving that this paper was the contract of the defendant, and by the defendant in endeavoring to evade its effect as a contract, on account of the failure of its officers to affix the signature of the company to it; but it seems to us that it was wholly immaterial whether this instrument was signed by the defendant or not. Let it be remembered that this was a statutory boom corporation, whose works were at the mouth of the Nooksack river. Section 4 of the act under which this corporation was organized provides as follows: "After such work shall have been constructed, such corporation shall catch, hold, and assort the logs and timber products of all persons requesting such service upon the same terms and without discrimination: \* \* \* Provided, that it shall be the duty of any corporation operating a boom at the mouth of any river to catch and hold, assort, boom, and raft all logs and timber products, except such as may be already in charge of its owner or his agents, without request of the owner or owners, and shall have the right to charge and collect tolls not to exceed seventy-five cents per thousand feet for such service." Under this statute it was immaterial whether this defendant had any contract or request, either oral or written. Any logs coming down the Nooksack river, not in charge of their owner or his agents, it was bound to catch and hold, raft and boom, as the law required. Failing to do this, it was liable to the penalties prescribed by sections 7 and 8 of the act.

Now, it was alleged in this case that large quantities of plaintiff's logs were allowed by this company to escape to the open waters of Puget sound, and to be there lost; and the uncontradicted proof is that some logs belonging to the plaintiff did escape and become scattered and lost. The proofs were not altogether satisfactory as to whether these logs that escaped actually passed the boom of the defendant or not. Some of them came down the river, and were stopped by the arbitrary action of the Nooksack River Boom Company, (the upper company,) and held under a claim for boomage for a time; whether rightfully or wrongfully is no matter. It seemed to be insinuated by the cross-examination of witnesses that it was through the action of the Nooksack Company that these logs escaped to the open sea through a slough; but it remains unexplained, so far as we are able to ascertain from the case, why the escaped

logs must not have passed the boom of the defendant on their way down the river to the waters of the Sound. It may be that there is some explanation not apparent in the case which the defendant may be able to offer upon a retrial, but the main point must stand that, if these logs passed the waters assumed to be controlled by the defendant for the purpose of boomage, it was its duty, both to the plaintiff and to the state, which is interested in not having the navigation of its waters made dangerous by floating logs, to catch them as they passed, and, to save itself from responsibility if they had passed its boom, to pursue, catch, and return them. The plaintiff sought to prove a great many elements of damage which were rightly excluded. He claimed that, by reason of defendant's permitting his logs to escape and be lost, he not only lost their sale, but ran his logging camp without profit, and was finally compelled to shut it down, to the injury of his financial credit, etc., and he appeals to *Lumber Co. v. Cole*, 1 Wash. St. 330, 26 Pac. Rep. 535, to sustain his right to recover all such damages, because the defendant knew of his situation; but there is nothing in the case to show that, if this was a contract entered into between the parties, any such matters were in contemplation by either of them. Nor do we think the statute was intended to cover anything more than the natural and ordinary damages resulting from failure of boom companies to perform the duties required of them thereby. In *Cole's Case* the whole operation of logging, and the furnishing of supplies therefor, were covered by the contract, but here the marketing of the logs was the only matter between the parties.

The second cause of action does depend upon a contract. The defendant apparently included in its business that of driving logs down the Nooksack river. Therefore, as soon as it got its works in order, it procured, on the 20th day of August, 1890, from the plaintiff and other loggers, an instrument in which it was named as a party, whereby it agreed, in consideration of 50 cents a thousand feet, to drive to its boom at the mouth of the Nooksack river such logs as the plaintiff and other signers should place in the river at any time during two years from the date of the instrument. The agreement stipulated that it should begin at the next driving stage of water in the river occurring after September 19, 1890, and that it should drive not less than twice a year, provided there were stages of water sufficient therefor. There was a provision that the amount of logs driven should be ascertained at its boom by the usual method of scalping, by a competent scaler furnished by the company, the company to have a lien upon all logs driven for the unpaid driving charges. Then there was a very important clause of the agreement, stipulating that "all logs left by the party of the first part, [the company,] and not driven clean, shall be scaled back where they lay, and paid for by said party of the first part at the market price of such logs where they lay, and the mark on such logs shall be changed, and they shall

become the property of said party of the first part." This instrument was procured at the instance of the defendant company, and taken into possession by it, under the promise made by the company's agent that the company would sign it and deliver to the other parties a copy of it. It was not signed, although it was retained, and, by what we regard as indisputable evidence, it was fully ratified by and acted upon by the corporation. Concerning this matter of ratification it is necessary to speak, since whether this was a valid contract or not depends largely upon ratification. The agreement, by its terms, was not to be completely performed within one year. Code 1881, § 2325. One J. S. Munday, in all these matters between the company and the plaintiff and the other loggers who acted with him, assumed to represent the defendant; but the case does not present other than circumstantial evidence, with one exception, to show that he was actually authorized to make such a contract as the one under consideration; and much difficulty was made by the defendant at the trial upon this point, and objections were interposed at every stage to the introduction of any testimony tending to show his relations with the defendant. But, in addition to the transactions with this plaintiff, it was shown that Munday was really the moving spirit of the whole enterprise, which culminated in the organization of the defendant as a corporation. Just what his nominal position was does not appear, but in whatever was done by the defendant, either in the building of its boom works, or in driving the logs in the river, or the purchase of material and supplies, it was always Munday who was at the front, and had the actual management and direction of affairs. And, moreover, there is in the case one element of proof which ought to go far towards foreclosing this corporation from denying that it had fully ratified all of its acts in procuring this contract, whether Munday was its authorized agent or not. In November, 1890, the defendant here sought to obtain from the superior court of Whatcom county a mandamus to compel the Nooksack River Boom Company to open its boom, and to allow 15,000,000 feet of logs to pass to the Bellingham Bay Boom Company. In that proceeding its officers, under oath, showed to the court that the very logs here in question had been consigned to it, and that it had "entered into a contract with the respective owners of said logs to drive the same from the landings where they were floated down said Nooksack river to the boom of plaintiff; and that, under said contract, plaintiff, by its agents, took possession and control of the said logs, and drove them down the said Nooksack river until they reached the boom of the defendant, through which they had been refused passage." It also showed to the court that the defendant had been served by it with a notice that it was the agent for the owners of these logs, (among them Tingley being named as one,) for the driving of said logs down the said Nooksack river to the boom of the said Bellingham Bay

Boom Company, at the mouth thereof. If any more solemn admission could be made by a corporation of its ratification of the acts of an assumed agent than a pleading, under oath, in a mandamus proceeding in a court of record, we are unaware of what it could be.

But the question remains whether, if the act of the agent in procuring this contract was ratified, it was then blinding upon the company, so that it could now be sued upon. The statute provides that any agreement, contract, or promise shall be void where by its terms it is not to be performed within one year from the making thereof, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. The question is, what is a signing of such an instrument? The instrument was in the handwriting of the agent, and the first clause is as follows: "This agreement, entered into this 20th day of August, 1890, by and between the Bellingham Bay Boom Company, of Fairhaven, Washington, party of the first part, and J. H. Moore and others, respectively, whose names are hereto subscribed, parties of the second part, witnesseth," etc. It is a well-established rule of law that a contract is signed, within the meaning of the statute, whether the name of the party to be charged appears at the bottom, top, middle, or side of the paper. *Drury v. Young*, 58 Md. 546; *Claeson v. Bailey*, 14 Johns. 487; *Barry v. Coombe*, 1 Pet. 640; 1 *Reed*, St. Frauds, § 384.

We consider the contract proven, therefore. But what effect should its existence have upon this case? Plaintiff brought his action for damages upon two alleged breaches of contract: (1) A failure to drive his logs; (2) a failure to catch and boom them. And his claim is answered by three propositions, viz.: (1) If fair stages of water have existed in the river since the 19th day of September, 1890, so that his logs could have been driven, and they have not been driven clean, then, under the terms of the driving contract, the logs left behind are to be scaled where they lie, and, upon payment of their value, they become the property of the defendant. But no such logs can be recovered for in this action, either under the pleadings or the evidence. (2) If logs driven by the defendant, for want of ordinary care on its part, failed to reach its boom, and went astray through "sloughs," whence they reached the sea and were lost, for the value of such logs, less charges for driving, the defendant is liable; but if the losses of this class, viz. through "sloughs," were caused by the interference of third parties, accompanied by such threats of violence as would have caused a reasonably prudent person to abandon the possession of the logs to avoid bodily harm to himself or his employes, in case of such logs the defendant would not be liable. (3) For the loss of such logs as floated down the river past the defendant's boom, and were lost because of its failure to catch and hold them, it is liable for the

value of the logs, less the driving and boomage charges. The contracts Tingley made with the Bellingham Mill Company, which respondent claims transferred the ownership of all the logs in question to that company, ought not to prevent a recovery in this case. The contracts show on their face that Tingley was responsible for the delivery of the logs at the mill in Whatcom, and that, unless he delivered the logs, he was to get no pay. The mill books also showed that he was credited with nothing but the value of such logs only as actually reached the mill company's possession. *Meeker v. Johnson*, 3 Wash. St. 247, 28 Pac. Rep. 542; *Manufacturing Co. v. Kerron*, (Wash.; decided Nov. 18, 1892,) 31 Pac. Rep. 595. That portion of the contract of September 3, 1890, which provided for advances upon logs thereafter to be put into the river did not have any of the elements of a sale. Judgment reversed, and cause remanded for a new trial.

DUNBAR, C. J., and HOYT and ANDERS, J.J., concur. SCOTT, J., concurs in the result.

(7 Wash. 617)

#### WARD v. HUGGINS.<sup>1</sup>

(Supreme Court of Washington. Feb. 23, 1893.)

APPEAL—PRACTICE—RECORD—TAX DEED—LIMITATIONS—COLOR OF TITLE—EJECTMENT.

1. It is no ground for striking the statement of facts from the transcript that the clerk has sent up the original statement instead of a copy, since such error cannot prejudice the appellee.

2. Where an appellee has failed to notify appellant that he contests the statement of facts as required by 2 Code Proc. § 1422, he cannot have the statement stricken from the record on the ground that it was settled without notice to him where it does not appear that the statement as settled was different from that originally filed, and of which appellee had notice.

3. Under Laws 1875, p. 72, § 41, which declares that tax deeds shall be presumptive evidence of the regularity of all the former proceedings, a tax deed is admissible as evidence of title without proof of the regularity of the tax proceedings under which it was issued.

4. Code, § 2939, which provides that "any suit or proceeding for the recovery of lands sold for taxes . . . shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter, except by the purchaser at the tax sale," applies in all cases where the tax deed was recorded after the passage of the act, even though the deed was executed before its passage.

5. A void tax deed is color of title sufficient to sustain the bar of the statute of limitations provided for actions relating to tax deeds.

6. In ejectment to recover land sold for taxes the court cannot consider rights arising from plaintiff's offer to repay defendant all back taxes and to redeem the land, since that is a matter of a purely equitable nature.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Ejectment by Hubert C. Ward against Edward Huggins. Defendant obtained judgment. Plaintiff appeals. Affirmed.

<sup>1</sup>For dissenting opinion, see 32 Pac. Rep. 1015.

John M. Boyle and M. Mulligan, for appellant. Judson & Sharpstein, for respondent.

ANDERS, J. The respondent moves the court to strike the statement of facts and the exhibits from the transcript, on the grounds: First, because the same are improperly made a part of the transcript, being originals, and not copies, as required by law; second, because the statement of facts was settled without having given the respondent any notice thereof as required by law; third, because said statement is not certified to, as required by law. While the law contemplates that the clerk shall send up to this court a copy of the statement of facts, we do not think that the fact that the original has been embodied in the transcript can work any injury to the respondent, and therefore deny the motion on that ground, as we have heretofore done in similar cases. Nor do we think the motion should be sustained on either of the other grounds stated. The notice of settlement was duly given and served, but at the time fixed by the court for the hearing the judge was absent. On his return two days afterwards he fixed another date for the settlement of the statement, of which respondent appears to have had no notice, and at which time he was not present in person or by his counsel. Neither is it shown by the record that the hearing was continued by order of court; and, this being so, the respondent's objection would be valid under many decisions of this court if he were in a position to make the objection. It was his duty to serve a written notice upon the opposite party, stating whether or not the correctness of the statement of facts was contested, and, if contested, in what particular or particulars it was deficient, incorrect, or incomplete, (2 Code Proc. § 1422;) and, having failed to do so, and it not appearing that the statement as settled was different from that originally filed, and of which respondent had notice, he cannot now be heard to urge his objection. The certificate of the judge states all the law requires, and is therefore sufficient.

The appellant brought this action against the respondent to recover the possession of certain land in Pierce county. The respondent, in his answer, denied all of the allegations of the complaint, and set up as a further defense the sale of the land on July 24, 1877, for nonpayment of taxes for the year 1876; the delivery of a certificate of purchase therefor; that said taxes were never paid or the land redeemed, and that a deed was delivered to defendant by virtue of said tax sale from the treasurer of Pierce county, on March 14, 1883; and that plaintiff's action was barred by section 51 (67) of the act of November 9, 1877, and by section 2939 of the Code of 1881. A demurrer to the defense of the statute of limitations was sustained by the court as to section 2939 of the Code, but by leave of the court the defendant subsequently amended his answer so as to plead the statute of limitations as set forth in said section 2939, by stating the date when the tax deed was recorded. At the trial in the superior court the appellant

proved that he purchased the land in controversy in the year 1871 from one J. W. Brazee, who purchased the same from the grantee of the United States; but his deed was not placed of record until some time after the tax deed under which the respondent claims was recorded. After the appellant had introduced his evidence and rested his case, the respondent offered in evidence the deed from the county treasurer of Pierce county, under which he claims title to the land. The court admitted the deed in evidence, over the objection of the plaintiff, without requiring the defendant to first show the regularity of the tax proceedings under which the deed was issued. In so doing the appellant claims the court committed error; and that would be true were it not for the provision of the statute under which the deed was issued, which declares that such deeds shall be presumptive evidence of the regularity of all former proceedings. Laws 1875, p. 72, § 41. The evident design of the statute was to obviate the necessity, on the part of the grantee, of making preliminary proof of prior proceedings. Any other construction of the statute would render it meaningless and useless. The common-law rule which cast upon the claimant under a tax title the burden of proving that every successive step in the tax proceedings, required by statute, had been taken, was found to work disadvantageously to purchasers at tax sales; and the difficulty of proving every step in a long course of proceedings with unvarying certainty, and the strong probability that some irregularity or slight omission in the proceedings could be found to defeat the title, had a strong tendency not only to deter persons from purchasing at such sales, but to make owners of property negligent in the payment of their taxes. A tax title was proverbially no title, and tax sales, though sanctioned by law, were little less than farcical. To remedy this undesirable state of affairs the legislatures of the various states have enacted statutes making tax deeds prima facie or presumptive proof of the regularity and legality of the preliminary proceedings, as well as of the deed itself, thus casting the burden of proof upon him who asserts the invalidity of the conveyance; and where such a statute exists the tax deed is competent evidence in behalf of the claimant, and its rejection, if offered as evidence of title, is ground for reversal of the judgment. Black, Tax Titles, § 251. It follows, therefore, that the respondent's deed was properly admitted in evidence.

But the appellant insists that, even if respondent's tax deed was competent evidence of title, the court erred in not permitting him to prove its invalidity by showing that the assessment was irregular and void by reason of having been made in the name of one not at the time the owner of the land, and that the land in controversy was assessed with other land without designating the value of each separate tract upon the assessment roll, and so returned upon the delinquent list; that the sale was not properly advertised, and that the land was not sold at the time specified by law; that the cer-

tificate of sale was not in conformity with the statute, and that the deed itself was irregular in several respects. The trial court held that the action was barred by the statute of limitations, and that the testimony offered was therefore immaterial. And this brings us to the consideration of the controlling question in the case. There can be no doubt that the testimony offered would have impeached the tax proceedings upon which the respondent's deed is based. Nor can it be doubted that the execution of the deed might have been enjoined by timely application to the court. And the only question, therefore, is whether the appellant has not suffered the time to pass within which he had a right to question the tax proceedings, or the deed founded thereon; or, in other words, whether the statute of limitations has not purged the tax proceeding of all imperfections, and established the validity of the deed beyond question. The statute relied on by respondent is as follows: "Any suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid of the land redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter, except by the purchaser at the tax sale." Code Wash. § 2939. This statute was passed subsequently to the execution of the deed in question, and for that reason appellant contends that it is inapplicable to the case at bar; but to that proposition we are unable to assent. The language of the act is general and comprehensive, and would seem to indicate that the legislature intended it to apply at least to all tax deeds recorded after the law took effect. In this case the deed was not recorded until some time after the statute went into operation, and we are of the opinion that the statute began to run in favor of the respondent at the time his deed was placed of record. Statutes of limitation relate only to the remedy, and the statutory limitation may be extended or shortened by the legislature, at its pleasure, provided a reasonable time is allowed for parties to assert existing rights. Wood, Lim. Act. pp. 26, 27, and cases cited; *Id.* p. 30; Blackw. Tax Titles, (5th Ed.) § 940. They are generally no part of any contract, and no party to a contract has any vested interest in a particular limitation. *Keith v. Keith*, 26 Kan. 27; *Terry v. Anderson*, 95 U.S. 628. In the latter case the court said: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. \* \* \* It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has been already established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for commencement of an action than they have in the form of the action to be commenced; and, as to the forms of action or modes of remedy, it

is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remains."

In addition to the objection already considered, it is further urged by the appellant (1) that the deed in controversy is void upon its face, and that there is therefore nothing upon which the statute of limitations can act; and (2) that there was such a relation existing between his grantor and the respondent that the latter could not legally become a grantee under a tax deed. But we think that neither of the points is well taken. The deed is not void upon its face. It recites that the land in controversy was assessed in Pierce county for the year 1876 to J. W. Brazee, and that the amount due thereon for taxes and costs was \$18.73; that the taxes so assessed were returned delinquent; that notice that the property would be sold in front of the courthouse door was published and posted for three successive weeks prior to the fourth Monday of July, 1877; that the property was sold at public auction by the sheriff of said county, in pursuance of the publication and notice given, on the 24th day of July, 1877, at the courthouse door at Stellscoom, that being the county seat of said county; that at said sale Edward Huggins became the purchaser for the sum of \$20.73, and paid the full amount of the taxes, cost, and price of the certificate; that the premises were not redeemed, and that the same were conveyed to the said purchaser, Edward Huggins, in the name of the territory of Washington, by the treasurer of said county. As to the contents of the deed, all that the statute required was that it should describe the land conveyed as it was described in the certificate of purchase; that it should run in the name of the territory of Washington, and be signed by the treasurer in his official capacity. Laws 1875, p. 72, § 41. The deed before us not only fulfills the express requirements of the statute, but the further recitals therein set forth enough of the previous proceedings to show authority to sell the land, and authority of the treasurer to make the deed. It cannot, therefore, be said to be void, or even irregular, upon its face. Black, Tax Titles, § 214. And if it was a void instrument it would still constitute such color of title in the respondent as would sustain the bar of the statute of limitations provided for actions relating to tax deeds. The respondent in this case is in possession, claiming title under his tax deed, and under such circumstances it is not necessary that his deed should be regular or valid, but only sufficient to afford color of title. In fact, in cases of adverse possession, even color of title is unimportant, except as a means of determining the extent and limits of the possession of the claimant. Title to real estate may be acquired by a disseisor who holds under a claim of right for the period prescribed by law; but in such cases, having no paper title, he can successfully claim only so much of the premises as are actually in his possession. We are aware that there are cases holding that a void tax deed will not constitute a

basis for the running of the statute of limitations, but we think such decisions overlook both the philosophy and the object of such statutes. Statutes of limitation are strictly statutes of repose, and the policy upon which they are founded is that a reasonable lapse of time shall put an end to legal strife and controversy, and that he who neglects or refuses to assert his rights within such a time as the legislature may deem reasonable shall be conclusively presumed to have waived them. If it is necessary for one claiming the benefit and protection of the statute to first prove a perfect and indefeasible title, it is impossible to perceive for what purpose such statutes are enacted. A perfect title needs no extraneous aid, and, if imperfect ones are not within the purview of the statute, then the law, in either case, is entirely ineffectual and useless, and might well be eliminated from the body of statutes.

Upon this question a learned text writer says: "There is no doubt that a deed fair on its face constitutes color of title, no matter what defect may really exist in the proceedings; but it has been held that a deed void on its face would not amount to color of title. The weight of authority and reason is, however, to the effect that, whether the deed be void on its face or not, if it is a deed, and of such a character that an ordinary purchaser, unskilled in the learning of the law, might believe it to be a good conveyance, it will be sufficient." 2 Blackw. Tax Titles, (5th Ed.) § 861. See, also, *Coulter v. Stafford*, 48 Fed. Rep. 266; *Edgerton v. Bird*, 6 Wis. 512; *Knox v. Cleveland*, 13 Wis. 274; *Oconto Co. v. Jerrard*, 46 Wis. 317, 50 N. W. Rep. 591; *Lindsay v. Fay*, 25 Wis. 460; *Pillow v. Roberts*, 13 How. 477; *Gatling v. Lane*, 17 Neb. 77, 80, 22 N. W. Rep. 227, 453; *Railway Co. v. Allfree*, 64 Iowa, 500, 20 N. W. Rep. 779. In *Pillow v. Roberts*, supra, the court expressed its view of the law as follows: "Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession obtained by a forcible ouster of the lawful owner will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected these only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world. \* \* \* Color of title is received in evidence for the purpose of showing the possession to be adverse, and it is difficult to apprehend why evidence offered, and competent to prove that fact, should be rejected till the fact is otherwise proved." A statute similar to ours has been many

times construed by the supreme court of Wisconsin, and it is there held that the only condition of things to which the statute will not apply is want of authority in the taxing officers to put the taxing power in motion. *Knox v. Cleveland*, supra; *Oconto Co. v. Jerrard*, supra. In the latter case the law is summarized as follows: "But when there is statutory authority within the scope of the constitution to raise money by taxation from property subject to taxation, to come within the public treasury for public use, and there is an actual attempt, under color of law, to exercise the authority, it is, while in fieri, prima facie a valid tax proceeding; and when the statute of limitations has run upon it, it is conclusively established as a valid exercise of the taxing power. The distinction is, in principle, like that between judicial jurisdiction and judicial error. Want of jurisdiction is always an open question everywhere. Error can be imputed only by appropriate judicial proceedings, within the time limited by law to establish it."

In regard to the contention that the respondent stood in the relation of tenant to appellant or his grantor, and could not, therefore, legally purchase the land at a tax sale, it is only necessary to observe that the appellant himself testified at the trial that respondent took possession of the land in dispute in the year 1883 or 1884, without right, authority, or lease from him, and that he has since held it adversely. Of course he whose duty it is to pay the taxes for another cannot neglect such duty, and permit the taxes to become delinquent, and purchase the property himself at the tax sale, because that would be a fraud on his principal. But in this case that rule is not applicable. Even at the time of the trial the respondent did not know the appellant, and, as he says, never saw him about the premises. He was simply an adverse claimant in possession, and must be awarded such rights as the law gives him.

Appellant argues, however, that the equities are with him, because he offered to pay all back taxes and redeem the land at about the time this controversy began. But this is an action at law, and we cannot consider matters of a purely equitable nature in determining legal questions. For aught that appears in the record, appellant neither paid nor offered to pay any taxes upon this land during the whole number of years intervening between the time of his purchase and the commencement of this controversy; and whether it was the result of negligence or a desire to evade taxation, the effect is the same now. What he might have heretofore done he cannot now do. The appellant's tax deed has, by force of the statute, become an indefeasible title. The objection to the record of respondent's deed is without force, as the index, if not technically correct, is substantially so, and is in no wise misleading. The judgment of the court below is affirmed.

DUNBAR, C. J., concurs.

SCOTT, J., (concurring specially.) Unless an adverse possession, coupled with



the deed, is requisite under section 2939 for the full period of three years, as specified, I doubt its constitutionality. There having been such adverse possession in this case, however, and the statute not being attacked on constitutional grounds, I concur in an affirmance.

**SEATTLE & M. RY. CO. v. STATE ex rel. COLUMBIA & P. S. R. CO.**

(Supreme Court of Washington. Feb. 20, 1893.)

**EMINENT DOMAIN—REVIEW—CERTIORARI.**

Certiorari will not lie to review a decision adjudging the proposed appropriation of rights of way a public use, since the decision can be adequately reviewed on appeal.

Application by the state on the relation of the Columbia & Puget Sound Railroad Company for a writ of certiorari. Denied.

Burke, Shepard & Woods, for petitioner. Andrew F. Burleigh, for respondents.

**STILES, J.** This is a petition of the Columbia & Puget Sound Railroad Company and others for a writ of certiorari to review the action of the superior court of King county in adjudging the proposed appropriation of certain rights of way in the city of Seattle a public use. We are of the opinion that all of the questions which could be raised upon certiorari in such a case can be as well determined upon appeal, and, as the statute provides for adequate protection to the petitioner through the bond required to be furnished by the condemning party, the application is denied.

**DUNBAR, C. J., and ANDERS, HOYT, and SCOTT, J. J., concur.**

(5 Wash. 777)

**TRADERS' BANK OF TACOMA et al. v. BOKIEN et al.<sup>1</sup>**

(Supreme Court of Washington. Feb. 20, 1893.)

**APPEAL—JURISDICTION—NOTICE.**

An appeal cannot be prosecuted by one defendant from a judgment rendered against himself and another, where no notice of the appeal is given to his codefendant, even though both defendants were represented by the same attorney.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by the Traders' Bank of Tacoma, J. Turner, and C. F. Erickson against George D. Bokien and Caroline Bokien, his wife, Benjamin A. Chilberg, and the Tacoma Trust & Savings Bank, to foreclose a mechanic's lien. Plaintiffs obtained judgment. The Tacoma Trust & Savings Bank appeals. Dismissed.

Richards, Murray & Pratt, for appellant. Pritchard, Stevens, Grosscup & Seymour, (J. A. Williamson, of counsel,) for respondents.

**HOYT, J.** This action was commenced by the plaintiffs against several defend-

<sup>1</sup>Rehearing denied.

ants. Judgment was duly rendered therein, from which one of the defendants has sought to appeal to this court. The notice of appeal given by said defendant was directed to and served upon the plaintiffs and all the defendants excepting Benjamin A. Chilberg. As to this defendant the notice was entirely silent, and there is no proof in the record that it was ever served upon him or his attorney. For the reason that said defendant Chilberg was not made a party to the appeal a motion is made to dismiss the same. It has frequently been held by this court that under the provisions of our statute all the parties who had appeared in the action in the court below must be made parties to the appeal, either by joining therein or having notice thereof served upon them. It follows that the motion is well taken unless there is something in the record to take this case out of the general rule. It is alleged on the part of the appellant that it is thus taken out of said rule by reason of the fact that the attorney for the appellant was also the attorney for said defendant Chilberg in the court below, and that, such being the fact, the knowledge of said attorney of such notice of appeal having been given should be held equivalent to service upon said defendant of a copy of the notice. We are unable to agree with this contention. In our opinion, the said defendant Chilberg was in no manner bound by the knowledge thus derived by one who had, in the court below, acted as his attorney. He was in no sense made a party to the appeal by the simple fact of such notice, and it would have been entirely competent for him to have prosecuted an appeal from the judgment at any time within six months after its rendition, regardless of the fact of the attempted appeal by this appellant.

The motion to dismiss must be granted.

**DUNBAR, C. J., and ANDERS, SCOTT, and STILES, J. J., concur.**

(5 Wash. 787)

**CHERRY et al. v. ARTHUR et al.**

(Supreme Court of Washington. Feb. 23, 1893.)

**FIXTURES—MORTGAGE—CONDITIONAL SALE.**

1. A planing machine, which is bolted to the floor of a saw mill, so as to keep it from moving, and which has no connection with the motive power except by a belt over a pulley wheel, is not part of the realty as between one who has delivered it to the owner of the mill upon conditional sale and a mortgagee of the realty to secure a pre-existing debt.

2. Where chattels are delivered upon an agreement to pay half the price in cash, conditional sale notes being given for the other half, and the cash payment is not made, taking other security for such cash payment does not impair the vendor's right to retain title until the notes are paid.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by C. C. Cherry and C. R. Parkes against J. M. Arthur, doing business as J. M. Arthur & Co., George E. Youle, Tabor A. Sherman, and Angelett J. Sherman, to restrain defendants from removing certain

sawmill machinery. Plaintiffs obtained a decree. Defendants Arthur and Youle appeal. Reversed.

Greene & Turner, for appellants. Stevens, Seymour & Sharpstein, for respondents.

**STILES, J.** Respondents Sherman made to respondents Cherry and Parkes a mortgage of certain real estate, "together with the sawmill, machinery, outbuildings, appurtenances, and fixtures of any and all kinds belonging to the same." Among the machinery in the mill was a planer, which was bolted to the floor in such a way as to keep it from moving from its place when being used. Its only connection with the motive power was by a belt over a pulley wheel. This planer had been delivered to Sherman by appellant Arthur under a conditional sale contract, which was effectual to retain the title in appellant, as between him and Sherman, (*De Saint Germain v. Wind*, 3 Wash. T. 189, 13 Pac. Rep. 753; *Dodd v. Bowles*, 3 Wash. T. 383, 19 Pac. Rep. 156,) whether it were fastened to the building or not, so long as it did not become a part of the realty. In ascertaining whether such a machine does become part of the realty in favor of mortgagees the rule is that the manner, purpose, and effect of annexation to the freehold must be regarded. If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening such as would cause permanent injury if removed. But mere furniture, although some fastening be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there, and we think the planer in this case is of the class mentioned, (*McConnell v. Blood*, 123 Mass. 47,) especially as Cherry and Parkes were not mortgagees for value, but to secure a pre-existing debt. But a point is made that the appellant had taken other security for the unconditional payment of the price of the planer, and that for that reason the sale should be held to become absolute. The price of the planer was \$800, one half of which was to be paid in cash; the conditional sale notes, under which the possession of the machine was claimed, covering the remainder. No cash was paid, but considerable time was conceded. When that time had expired appellant took from Sherman a mortgage of real estate to secure the cash payment on the planer, and certain other indebtedness then due. There was no pretense of any settlement between appellant and Sherman, and no agreement to surrender the conditional sale notes. Under these facts we see no reason for disturbing the contract between the parties. Appellant contracted for cash, but he has been compelled to accept a substitute in the shape of a mortgage, and as to the conditional portion of the arrangement there has been no charge. Cherry and Parkes, at least,

have no right to complain, for they have parted with nothing, but are purely voluntary mortgagees. The decree will be reversed, and a new decree entered in accordance with this opinion.

**HOYT, SCOTT, and ANDERS, JJ., concur.**

(5 Wash. 778)

**DOWNS et ux. v. SEATTLE & M. RY. CO.**  
(Supreme Court of Washington. Feb. 23, 1893.)

**RAILROAD COMPANIES—EMINENT DOMAIN—ACTION FOR TRESPASS ON REALTY—RES JUDICATA—REVIEW ON APPEAL.**

1. The condemnation act of 1890 (Sess. Laws 1889-90, p. 204) authorizes railroad companies to institute proceedings to condemn land, but does not, in express terms, authorize the owner of the land to institute such proceedings against a railroad company. *Held*, that said act did not prevent the owners of land, over which a railroad had been built without previous condemnation, from bringing a common-law action for damages caused thereby to their land.

2. Where the judge who hears such action, and who has also heard another action brought by the railroad company to condemn the same land, refuses to dismiss the action for damages when asked to do so, on the ground that the damages claimed therein have been recovered in the condemnation suit, such ruling will not be reversed on appeal, where the record of the condemnation suit is not brought upon the appeal.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by H. P. Downs and wife against the Seattle & Montana Railway Company. Plaintiffs obtained judgment. Defendant appeals. Affirmed.

Burke, Shepard & Woods, for appellant. Million & Houser, for respondents.

**SCOTT, J.** This appeal is from a judgment rendered in the superior court of Skagit county in favor of the respondents for the sum of \$500 in an action brought against the railroad company for trespassing upon certain lands owned by them, and destroying 100 rods of fence, and for cutting and removing valuable timber thereon growing. The railroad of the appellant is constructed across the respondents' land. Preliminary to building the same, negotiations were had between the railroad company and the respondents for the purpose of agreeing on terms for a right of way. A survey had been made by the railroad company for its line of road across said land, and in accordance therewith a deed had been prepared, and signed by the respondents, but the same was never delivered to the railroad company. It seems that after these negotiations the company concluded to change the location of its road upon said lands, which it did, and proceeded to construct the same in accordance with such changed location. At this point all negotiations looking towards the conveyance of a right of way by the respondents to the railroad company seem to have been suspended, although the company claims that all the acts performed by it

in entering upon such lands, and in building its line of railroad, were done with the knowledge and consent of the respondents. The respondents deny this, and testify that they notified the railroad company not to enter upon said lands and build said road in accordance with the location as changed. This was a question of fact, which the jury disposed of.

As one of its defenses to said action, the railroad company pleaded the act of the legislative assembly approved March 21, 1890, relating to the institution of proceedings where land is sought to be taken for a right of way, and alleged that the same is exclusive. The lower court held that the act in question did not constitute a bar to plaintiffs' action, and the jury found in their favor upon the facts. The verdict was rendered in favor of the plaintiffs on the 13th day of October, 1891. The defendant made a motion to set it aside, and for a new trial, and while said motion was pending it instituted proceedings under said act to condemn a right of way for its railroad in accordance with its location. In this proceeding a judgment of condemnation was rendered in favor of the railroad company, and the sum of \$630 was awarded the respondents as damages, which the company paid. Thereafter, on the 7th day of January, 1892, the railroad company moved that the action instituted by the respondents be dismissed, upon the ground that the matters for which they had recovered damages in said action were fully paid for and satisfied by the payment of the judgment in the condemnation proceedings. This motion was denied, as was also the motion for a new trial, whereupon judgment was rendered for the respondents upon the verdict, and the railroad company appealed.

By comparing the condemnation act of 1890, (Sess. Laws 1889-90, p. 294,) with the previous one approved February 1, 1888, (Sess. Laws 1887-88, p. 58,) which it superseded, a material difference is noticed therein. The first section of the 1888 act, in direct terms, authorized the institution of such proceedings by either party, and section 14 of said act provided that the remedy therein authorized should be exclusive of all other remedies. The subsequent act omitted the express authorization permitting the landowners to institute the proceedings; but said act, in section 2, in speaking of the notice to be given, says: "Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this chapter are instituted by the owner, or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such person, owner, or party interested, or his or her or its attorney." This is the only reference in said act, anywhere, looking towards the right of the landowners to institute the proceedings. The provisions of the act relating to what the notice shall contain are largely inconsistent with the institution of such proceedings by the landowners, and it is very questionable whether a remedy is provid-

ed in said act for such owner in case the railroad company fails to institute the proceedings. An owner cannot certainly know just where the railroad is to be located, in advance of its construction; for, although a survey has been made, yet this is subject to change, and was changed in this particular instance. In instituting proceedings to condemn, the petition should show the definite location of the road, and the railroad company only can well know in advance where this is to be. The proceeding is not in the last act declared to be exclusive of all other remedies. Under the circumstances, we do not think that the remedy is an exclusive one. *Navigating Co. v. Loose*, 2 Wash. St. 500, 27 Pac. Rep. 174. It was provided for the purpose of authorizing the railroad company to institute the proceeding before commencing the construction of the road. The only thing the company would have a right to do, preceding this, would be to enter upon the land for the purpose of determining the location of the road; and where the company fails to institute the proceeding, as in this case, we are of the opinion that the landowner has his right to a common-law action. He cannot certainly know the purposes for which the railroad company enters upon his land. Presumably, it would be for the purpose of building a railroad, but the company at any time might abandon the location, and remove or change the location of its road so as to avoid crossing such owner's land at all. The company would not be bound to accept the right of way, or to construct the road, although it had entered upon the construction.

Appellant urges here that this action should have been dismissed by the lower court upon its motion made upon the condemnation proceedings, as a basis, and contends that the very elements of damage for which plaintiffs obtained a judgment in this case were considered, passed upon, and paid for in the proceedings to condemn. The only knowledge we have that this was the fact is by an affidavit of one of the attorneys for the appellant. Counter affidavits were filed by the respondents. These affidavits directly contradict each other. Those filed by the respondents allege that none of the damages considered in the condemnation proceedings were the same as those for which they recovered in this action. The record in the condemnation case is not here, and we are in no position to say what the truth of the matter is.

It is contended by the respondents that the value of the premises was not recovered in the action for trespass, and this is sustained by an instruction which the court gave to the jury, directing them that the plaintiffs could not recover for the value of the premises in such action. Had the plaintiffs sought to have done so, the railroad company might have secured its right of way in that action without resorting to the proceedings to condemn. All future damages were likewise excluded from the consideration of the jury in the trespass case by the instructions of the court; that is, such as were likely to result to the land in consequence of the

building and operation of the road. The court which heard and decided this motion had tried both of said actions, and it was in a position to know what the facts were. Had the appellant desired to have this point presented to the court, it was necessary for it to have brought up so much of the proceedings in the suit for condemnation as was necessary to show that the grounds upon which recoveries were had in said suits were identical. Failing to have done so, there is no foundation upon which it can allege error in the ruling of the lower court thereon.

The appellant also alleges that the superior court erroneously refused to give certain instructions to the jury, which it had requested. It is unnecessary to set out these instructions, and also the instructions which the court did give, as we do not consider that the point submitted in this particular is a close one. The record shows that the case was fairly submitted to the jury by the lower court, and that the instructions fully and fairly cover the matters they were to pass upon.

Affirmed.

DUNBAR, C. J., and ANDERS, J., concur.

(5 Wash. 792)

HANSEN v. HOFFMAN et al.

(Supreme Court of Washington. Feb. 24, 1893.)

PLEDGE—FRAUD OF PLEDGOR—INNOCENT THIRD PERSON.

Defendant obtained notes and mortgage belonging to plaintiff from one H., who had fraudulently obtained them from him, and loaned H. \$960, taking his note for \$1,200, with the said notes and mortgage as collateral. Defendant knew that H. was irresponsible, and he made no investigation before making the loan; but it did not appear that he knew or suspected that H. had obtained the notes and mortgage by fraud. *Held*, that defendant was entitled to a lien on the notes and mortgage for the \$960, with interest. Dunbar, C. J., dissenting.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by Jens Peater Hansen against J. H. Hoffman, otherwise known as John H. Crawford, and W. W. Swank, to enjoin defendants from disposing of certain notes and the mortgage securing same, and to obtain possession of said notes and mortgage. Plaintiff obtained judgment. Defendant Swank appeals. Modified.

Freston, Albertson & Donworth, for appellant. Stratton, Lewis & Gilman, (A. G. McBride, of counsel,) for respondent.

SCOTT, J. The disposition of this case rests upon a question of fact. Respondent, Hansen, was the holder and owner of two negotiable promissory notes, each being for the sum of \$1,200, and secured by a mortgage upon certain real estate. The defendant, then known to respondent Hansen as J. H. Hoffman, entered into an agreement with Hansen whereby they were to purchase a certain saloon in the city of Seattle, and conduct a saloon busi-

ness therein as partners. The purchase price of said saloon and stock was \$5,200, all of which Hoffman was to advance, and Hansen agreed to transfer to Hoffman the notes aforesaid and mortgage as security for his one half of the purchase price. Pending these negotiations between Hoffman and Hansen, Hoffman, under the name of J. H. Crawford, was negotiating with appellant, Swank, for the purpose of obtaining a loan from him. At this time he obtained from Hansen an assignment of the notes and mortgage in question, said assignment being a separate instrument, executed and acknowledged by him before a notary public, and he delivered it to Hoffman. The notes and mortgage were taken by Hansen, and he went with Hoffman to one Rosenfeldt, the proprietor of the saloon which they proposed to purchase, and there deposited said notes and mortgage in the safe of the said Rosenfeldt, in an envelope belonging to Hoffman. The assignment in question had been executed to Hoffman as J. H. Crawford, although Hansen did not know this, the assignment not having been read to him. He claims that it was fraudulently procured from him; that he understood it was, and it was represented to him to be, an agreement to enter into partnership. Some time after the notes and mortgage were deposited as aforesaid, Hoffman went to the saloon in question, and obtained them from the proprietor, and took them to appellant, Swank. At this time the notes purported to have Hansen's name on the back of them. Hoffman transferred the notes and mortgage to Swank, and executed to him a note for \$1,260, and obtained from him \$960. Hansen denied ever having indorsed the notes, and claimed that his name had been forged thereon by Hoffman, and that, in consequence of the assignment having been fraudulently obtained from him, he never parted with the title to the notes and mortgage, and that appellant, Swank, obtained no title or rights thereto, even though he acted in good faith. But he claims that Swank acted not in good faith. It appears that when the notes and mortgage were taken to Swank he noticed a difference between the signatures on the back of the notes and the signature to the assignment, whereupon Hoffman, or Crawford, said he would take them back, and have them reindorsed. He took them with him and returned in a short time, and said that Hansen had refused to indorse them again, saying he had written his name on them once, and that was enough; but he wrote his name on a separate piece of paper, and sent that along, whereupon Swank accepted the papers. Hansen subsequently brought this action to restrain Swank from disposing of the notes and mortgage, and to obtain possession of them. He alleged that Swank obtained the same without consideration; also that he did not obtain them in good faith. It is urged that Swank had notice that Hoffman, or Crawford, rather, as he was known to him, was an unreliable person. It appears that he had previously obtained a loan from Swank for \$50 with an irresponsible surety, and that

Swank had threatened to prosecute him for misrepresentations connected therewith; and from that fact, and the fact that Swank's suspicions were aroused by the discrepancy in Hansen's signature upon the notes and upon the assignment, and the further fact that Swank took the mortgage without any investigation of the title to or value of the land covered by it, he argues and insists that Swank was not a bona fide holder; and this is admitted to be the turning point in the case, if Hansen actually executed the assignment of said papers as an assignment, and did not indorse the notes.

It would be useless to undertake to set forth all the testimony. Several witnesses were sworn and testified, including the notary public before whom Hansen executed the assignment; and we are satisfied from the proofs in the case that Hansen, at the time he executed the document to Hoffman, knew that he was assigning the notes and mortgage to him. After the proposed partnership arrangement fell through, he called upon Hoffman, and asked that the assignment be returned to him, he calling it "the paper." It is admitted that this document was not read to Hansen at the time he signed it, but the notary says it was explained to him. At the time he went to obtain it from Hoffman, Hoffman opened a drawer in his desk, and, taking out a paper, said, "Here's your paper," holding it up before him, and proceeded to tear it up, and throw it into the waste basket. Hansen asked if it had been placed upon record. Hoffman told him it had not, and Hansen went away apparently satisfied. In advancing Hoffman, or Crawford, the \$960, Swank was apparently making \$300 out of the transaction, and as a part of said sum he returned to him the note for \$50 which Crawford had previously given him. He said he did not investigate the title to the land, or its value, because he knew the parties who had purchased it of Hansen, and gave him the notes and mortgage to secure a part of the purchase price, and he was satisfied to rely upon their judgment as to the title and value. It is immaterial whether Hansen indorsed the notes or not, and we are not called upon to find as to that, as we are satisfied that he did execute the assignment, knowing substantially the effect of it. Some days after their negotiations to go into partnership had ceased, and Hansen had, as he supposed, seen the document he had executed to Crawford destroyed, he went to the saloon in question to demand his papers, and found that they had been given up to Hoffman. The proprietor of the saloon said he understood Hoffman had a right to them when they were left there, and for that reason he permitted him to take them. Hoffman was arrested, tried, and convicted, and sentenced to the penitentiary for his transactions in said matters. In this case the lower court found that Swank did not obtain the notes and mortgage in good faith, and found for plaintiff, whereupon Swank appealed to this court. In this particular we think the finding of the court was wrong. We are well satisfied from the proof that

Swank actually advanced the \$960, including the note for \$50, to Crawford; and, although he might not have been very cautious in the matter, and took chances that perhaps a prudent business man would not have taken without further satisfying himself of the character and value of the security, yet we do not think that Swank doubted Crawford's title to the papers in the least, nor suspected him of acting under two different names; and later, when he received information which caused him to suspect the character of Crawford, and to doubt that the transaction upon his part was all right, he caused an investigation to be set on foot. Swank would not have made this additional loan of over \$900 in money had he supposed that Crawford was not the owner of the notes and mortgage, as he pretended to be. While he might have supposed that the paper was not first class, such as would pass at a bank ordinarily, doubtless he was willing to take some chances in this regard in order to secure the bonus of \$300, and security for the \$50 he had previously loaned to Crawford. Before the transaction was closed between Swank and Crawford he caused Crawford to go with him to see his attorney, and the whole matter was submitted to such attorney, and his advice taken thereon; whereupon the trade was consummated. It fairly appears that Swank acted in good faith, and he should be protected to the extent of the money that he advanced. Consequently the judgment of the court below should be modified to the extent that Swank have a lien upon the notes and mortgage for the sum of \$960, with interest thereon at the rate of 10 per cent. from the time he advanced the same to Crawford until the same be paid to him, and that, upon paying said amount to Swank, the papers should be returned to Hansen; and for that purpose the same may be taken from the files of this court, upon the stipulation of counsel; appellant to recover costs.

HOYT, ANDERS, and STILES, JJ., concur.

DUNBAR, C. J., (dissenting.) From all the testimony in the case I am not satisfied that the court was not justified in coming to the conclusion that it did. The trial judge had the witnesses before him, and therefore had better opportunity to distinguish the true testimony from the false than this court has, and, unless it clearly appears that he is wrong, I am not inclined to disturb his findings. I therefore dissent to the modification of the judgment.

(5 Wash. 797)

#### PILLING v. MORSE.

(Supreme Court of Washington. Feb. 24, 1893.)

PLEADING AND PROOF—VARIANCE—TRIAL—LEADING QUESTION—INSTRUCTIONS—HARMLESS ERROR.

1. An allegation that plaintiff loaned defendant money may be supported by proof that the money was obtained by defendant

from plaintiff's wife, and that it was plaintiff's money.

2. Allowing a leading question on an immaterial point is harmless error.

3. In an action for money lent, the court instructed the jury that "the second cause of action is for \$100 loaned money, which he claims was loaned by the plaintiff to the defendant, and the court will instruct you on this point that this \$100,—for the purpose of distinguishing it from any other \$100,—that this \$100 is the \$100 which the plaintiff claims was loaned by Mrs. Pilling to the defendant; not any other, and the plaintiff cannot recover for any other than that in any event. He is limited in his proof to that particular transaction. The court does not indicate in any manner as to what the evidence is. You are the judge. The court called your attention to that particularly for the purpose of impressing on your minds that we are not trying any other \$100 transaction between the parties, and the testimony in this case has fixed this \$100 transaction; and, unless that occurred, the plaintiff cannot recover on that. If it did occur, of course you will find for the plaintiff on that cause of action." It appeared from the evidence that plaintiff had previously lent defendant another \$100, which had been paid back by defendant, but there was no controversy about this prior loan. *Held*, that the instruction was not prejudicial to the defendant.

Appeal from superior court, King county; R. Osborn, Judge.

Action by William H. Pilling against Willard A. Morse. Plaintiff obtained judgment. Defendant appeals. Affirmed.

John Fairfield and Daniel T. Cross, for appellant. Allen & Powell, for respondent.

SCOTT, J. The plaintiff brought an action against the defendant to recover the sum of \$280, on several causes of action pleaded in his complaint, one of which was upon a promissory note for the sum of \$100. He obtained judgment, and the defendant appealed.

The first error alleged is as to testimony admitted in relation to the cause of action upon the note. The testimony showed that the money had been obtained by the defendant from the plaintiff's wife. The plaintiff testified that it was his money. Appellant alleges that the proof was inadmissible, because of the allegation in the complaint that the plaintiff had loaned the defendant this money. There is no substance in this point. It is immaterial whether the defendant obtained the money from the hand of the plaintiff or whether it was delivered by his wife.

The next error alleged is upon a question which the plaintiff's attorney asked the plaintiff. It was objected to as leading. The court permitted an answer. The question went to an immaterial matter, and was of no consequence with regard to the matter in controversy.

The last objection raised is with reference to an instruction which the court gave the jury. It is as follows: "The second cause of action is for \$100 loaned money, which he claims was loaned by the plaintiff to the defendant, and the court will instruct you on this point that this \$100,—for the purpose of distinguishing it from any other \$100,—that this \$100 is the \$100 which the plaintiff claims was loaned

by Mrs. Pilling to the defendant; not any other, and the plaintiff cannot recover for any other than that in any event. He is limited in his proof to that particular transaction. The court does not indicate in any manner as to what the evidence is. You are the judge. The court called your attention to that particularly for the purpose of impressing on your minds that we are not trying any other \$100 transaction between the parties, and the testimony in this case has fixed this \$100 transaction; and, unless that occurred, the plaintiff cannot recover on that. If it did occur, of course you will find for the plaintiff on that cause of action." It is contended by the appellant that this instruction was objectionable, because there was a controversy as to the particular \$100 which the plaintiff had loaned the defendant. It appeared from the cross-examination of the plaintiff by the defendant's attorney that he had previously loaned the defendant \$100, and that the defendant had paid it; but there was no controversy as to this prior loan, and it was in no wise made an issue by the plaintiff. He only sought to recover for one \$100 loan. The defendant was not injured by the instruction. Affirmed.

DUNBAR, C. J., and HOYT, SFILES, and ANDERS, JJ., concur.

(5 Wash. 802)

#### McDOUGALL v. McDOUGALL.

(Supreme Court of Washington. Feb. 27, 1893.)

#### DIVORCE—CRUELTY—EVIDENCE.

1. It is not a sufficient ground for divorce that the parties will not live together.

2. In an action for divorce by a husband on the ground of cruelty, evidence that the wife twitted him with stealing her money is insufficient to sustain a decree, when such evidence is contradicted by her.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Suit for divorce, brought by Isaac W. McDougall against Mary L. McDougall, on the ground of cruel treatment. The alleged cruel treatment consisted in twitting plaintiff with having stolen her money from her. This was denied by the defendant. Plaintiff obtained a decree. Defendant appeals. Reversed.

Fishback, Hardin & McLean, for appellant.

HOYT, J. This was an action for divorce, and was heard upon the merits. On such hearing, the court below granted to the plaintiff a decree of divorce, with other relief. It is with great reluctance that this court disturbs a decree of a lower court on a review of the facts found by such court upon proofs taken before it. In this case, however, there is such an absolute want of proof to sustain the findings of the court that we feel compelled to interfere. The testimony of the plaintiff, if all taken as true, establishes only such a state of facts that, if a decree of divorce can properly be granted thereon, it will follow that nine couples out of ten, of the

station in life of the parties to this action, could, upon application to the court and a showing of the state of the relations between them, be properly granted a release from the bonds of matrimony. Not only is there such want of sufficient showing on the part of the plaintiff, but even the slight showing which he does make is substantially contradicted by the proofs offered on the part of the defendant, which, under all the circumstances of the case, we think entitled to as much, if not more, weight than that offered on the part of the plaintiff. It follows that, in our opinion, there was no case made which authorized the court to interfere as between the parties. The only theory upon which we can account for the action of the court below is that it came to the conclusion that, under all the circumstances of the case, the parties would not probably again live together as husband and wife, and from that fact assumed that it would be proper to decree a dissolution of the marriage bonds. There are some who would justify a divorce for this reason, but for the good name of our state we are glad to be able to say that principles of this kind have not yet taken the shape of legal enactment here. As our statute at present stands, it is not enough to authorize a decree of divorce that the court should find as a fact that the parties will no longer live together as husband and wife. It is necessary that there should be found to exist some of the causes mentioned in the statute in favor of the one as against the other party, and that the party in favor of whom such cause of divorce is found has not been guilty of like misconduct against the other party. The decree will be reversed, and the cause remanded, with instructions to dismiss the action. The appellant will recover the costs of both courts.

SCOTT, ANDERS, and STILES, JJ., concur. DUNBAR, C. J., concurs in the result.

(5 Wash. 804)

**STATE ex rel. TIMM v. TROUNCE.**

(Supreme Court of Washington. Feb. 27, 1893.)

**WITNESS—CONTEMPT OF COURT—JURISDICTION—  
SUPPLEMENTARY PROCEEDINGS—PRESCRIPTION.**

Code, § 1650, declares that no person shall be obliged to attend as a witness in any civil action or proceeding out of the county where he resides unless he resides within 20 miles of the place where he is required to testify. *Held*, that where a witness was served with process in one county, commanding him to appear and testify in supplementary proceedings had in another county, the court had no jurisdiction to punish him for contempt in failing to appear, where no proof was submitted to the court to show that the witness lived within 20 miles of the place of holding court; since, as supplementary proceedings are special in their nature, no presumption can attach in favor of the jurisdiction of the court.

Appeal from superior court, Pierce county; Fremont Canipbell, Judge.

Proceeding to punish F. W. Trounce for alleged contempt of court. Defendant was found guilty, and he appeals. Reversed.

Parsons & Corell and Blaine & De Vries, (E. C. Hughes, of counsel,) for appellant. W. H. Snell, Co. Atty., (Heilig & Hartman, of counsel,) for respondent.

SCOTT, J. The respondent moves to strike portions of the transcript, for certain reasons specified; but, as the motion presents no points that have not been heretofore decided by the court, it will be denied without setting them forth. One Peter Timm recovered a judgment against D. Stegman, S. Loeb, and John Frazier, in the superior court of Pierce county, and proceedings were instituted supplementary to execution, and this proceeding is founded therein. The appellant was not a party to said suit, but was summoned to appear under sections 524 and 525, vol. 2, Code, and, failing to appear, he was adjudged guilty of a contempt of court. Several questions are raised upon this appeal, but, as the determination of one of them disposes of the proceeding, the others will not be discussed.

The appellant was served with process in King county, which commanded him to appear before the superior court of Pierce county at a time and place specified. At the time of the hearing, the appellant appeared by an attorney, and objected to the proceedings, on the ground that the court had no jurisdiction in the premises, for the reason that the appellant resided more than 20 miles from the place where he was cited to appear, as aforesaid. This objection was overruled. In such a matter as this the appellant is summoned rather as a witness than as a party to a proceeding. Such proceedings are authorized to be taken before a court or judge, and are special in their nature. No presumption can attach in favor of the jurisdiction of the court. There was no proof submitted to the court in any way that the defendant resided within 20 miles of the place at which he was commanded to appear and testify. Section 524, aforesaid, authorized the judge to make an order requiring such person to appear before him, or a referee appointed by him. Section 525 declares that a witness may be compelled to appear and testify before the judge or referee upon any proceedings under this chapter as upon the trial of an issue of fact. Section 1650 declares that no person shall be obliged to attend as a witness before any court of record, judge, referee, etc., in any civil action or proceeding out of the county in which he resides, unless his residence be within 20 miles of such court, judge, etc. In this case, before the appellant could have been adjudged guilty of a contempt of court, it should first have appeared that he resided within the jurisdiction of the court; otherwise, a party might be summoned and compelled to appear from a remote part of the state, to make his objections to a proceeding in which he has no interest whatever, except to protect himself from paying money or delivering property upon an invalid order. We do not think that such can be the intent of the law, and, before a party can be punished for a failure to obey the summons, it must appear that the court had jurisdiction over him; and a residence.



within 20 miles, as aforesaid, is one of the essential requirements. It follows that the superior court had no jurisdiction to make an order adjudging the appellant guilty of a contempt of court, nor to render any judgment against him whatever in said proceedings; and the same are in each and every part reversed and set aside.

DUNBAR, C. J., and HOYT, ANDERS, and STILES, J.J., concur.

(5 Wash. 699)

MOODY v. SPOKANE & U. H. ST. RY. CO. et al.

(Supreme Court of Washington. Feb. 7, 1893.)

VENDOR AND PURCHASER—CONTRACT.

A contract between the owner of land and a railway company provided that, in consideration of a conveyance by the former to the latter "by deed in fee simple, and free from all incumbrances," the latter should do certain things. *Held*, that it was error to hold as matter of law that a conveyance of the land, with a mortgage on it, by deed with a covenant against incumbrances, was a compliance with the contract, as the contract, in the absence of any other showing, required the land to be actually free from incumbrances.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by H. L. Moody against the Spokane & University Heights Street-Railway Company and others. There was a judgment for plaintiff and defendants appeal. Reversed.

Hyde, Glass & Reagan, for appellants. Jones, Voorhees & Stephens, for respondent.

DUNBAR, C. J. This is an action brought by respondent against appellants to recover \$2,500 fixed value of certain real estate, the right to recover depending upon the failure of appellants to perform a certain agreement contained in a contract made by Ella E. Tift and William F. Tift, her husband, of the first part, and the appellants of the second part. The respondent sues as assignee of the Tifts. The contract set forth the fact that the parties of the first part are the owners in fee simple of certain lands described, (which are the lands in question in this case,) and the pertinent portion of the contract is as follows: "Now, therefore, in consideration of the conveyance by the parties of the first part to the said Robert Abernethy, by deed in fee simple and free from all incumbrances, the following described property, to wit," etc., "the parties of the second part hereby agree by and with the said parties of the first part to begin to construct the above-mentioned street railway not later than June 1st, 1891," etc. It is not necessary to set forth the agreement at greater length, as it is conceded that the agreement was not carried into effect by the street-railway company. The deed of warranty to the lands described was given by the Tifts to Abernethy in trust for the company, with the covenant that it was free from all incumbrances, but after the acceptance of the deed by the company it was discov-

ered that there was an incumbrance, to wit, a mortgage for a certain sum, on the land at the time it was conveyed. This fact is not disputed by the respondent, but it is alleged in reply that at the time of the conveyance by the Tifts Abernethy knew of said incumbrance, and accepted the said deed with full knowledge of all the facts connected with said mortgage, and without objection thereto, and that plaintiff, at the time of the delivery of said deed by the Tifts to said Abernethy, executed a good and sufficient release and satisfaction of said mortgage, and tendered and offered to deliver the said release to the said Abernethy, which the said Abernethy refused to accept. The court, however, wholly fails to sustain this averment. So that the question to be considered here is, was a deed with a covenant that the premises were free from all incumbrances the consideration moving the company to enter into the contract, or was it a conveyance of the land which was actually free from all incumbrances? The court evidently took the view that it was the execution and acceptance of the deed that was the moving consideration, for it instructed the jury as follows: "If the jury find from the evidence that in pursuance of the aforesaid contract Ella E. and William F. Tift made, executed, and delivered to the defendant Robert Abernethy a deed in fee simple and with covenants against incumbrances to and for the lands described in the complaint, and that said Abernethy accepted the same, and that defendants did not comply with their contract with reference to the construction, equipment, maintenance, and operation of the street railway in said contract provided for, and did not begin the operation of the said street railway prior to or on the 1st of October, 1891, then the plaintiff is entitled to recover the amount defendants agreed to pay Ella E. and William F. Tift for the land in said contract described, even though the jury should find from the evidence that there was a mortgage on the aforesaid land at the date of the alleged deed from Ella E. and William F. Tift to defendant Robert Abernethy of the aforesaid land, as alleged in the answer herein." This instruction was excepted to by the appellants, and is alleged here as error. This contention, we think, must be sustained. It is not the ordinary case of the breach of a covenant in a deed, where the remedy would be a suit on the warranty, but the respective contracts here are dependent upon each other. The deed was made in consideration of a separate instrument in writing, entered into between the grantor and grantee, and it is very evident from that contract that it was not simply a deed of the fee that the appellant was contracting with reference to, but that it was the real title to the land, and the character of the deed was simply stipulated as a compliance with the forms prescribed for conveying such title; in other words, there is nothing to indicate that the appellants were contracting for the shadow rather than the substance. The case of *Morris v. Whicher*, 20 N. Y. 41, is a leading case on this subject. The court in that case says: "It

needs no argument to prove that a simple covenant to convey is performed by a conveyance. The obligation being thus satisfied, that is the end of it. But it is just as plain, both in common sense and in law, that covenants which relate to other things than a mere conveyance are not thus performed or satisfied. \* \* \* In all cases, then, where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence will be decisive. If not so expressed, the question is open to other evidence, and I think, in absence of all proof, there is no presumption that either party, in giving or accepting a conveyance, intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction." Without entering into a discussion or citation of authorities, we think they almost universally sustain the doctrine announced above. This question of the intention of the parties was taken from the jury by the instruction of the court, which was error. If the respondent had not performed his part of the contract, it requires no citation of authorities to show he could not commence this action. On the other hand, the appellant would have the right to rescind the contract. This it elected to do, and gave notice of its purpose to the respondents, offering to deed back the land, and place the respondents in statu quo. The judgment is reversed.

**ANDERS, HOYT, SCOTT, and STILES, JJ., concur.**

(5 Wash. 785)

**KELLY, DUNNE & CO. v. JOHNSON et al.**  
• (Supreme Court of Washington. Feb. 23, 1893.)

**Sale—Action for Price—Pleading and Proof.**

Where the complainant seeks to recover for goods sold defendants as partners under the name of the W. Co., it is error to admit evidence to show, and to instruct the jury on the theory, that the W. Co. was a corporation, and the goods were sold to it, and that defendants undertook to be responsible for the price, or that defendants bought out the corporation, and assumed the debt.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Kelly, Dunne & Co., a corporation, against Charles M. Johnson and another, partners trading as the Washington Manufacturing Company, for the price of goods sold. There was a judgment for plaintiff, and defendants appeal. Reversed.

Parsons & Corell, for appellants. Marshall K. Snell, for respondent.

**STILES, J.** The complaint alleged that the defendants, Charles M. Johnson and

Benjamin F. Thompson, were at all times named therein copartners, trading under the name and style of the Washington Manufacturing Company, and that the plaintiff, between certain dates, at the instance and request of the defendants, sold and delivered to them certain merchandise. Upon the trial some testimony was admitted tending to show that, although the defendants had never formally entered into a partnership, they had done business in such a way as to bind themselves as partners by holding out and that they were known as the Washington Manufacturing Company. But while there was some evidence which it is claimed tended to show that the defendants had bought the goods, a large part of the evidence which was admitted and considered, under objection, was to the effect that they had merely undertaken to be responsible for the purchase of certain goods by the Washington Manufacturing Company, which was a corporation. The admission of that testimony, and a portion of the charge of the court, are complained of. The charge was as follows: "If you find from the evidence that the Washington Manufacturing Company was a corporation, no promise or agreement by these defendants to answer for the debt or default of the said corporation will be valid, unless some note or memorandum therefor was made in writing, and signed by the party to be charged therewith, or unless some consideration passed for the promise, or unless credit was given to them direct; but, if any of these exceptions exist, the promise would be good, whether it was in writing or not. If you find that Thompson and Johnson bought out the assets of this company or corporation, then they could assume the debt of the company, and the purchase would be a consideration for the promise, and validates it. Thompson and Johnson could do business as partners, and use any name they pleased, of a company or otherwise, and could assume the debts of their predecessors as part of the purchase. If such assumption passed, it would make a contract for payment." This language of the court was entirely outside of the cause of action pleaded, and its only effect was to mislead the jury. Such of the plaintiff's testimony also as tended to show merely a promise to assume a debt or to pay for goods sold to a corporation was open to the same objection. The court should have charged that if the jury found that the Washington Manufacturing Company was a corporation, and the goods were sold to it, they must find for the defendants. Under the pleadings there was no alternative. Objections had been repeatedly made, and there was no offer of amendment made by the plaintiff. The judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

**DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.**

(13 Mont. 170)

**KELLEY v. JEFFERIS, Sheriff.**

(Supreme Court of Montana. April 18, 1893.)

**MARRIED WOMEN—RECORD OF SEPARATE PROPERTY.**

1. Act Jan. 12, 1872, (Comp. St. § 1432,) which requires a married woman to place a list of her property on record in the office of the register of deeds, to enable her to hold it as exempt from her husband's debts, but which does not prescribe any particular form for the list, or provide for its record in any special way, is sufficiently complied with by filing in the office of the register of deeds a chattel mortgage executed by a married woman, and containing a list of the property covered thereby.

2. Comp. St. § 1439, enacted in 1887, provides that women shall retain the same legal existence and legal personality after marriage as before, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury to her property she shall have the same right to appeal in her own name alone to the courts for redress that her husband has. *Held*, that this statute so modifies the above act of 1872 as to enable a married woman to hold her individual separate property, as against her husband's creditors, without having a list thereof on record, on showing the facts necessary to establish her individual title thereto.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by Violet M. Kelley against Charles M. Jeffers, sheriff, for the alleged wrongful seizure and conversion of personal property owned by plaintiff. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

J. A. Carter and A. K. Barbour, for appellant. F. U. & S. H. McIntire, for respondent.

**HARWOOD, J.** This action is prosecuted to recover damages for the alleged wrongful seizure and conversion of personal property. Plaintiff, Violet M. Kelley, is and was a married woman, residing with her husband, James J. Kelley, in the city of Helena, county of Lewis and Clarke, Mont., during all the times when the facts in this case transpired. It appears that, at the time of her marriage, plaintiff possessed the sum of \$700 in money, her own individual property, acquired prior to marriage; that, soon after said marriage, plaintiff invested said money in certain articles of saloon furniture, described in the complaint, all alleged to be of the value of \$700; that, after the purchase of said chattels, plaintiff executed and duly acknowledged, in the manner required by the laws of this state, an instrument intended to be a chattel mortgage on said furniture, which instrument was filed for record in the office of the county clerk and recorder of Lewis and Clarke county, where said property was situate; that said chattels were used as the furniture of a place in said city, where plaintiff carried on, in her own name, the business of selling, at retail, liquors, cigars, and other goods usually sold in a saloon; that plaintiff's husband acted as her agent in carrying on said business in plaintiff's name; that, while plaintiff so owned and used said furniture, the same was seized and sold by appellant, acting as sheriff

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of said county, under execution issued against plaintiff's husband, to enforce a judgment obtained against him on his indebtedness, contracted and owing prior to his marriage with plaintiff; whereupon plaintiff instituted this action to recover the value of said property as damage for the alleged wrongful seizure and conversion thereof, alleging the same to be her sole and separate property. Defendant, by answer, denied the allegation of plaintiff's complaint, to the effect that she was the owner of said chattels, in her sole and separate right, or was entitled to the possession thereof, when defendant seized the same; and defendant set up the seizure, under execution issued upon said judgment, against James J. Kelley, in justification of the taking of said property. The trial resulted in judgment for the plaintiff in the sum of \$550, and costs of suit, for which defendant prosecutes this appeal.

The contention of appellant is that, admitting the facts to be as epitomized above in reference to said property, plaintiff is not entitled in law to recover damages for the seizure thereof by appellant, in satisfaction of the execution against plaintiff's husband. If respondent's claims upon the property in controversy were to be determined entirely by an application of the principles of the common law in relation to the rights and disabilities of married women on the subject of holding property, appellant would doubtless prevail in his contention that said property was subject to seizure and sale to satisfy the liability of plaintiff's husband. But there are statutes in this state, existing when these facts arose, which modify the rules of the common law in this respect; and this case, we apprehend, must be determined by a consideration and application of those statutes. An act of January 12, 1872, now constituting section 1432, Comp. St., provides "that the property owned by any married woman before her marriage, and that which she may acquire after her marriage, by descent, gift, grant, devise, or otherwise, and the increase, use, and profits thereof, shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years: provided, however, that the provisions of this chapter shall extend only to such property as shall be mentioned in a list of the property of such married woman as is on record in the office of the register of deeds of the county in which such married woman resides." In 1874 another statute was enacted by the legislature, authorizing any married woman residing in this state to engage in and carry on business, as sole trader, in her own name, and on her own account; and providing that neither her property embarked in such business, nor the proceeds thereof, shall be subject to her husband's debts. By that statute the married woman intending to become such sole trader was required to make and acknowledge before any person authorized to take acknowledgment of deeds in Montana, and record in the office of the county clerk and re-

corder of the county wherein the business was to be transacted, her declaration, describing the proposed business, and setting forth her intention to engage therein as sole trader. See Sess. Laws 1874, p. 93; also same statute in sections 1433-1438, div. 5, Comp. St. This statute has been superseded by another of similar effect, but providing a different manner of procuring for record the declaration as sole trader. Sess. Laws 1891, p. 263. These statutes as to married women becoming sole traders are referred to as showing the course of legislation in this jurisdiction respecting the property rights of married women; but it is not contended by either party that the statute in reference to married women becoming sole traders has any particular bearing upon this case. It was asserted on the argument that certain of plaintiff's merchandise, connected with said business, was seized along with the furniture; but plaintiff does not contend that she could hold the merchandise, because she had not complied with the statute as to sole traders. She insists, however, that the property under consideration in this suit was not in trade, nor in market for sale, but was simply chattels belonging to her, and in her personal use. The next statute relative to the rights of married women in Montana, which should be considered in determining this case, became a law in 1887, and reads as follows: "That, from and after the passage of this act, women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and, for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone." Section 1439, div. 5, Comp. St.

Plaintiff relies upon the provisions of the statute first and the last above quoted as sufficient to support her recovery upon the facts shown in this case. It is contended on her behalf that section 1432 was sufficiently complied with by filing in the office of the register of deeds of the proper county the instrument intended as a chattel mortgage on the property in question, and containing a complete list and description thereof executed by plaintiff to Weber & Meile Co., of Chicago, Ill. The provisions of that section do not require any particular form of such list, nor that it shall be placed on record in any special way. Chattel mortgages filed and entered in the proper indexes, as required by the statutes of this state, are on record in the office of the register of deeds, to all intents and purposes, for giving notice of the contents thereof, although not required to be transcribed onto the pages of a book kept in said office. In that form the instrument mentioned contained a list of the property in question, on record in the office of the register of deeds of the county where plaintiff resided. It does not seem to be an unwarranted construction of said statute to hold that the leg-

islature intended, as to the list required to appear "on record" in said office, that such list might appear by an examination of any records of said office, pertaining to property such as deeds, mortgages, or other conveyances or instruments of record, affecting the title, or showing apparent ownership or interest in property, sufficient to put a party interested upon notice. Such records are readily accessible, and are usually consulted by those seeking information as to the ownership of property, so far as disclosed by the public records in said office. If the legislature intended to require that the record of a married woman's separate property should appear in any particular form or book or instrument recorded in that office, it seems reasonable to suppose such intent would be manifest by an appropriate provision of said act, designating the form or record wherein such list must appear. The most reasonable conclusion, we think, is that the legislature, in view of the fact that persons investigating the records of said office as to the title of property are presumed to examine the various instruments of record there affecting title or showing apparent ownership, and take notice of the contents thereof, left this provision broad enough to include all such records. This appears to be the view held in *Griswold v. Boley*, 1 Mont. 556. Such record only gives notice that the property in question is ostensibly held in the name of the married woman as her own property. It would certainly not be conclusive evidence of ownership. The facts supporting ownership or acquisition of property through the source mentioned in the statute must exist, or the mere record would be unavailing. The facts set forth in this case as to the means whereby plaintiff acquired this property do not appear to be disputed.

Secondly, plaintiff relies upon the provisions of section 1439 of the statute to sustain her in holding said property in her own individual right, free from the liabilities of her husband. The provisions of that statute undoubtedly absolve married women from certain disabilities imposed upon her status by the common law. It appears to be aimed directly at the fiction of the common law, whereby the legal personality of the wife was regarded as merged by marriage in that of her husband. As one of the logical corollaries deduced therefrom, it became an established principle of the common law that the wife could not own and hold in possession personal property in her individual and separate right; but such property was deemed, in view of the common law, to be in possession of the husband, and subject to his dominion, disposition, and liabilities. Not only so; the personal property belonging to the wife of which the husband could obtain possession was deemed his property, and subject to his liabilities. While these were the prevailing rules of the common law, founded upon the fiction that the wife's legal personality was merged in that of her husband by marriage, and this doctrine, with its attending hardships, was constantly illustrated in the face of society by practical

experience, equity held a different view. Equity regarded the feme covert as an individual personage, capable of having and retaining property rights after marriage, which ought in justice to receive protection, for her individual enjoyment; and, by virtue of the supremacy of the principles of equitable jurisprudence over the common law, equity found means to protect such rights in many, if not all, cases, notwithstanding the rules of the common law. Pom. Eq. Jur. §§ 53, 54, 159, 1098; Bisph. Prin. Eq. §§ 96-115; 2 Spence, Eq. Jur. 503; Id. pp. 474-533, § 9. The course of legislation demonstrates that the doctrines of equity on this subject were approved by common sentiment. Legislation has from time to time swept away at least some of the dogmas of the common law on this subject. See digest of statutory enactments on this subject in various states, collected in note to Kirkpatrick v. Buford, 76 Amer. Dec. 366. The legislature of Montana moved in this direction by declaring that "women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and, for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone." Section 1439, div. 5, Comp. St. This is a comprehensive provision, and commands the courts in this jurisdiction, where a united jurisprudence of equity and law is administered, to disregard the ancient doctrine of the common law on the question under consideration as a dead dogma, and enforce and protect the rights of married women unhampered thereby; and we think the effect of this statute would be to so modify the prior act of 1872, above quoted, as to enable a married woman to hold her individual separate property as against her husband's creditors without having a list thereof on record, on showing the facts necessary to establish her individual title thereto. The judgment of the trial court is therefore affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(23 Or. 599)

MEIER et al. v. HESS et al.

(Supreme Court of Oregon. April 4, 1893.)

GARNISHMENT—LIEN—ASSIGNMENT OF CLAIM.

A bona fide assignee of a chose in action has priority over a subsequent attaching creditor of the assignor, whose garnishment was served on the assignor's debtor before notice of the assignment, though Hill's Ann. Laws, § 150, provides that from the date of an attachment until it is discharged, or the writ executed, plaintiff, as against third persons, shall be deemed a bona fide purchaser for value of the property attached.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by Meier & Frank against Hess,

Goldsmith & Co. and Sophia Schwab, as assignee of Schwab & Bros., to determine the conflicting claims of defendants to a fund in plaintiffs' hands. From a decree for Hess, Goldsmith & Co., defendant Schwab appeals. Reversed.

Jos. Simon, for appellant. Jos. N. Teal, for respondents.

BEAN, J. This is a suit to determine the conflicting claims of the defendants, Hess, Goldsmith & Co. and Sophia Schwab, to a fund in the hands of the plaintiffs, who bring this suit to obtain a judicial determination of the priorities of the respective claimants. The facts, which are not disputed, are that on March 23, 1891, Schwab & Bros., of New York, having a demand against plaintiffs on account for \$1,541, for a valuable consideration sold, assigned, and transferred the same to defendant Sophia Schwab; that in the regular course of mail, and on April 1, 1891, plaintiffs, who reside in Portland, received written notice from Schwab & Bros. and from the defendant Sophia Schwab that the claim and demand had been so assigned and transferred. After such sale and transfer, but prior to the receipt of the notice thereof by plaintiffs, and on March 27, 1891, the defendants, Hess, Goldsmith & Co., commenced an action in Multnomah county against Schwab & Bros. to recover the sum of \$694, sued out a writ of attachment, and caused a notice of garnishment to be served on the plaintiffs, who immediately furnished to the sheriff a certificate of their indebtedness to Schwab & Bros., but did not pay over the money. The question thus presented is as to the priority of right between the assignee of a chose in action and an attaching creditor whose garnishment is served before notice of the assignment to the debtor. Under our statute its solution depends upon whether a failure to notify the debtor will invalidate the assignment of a chose in action as against a subsequent bona fide purchaser from the assignor, who first gives notice to the debtor of his purchase. By section 150, Hill's Ann. Laws,<sup>1</sup> an attaching creditor is placed in exactly the same position, with reference to his rights in the property attached, as a bona fide purchaser in good faith and for value. Rhodes v. McGurry, 19 Or. 222, 23 Pac. Rep. 971. Without this statute, which seems peculiar to our legislation, there can be no doubt that an assignment will take precedence over a subsequent attachment, for it is valid as between the parties, and the general rule is that the garnishment of attachment "operates only on the legal rights of the defendant in the attachment or judgment,—such rights as the debtor could, by action at law, enforce in his own name. The plaintiff acquires no greater rights against the garnishee than the defendant himself possesses, except when the garnishee is in possession of property of the defendant

<sup>1</sup>Hill's Ann. Laws, § 150, provides that from the date of an attachment until it is discharged, or the writ executed, plaintiff, as against third persons, shall be deemed a bona fide purchaser for value of the property attached.

under a fraudulent transfer from him. Nor does garnishment have any retroactive effect, so as to affect prior transactions between the garnishee and the defendant. Only, therefore, such demands can be subjected to garnishment as the defendant in his own name would have a right to recover in an action at law." Lord, J., in *Navigation Co. v. Gates*, 10 Or. 514; *Baker v. Eglin*, 11 Or. 334, 8 Pac. Rep. 280; *Phipps v. Rieley*, 15 Or. 497, 16 Pac. Rep. 185; *Case v. Noyes*, 18 Or. 329, 19 Pac. Rep. 104; *Rhodes v. McGarry*, 19 Or. 222, 23 Pac. Rep. 971; *Riddle v. Miller*, 19 Or. 468, 23 Pac. Rep. 807. But our statute undertakes to and does put the attaching creditor not only on the footing of his debtor, but on that of a bona fide purchaser for value, which, in many instances, may place him in a better position as to the property attached than his debtor.

We are therefore confronted with the question as to whether, between successive purchasers of a chose in action, their rights will depend upon the priority of the assignment or of notice to the debtor. In England the rule undoubtedly is that the question which of successive assignees of the same obligation should be preferred depends, not on the date of the respective transfers, but upon the time when they were communicated to the obligor. *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, Id. 30; *Pom. Eq. Jur.* § 695, and notes. And this rule has been adopted by the courts of many of the states in this country. *Spain v. Hamilton's Adm'r*, 1 Wall. 624; *Campbell v. Day*, 16 Vt. 558; *Vanbuskirk v. Insurance Co.*, 14 Conn. 141; *Hobson v. Stevenson*, 1 Tenn. Ch. 203; *Clodfelter v. Cox*, 1 Sneed, 329; *Murdoch v. Finney*, 21 Mo. 139. It is explained by the courts adopting it as but an application, to the case of an assignment of a chose in action, of the principle which renders void, as to bona fide purchasers, sales and transfers of chattels, unless accompanied by a delivery and continuous change of possession. It is said that the act of giving the debtor notice is, in a certain degree, taking possession of the fund, and is going as far towards an actual change of possession as is possible; and, if this notice is omitted, the assignee is guilty of the same degree and species of neglect, and must suffer the same consequences, as one who leaves a chattel, purchased by him, in the possession of his vendor. In jurisdictions where the rule prevails that the sale of personal property, capable of immediate delivery to the purchaser, is fraudulent and void as to subsequent bona fide purchasers unless accompanied by immediate delivery, and followed by an actual change of possession, the reasoning of the authorities cited seems unanswerable, and to rest upon a solid foundation of argument. But where, as in this state, the sale of chattels, unaccompanied by a change of possession, only creates a presumption of fraud as against a bona fide purchaser, which may be rebutted by showing that the sale was made in good faith, for a sufficient consideration, and without intent to defraud, (*Hill's Code*, § 776, subd. 40; *Marks v. Miller*, 21 Or. 317,

28 Pac. Rep. 14,) the foundation for the rule fails, and no sufficient reason can be perceived why a plaintiff should obtain any other or better rights, by the attachment of a chose in action which had previously been assigned, but of which the debtor had no notice, than he would obtain by the attachment of a chattel which had been sold, but still remained in the possession of his debtor. It seems to us, therefore, that under the rule prevailing in this state an assignment of a chose in action, made in good faith for a sufficient consideration, and without intent to defraud creditors or subsequent purchasers, is complete upon the mutual assent of the assignor and assignee, and does not gain an additional validity, as against third persons, by notice to the debtor; and, as between successive bona fide assignees of a chose in action from the same person, the one prior in point of time will be protected, though he has given no notice to either the subsequent assignee or the debtor. Notice is, indeed, needful, in order to charge the debtor with the duty of payment to the assignee, so that if, without notice, he pay the debt to the assignor or to a subsequent assignee, or on a garnishee process, he will be discharged from the debt. This seems to us to be the better doctrine, as supported by the general course of decisions in this country. 2 *White & T. Lead. Cas.* 1666; *Thayer v. Daniels*, 113 Mass. 129; *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. Rep. 870; *Muir v. Schenck*, 3 Hill, 228; *Beckwith v. Bank*, 9 N. Y. 211; *Bholen v. Cleveland*, 5 Mason, 174; *Dix v. Cobb*, 4 Mass. 507; *Wood v. Partridge*, 11 Mass. 488. We are of the opinion, therefore, that the assignment of the debt against Meier & Frank to defendant Sophia Schwab gave her a prior right to the fund, although the debtor did not receive notice of the assignment until after the attachment; and the decree must be reversed.

(24 Or. 32)

#### ALDRICH et al. v. ANCHOR COAL & DEVELOPMENT CO. et al.

(Supreme Court of Oregon. April 10, 1893.)

FOREIGN CORPORATION — JURISDICTION OF STATE COURT — PERSONAL LIABILITY OF STOCKHOLDERS.

1. Under *Hill's Ann. Laws*, § 516, which provides that no foreign corporation shall be subject to the jurisdiction of the state courts unless it has an agency within the state for the transaction of business or has property therein, the making, within the state, of a contract between a foreign corporation and plaintiff, to be performed in another state, and the service of summons on an officer of the corporation while temporarily within the state, are not sufficient to confer jurisdiction on the state courts.

2. Since the California statute imposing an individual liability on each shareholder for his proportionate share of the corporate debts prescribes no particular remedy, but leaves the creditor to his common-law action, such liability may be enforced by a common-law action in the courts of Oregon, whenever the creditor can obtain jurisdiction over any stockholder.

3. The fact that the liability of a stockholder in a domestic corporation to contribute, for the benefit of creditors, the amount of his unpaid subscription, can be enforced only in equity, does not require a resort to the same

forum to enforce the personal statutory liability of a stockholder in a foreign corporation.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by E. M. Aldrich and others against the Anchor Coal & Development Company, a California corporation, and B. E. Loomis, to recover on a contract for work and labor performed for the corporation in the state of Washington. A demurrer interposed by defendant Loomis was sustained, and the service of summons on the corporation was set aside. Plaintiffs appeal. Affirmed in part, and reversed in part.

Milton W. Smith, for appellants. E. B. Watson, for respondents.

BEAN, J. This action was brought against the defendant, a California corporation, and B. E. Loomis, one of its stockholders, in the circuit court of Multnomah county, to recover the sum of \$2,492.72 upon a contract for work and labor performed for the corporation in building a railway in the state of Washington. The complaint, after alleging a cause of action against the defendant corporation, avers, in order to charge the defendant Loomis individually, that he is a stockholder of such corporation; and the statute of California under which it was organized provides that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each; and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each in conformity therewith." The summons for the commencement of the action was served upon the defendant Loomis personally, and also upon him as vice president and general manager of the defendant corporation, while he was temporarily within the state of Oregon. The defendant Loomis demurred to the complaint on the grounds that the court had no jurisdiction and the complaint did not state a cause of action against him, and the defendant corporation appeared specially, and moved to set aside the service upon it on the ground that it was unauthorized and ineffectual for any purpose. Both the demurrer and motion were sustained by the court below, and the complaint and action dismissed, from which plaintiffs appeal.

The first question for our consideration is whether the service upon the general manager of the defendant corporation in the state of Oregon gave the court jurisdiction of the corporation. It appears, from the affidavits in support of and against the motion to vacate the service, that the defendant, being a corporation

organized and existing under the laws of California, with its principal office in the city of Oakland in that state, transacted no corporate business, had no property within this state, and had no agency for the transaction of any portion of its business therein, but that at the time its general manager was served he was temporarily within the state for the purpose of negotiating a sale of the stock and plant of the defendant company in the state of Washington to residents of Oregon, and that the contract under which the work was done by plaintiffs in Washington was made and entered into within this state. The claim is therefore made that under these facts the service upon Loomis could not bind the defendant corporation, or give the courts of this state jurisdiction of it. By the common law, process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty by whose laws it exists, and any authority for proceeding against it in any other manner must be conferred by statute of the state where process is served. *Moulin v. Insurance Co.*, 24 N. J. Law, 222; *McQueen v. Manufacturing Co.*, 16 Johns. 4. The inconvenience and often manifest injustice of exempting a corporation from being sued in a state other than that in which it was created has caused the rule in modern times to be very much relaxed, and it is now generally held that where a corporation created in one jurisdiction is permitted, either by express enactment or by acquiescence, to do business in another, it is to be deemed a resident, and subject to the jurisdiction of the courts of the latter in all matters founded upon contracts made or causes of action arising there, and service may be made upon it in the same manner as a domestic corporation where the law does not provide otherwise. 2 Mor. Corp. 980; *Miller v. Mining Co.*, 45 Fed. Rep. 345; *St. Clair v. Cox*, 106 U. S. 359, 1 Sup. Ct. Rep. 354. But where a foreign corporation is not engaged in business in the state, and has neither an agency established nor property therein, there is no way of reaching it with process, and service upon an officer or agent of the corporation residing in another jurisdiction, and only casually in the state, will not, in the absence of a statute authorizing such service, confer jurisdiction, it being deemed that his official character does not accompany him beyond the jurisdiction in which the corporation was created. *Moulin v. Insurance Co.*, 24 N. J. Law, 224; *McQueen v. Manufacturing Co.*, 16 Johns. 5; *Perkham v. Haverhill Parish*, 16 Pick. 286; *Newell v. Railway Co.*, 19 Mich. 345; *Latimer v. Railway Co.*, 43 Mo. 105; *State v. District Court of Ramsey Co.*, 26 Minn. 234, 2 N. W. Rep. 698; *Railway Co. v. McDermid*, 91 Ill. 170; *Phillips v. Library Co.*, (Pa. Sup.) 21 Atl. Rep. 640; *Clews v. Iron Co.*, 44 Fed. Rep. 31. This state permits foreign corporations to transact business within her limits, and, either by express enactment, as in case of certain corporations, or by her acquiescence, they are as free to engage in legitimate business as corporations of her own creation. There is no statute expressly providing for service of process



upon them, except in the case of certain named corporations not material to be noted in this connection; but it is expressly provided by section 516, Hill's Ann. Laws, that "no corporation is subject to the jurisdiction of a court of this state unless it appear in the court, or have been created by or under the laws of this state, or have an agency established therein for the transaction of some portion of its business, or have property therein, and in the last case only to the extent of such property at the time the jurisdiction attached." From the provisions of this section it seems clear that when service is made within the state upon the agent of a foreign corporation it is essential, in order to give the court jurisdiction to render a personal judgment, that it should appear somewhere in the record that the corporation has an agent in the state, conducting some portion of the business for which it was organized. It proceeds upon the theory that when a foreign corporation, availing itself of the rule of comity, carries on its business, or any portion thereof, in this state, it shall be treated and held to be found here, also, to respond to its obligation when called upon to do so in the courts of the state. But it is quite clear that the mere making of a contract with plaintiffs in this state, to be performed in Washington, in the absence of a more definite statement as to the nature and terms of the contract, and the fact that Loomis, at the time of service upon him, was temporarily within the state for the purpose of negotiating a sale of the property of the defendant corporation, was not invoking the comity of the state by the corporation for the exercise of its franchise or the transaction of any portion of the business for which it was organized, and did not, under the statute, give the court jurisdiction, and hence there was no error in sustaining the motion to vacate the service upon Loomis. *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635.

The remaining question is whether an action at law can be maintained in this state to enforce a stockholder's liability created by the laws of California. By the statute of that state each stockholder in a corporation is made personally and individually liable for such proportion of each debt or claim against the corporation as the amount of his stock bears to the whole subscribed capital stock, and any creditor can maintain a several action against him for such proportion of his claim. *Deer. Civil Code*, § 322. This statute has repeatedly been before the courts of that state for interpretation, and the construction uniformly put upon it has been that the liability of a stockholder for the corporate debts is primary and original, and in no way dependent or contingent upon a recovery against the corporation, and that proceedings in behalf of a creditor to enforce such liability may be had in an ordinary action at law. *Canal Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646; *Bank v. Hill*, 59 Cal. 107; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. rep. 354; *Borland v. Haven*, 37 Fed.

Rep. 394. It will thus be seen that the liability of a stockholder in a California corporation is, by the statute and decisions of that state, a liability in the nature of a contract, the same in legal effect as if he had separately and directly contracted with a creditor to pay such proportion of his claim as the amount of his stock bears to the whole subscribed capital stock, and is enforceable by an action at law in the same manner, and we cannot see why it may not be so enforced in this state. The statute indeed creates a new right and liability, not existing at common law, but does not prescribe a peculiar remedy for its enforcement, but only declares that it may be enforced by action, leaving the creditor to select such common-law remedies as may be in use in the jurisdiction where the suit is brought to enforce such liability. When a statute not only creates a new right and liability against a stockholder, but prescribes a peculiar remedy for its enforcement, such remedy is sometimes held to be exclusive, and often cannot be enforced in another state by the employment of the remedies and according to the course of procedure provided by its laws. In such case it would seem the creditor can enforce the stockholder's liability only in the state where the corporation exists. (*Cook, Stock, Stockh. & Corp. Law*, § 219; *Nimick v. Iron Works*, 25 W. Va. 184;) not, however, because the liability is not recognized as valid and binding, but because the forum where it is sought to be enforced is incapable of administering the peculiar remedy provided for its enforcement. But where a liability is created by statute, without making the procedure for its enforcement, as it were, a part of the liability, we cannot see why it should not be enforced in any court having jurisdiction of the subject-matter and parties. There is no difference between a statutory and a common-law right or liability in this regard. The nature of the remedy or the jurisdiction of the court to enforce it do not in any manner depend on the question whether it is the one or the other. "Whenever," says Mr. Justice Miller, "by either the common law or the statute law of the state, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." *Dennick v. Railroad Co.*, 103 U. S. 18. And, in general, a creditor of a corporation whose shareholders are by statute made personally liable in the nature of a contract for its debts may maintain a suit or action to enforce this liability in any court capable of administering the proper relief, whenever he can obtain jurisdiction over the parties, if it is not opposed to the legislation or public policy of the state in which it is sought to be enforced. *Thomp. Liab. Stockh.* § 8; *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. Rep. 263, 16 Fla. 428; *Aultman's Appeal*, 98 Pa. St. 505; *Ex parte Van Riper*, 20 Wend. 614. It is insisted, however, by counsel for defendant, that, because the rule prevails in this state that the liability of a stockholder to the creditors of a domestic corporation

can only be enforced in equity, resort must be had to the same forum to enforce the personal statutory liability of a stockholder in a foreign corporation; but we are unable to concur in this view. The liability of a stockholder in this state is upon his obligation to contribute to the capital stock, which is regarded as a trust fund to be held by the corporation for the benefit of its creditors. He is not personally liable to the creditor, except through the corporation, and the creditor is not given, either by the constitution or statute, any remedy against the stockholder except to require him, in case of the insolvency of the corporation, to contribute for the benefit of the creditors the amount of his unpaid subscription; hence his remedy to enforce this liability is in equity, where the rights of the corporation, the stockholders, and creditors can be adjusted in one suit. *Ladd v. Cartwright*, 7 Or. 329; *Hodges v. Mining Co.*, 9 Or. 200; *Brundage v. Mining Co.*, 12 Or. 322, 7 Pac. Rep. 314; *Patterson v. Lynde*, 108 U. S. 519, 1 Sup. Ct. Rep. 432. But the liability sought to be enforced in this action is, by the statutes and decisions of California, a legal liability in the nature of a contract in favor of the creditor and against the stockholder, enforceable in an ordinary action at law, and there is no sufficient reason why it may not be enforced in the courts of this state the same as any other legal liability arising on contract made in another state. For the reasons suggested the judgment of the court below will be affirmed as to the defendant corporation, and reversed and remanded for further proceedings not inconsistent with this opinion as to the defendant Loomis.

(24 Or. 40)

**WILLAMETTE STEAM MILLS LUMBERING & MANUF'G CO. v. SHEA et al.**

(Supreme Court of Oregon. April 11, 1893.)

**Mechanics' Liens—Notice—Inclusion of Several Buildings and Lots.**

*Hill's Ann. Laws*, § 3669, gives a lien to every mechanic or other person performing labor or furnishing material to be used in the construction of any building; section 3670 subjects to the lien the land on which the building is constructed; and section 3673 requires the notice of lien to be filed in the county in which the building is situated. *Held* that, though the words "building" and "land" are used in the singular, one who, under an entire contract, has furnished material used indiscriminately in the erection of several houses on contiguous lots, belonging to the same owner, may include all the buildings and lots in one notice of lien, and need not file a separate notice for each building and lot. *Dalles Lumber, etc., Co. v. Woolen Manuf'g Co.*, 3 Or. 527, and *Kesartee v. Marks*, 16 Pac. Rep. 407, 15 Or. 529, criticised.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by the Willamette Steam Mills Lumbering & Manufacturing Company against J. F. Shea and Dayton, Hall & Avery to foreclose a mechanic's lien. From a judgment in plaintiff's favor, defendant Shea appeals. Affirmed.

Gilbert J. McGinn, for appellant. G. G. Gammons and Joseph Simon, for respondent.

**LORD, C. J.** This is a suit brought by the plaintiff against D. C. McDonald, J. F. Shea, and Dayton, Hall & Avery, as defendants, to foreclose a mechanic's lien upon lot No. 8 and the north half of lot No. 5, in Couch's addition to the city of Portland; the same being contiguous lots, constituting one entire tract. The facts, as found by the referee, substantially, are that the defendant J. F. Shea, being the owner of said premises, entered into a contract with the defendant D. C. McDonald, by the terms of which the said McDonald agreed, for a stipulated sum or price, to furnish the material and perform the carpenter work in the erection thereon of four separate dwelling houses; that the defendant McDonald entered into a contract with the plaintiff for the lumber necessary for the building of said houses, and made a contract with the defendant firm of Dayton, Hall & Avery for the hardware required for the same; that the plaintiff furnished the lumber and building material which were used in the construction of the said four houses, and upon which there was due at the time of the commencement of this suit the sum of \$777.77, and that the defendants Dayton, Hall & Avery furnished the hardware which was used in the construction of the same, and upon which there was due at the time of the commencement of this suit the sum of \$188.27; that the building material and hardware which the plaintiff and Dayton, Hall & Avery furnished to D. C. McDonald were not furnished in separate quantities, but as a whole, for the several houses, to be used indiscriminately; that the liens were duly and severally filed by the plaintiff and Dayton, Hall & Avery against said houses and lots as a whole.

Upon this state of facts, the contention for the appellant is that a separate notice of lien should have been filed against each house, to acquire a valid lien; or, in other words, that the including of four dwelling houses in one notice of lien was void. This is predicated upon the principle that our statute, by its terms, contemplates only a separate lien on a single building, and not a joint lien on several buildings. The language of our statute is: "Every mechanic \* \* \* or other person performing labor or furnishing materials \* \* \* to be used in the construction of any building \* \* \* shall have a lien upon the same," etc. Section 3669. "The land upon which any building \* \* \* shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, shall also be subject to the liens created by this act," etc. Section 3670. "It shall be the duty \* \* \* of every mechanic \* \* \* or other person, within thirty days after the completion, \* \* \* to file with the county clerk of the county in which such building shall be situated a claim containing a true statement of his demand," etc. Section 3673. As the words "building" and "land" are used in the singular, it is in

sisted that the lien given by the statute attaches only to the particular building upon which the labor was performed, or for which the materials were furnished, and to so much of the land as may be required for the convenient use and occupation of such building, and, as a consequence, that the notice of lien required to be given by the statute in order to acquire a valid lien must be confined to the particular building, and the land on which it is situated, and may not include work done and materials furnished for another building upon any other land. In *Hill v. Braden*, 54 Ind. 77, the statute under consideration provided that "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building may have a lien," and the court says: "Our mechanic's lien law, by its terms, contemplates only a separate lien on a single building, not a joint lien on several buildings." And again: "So far as the lien is given upon the lot or land, it is only as an incident to the lien upon the house on the lot or land, for the materials in the house; the house and lot on which it stands, the curtilage, constituting one parcel of real estate. As the mechanic's lien act contemplates only liens on separate pieces of property, so it contemplates only a notice of intention to hold a lien on a separate piece of property, including, of course, its appurtenances." This view of the statute is approved in *Wilkerson v. Rust*, 57 Ind. 172, and in *McGrew v. McCarty*, 78 Ind. 497. It proceeds upon the theory that the lien is specific,—that is, that it is confined to a particular building or structure upon which the labor was done, or for which the materials were furnished. Jones, Liens, § 1310. Mr. Phillips states the reason to be that, "if the work be done or materials furnished upon distinct premises, the lien must be against each of the several premises, according to the value of the work and materials incorporated in each, and not against both for the aggregate amount. The reason a joint claim may be sustained against several houses put up at the same time, without an interval between them, is that they may be considered as one building, and consequently as an integer or unit which may be covered by one claim. But this cannot be asserted with any truth where there is an interval, however small, which prevents the whole from being one continuous structure. It has accordingly been held that a joint claim against separate blocks of houses in different streets is a nullity, and the same principle applies to different blocks on different sides or on the same side of the same street, and in every instance where the residence against which the claim is filed is not substantially one building." Phil. Mech. Liens, § 376.

There is still another reason given in support of this rule or theory. In *McGrew v. McCarty*, 78 Ind. 498, Elliott, C. J., says: "The theory of the law is that credit is given to the identical building for which the materials are furnished, or upon which the work is done. Each building represents a distinct or separate security. One building cannot be

made to stand as the security for another. In truth, each building stands as a several debtor, and one can no more be made to discharge the debt of another building than one individual debtor can be made to pay a separate claim owing by somebody else to the same creditor. It is upon this principle that those cases may be sustained which hold that a joint claim cannot be supported by the proof of a separate right." As sustaining this view, see *Gorgas v. Douglas*, 6 Serg. & R. 512; *Fitzpatrick v. Thomas*, 61 Mo. 512; *Chapin v. Paper Works*, 30 Conn. 461; *Steigleman v. McBride*, 17 Ill. 300; *Landers v. Dexter*, 106 Mass. 531; *Barker v. Maxwell*, 8 Watts, 478; *Simmons v. Carrier*, 60 Mo. 581. But it is observable, under these statutes in which the word "building" is used in the singular, and which by reason thereof have been construed in some jurisdictions to confine the lien to a single building, or to authorize only a single lien against each building for which the materials were furnished, or upon which the work was done, that nevertheless such single lien may cover or include the outbuildings, as dependencies and appurtenances to the main building. In *Bank v. Curtiss*, 18 Conn. 342, a single lien was filed for work upon a dwelling house and barn and one acre of land, and it was held that the lien was valid. The theory is that the barn and other outbuildings connected with the dwelling house form one homestead. The outbuildings being dependencies or appurtenant to the dwelling house, they were erected for a connected use, relatively as much so as the different apartments of a dwelling house, which entitles them to be considered as one structure, forming one homestead. So, too, where a solid block of buildings, consisting of distinct but connected houses, and covering several lots, has been erected by the same owner at the same time, a single lien covering the whole improvement has been held valid on the ground that the entire structure was but one building. In *Brabazon v. Allen*, 41 Conn. 361, it was held that where a block of buildings comprising several dwelling houses, separated from one another by a partition wall, is erected upon a single lot, and work is done upon it as a whole, under one entire contract, the builder's lien extends, as a single lien, to the whole block. Foster, J., said: "The plaintiffs in error insist that here are five dwelling houses, which, though contiguous to each other, are still in point of fact separate, distinct, and independent,—as much so, in contemplation of law, as if each stood on a lot by itself." But to this argument he answered: "We think that the plaintiffs are entitled to a lien on the building on which they had labored, and for which they had furnished materials, and on the whole building, and the land on which it stands." It will be seen, therefore, while the plaintiffs in error claimed that there were five dwelling houses, within the intent and meaning of the statute providing for a lien against "every dwelling house or other building," the court thought and held that, within such meaning and intent, where the materials were furnished and the work was

done on the structure as a whole, under one entire contract, there was but one building, although, when completed, it made five dwelling houses, separated one from another by a partition wall. We have been cited to these adjudications, under statutes similar to our own, as supporting the decisions of this court, and as throwing light upon the subject under discussion. The decisions of this court referred to are Dalles Lumber, etc., Co. v. Woolen Manuf'g Co., 3 Or. 527, and Kezar-tee v. Marks, 15 Or. 529, 16 Pac. Rep. 407. At the time the first case was decided, the statute provided "that any person who shall hereafter, by virtue of any contract with the owner of any building, \* \* \* perform any labor or furnish any material for the construction or repair of such building, shall, upon filing the notice prescribed, have a lien upon such building." The controversy in the case was between a mortgagee of the woolen manufactory and the plaintiff, claiming a lien for labor and material furnished in the construction of the factory, dye house, bleach house, and dry house. The case was decided upon the sufficiency of the facts stated in the complaint, the court holding that it was ultra vires for a corporation organized to sell lumber to perform work and labor, and that it did not appear from the complaint how much was for labor, nor how much for lumber. In its opinion the court says "that, the buildings being separate and apart, the lien is properly on each building for the particular amount of lumber furnished;" that the statute "confines the lien to the building constructed or repaired. This evidently refers to the particular building upon which the labor was performed, or for the construction or repair of which the materials were furnished, and to no other." To the claim by the respondent that the dry house, dye house, and bleach house were as necessary to the factory as a milldam is to a mill, as decided in Willamette Falls Co. v. Remick, 1 Or. 170, the court answered: "Whether these outbuildings are as necessary to carry on the business of a factory as a milldam is to a mill, the court is not advised. There is one thing certain, which appears from the pleadings in this case, that these outbuildings are separate and distinct from the main factory." It is clear, however, if the court had been advised that the outbuildings were used in connection with the factory for a common purpose, and were as necessary to the factory as a milldam is to a mill, it would not have affected its conclusions, as the facts that these outbuildings were separate from the factory building, and the statute, in its opinion, confined the lien to a single building, there could not be a lien on the factory building and its outbuildings. We think this is doubtful, even though the construction be correct that the statute confines the lien to a single building. A single lien upon separate buildings is allowed when they are erected for any common purpose or connected use, as in the case of barns, stables, and other outhouses used in connection with, and within the curtilage of, a dwelling, or where the buildings have been erected

for some general and connected use. *Lindsay v. Gunning*, 59 Conn. 296;<sup>1</sup> *Willamette Falls Co. v. Remick*, 1 Or. 170. These outbuildings were essential to the use of the factory, and connected with it for a common purpose, and, upon analogous principles, ought to be considered, under the statute, in the light of all the authorities, as a part of the factory, or its dependencies.

The case at bar, however, is distinguishable from *Dalles Lumber Co. v. Woolen Manuf'g Co.*, supra, in that it does not appear in the latter case (1) that the materials were furnished under one entire contract; (2) nor does it appear that the buildings were situated on the same tract of land, or on contiguous lots. In *Kezar-tee v. Marks*, supra, it was held to be a fatal objection to the lien because it included materials used in the repair of the house, as well as the construction of the fence. This case is also distinguishable from the case at bar, in that (1) it does not appear that the materials were furnished under one entire contract, or even under one contract, (2) nor that there was anything in common between the house and fence, except that they were on the same donation land claim. But while the case at bar is distinguishable from those cases, indicating that the question presented by the record, namely, whether a single lien for materials furnished or work done on several houses as a whole, under an entire contract for a stipulated sum, is valid, has not been directly decided, yet there is no doubt that the trend of these decisions is adverse to its validity. They are predicated upon the idea that the statute contemplates that the lien should be confined to a single building, as indicated by the use of the word "building," and for the reason that credit is only given to such "building" for the materials furnished or the labor done upon it, and consequently that a single lien cannot be made to cover several buildings. But certainly too great importance ought not to be attached to the use of the word "building," in view of the fact that a like use of the singular in the statutes of many other states has been no bar to an adverse conclusion. The statutes are set out in *Jones on Liens*, (volume 2, §§ 1133, 1184;) and the cases to which we shall refer have all been decided under statutes like our own, which use the singular, rather than the plural. These cases hold, where the contract is entire, the lien attaches to the buildings and the land as a whole. They proceed upon the principle that where labor and materials are furnished in the erection of several buildings upon contiguous lots, under an entire contract with the owner, the lien attaches to the buildings for all the materials and labor furnished.

In *Wall v. Robinson*, 115 Mass. 429, the contract was for labor performed in the erection of three dwelling houses and one stable upon the same lot, and the contractors were to receive \$140 for each house, and \$30 for the stable. The lien was held valid. The court says: "In the case at bar the petitioners have performed labor

<sup>1</sup>22 Atl. Rep. 310.

upon several buildings situated upon the same lot, under an entire contract, for an entire price. We think such a case is within the purpose of the statute and the intention of the legislature. The parties, by their contract, have connected the several buildings, and treated them as one estate. Under the contract the labor performed on each building creates a lien upon the whole lot, and therefore upon all the other buildings. Although it cannot be said with strict accuracy that the labor for which the lien attaches was all performed on each building affected by it, yet it was all performed on one estate, and to deny the lien would defeat the spirit of the statute by a too literal adherence to its letter.

\* \* \* We are of opinion that when labor is performed or furnished under an entire contract, in the erection or repair of several buildings owned by the same person, and situated upon the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, if the other conditions of the statutes are fulfilled." To the same effect is *Batchelder v. Rand*, 117 Mass. 176, where Endicott, J., holds that the facts that the land was conveyed in separate lots, and the buildings were separate,—one standing on each lot,—do not affect the principle upon which *Wall v. Robinson*, supra, was decided.

In *Doolittle v. Plenz*, 16 Neb. 153, 20 N. W. Rep. 116, where A. erected three houses for B.,—one upon each of three adjoining lots,—for an entire sum, it was held that the lien attached to all the lots, and the buildings thereon. In *Lax v. Peterson*, 42 Minn. 221, 44 N. W. Rep. 3, four houses were built separately on the same tract of land, under an entire contract, and it was held that the lien extended to the whole premises as an entirety. *Mitchell, J.*, said: "But how have the parties to the building contracts treated the property, and not how the owner intends to use it after the completion of the houses, is the question. By contracting for the erection of these four houses under one entire contract, they have connected the two city lots and the several buildings, and treated the whole as one tract or estate. Had the houses been contiguous, so as to form a solid block, according to all the authorities, the lien would have extended to the whole property, although consisting of different city lots according to the plat, and although the different parts of the block were designed to be used separately, and not as appurtenant to each other. But that case would not differ from the present unless we attach special significance to the literal reading of the statute, which uses the words 'house' and 'dwelling' in the singular. This would defeat the spirit of the law by a too strict adherence to its letter." *Glass v. Sleigh Co.*, 43 Minn. 228, 45 N. W. Rep. 150, follows *Lax v. Peterson*, supra. In *Pennock v. Hoover*, 5 Rawle, 291, the right of a joint lien upon several houses, the property of the same person, was upheld under a statute which provided that "every dwelling house or building shall be subject to the payment of the debts contracted" for building it. This case presents an interesting discussion of the use of the words in the statute, "every

dwelling house or other building," as showing that they may include more than one building. To the same effect is *Phillips v. Gilbert*, 101 U. S. 721, where a joint lien was claimed on six houses and lots in the city of Washington, under an act of congress which gave a lien upon complying with certain conditions therein. The validity of the lien was contested on the ground that the claim of lien was void because made in gross upon six separate lots, without specifically setting forth the amount claimed upon each lot. The court held there was nothing in this objection; Mr. Justice Bradley saying: "The contract was one, and related to all the buildings as an entirety, and not to the particular buildings separately. The whole row was one building, within the meaning of the law, from having been erected by the parties on one contract, as one general piece of work." In *Carr v. Hooper*, 48 Kan. 253, 29 Pac. Rep. 398, it was held, where work and material were furnished in the erection of five buildings upon a single lot under an entire contract with the owner, the lien attaches to the lot and buildings for all the materials and labor furnished. In *Sergeant v. Denby*, 87 Va. 206, 12 S. E. Rep. 402, two houses were built on opposite sides of the street for an entire price, and the lien claimed was on both houses and lots. The defense was that the lien was void because the lien given by the statute is a separate and distinct lien on each building for the amount of the materials actually delivered for construction. The lien was held valid. In *Fullerton v. Leonard*, (S. D.) 52 N. W. Rep. 325, the facts are somewhat similar to the case at bar, except that the two lots upon which the buildings were erected belonged to separate individuals, who joined in the contract. A subcontractor furnished materials to be used in the erection of all the buildings under an entire contract with the builder. The question was whether a joint lien can be enforced against two separate properties owned by different individuals, based upon a single account of lumber and materials furnished to both upon a joint contract. The court held that the lien could be enforced against all the buildings and the two lots; that the contract was to govern; and that the buildings, having been united in one contract, must be regarded as one piece of work. The court says: "It is true that the several lots or parcels of land were owned by the same person, but we can perceive no distinction in principle between a case where several lots are owned by one person, or where the lots are owned by different owners, as it is not so much the different ownership, as it is the contract upon which the work is to be performed, that is to determine whether the lien must be joint or several. A joint lien upon several buildings, situated upon different lots, owned by the same persons, could not be maintained where a separate contract had been entered into by the owner and contractor; for by the several contract the inference would be that a separate account should be kept with each building. Not so when the contract covered several buildings to be erected for a

gross amount, without regard to the cost of each. So, if two or more several owners of lots or parcels of land wish to jointly contract for the erection of several buildings, to be situated upon these several pieces, for a definite and specific sum in gross for all, without regard to the cost of either one, a joint lien may be asserted upon all for any balance due for the erection of such buildings. The contract with the parties has no reference to the separate ownership, and no inference can be drawn from it that a separate account shall be kept with each building, or each person interested in the contract." It is true that a lien is the creation of the statute, but its foundation is in the contract. If the contract is to control, and it treats the property as a whole, there can be no substantial reason why the lien may not cover it. In such case the contract relates to no particular building, but treats them all as a whole, though they are, in point of fact, separate and distinct buildings.

As we have seen, there are some authorities which hold that where several houses are built together in one block, under an entire contract, the lien extends, as a single lien, to the whole block, but that they refuse to so hold when the buildings are separate and distinct. But it does not seem to us there is any sound basis for this distinction, for the reason that houses so constructed in a block are always treated as separate buildings, and are owned and sold as such, as fully as though wholly disconnected. There is no reason, whether the buildings are comprised in one block, or are in fact separate and distinct from each other when constructed upon adjoining lots constituting one tract, if the contract is entire, and treats them as a whole, why a single lien should not attach, in either case, to the entire land, and buildings upon it. There is nothing definite in the statute which indicates the number of buildings that may be covered by a lien. While we have required those who would receive the benefit of the statute to comply with its positive requirements in order to acquire a valid lien, (*Gordon v. Deal*, [Or.] 31 Pac. Rep. 287; *Nicola Bros. Co. v. Van Fridagh*, 1d. 288,) we think a more liberal rule should prevail as to those parts of the statute less definite, which, to rigorously enforce, would deprive the claimant of its benefits. It can be a matter of no importance to the defendant Shea, who is owner of the entire property, whether he pays the entire debt as a single lien upon all the buildings, or as four separate liens. So far as notice is concerned, the single lien would answer that purpose as well as if they were separate. By the contract, the buildings and land are united, and treated as one structure. The materials were furnished and used indiscriminately in all the houses. No separate accounts were kept. The buildings were carried along together through these several stages of construction. They were situated upon contiguous lots, and belonged to the same owner. If the plaintiffs have no lien against the four houses as a whole, they have no lien at all; for they have furnished no particular materials for any particular house. As a

consequence the estate of the defendant Shea would have the benefit of their materials, and the plaintiffs would be deprived of their lien. If we can fairly avoid it, no such construction ought to be put upon our statute as would lead to this result. To uphold the lien does not conflict with the decision in *Kezartee v. Marks*, supra, but only its reasoning. But, for the reason suggested, that case may well and rightly stand upon its facts. The question presented by this record has not hitherto been before this court, in consideration of which, and our own decisions, we have been induced to carefully examine the different adjudications, and the reasoning by which they are supported, with the result that under the facts herein the liens attach to the lands and the houses as a whole. It follows that there was no error, and that the decree must be affirmed.

(24 Or. 28)

## BENN v. KUTZSCHAN.

(Supreme Court of Oregon. April 10, 1893.)

NOTES—NEGOTIABILITY—STIPULATION FOR ATTORNEY'S FEE—LIABILITY OF INDORSER.

1. A stipulation in a note for the payment of a reasonable attorney's fee in case of suit does not destroy its negotiability.

2. An indorser of a note is liable, by virtue of his contract of indorsement, for a reasonable attorney's fee, stipulated for in the note in case of suit.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Charles E. Benn against G. Kutzschan as indorser of a promissory note. From a judgment in defendant's favor, plaintiff appeals. Reversed.

Milton W. Smith, for appellant.

BEAN, J. This is an action brought against the indorser of a promissory note, of which the following is a copy: "\$347.00. Portland, Or., May 19th, 1892. Ninety days after date, without grace, I promise to pay to the order of J. C. McCaffrey three hundred and forty-seven no-100 dollars in U. S. gold coin, at Portland, Or., with interest thereon in like gold coin at the rate of 10 per cent. per annum from maturity until paid, for value received; interest to be paid after maturity, and, if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note; and in case suit is instituted to collect this note, or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, such sum as the court may adjudge reasonable and just, in like gold coin, for attorneys' fees in said suit or action. [Signed] M. F. Milburn, 489 Starr St., Albina." There are but two questions presented on this appeal: First, does a stipulation in a promissory note for the payment of a reasonable attorney's fee in case of suit or action destroy the negotiability of the instrument? and, second, if not, can such stipulation be enforced against an indorser? Upon these questions the authorities are in hopeless and irreconcilable conflict. There is one

line of cases which sustains the validity of the stipulation and negotiable character of the note; another, which denies the validity of the stipulation, thereby affirming the negotiability of the note; and still another, which seems to sustain the stipulation, but denies the negotiability of the instrument. In *Peyser v. Cole*, 11 Or. 39, 4 Pac. Rep. 520, it was held by this court that such a stipulation is valid, and will be enforced, and this has become the settled law of this state, so that the only remaining question open for inquiry is whether we shall follow the authorities sustaining such stipulation and the negotiability of the note; or the other class, which, while sustaining the stipulation, denies the negotiability of the instrument. The authorities on both of these questions will be found fully collated and discussed in 1 *Daniel on Negotiable Instruments*, (4th Ed. § 62, and note,) and 16 *Amer. Law Rev.* 849, to which reference may be had by those desiring to investigate the subject. It has been so often and ably treated in all its various aspects that nothing original remains to be said thereon, and we shall attempt no extended citation or review of the authorities. A careful examination has satisfied us that the weight of authority, and especially of the more recent decisions, is strongly in favor of the doctrine that the negotiability of a promissory note is in no way affected by a stipulation for a reasonable attorney's fee. This is the doctrine in the states of Arkansas, Dakota, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, Nebraska, and Texas, and also in the general trend of the decisions in the federal courts. *Trader v. Chidester*, 41 Ark. 242; *Bank v. Rasmussen*, 1 Dak. 60, 46 N. W. Rep. 574; *Nickerson v. Sheldon*, 33 Ill. 373; *Smith v. Bank*, 29 Ind. 158; *Stoneman v. Pyle*, 35 Ind. 103; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433; *Dietrich v. Bayhl*, 23 La. Ann. 767; *Bank v. Fuqua*, 11 Mont. 285, 28 Pac. Rep. 291; *Heard v. Bank*, 8 Neb. 10; *Washington v. Bank*, 64 Tex. 4; *Sewing-Mach. Co. v. Moreno*, 6 Sawy. 35, 7 Fed. Rep. 806; *Adams v. Addington*, 16 Fed. Rep. 89; *Mortgage Co. v. Downing*, 17 Fed. Rep. 660; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Farmers' Nat. Bank v. Sutton Manuf'g Co.*, 52 Fed. Rep. 191, 3 C. C. A. 1; *Howenstein v. Barnes*, 5 Dill. 482; *Schlesinger v. Arline*, 31 Fed. Rep. 648. The contrary decisions in Missouri, Minnesota, North Carolina, and Pennsylvania it would be useless to consider or attempt to distinguish. From the position that a stipulation for a reasonable attorney's fee in no way impairs the negotiability of a note, it would seem logically and necessarily to follow that the indorser of such a note is just as liable for the attorney's fee as for the principal of the note. An indorser, by his contract of indorsement, promises, among other things, that he will discharge the note according to its tenor, upon due presentment and notice. "It is a fresh, substantial contract," says Mr. Daniel, "embodying all the terms of the instrument indorsed in itself." 1 *Daniel, Neg. Inst.* § 669. And in *Van Vleet v. Sledge*, 45 Fed. Rep. 753, Mr. Justice Jackson, now

of the supreme court of the United States, says: "The legal undertaking of the indorser is that he will pay the note if the maker fails to do so at maturity, upon proper demand made, and notice of such failure given, when not waived. When he passes the title to the paper to an indorsee for value with this undertaking, the sounder view seems to be that the indorser renders himself liable for the face of the note or bill." Again, in *Bank v. Ellis*, 2 Fed. Rep. 44, in discussing the question now before us, Mr. Justice Deady uses the following language: "While there is a conflict in the authorities upon the question of whether an instrument, otherwise negotiable, that contains a stipulation for the payment of an attorney's fee, is thus negotiable or not, no case has been cited which holds that such stipulation does not pass with the instrument in case the same is deemed negotiable. \* \* \* The maker of these notes having agreed to pay an attorney's fee to the holder thereof, if the same were not paid without action, in my judgment, each subsequent party thereto assumed a like responsibility to such holders, and therefore the plaintiff is entitled to recover such fee from the defendants in this case." It follows from these conclusions that the judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(24 Or. 54)

## PORTLAND CONST. CO. v. O'NEIL et al.

McELVAIN v. WOLFE et al.

(Supreme Court of Oregon. April 17, 1893.)

## APPEAL—WAIVER OF RIGHT—ACCEPTING BENEFITS OF DECREE.

In an action to foreclose a lien, where the decree finds that there is due a certain sum in addition to the amount admitted by defendants to be due, and which they have deposited with the clerk of the court, and directs a sale of the property unless such amount is paid, and defendants deposit such additional amount with the clerk, and plaintiff accepts the whole amount so deposited, he cannot afterwards return the same to the clerk, and appeal from the decree, on the ground that there was more due him, since his acceptance of the money satisfies the decree.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by the Portland Construction Company against J. R. O'Neil and others, consolidated with a suit by J. S. McElvain against O. D. Wolfe and others. From the decree the Portland Construction Company appeals. Dismissed.

Milton W. Smith, (Walter S. Perry, of counsel,) for appellant. R. Stott, Thos. N. Strong, and J. J. Johnson, for respondents.

MOORE, J. This is a suit brought by the Portland Construction Company, as assignee of Messrs. Wolfe & Callahan, to foreclose a lien upon the property of the Sisters of Charity for excavating for the foundation of St. Vincent's Hospital, at Portland, Or. The answer of the Sisters of Charity admits that there was due a balance of \$7,442.16, which sum was de-



posited with the clerk, but at the trial, on November 14, 1892, the court found that there was due in addition thereto the sum of \$1,307.98, and decreed that, if this amount was not paid, the property should be sold to satisfy the lien; that on November 15, 1892, the Sisters of Charity paid into court the amount so found due, and the plaintiff on the next day drew the whole amount so tendered and paid, from the clerk, but did not cancel the decree of record, and kept the same until November 19, 1892, when, becoming dissatisfied therewith, it was returned to the clerk, and on December 7, 1892, the plaintiff attempted to appeal from said decree by serving and filing a notice thereof, wherein it sought to recover the sum of \$3,954.87,—\$1,000 as attorneys' fees; interest on the whole claim from October 1, 1891; and the costs and disbursements in addition to the amount so decreed. The Sisters of Charity, on January 7, 1893, filed a motion in the court below for an order requiring the clerk to satisfy the decree, which was on January 17, 1893, allowed, and the clerk ordered to satisfy the same as of November 16, 1892, from which order the plaintiff also appeals. The Sisters of Charity move to dismiss the appeal from the decree of November 14, 1892, and contend that it has been paid and satisfied, while the plaintiff contends that the appeal is from that part of the decree which failed to award the full amount of its claim, and that the acceptance of the fruits of the decree is not a waiver of its right to appeal. Judge Elliott, in his work on Appellate Procedure, (section 150,) says: "It is a general rule that a party who accepts the benefit of a judgment waives the right to prosecute an appeal from it." Mr. Freeman, in his valuable work on Judgments, (section 426,) says that "payment will, of course, operate as a release, if made to the plaintiff or to any person authorized by him to receive it." And the same learned author, at section 466, says that "payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement." The deposit of this money with the clerk was not a payment of the decree, and could not operate as a discharge thereof until the plaintiff accepted it. "A tender upon a judgment, if not accepted, does not operate as an extinguishment of the lien." *People v. Beebe*, 1 Barb. 385. It has been repeatedly held that where the pleadings admitted a certain amount due, and such sum had voluntarily been tendered or paid after judgment, the amount tendered or paid on the judgment may be accepted by the prevailing party without waiving the right to appeal. *Embry v. Palmer*, 107 U. S. 8, 2 Sup. Ct. Rep. 25; *Morriss v. Garland*, 78 Va. 215; *Higbie v. Westlake*, 14 N. Y. 288; *Dudman v. Earl*, 49 Iowa, 37; *Manufacturing Co. v. Hulske*, 69 Iowa, 557, 29 N. W. Rep. 621. The Sisters of Charity having admitted that there was due \$7,442.16, and having voluntarily tendered this amount, the plaintiff, after judgment, might have accepted the same, because it was a confession of judgment for that amount, and due at all events; and, if the money had been allowed to re-

main with the clerk, the interest thereon would have been lost to the plaintiff. In *Moore v. Floyd*, 4 Or. 260, this court held that "a party cannot claim the benefit of a judgment, and at the same time appeal from it. The right to proceed on a judgment and enjoy its fruits and the right of appeal are not concurrent; on the contrary, they are totally inconsistent. An election to take one of these courses was therefore a renunciation of the other." The case of *Lyon v. Bain*, 1 Wash. T. 482, is directly in point. A decree was there rendered awarding a lien upon certain land for the payment of \$200 and costs, which was paid into court in pursuance of the decree. The attorney for the prevailing party drew out the costs and \$100 on account of the decree, which latter sum he subsequently returned to the court, and on these facts the appeal was dismissed. The court, by Wingard, J., said: "The payment of the money into court was in the nature of a tender. The plaintiff was not bound to take it, but, having done so, his act is a termination of his right to further litigation." The payment of \$1,307.98 was not voluntary, but was coerced by the decree, and, while the plaintiff might have accepted the amount tendered, it could not appropriate this amount and maintain its appeal unless the decree is severable. In *Shook v. Colohan*, 12 Or. 239, 6 Pac. Rep. 503, this court held "that the trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal." In *Inverarity v. Stowell*, 10 Or. 261, the lower court decreed that the building which was subject to a mechanic's lien be sold separately from the land, with the right of removal by the purchaser, and the proceeds applied first to the satisfaction of the mechanic's lien. The record also shows that appellant, after the decree, had obtained an order for the issuance of an execution thereon, and the respondents claimed that the right of appeal had been waived. *Watson, C. J.*, says: "The principle, as we understand it, which the respondents seek to have applied here, is that, when the provisions of a judgment or decree are so closely connected and mutually dependent that a reversal as to one would render necessary the reversal of the others, a party cannot take the benefits of some of such provisions, and still retain his right of appeal,"—and held that the decree for the sale of the property might well stand and be enforced, and yet the portion directing the application of the proceeds be reversed or modified. In the case at bar, plaintiff cannot have a decree in the court below for more than the amount tendered, and here for an additional sum. The issue there tried was the difference between the sum tendered and the amount claimed, and the appeal, if properly taken, brings up every part of the decree in addition to the tender, and is so closely connected with and mutually dependent upon the amount involved that it would necessitate an examination into the whole question of the amount due in excess of the tender. The plaintiff having accepted the fruits of the decree, the lien thereof was discharged, and there was

nothing from which to appeal. The return of the money could not reinstate the decree so as to give this court jurisdiction, and the motion to dismiss the appeal must be allowed.

(24 Or. 59)

PORTLAND CONST. CO. v. O'NEIL et al.  
McELVAIN v. WOLFE et al.

(Supreme Court of Oregon. April 17, 1893.)

JUDGMENT—SATISFACTION.

Where, in an action to foreclose a lien, after a decree finding that there is due plaintiff a certain sum in addition to the amount admitted by defendants and deposited by them with the clerk, defendants also deposit such additional sum, and plaintiff accepts the whole deposit, the decree is satisfied.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by the Portland Construction Company against J. R. O'Neil and others, consolidated with a suit by J. S. McElvain against O. D. Wolfe and others. There was a decree for the Portland Construction Company for part only of its demand. The amount thereof was deposited with the clerk of the court, and accepted by said company, and, from an order directing the clerk to satisfy the decree, it appeals. Affirmed.

Milton W. Smith, (Walter S. Perry, of counsel,) for appellant. R. Stott, Thos. N. Strong, and J. J. Johnson, for respondents.

MOORE, J. In the second appeal, from the order of the court directing the clerk to enter satisfaction of the judgment, for the reasons embraced in the foregoing opinion, (32 Pac. Rep. 764,) the decree of the court is affirmed.

(24 Or. 59)

W. W. KIMBALL CO. v. BLEICK et al.  
(Supreme Court of Oregon. April 17, 1893.)

REPLEVIN—REDELIVERY BOND—RIGHT TO SUE.

The fact that a redelivery bond in replevin is made payable to the sheriff, instead of to plaintiff, as required by Hill's Code, § 137, does not render it void, and plaintiff, being the real party in interest, may sue thereon in his own name.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by the W. W. Kimball Company, a corporation, against Theodore W. Bleick and others on a redelivery bond in replevin. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

Guy G. Willis and Dan. J. Malarkey, for appellants. John H. Handy, for respondent.

PERCURIAM. This is an action against the principal and his sureties on a redelivery bond given in a replevin suit, pursuant to section 137 of Hill's Code. The defendants Meyer and Lynch interposed a demurrer to the complaint, which the court overruled, and, refusing to further plead, final judgment was rendered against them. The errors assigned are (1) that

the undertaking is void because it runs to the sheriff instead of the plaintiff, and therefore no action can be maintained upon it; and (2) that if it is good the complaint is defective, because the action is brought in the name of the wrong person. Under section 137 an undertaking may be given to the sheriff, made payable to the plaintiff, who is the real party in interest, and for whose benefit the undertaking is taken. The undertaking, then, being sufficiently in compliance with the statute, an action may be maintained upon it, and the plaintiff, being the real party in interest, is the proper party to prosecute.

The judgment is affirmed.

(5 Wash. 789)

FIFE et al. v. OLSON et al.

(Supreme Court of Washington. Feb. 23, 1893.)

FORCIBLE ENTRY AND DETAINER—TITLE OF PLAINTIFF—PLEADING.

1. On appeal from a judgment for plaintiffs in an action for unlawful detainer, the stipulated facts showed that one C. brought an action, and failed therein, against plaintiffs, to set aside a patent under which plaintiffs derived title, and to recover the land, the court deciding that he had no title; that, while his suit was pending, defendants entered on the land without claim of title, and after judgment in the action obtained his consent to stay there until his appeal should be determined; and that the proceedings in taking the appeal showed no appeal perfected. *Held*, that a judgment for plaintiffs was proper.

2. The fact that defendants, in their answer, alleged that C., from whom they claimed title, had been in possession of the land, under a claim and color of title, for more than 20 years preceding the action, and that the allegation was not denied, did not entitle them to judgment, as the stipulated facts showed that whatever claims C. had or made had been decided against him.

3. In an action for unlawful detainer under Code, §§ 571-573, it is not necessary to reply to affirmative matter contained in the answer.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by William H. Fife and others against John Olson and others for forcible entry and detainer. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Carroll & Carroll and D. C. Hansen, for appellants. Parsons & Corell, for respondents.

SCOTT, J. This is an action for unlawful detainer, brought under sections 571-573, vol. 2, Code. The case was tried upon a stipulated statement of facts, with a right reserved to either party to read evidence from a certain transcript of testimony in an action in the United States circuit court, begun by Anthony P. Carr against the plaintiffs in this action and others. The cause was tried before the court without a jury, judgment was rendered for the plaintiffs, and the defendants appealed. No statement of facts or bill of exceptions was settled. It appears that testimony was read at the trial from the transcript aforesaid, but that testi-

mony is not here. If the case is here to be tried at all, it is only upon the stipulated facts, which are in substance as follows: "(1) That plaintiffs have title, as shown by the abstract annexed to the complaint, and that the abstract shall be accepted as sufficient evidence of their title, unless defendants should demand further evidence, and no claim is made that they have. The patent to Sproul under which plaintiffs derive title was issued December 15, 1875. (2) That twelve years after this patent was issued,—April 9, 1887,—said Anthony P. Carr commenced an action against these plaintiffs and others to set aside the patent, and to recover the lands. That he failed in this action, the court deciding that he had no title to, or interest, legal or equitable, in, the lands. The evidence referred to in the stipulation was given upon that trial. (3) That, while Carr's suit was pending, these defendants and others entered without any title or claim of title, but with the expectation that it would ultimately be held government land, subject to entry, and that they would be allowed to enter it. That after the case had been decided against Carr, and it had been held that he had no interest in the land, they obtained from him his consent that, 'so far as he was concerned,' they could stay there until his appeal therein should be determined by the supreme court of the United States. The proceedings in taking the appeal are set out, and show that he gave a cost bond only, and no order was made by the court."

The further point is made by the appellants that in their answer they alleged that Carr, from whom they obtained title, had been in possession of the lands, under a claim of title and color of title, for more than 20 years preceding the action, and they allege that this was not denied nor replied to by the plaintiffs, and for that reason the judgment should have gone for the defendants. But, in the facts as stipulated, it appears that the plaintiffs own the land, and that whatever claims Carr had, or had ever made, had been tried and decided against him. Furthermore, the statutes under which this proceeding was brought do not seem to require a reply to any affirmative matter contained in the answer. Upon the case as made here, the judgment of the superior court must be affirmed.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur. STILES, J., did not sit, he being disqualified.

(5 Wash. 659)

#### LAKE v. STEINBACH.

(Supreme Court of Washington. Feb. 3, 1893.)

#### PLEADING—ANSWER—STATUTE OF LIMITATIONS.

1. An answer stating that defendant does not deny or admit certain material allegations of the complaint does not traverse them, and they are to be taken as true, under 2 Hill's Code, § 194, requiring the answer to contain a general or specific denial of each material allegation of the complaint controverted by defendant, and providing that every material al-

legation not controverted shall be taken as true.

2. An allegation in the complaint, in an action on a judgment, that no part of the judgment has been paid except a certain sum, and that there is now due plaintiff thereon a certain sum, is not sufficiently controverted under the statute by a simple denial that there is any money due or owing plaintiff on any judgment obtained by him against defendant, and is therefore to be taken as true.

3. In an action on a foreign judgment, where the complaint alleges that defendant was absent from the state where the action is brought when the judgment was obtained, and did not come into the state until less than six years prior to the commencement of the action, an answer that more than six years has elapsed since the cause of action on the judgment accrued is not new matter constituting a defense, and requiring a reply, since it is not inconsistent with the complaint.

4. In such case it is error to enter judgment for defendant on the ground that the action is barred, since the complaint brings the case within Code, § 123, providing that, if a cause of action accrues against a person who is out of the state, it may be commenced within the time limited after his return into the state.

5. Defendant cannot object that he was a nonresident of the state, and that, therefore, the provision tolling the statute of limitations while a person is absent from the state until his return into the state does not apply where his nonresidence is not shown by the pleadings.

6. Code, § 123, providing that, if a cause of action accrues against any person who shall be out of the state, it may be commenced within the time limited after his return into the state, applies to persons who are nonresidents when the cause of action accrues against them.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by John Lake against E. Steinbach. There was a judgment for defendant, and plaintiff appeals. Reversed.

Arthur Remington, (Emmons & Emmons, of counsel,) for appellant. Shank & Murray, for respondent.

ANDERS, J. The appellant brought this action against the respondent to recover the amount due upon a judgment rendered in the state of Illinois. The allegations of the complaint are as follows: "First. That, at the times hereinafter mentioned, the circuit court of Winnebago county, in the state of Illinois, was a court of general jurisdiction, duly created and organized under and by virtue of the laws and constitution of said state of Illinois. Second. That on the 15th day of August, 1885, the plaintiff commenced an action in said court by the filing of a declaration; and that thereupon said defendant, E. Steinbach, on the same day, duly appeared in said action in said court, by his duly constituted and appointed attorney, and duly waived service of process, and admitted the cause of action alleged against him in said declaration, and the amount therein claimed to be due upon the promissory note therewith filed, and did then and there confess and consent to the entry of judgment against him, in favor of said plaintiff, for the sum of four thousand one hundred and forty-one and 66-100 dollars, and costs of suit. Third. That thereupon such proceedings

were had therein in said court that on the 15th day of August, 1885, a judgment for the sum of four thousand one hundred and forty-one dollars and sixty-six cents, and costs, duly taxed at two dollars and seventy-five cents, was duly given, made, and entered by said court in favor of the plaintiff, John Lake, and against the defendant, E. Steinbach. Fourth. That no part of said judgment has been paid or satisfied, except the sum of three thousand six hundred and forty-two dollars and twenty-two cents; and that there is now due and owing to said plaintiff, who is now the legal owner and holder of said judgment, from the said defendant, upon the said judgment, the sum of five hundred and two dollars and nineteen cents, together with the interest thereon, at the rate of six per cent. per annum, from the 18th of September, 1885. Fifth. That said defendant, E. Steinbach, was out of and absent from the state of Washington at the time said judgment was entered and given as aforesaid, and did not come into or return to this state thereafter until less than six years prior to the commencement of this action." To this complaint the defendant filed an answer, consisting of the following averments: "(1) That he does not deny or admit the first, (1,) second, (2,) or third (3) allegations of plaintiff's complaint. (2) In answer to the fourth (4) allegation of plaintiff's complaint, defendant denies that there is any money due and owing to said plaintiff on any judgment whatever obtained by said plaintiff against said defendant. (3) Defendant neither admits nor denies the fifth (5) allegation contained in plaintiff's complaint. (4) As a further answer to plaintiff's complaint, defendant alleges, first, that more than six years has elapsed since the cause of said action on said judgment referred to in plaintiff's complaint accrued." The plaintiff, believing that the answer neither controverted any of the material allegations of the complaint nor contained any new matter constituting a defense or counterclaim, after waiting until the time for answering had expired, disregarded the same, and moved for a default and for judgment. This motion was denied, and, the plaintiff electing to stand upon his motion, and failing to reply to what the defendant deemed new matter in the answer, the latter applied to the court for judgment on the pleadings, in accordance with section 200 of the Code of Procedure. The court granted defendant's motion, and entered judgment dismissing the action, and for costs against plaintiff. The plaintiff appeals, and contends that the court erred (1) in denying his motion for judgment, and (2) in dismissing the action for failure to file a reply. And the question to be determined is, does this answer traverse any material fact alleged in the complaint, or set out any new matter constituting a defense to the action? If it does not, then the action of the court was clearly wrong.

In deciding this question we are to be governed wholly by the provisions of the statute. 2 Hill's Code, § 185 et seq. And the statute provides "that the answer of the defendant must contain "(1) a general or

specific denial of each material allegation of the complaint controverted by the defendant; \* \* \* (2) a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition." Id. § 194. It is further declared that "every material allegation of the complaint \* \* \* not controverted by the answer \* \* \* shall be taken as true." Id. § 215. Now, tested by the foregoing requirements, this answer is obviously insufficient. It neither denies generally nor specifically any material allegation of fact alleged in the complaint. Indeed, the defendant explicitly states in the answer that he "does not deny or admit" the 1st, 2d, 3d, and 5th allegations of the complaint, all of which are material; and while admitting all of the facts stated in the 4th paragraph, by not denying them, he controverts the mere conclusion drawn by the pleader from the facts stated, and "denies that there is any money due and owing to the said plaintiff on any judgment whatever obtained by said plaintiff against said defendant." This is not such a denial as is contemplated by the statute, and it puts in issue no fact alleged. *Lightner v. Menzel*, 35 Cal. 452; *Nelson v. Murray*, 23 Cal. 338; *Buller v. Sidell*, 43 Fed. Rep. 116; *Watson v. Lemen*, (Colo. Sup.) 11 Pac. Rep. 88. The denial of indebtedness is merely a denial of a legal conclusion, and is permissible only in cases where indebtedness is pleaded as a fact, without showing how it arose. *Boone*, Code, Pl. §§ 62, 67. As to all of the material allegations of the complaint in this case, the defendant says he neither denies or admits them. In other words, he does not controvert them; and, not being controverted, the statute declares in unmistakable language that they shall be taken as true. The facts alleged being true, it follows that the plaintiff was entitled to judgment for want of an answer, unless the allegation in the so-called "answer" "that more than six years has elapsed since the cause of said action on said judgment referred to in plaintiff's complaint accrued" is new matter, constituting a defense to the action. *Port v. Parfit*, (Wash.) 30 Pac. Rep. 328; *King v. Navigation Co.*, 1 Wash. St. 127, 23 Pac. Rep. 924. We are of the opinion that it is not new matter, for the reason that it is not only consistent with, but fairly included in, the complaint. Indeed, the facts stated in the complaint clearly show that more than six years have elapsed since the rendition of the judgment sued on, and the answer simply states the conclusion which necessarily follows from the facts alleged in the complaint, and can therefore in no sense be deemed new matter requiring a reply.

In dismissing the action, the court below must have proceeded on the theory that it was barred, because not commenced within six years after the judgment was rendered; but, upon the admitted facts in the case, the action was not barred, because the allegations of the fifth paragraph of the complaint bring it clearly within the provision in section 123 of the Code, which is as follows: "If the cause of action shall accrue against any person who

shall be out of the state or concealed therein, such may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment." It is alleged in the complaint, and is not denied, that the defendant was out of and absent from the state of Washington at the time said judgment was rendered and given, and did not come into or return to said state thereafter until less than six years prior to the commencement of this action; and this refutes the idea that the purported new matter set up in the answer is a defense to this action.

It was urged by counsel for the respondent, on the argument, that section 123 is not applicable to this case, for the reason that, when the cause of action accrued against him, he was a nonresident of the state, and that this section only applies to residents of the state who leave it and afterwards return, and not to nonresidents coming for the first time into the state. But the pleadings are silent on the subject of residence, and, if the position assumed by respondent were correct, (and we think it is not,) he could only avail himself of the objection that he was a nonresident by alleging it affirmatively as a fact in his answer. See *Crawford v. Roberts*, 8 Or. 324; *Sherman v. Osborn*, Id. 66. There is nothing in the pleading to warrant even the inference that the defendant was a nonresident, and, in the absence of the averments in the complaint, the presumption would have been that he was not. *Bass v. Berry*, 51 Cal. 264. The whole argument, therefore, upon the construction of the statute, was entirely irrelevant,—outside of the case as presented in the record,—and will not now be further considered. For the reasons above indicated, the judgment of the court below is reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff for the sum demanded in the complaint.

DUNBAR, C. J., and HOYT, STILES, and SCOTT, JJ., concur.

(5 Wash. 682)

#### KIRBY v. COLLINS.

(Supreme Court of Washington. Feb. 6, 1893.)

##### APPEAL BOND—SUFFICIENCY.

1. On a motion questioning the sufficiency of the surety on an appeal bond, the moving party need only make a prima facie case of insufficiency to cast on the surety the burden of showing his responsibility.

2. The fact that a surety on an appeal bond is owner of 12 shares of stock of a certain corporation, of the par value of \$100 each, and of a certain 160 acres of land in the county, is not sufficient proof of the surety's responsibility, where the market value of the stock is not shown, and it appears that his title to the land is in dispute.

Appeal from superior court, Jefferson county; Morris B. Sachs, Judge.

Action by Brandon Kirby against Emma N. Collins to foreclose a mortgage. Defendant had judgment, and plaintiff appealed. Defendant now moves to dismiss

appeal, because of the insufficiency of the appeal bond. Conditional order.

Geo. W. Tyler, for appellant. Smith & Felger, for respondent.

HOYT, J. In our opinion the affidavits on the part of the moving party prima facie establish the fact that the surety on the bond was not sufficient. It is true that the showing that such surety has not sufficient property is confined principally to the county of Jefferson, but there are some allegations which relate to his general want of property qualification. The fact as to whether or not a surety has property such as will warrant the court in finding that he is sufficiently responsible to be approved as such surety is peculiarly within his own knowledge, and for that reason the court should not require a very full showing on the part of one moving against a bond, in order that it should be held to establish a prima facie case, and thus cast the burden of showing that he is responsible upon the surety. The showing then by the moving party in this case was sufficient, and the only question remaining is as to whether or not the counter showing made by appellant overcomes the prima facie case thus made. We think it does not. Taking the facts alleged in his affidavit in connection with other facts shown by the record, it appears therefrom that the only property he has is 12 shares of the capital stock of a certain corporation of the par value of \$100 each, and a certain 160 acres of land situated in the county of Jefferson. And it is not shown that the stock has any particular market value, nor is it shown that the assets of the corporation, over and above its liabilities, are such as to make the capital stock of any real value. The only allegation in regard to the value of such stock is that it is held by the stockholders for investment, and is not for sale, and that it could not be bought in the market at par. But in view of the fact that the affidavit on the part of the moving party attacked the value of this stock by showing that the assets of the corporation were only about \$2,000, while the par value of the stock was \$30,000, we think that it should have been met by some showing as to the net assets of the corporation, or that the stock had an established market value. As to the 160 acres of land the prima facie showing by appellant in his affidavit would, perhaps, be sufficient to show that his interest therein was such that it made him a competent surety. But the force of the allegation of his affidavit, which was intended to meet that of the respondent, charging that the title to this land was in question, is entirely overcome by a copy of the records of the superior court of Jefferson county showing that the judgment referred to in said affidavit of appellant was, on the day following its entry, set aside by the court. Hence it appears that the title and right to possession of said land is still in question substantially as set out in the affidavit of the respondent. The object of the statute which requires a bond to be given in the course of judicial proceedings is that the party in

whose interest such bond is required shall be absolutely protected. And he has a right to require such a bond as shall be clearly sufficient to afford such protection. In case of a doubt as to whether or not any bond which is offered will afford such protection, it is the duty of the court to require a different one. But while this is the rule on the one side, the rule on the other is that a party should not be deprived of the right to adjudication by the courts on account of a failure to furnish a sufficient bond, so long as he in good faith is attempting so to do. In this case we are satisfied that the appellant has at all times been prosecuting his appeal in good faith, and endeavoring to furnish a good bond, and otherwise to comply with the statute and the orders of the court. We are therefore of the opinion that he should not be deprived of the benefits of his appeal, if, when required so to do, he is still willing to furnish such a bond as will protect the respondent. Something has been said in regard to the amount of the bond required by the court below being greater than was necessary to protect the rights of the respondent, but as to this the determination of the superior court is at least *prima facie* conclusive. And nothing has been shown which would authorize us to interfere with its conclusion. The respondent, then, is entitled to a further bond in the sum fixed by the order of the superior court, and, to avoid the necessity of another proceeding in this court upon any further bond that may be offered by the appellant; such an approval thereof will be required as to make it improbable that there will be any necessity to move against it. The order will be that the bonds heretofore filed by the appellant be discharged, unless within 20 days from this date a further bond be filed with two or more sufficient sureties; such bond, and the sureties thereon, to be approved by the judge of the superior court of Jefferson county after an examination of such sureties before said judge upon three days' notice to the respondent.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

(5 Wash. 692)

#### MORROW v. MORAN.

(Supreme Court of Washington. Feb. 7, 1893.)

##### EXECUTION SALE—TITLE ACQUIRED BY.

The purchase of land at execution sale, and the payment of the price, gives the purchaser the equitable title, whether the sale is confirmed or not.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by Vanderver P. Morrow against Thomas Moran to quiet title to land. Defendant had judgment, and plaintiff appeals. Affirmed.

The complaint alleges that plaintiff is owner of and entitled to the possession of the land described; that the land is now, and has been for more than one year last past, vacant, and not in the actual possession of anyone; that defendant claims some estate, right, title, or interest in the

land adversely to plaintiff. The prayer of the complaint asks that defendant be required to set forth by answer the true nature of his claim, and that the same be adjudged invalid; that plaintiff be decreed to be owner in fee, and entitled to the possession of the land. Defendant, by answer, claims title (1) by judgment of the supreme court of the territory of Washington in the case of Willey against Morrow and another, July term, 1875; (2) execution levy, sale, and confirmation of sale by the supreme court; (3) sheriff's deed. Exceptions to the answer were overruled, and at the hearing the complaint was dismissed. Plaintiff assigns as error the overruling of his exceptions to defendant's answer, because the supreme court was without jurisdiction to confirm the sale, and therefore no valid deed could be made by the sheriff.

C. W. Hartman, for appellant. Judson & Sharpstein, for respondent.

DUNBAR, C. J. To reverse this case it would be necessary to overrule the supreme court of the territory of Washington in *Willey v. Morrow*, 1 Wash. T. 474. The supreme court in that case, after a pretty thorough examination of the law, decided, both upon the hearing and petition for rehearing, that it had jurisdiction of the case; and under the law as it then existed we are not willing to say that their decision was erroneous. At all events, it must be held conclusive where attacked collaterally, as in this case. And then, if the appellant's theory of law be conceded to be correct, it is cured by act of congress approved April 7, 1874. See act entitled "An act concerning practice in territorial courts." Code Wash. p. 22. Even if the supreme court had no right to confirm the sale, it is not the confirmation that gives the equitable title to the land, but it is the purchase at the execution sale, and the payment of the purchase price according to the terms of the sale. If the proceeding had been regular up to the time of and including the sale, the equitable title would pass to the purchaser. The confirmation is really only the announcement of the legal determination of these facts. We have examined the whole case without specially arguing all the errors alleged by appellant, and have been unable to find any error in the rulings or judgment of the court below, and the judgment is therefore affirmed.

ANDERS, STILES, HOYT, and SCOTT, JJ., concur.

(5 Wash. 492)

#### CLANCY et al. v. WILLIAMS.

(Supreme Court of Washington. Feb. 6, 1893.)

On rehearing.

For former report, see 31 Pac. Rep. 972.

HOYT, J. If we could interpret the record in this case as it seems to be interpreted by appellant, as shown by the statements made by her in the petition for rehearing, we should, doubtless, agree with her that the decision of the court heretofore rendered was wrong. But we are un-

able to do so. As we view the proofs, it clearly appears therefrom that the appellant had been subrogated to the rights, and had assumed the duties, of the person to whom the premises were originally leased by the respondents, and that the relation of landlord and tenant existed, at the time the suit was commenced, between said appellant and respondents, as fully as it would have existed between said respondents and the person to whom they originally leased the premises, if there had been no transfer of his rights. Such being our interpretation of the facts, the entire force is taken from the argument of the appellant in her said petition, and the same must be denied.

**DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.**

(5 Wash. 344)

In re FRASCH.

**DEXTER, HORTON & CO. v. SCHWABACHER BROS. & CO. et al.**

(Supreme Court of Washington. Feb. 7, 1893.)

On rehearing.

For former report, see 31 Pac. Rep. 755.

**DUNBAR, C. J.** The petition for rehearing in this case presents no new argument. That portion of the petition which indulges in flat contradictions of statements made by the court, and which is a greater exhibition of choler than of logic, can be of little assistance to the court in determining grave questions of law in a dispassionate and rational manner. Therefore, we will not further notice it.

The petition is denied.

**STILES, SCOTT, and ANDERS, JJ., concur.** **HOYT, J.,** did not sit in the case.

(5 Wash. 631)

**CLARK v. SHERMAN.**

(Supreme Court of Washington. Feb. 6, 1893.)

**PLEADING AND PROOF—VARIANCE—REPLY.**

1. An action for money had and received is not supported by proof that defendant is liable on a contract by which he agreed to pay plaintiff the amount of money sued for. *Distler v. Dabney*, 23 Pac. Rep. 335, 3 Wash. St. 200, followed.

2. Plaintiff cannot recover, though her real cause of action is set out in her reply, since a plaintiff cannot allege one cause of action in his complaint, and then, by means of a reply, recover on an entirely different cause of action.

Appeal from superior court, Pierce county; **F. Campbell, Judge.**

Action by **Charlotte M. Clark** against **A. H. Sherman** to recover for money had and received. A motion for a nonsuit was overruled, and defendant appeals. Reversed.

**Charles W. Seymour**, for appellant. **A. H. Garretson** and **Taylor & McKay**, for respondent.

**HOYT, J.** Plaintiff brought an action for money had and received. The proof

introduced showed that the liability of the defendant, if any, did not arise at all on account of any money which had come into his possession under such circumstances as would authorize a recovery therefor, as for money had and received for the use of plaintiff. On the contrary, such proof showed that the liability of the defendant to the plaintiff grew out of an alleged contract, by which, in consideration of her agreeing to surrender to him the interest which she had in certain real estate, he agreed to pay her the amount of money for which she brought suit. Such being the fact, the case is brought directly within the decision of this court in *Distler v. Dabney*, 3 Wash. St. 200, 28 Pac. Rep. 335; and under the ruling therein announced the plaintiff had so failed to make out the cause of action stated in her complaint, at the time she rested her cause, that the motion of the defendant for a nonsuit, at that time interposed, should have been granted.

Plaintiff seeks to avoid the effect of that decision, by showing that her real cause of action is disclosed by the answer and reply, and that she ought to be allowed to recover on that account. We cannot sustain this contention. A plaintiff cannot allege one cause of action in his complaint, and then, by means of a reply, recover upon an entirely different cause of action. The judgment must be reversed, and the cause remanded, with instructions to sustain the motion of the defendant for a nonsuit.

**DUNBAR, C. J., and ANDERS, SCOTT, and STILES, JJ., concur.**

(5 Wash. 518)

**STATE ex rel. CUMMINGS v. SUPERIOR COURT OF KING COUNTY et al.**

(Supreme Court of Washington. Feb. 7, 1893.)

**COSTS—REAL PARTY IN INTEREST.**

Where, on the relation of defendant in an action in the superior court, a writ of prohibition is granted to prevent it from trying the action, the relator is entitled to judgment for costs taxed against the plaintiff therein, since such person, though the superior court is the record party to the prohibition proceedings, is the real party in interest.

Petition for writ of prohibition by the state on the relation of **J. H. Cummings** against the superior court of King county and **Hon. Richard Osborn**, judge of said court, to prevent the trying of an action pending in said court. Writ allowed.

**C. E. Shepard** and **H. H. Johnston**, for relator. **Hughes, Hastings & Stedman**, for respondents.

**PER CURIAM.** In this case, while the court was the record party to the action, the real party in interest is **Belle B. Haines**, administratrix of the estate of **J. C. Haines**, deceased, who is the plaintiff in the action. The costs will therefore be taxed to the plaintiff in the action in the superior court, and the relator will take judgment for the same.



**WEBER v. YANCY.**

(Supreme Court of Washington. Feb. 4, 1893.)

**DISMISSAL OF APPEAL.—FAILURE TO FILE TRANSCRIPT.**

Where, on motion to dismiss appeal for failure to file transcript on time, appellant shows facts in extenuation, he will be allowed to file the transcript on payment of attorney's fee to respondent.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by A. Weber against George W. Yancy. Plaintiff had judgment, and defendant appealed. Plaintiff now moves to dismiss the appeal. Conditional order.

Burke, Shepard & Woods, for appellant. Emmons & Emmons, Paden & Gridley, and Hawley & Prouty, for respondent.

**DUNBAR, C. J.** Respondent in this case brings to this court a short record, and moves the court to affirm the judgment appealed from, and for judgment in this court for the amount thereof, together with interest and costs against appellant and his sureties, for the reason that appellant has failed to file a transcript of the case within the time prescribed by law. In consideration of the showing made by the appellant in extenuation of his failure to file the transcript within the time prescribed by law, we think it would be too harsh a judgment to dismiss the appeal, or affirm the judgment; but inasmuch as the respondent had a right, under the rules of the court, to make the motion he has made in this case, we deem it but just to impose terms upon the appellant; and it is therefore ordered that, upon the payment by appellant to the attorney for respondent, within 10 days, of the sum of \$25, the motion will be overruled, and, if not so paid within that time, the motion will be sustained, and the appeal dismissed, as prayed for.

**ANDERS and SCOTT, JJ., concur.**

(5 Wash. 715)

**MEEKER et al. v. JOHNSON**

(Supreme Court of Washington. Feb. 14, 1893.)

**SALE.—PAYMENT OF PRICE.—TIME.**

1. A contract for the sale of growing hops provided for their delivery between September 20th and October 20th, payment to be made on delivery and acceptance. *Held*, that a delivery of a portion of the hops during the time specified, with notice by the seller of his readiness to deliver the balance, was sufficient notice to the purchasers as to the date when the hops would be delivered to render them liable for the agreed price on the delivery and acceptance of the balance, two days later.

2. On the delivery and acceptance of the hops the purchasers' agent was unable to make payment, and informed the seller of his intention to telegraph his principals about it. The seller then notified him that he could not have the hops if payment was not made on that day. *Held*, that since, by the terms of the contract, the purchasers were bound to pay on acceptance, the seller was at liberty to rescind the sale on the nonpayment during the day specified by him; and his rescission could not be defeated by a tender of the purchase price, made three days after the delivery and accept-

ance, though the purchasers could not make payment any earlier because the telegraph wires were down, and there was no bank at the place of delivery.

Appeal from superior court, Lewis county; Edward F. Hunter, Judge.

Action by E. Meeker and Fred Meeker, partners, against Ira Johnson, for the possession of personal property or its value. From a judgment for defendant, plaintiffs appeal. Affirmed.

Pritchard, Stevens, Grosscup & Seymour and Reynolds & Stewart, for appellants. Herren & Elliott, for respondent.

**ANDERS, J.** On August 9, 1890, the plaintiffs and the defendant entered into the following contract in writing: "This agreement, made and entered into this ninth day of August, 1890, by and between Ira Johnson of Napavine, county of Lewis, and state of Washington, party of the first part, and E. Meeker and Company, of Puyallup, in the county of Pierce, state of Washington, parties of the second part, witnesseth that the said party of the first part, for the consideration hereinafter named, has sold, transferred, and set over, and by these presents does sell, transfer, and set over, unto said parties of the second part, their heirs and assigns, and agree to deliver to said parties of the second part, between the twentieth day of September, 1890, and the twentieth day of October, 1890, at the N. P. Railway station at Napavine, 10,000, more or less, being the entire crop of hops of the growth of the year 1890, more particularly described as ten thousand lbs. of hops belonging to the said party of the first part, and now growing upon his own farm near Napavine. The said party of the first part further agrees to complete the cultivation of said hops, and in due season to pick, cure, and bale the same in bales of about 160 lbs. each, 71 lbs. per bale allowed as tare, or 200 lbs., and at the same time and place above specified to deliver the same, of strictly choice quality, of even color, well and cleanly picked, and thoroughly cured, but not high dried. In consideration whereof the said parties of the second part agree to pay said party of the first part the sum of 20 cents per pound for said hops, as follows, to wit: — cents per lb., being the sum of — dollars upon execution of said contract, the receipt of which sum is hereby acknowledged by said party of the first part; — cents per pound, being the sum of — dollars, for picking purposes on demand after the — day of September, 18—; twenty cents per pound, or the balance that may be due upon said hops, upon delivery and acceptance of the same by said parties of the second part. It is further agreed that said party of the first part shall keep said hops insured from the time the same are picked until they are delivered, in a sum equal to all advance that shall have been made by said parties of the second part. Above insurance is not necessary unless part payment is made before delivery of hops." On the 15th day of October, 1890, in pursuance of his agreement, Johnson commenced hauling his hops to the station at Napavine. He hauled but two

loads on that day, for the reason that no more could be put into the warehouse where they were to be delivered until plaintiffs' agent, Mr. Lowry, removed other hops which were then in the warehouse, and which were not removed until late in the evening. The next day it rained, and no hops could be hauled. On the following day, the 17th of October, he placed the remainder of his crop of hops in the warehouse, and so notified Lowry. At the latter's request, Johnson went to Napavine the next morning, which was Saturday, for the purpose of assisting in the weighing and inspection of the hops. After they were inspected and weighed they were placed in a railroad car provided for that purpose by the plaintiffs. It was about 3 or half past 3 o'clock in the afternoon when they finished weighing and putting the hops into the car. The entire weight of the hops was then ascertained, and their value at the contract price agreed upon. Immediately thereafter a conversation occurred between Mr. Lowry, plaintiffs' agent, and the defendant, as to which there is practically no controversy. As to what was then said the defendant Johnson testified: "I asked Mr. Lowry if these hops filled the bill, and he said they did; said the hops were all right. I asked what he was going to do with them, and he said he was going to send them to Puyallup, to Mr. Meeker; and I put my hand into my pocket and took out my contract, and said my contract called for cash on delivery or acceptance; and I called Mr. Keys, the station man there, as a witness, and demanded my money, and told him that if he did not pay me that day, I would give him the balance of that day to pay me, and if he did not pay me, the hops were mine, and I should take them out of the car." To this Lowry says he replied: "I haven't the money here, Mr. Johnson, but I will send the returns to Mr. Meeker, and the money will be sent to you." He replied: "If the money is not paid by 12 o'clock to-night I will take the hops out of the car." I said I could not help it, but would telegraph to Mr. Meeker, and see what I could do about it." During the course of the conversation in regard to the payment for the hops Lowry told Johnson that he would guaranty that the hops would not leave the station until his money was paid. Lowry attempted to telegraph to his principals at Puyallup in regard to the condition of affairs, but, the wires being down, he was unable to reach them. Johnson "fastened up" the car containing the hops and went home, and did not return until Monday. Lowry took the first train, which left Napavine about 5 o'clock in the afternoon, and went to Chehalis, (nine miles distant,) where the nearest bank was situated, and from there telegraphed to Meeker. When he arrived at Chehalis on Saturday evening the bank was closed. On Monday morning he returned to Napavine by the earliest train from Chehalis, arriving there about 11 o'clock. He at once met Johnson, and offered to pay him the full value of the hops in gold coin. Johnson declined to accept the money, claiming that the plaintiffs had violated

their contract, and some time during the afternoon removed the hops from the car with the knowledge of and without any objection from Lowry, and placed them in a building belonging to one Urkhart, where they remained until taken by the sheriff and delivered to the plaintiffs by virtue of process regularly issued in this action.

This is the second time this case has been before this court, and the facts disclosed in the record are substantially the same facts which were presented on the former appeal; and the learned counsel for the appellants have not discussed certain questions which they considered decided on the first appeal, and which are therefore not now subject to re-examination. It is the settled law of this case that the title to the hops in question did not vest in the plaintiffs on the execution of the contract, nor even when they were accepted and placed in the car; and also that the defendant did not waive the right of possession by extending the time of payment until midnight of the day on which the hops were delivered. See *Meeker v. Johnson*, 3 Wash. St. 247, 28 Pac. Rep. 542. But appellants strenuously insist that this court, at the former trial, decided that they were entitled to a reasonable time for payment after the ascertainment, by weighing and examination, of the amount to be paid under the contract, and that, therefore, the trial court, by refusing the instructions asked by appellants, as well as by the instructions given on its own motion, erroneously took that question from the consideration of the jury. Turning to the opinion of the court, at page 261, 3 Wash. St., and page 546, 28 Pac. Rep., we find this language: "It is also contended that the vendee was not given a reasonable time to procure the money to make the payment after the delivery of the goods, but, even if the question of reasonable time could be considered at all in an executory contract, where the time of payment was specified in the contract, and no provision made in the contract for notice, yet that question was submitted to the jury under instructions that were favorable to the plaintiff, and the jury have passed upon that proposition, and this court is not authorized to disturb their findings." While the court did not in positive and unequivocal language decide the question, it would seem that the only inference that could be legitimately drawn from what was there said is that the question of reasonable time for payment should not have been considered at all in the construction of the contract under consideration, but, having been considered and passed upon by the jury, their verdict, under the circumstances, would not be disturbed. But, be that as it may, the real question for us to determine is not whether the appellants were entitled to a reasonable time in which to comply with the terms of their contract, for the time was fixed by the contract itself, but whether they performed or offered to perform their part of the agreement according to its substance and spirit. If they were themselves in default, it needs no argument or citation of authorities to show that they are not in a

position to enforce the contract as against the respondent. The agreement provided, in legal contemplation, that the respondent might deliver his crop of hops at Napavine, on any day between September 20 and October 20, 1890, and that he should be paid for the same on delivery and acceptance by the appellants. And the respondent had a right to presume that appellants, having entered into the contract, would perform it, according to its terms, when the time of performance arrived; and, not only that, but he had a right to insist that they should do so before assuming to be the owners of the chattels. The hops having been delivered, at the place designated, within the time specified, and having been examined and found to be of the required quality, the time had then arrived for the appellants to fulfill their part of the contract, which was to accept and pay. They were then and there ready and willing to accept, but had entirely neglected to make preparation for payment, although they had agreed that acceptance and payment should be concurrent acts. The agent of appellants, at the time he accepted the goods for his principals, neither paid nor offered to pay for them. He told the respondent that he had no money at Napavine, but would telegraph, and see what could be done about it; that he would send the returns to Mr. Meeker, who was in another county, and the money would be sent to him. Now, under these circumstances, and notwithstanding the fact that the respondent distinctly told Mr. Lowry that he could not have the hops if the money was not paid that day, the appellants claim that they on that very same day became the owners of the hops, and that the respondent violated his contract of sale by not accepting a tender of the price made two days thereafter. And it is argued on behalf of appellants that they were not in default, because they were entitled to notice of the time when the hops would be delivered, so that they might be prepared to make payment when they were accepted, and that they were entitled to a reasonable time thereafter to procure the money, and that Monday was a reasonable time.

As to the first proposition, it is sufficient to observe that the testimony shows that Lowry, who was representing appellants, had notice on the 15th of October that the respondent was ready to deliver the hops. On that day, not only were two loads hauled and put into the warehouse, but Lowry was told by Johnson how many bales he had altogether to deliver. On the 17th the balance were delivered, and Lowry notified of the fact. Besides, appellants were to pay on delivery and acceptance, and it can hardly be contended that they had no notice of their own acceptance of the hops. Indeed, under this contract, Johnson was not bound to give notice of performance on his part, for it is a general rule that one who binds himself to do anything on the happening of a particular event is bound to take notice, at his own peril, and to comply with his promise when the event happens. *Benj. Sales, (Bennett's Notes), § 577; 2*

*Schouler, Pers. Prop. § 291; 5 Lawson, Rights, Rem. & Pr. p. 4151. In Keys v. Powell, 2 A. K. Marsh. 254, it was held that the defendant, who had lost a trunk belonging to the plaintiffs, and who agreed to pay plaintiffs the value of its contents when ascertained by a certain designated person, was not entitled to notice before suit that the value had been ascertained by said person, for the reason that the defendant's contract showed that he had the means of informing himself of the fact; and the same principle would apply in this case. In any event, therefore, appellants are entitled to no immunity on the ground of want of notice.*

Nor do we think that the claim that they were entitled to reasonable time, in the sense contended for, is sustained by the authorities cited, when applied to the facts of this case. The case cited in section 708, *Benj. Sales, (1888),* is not in point. There was there no rescission of the contract, but the vendor was about to commence an action against the vendee, who made a tender before the writ was issued, and the court held that it was not too late. But the same author, in section 709 of his work, states the rule as to reasonable time as follows: "When the contract provides that the payment is only to be made on demand or notice, a reasonable time must be allowed to fetch the money." See also, *2 Schouler, Pers. Prop. § 290. In Blackwell v. Fosters, 1 Metc. (Ky.) 88, the parties had bound themselves to give security for their respective performance of the contract, if at any time required, and the court held, in accordance with the rule just stated, that the party had a reasonable time to get security after demand. In the Rhode Island case—Furlong v. Barnes, 8 R. I. 226—the plaintiff was ready with the money, on the evening appointed, to pay for the rags he had purchased, and the question in dispute was whether he was required to be at the place designated at a few minutes before 9 o'clock or between 9 and 10 o'clock on that evening, and the court held that the contract must be reasonably construed, and that it was not necessary to show the time to a second or minute, but that "all that the plaintiff could be required to show was that he was in the appointed place at the appointed time, in readiness to perform his part of the contract, and that the defendant made default." And in *Toms v. Wilson, 4 Best & S. 442, it was held that a promise to pay "immediately on demand" could not be construed to deprive the debtor of an opportunity to get the money which he may have in bank or near at hand, and, "if a condition is to be performed immediately or on demand, that means that a reasonable time must be given, according to the nature of the thing to be done." And Cockburn, C. J., said: "By the terms of the bill of sale the plaintiff was under obligation to pay this money immediately upon demand in writing, and if he did not, then the defendants were entitled to take possession of and sell the goods. Here such a demand was made. The deed must receive a reasonable construction, and it could not have meant that the plain-**

tiff was bound to pay the money in the very next instant of time after the demand, but he must have a reasonable time to get it from some convenient place. For instance, he might require time to get it from his desk, or to go across the street, or to his bankers for it." In *Martindale v. Smith*, 1 Adol. & E. (N. S.) 592, the defendant, on the 23d of April, sold plaintiff six stacks of oats, then on defendant's ground, under an agreement by which the plaintiff was to have liberty to leave the stacks on the ground for four months if he saw fit, and was to pay for them in twelve weeks from the date of the agreement. In the beginning of July the defendant told the plaintiff that if he, plaintiff, did not pay on the 16th of that month, defendant would consider the contract at an end. The plaintiff did not pay on that day, but two or three days afterwards tendered the money, which the defendant refused to accept. Afterwards the defendant sold the stacks which had remained on his ground. In an action of trover it was held that the plaintiff could recover. The question before the court was whether the vendor had a right to treat the sale as at an end and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, and the court said: "We are clearly of the opinion that he had no such right, and that the action is well brought against him; for the sale of a specific chattel on credit, though that credit may be for a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But the default of payment does not rescind the contract. \* \* \* The vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain; and here the lien was gone by tender of the price." In the case at bar the vendor had more than a lien for the price of the goods. He had the property in the goods, and did not at any time agree to relinquish it until the price was paid, and therefore the question of lien is not here applicable. And in *Bass v. White*, 65 N. Y. 565, the plaintiff was prepared to pay for the coal, as agreed, upon receipt of the bill of lading, and expected to do so by check, as that was the custom among merchants in New York. In fact, the defendants themselves first demanded a check in payment, but afterwards refused to take it, as the bank had closed for the day, which was Saturday. Plaintiff then brought a responsible friend, who offered to indorse the check. This was refused. And on Monday morning the plaintiff tendered to defendants the money for the amount of the bill, which was also refused. Upon that state of facts the court very properly held that the plaintiff was entitled to a reasonable time, after refusal of the check, to procure the money, and that until the morning of the next banking day was not unreasonable, "particularly as defendants did not inform him that he must procure the money at once or forfeit his contract." We have but little doubt that if the plaintiffs in that

case, instead of tendering their check at the time agreed on, had simply said they had no money in New York, but would send elsewhere and have it forwarded at some other time, and the defendant had told them to procure the money at once, or forfeit their contract, the decision of the court would have been in accordance with the principle laid down in *Gardner v. Clark*, 21 N. Y. 399, where it was held that a party under contract to deliver articles by the wagon load, and entitled to pay for each load as delivered, does not waive that right, but may treat the contract as broken by a single failure to make payment upon tender of delivery, although he has repeatedly delivered loads without payment, and has given the other party no notice of his intention to insist upon immediate payment.

We think that it was the duty of appellants to be prepared to pay the purchase price of the hops at the time they proposed to accept them, and, having failed to do so, the defendant was at liberty to rescind the contract, and that his right of rescission was not defeated by the tender made subsequently to their default. They had all of the day on which the goods were accepted to make payment, and the fact that they could not then do so because the wires were down, or there was no bank at Napavine, can have no effect upon the rights of the respondent. See *Beauchamp v. Arthur*, 58 Cal. 431. Having thus disposed of the principal question involved in the case, it is not necessary to discuss other objections raised by appellants. The judgment of the court below is affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

(5 Wash. 425)

STATE ex rel. BATTERSBY et al. v.  
BOARD OF TIDE LAND APPRAISERS  
OF WHATCOM COUNTY et al.

(Supreme Court of Washington. Feb. 6, 1893.)

On rehearing.

For former report, see 32 Pac. Rep. 97.

HOYT, J. If the vehement assertions contained in the petition for rehearing filed in this cause be stricken therefrom, it will contain nothing additional to the argument in the brief upon which the cause was decided; and, as we are satisfied with our decision, it follows that the petition for rehearing must be denied. In doing so, however, we desire to sound a note of warning for the benefit of counsel as to language which is frequently found in such petitions. In this case, counsel make use of the following language: "The rule announced by this court in its opinion, if that opinion is permitted to stand, strikes at the heart of all authority, overrules all principles of construction, and establishes an arbitrary system that can neither be followed with safety nor looked to with confidence." Vehement declarations like this prove nothing, and are so far out of place in a communication by an attorney addressed to a court that it would be justified in striking the paper in

which they were contained from the files, without any consideration thereof upon the merits; and even a more severe penalty might well be imposed.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

(7 Wash. 631)

### BAER v. CHOIR.

(Supreme Court of Washington. Feb. 14, 1893.)

TAXATION—ASSESSMENT OF UNOCCUPIED LANDS—  
LIMITATION—ADVERSE POSSESSION—CHANGE OF  
STATUTE.

1. Acts 1871, p. 36, § 6, requires unoccupied land, if the owner is unknown, to be assessed without mentioning the name of any owner. Section 22 requires unoccupied lands liable to taxation, when the name of the owner is unknown, to be described, and the value thereof set down in the assessment roll, in a part thereof separate from other assessments. Section 38 declares that the certificate of purchase issued at the sheriff's sale for delinquent taxes shall convey all right, title, and interest of the "person in whose name" such land was taxed. *Held*, that the assessment of unoccupied land owned by a nonresident in the name of a person not the owner was unauthorized and void, and that a sale and tax deed based thereon were likewise void.

2. While a recital in a tax deed that the property had been assessed in the name of a specified person, as owner, raises a presumption of ownership in such person when the assessment was made, yet such presumption is overcome by an affirmative showing in the record that another person was then the owner.

3. Code 1881, §§ 1294, 1683, provide that "when a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy has begun to run before this Code takes effect, and the same or any limitation is prescribed in the Code, the time which has already run shall be deemed to be a part of the time prescribed as such limitation by this Code." *Held*, that in view of the fact that section 1294 originally formed part of Act Nov. 16, 1881, relating to crimes and punishment and proceedings in criminal cases, and that section 1683 was contained in Act Nov. 4, 1881, defining the jurisdiction and practice in probate courts, such sections cannot have any effect outside of the domain of the laws of which they were parts, and that the general statute of limitations found in Code 1881, c. 2, is not controlled or affected by them.

4. Code 1881, § 26, which reduced the 20-year period of limitation for the recovery of real estate to 10 years, applies to adverse possession begun before its enactment; but the record owner has 10 full years from the enactment of the Code within which to bring action. *Sohn v. Waterson*, 17 Wall. 596, followed.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by Milton L. Baer against Melody Choir to quiet title to land. The action was dismissed, plaintiff's motion for a new trial denied, and he appealed. Reversed.

Beriah Brown, Jr., for appellant. Hughes & Hastings and Fred H. Peterson, for respondent.

STILES, J. This was an equitable action brought by the appellant, who was in possession of the land which was the subject of the controversy, to quiet his title against two tax deeds and a quitclaim deed. The disposition of the tax deed

from the city of Seattle, and the quitclaim deed, seems to be left to be controlled by the disposition of the case made upon the tax deed executed by the sheriff of King county to the respondent August 27, 1878. The appellant deraigned complete title from the United States to himself through sundry meane conveyances, the deed to him having been executed February 7, 1889, at which time he went into possession of the lots in question, viz. lots 7, 8, and 9, block 22, Edes & Knight's addition to the city of Seattle. The chain of title showed that one Elizabeth B. Bonnell took title to the land by a deed October 8, 1870, and the conveyance from her was executed January 29, 1889. Respondent produced a tax deed from the treasurer of King county, dated August 27, 1878, purporting to convey the lands in dispute, and other lands, for taxes unpaid thereon for the year 1875, assessed for that year to one N. B. Knight. This deed was recorded in the office of the auditor of King county on the 30th day of April, 1879. Under objection this deed was admitted in evidence, but appellant maintains that it was a void deed, under the evidence in the case. The first proposition to sustain this contention is that the property was not assessed to the owner thereof, Elizabeth B. Bonnell, or to an unknown owner. The act of 1871 (Acts 1871, p. 36) contains the following provisions in regard to the assessment of property for taxation: "Sec. 6. All lands shall be assessed in the county in which the same shall lie, and every person assessed shall be assessed in the county where he resides when the assessment is made, for all real and personal property then owned by him within such county; but land owned by one person, and occupied by another, may be assessed in the name of the owner or occupant, and unoccupied land, if the owner is unknown, may be assessed as such without inserting the name of any owner." "Sec. 22. Unoccupied lands liable to taxation, when the name of the owner is unknown, shall be described, and the value thereof set down in the assessment roll, in a part thereof separate from the other assessments, in the same manner that lands of residents are required to be described, and the value thereof designated." Section 23 contains the form of an assessment roll for real property, and section 17 prescribes that the assessor shall set down in the roll, in separate columns, according to the best information he can obtain—First, the names of all the taxable persons in his county; second, a description of each tract or parcel of land to be taxed, etc., corresponding with the form of the roll given in section 23. Section 33 was as follows: "The sheriff shall proceed to call once on each person named in the transcript, if he can be found in the county, and collect the taxes charged, as provided in this act, and if not then paid, or the person be not found, shall levy the same on the goods and chattels and other personal property of such person, and give six days' notice of the time and place of sale, and the property to be sold, by posting up advertisements in four public places in the county, and sell the same at public

auction, and if such property shall sell for more than the taxes, costs, and damages, the surplus shall be paid to the owner thereof," etc. After thus calling upon each person named in the transcript, the sheriff was required to make his return to the auditor, showing a list of taxes remaining unpaid; and thereupon the auditor was required to make up lists of lands, city and town lots, returned as delinquent, with the amount of taxes due thereon, and deliver one list to the sheriff, who was authorized to proceed and sell the property described in the list. Section 43 provided for the correction of the name of any person taxed, if any error therein were discovered, and the person be taxable. Section 38 declared that the certificate of purchases should be held to convey all right, title, and interest of the person in whose name such land or town lots should have been taxed; and section 43 also provided a most liberal means for the taxation of any land found to have been omitted. From these provisions, we think it is clear that it was the intention of the law of 1871 that somewhat unusual care should be taken in the matter of assessing real estate to the owners thereof. In this instance the property taxed was unoccupied land, and it was made the duty of the assessor, if the owner of such land was unknown, to assess the property as unoccupied land, owner unknown. As has been seen, Elizabeth B. Bonnell had been the owner of this property since 1870, and it is made reasonably certain by the evidence that she was not a resident of King county, or of the Territory of Washington.

Were there nothing in the case but the recital of the deed that the property had been assessed to Knight as owner, the presumption of the regularity of all former proceedings would carry the presumption that the assessment to him had been properly made by the officer. But the record shows that, although Knight had been the owner, he had conveyed by a recorded deed in 1870; that for the years 1873 and 1874, at least, the lots had been assessed to Mrs. Bonnell; and that Mrs. Bonnell did not convey until 1889; and this showing was sufficient to rebut the presumption which the deed raised.

Respondent maintains that the act of the assessor in inserting the name of Knight was a mere irregularity, and cites in support of his position *Cooper v. Jackson*, 71 Ind. 244; *Stilz v. Indianapolis*, 81 Ind. 582; *Peckham v. Millikan*, 99 Ind. 352; *Town Co. v. Davis*, 44 Iowa, 631. But a reference to the statute under which the Indiana cases were cited shows that they were all based upon a provision that an error in the name of the party to whom property was assessed should not constitute anything more than an irregularity. It does not appear from those cases whether or not there were provisions in the revenue law of Indiana looking towards the collection of taxes out of the personal property of the individuals against whom the tax was assessed, and making a demand a condition precedent to the right to sell real estate; but it is the more likely that no such provision existed, as it is not a usual provision in tax laws. In the Iowa case,

land was assessed to an unknown owner, when the fact was the owner resided in the county, and the records disclosed his name; and the court merely presumed that the assessor did his duty in endeavoring to ascertain the name of the owner, and that the name was in fact unknown to him. The better rule upon this subject is laid down in *Whitney v. Thomas*, 23 N. Y. 281. The statute there construed is the same as our act of 1871, in substance, and it was held that such an assessment was unauthorized and void. A recent case upon the same subject is *Murtaugh v. Railroad Co.*, (Sup.) 3 N. Y. Supp. 488, where the same result was reached.

The assessment being void, as against the true owner, it is conceded by respondent that there was no sale, and that the deed was void, also. For the reason that there was no sale, it is also conceded that the special three-year limitation found in section 2939 of the Code of 1881 has no application. But it is maintained that, although the deed was void, it afforded color of title, under which, by virtue of the circumstances of this case, respondent is entitled to be protected in asserting title by adverse possession maintained for more than 10 years. It is not necessary to pass upon the facts claimed to constitute adverse possession. Respondent received his certificate of sale about July, 1876, and immediately went upon the lands certified to have been sold, and assumed to be the owner of them, and continued to exercise acts of ownership and dominion over them until 1888. In 1889 appellant entered peaceably, and has been in undisturbed possession ever since. The statute of 1871 did not, in terms, give a purchaser at a tax sale any right of possession of lands sold, before the issuance of the deed, and such a possession would not be "under color of title;" but, if the continuance of a possession initiated in that way could be the adverse possession contemplated by the law on that subject, then there was more than 10 years of such possession from the date of the deed to the commencement of this action, for the constructive possession claimed to have existed for all of the time, but very short periods, was as fully continued after the respondent left the state, in 1888, as before. This deed was taken in 1873, when the statute of limitations allowed 20 years for the commencement of actions for the recovery of real property, (Laws 1862-63, p. 86;) and this continued to be the law until 1881, under the revisions of 1869, 1873, and 1877. There never had been, however, any limitation upon the time for commencing actions to remove a cloud from a title by one in possession, although, in a case like this, where an adverse possession has been maintained for the full term of the statute under the instrument alleged to constitute the cloud, it is a defense to the action. But section 26 of the Code of 1881 reduced the time from 20 to 10 years, and the only remaining point in controversy is whether or not the new limitation had the effect to complete respondent's adverse possession August 27, 1888, instead of 10 years later, as would have been the case under the old law. This action was commenced

April 25, 1890,—too late by eight months, according to respondent's contention, but in abundance of time, according to the other side. There are two sections (1294 and 1683) in the Code of 1881 which respondent urges should be taken as governing this matter, and they are in the following terms: "When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy has begun to run before this Code takes effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed to be a part of the time prescribed as such limitation by this Code." It has, perhaps, been a misfortune to the people of the territory and state that the acts of the legislature of 1881 have not, for the most important part, been printed, except in the volume known as the "Code" of that year and this is an evidence of it; for the civil practice act passed December 1, 1881, which ends with section 763, did not contain either of the sections above mentioned. Section 1294 was contained in an act entitled "An act relative to crimes and punishments and proceedings in criminal cases," passed November 16, 1881; and section 1683 was contained in an act entitled "An act defining the jurisdiction and practice in probate courts of Washington Territory," passed November 4, 1881, (Abbott's Real Property Statutes, No. 339, note.) Both acts were approved December 1, 1881, and went into effect immediately; and wherever, in the Code, the words "this Code" are found, the acts read "this act," only. In the face of these facts, it cannot be held that the sections quoted had, or were intended to have, effect outside of the domain of the laws of which they were parts; and the conclusion is imperative that the general statute of limitations found in chapter 2 of the Code of 1881 is not controlled or affected by them. The supreme court of the United States in *Sohn v. Waterson*, 17 Wall. 596, a case where it was unfettered by any state statute or judicial construction, preferred to hold that a new statute of limitations took effect upon pre-existing rights of action, and limited them, but that in every such case the full time allowed by the new statute should be available to the complainant, and it has consistently adhered to that view. Some of the state courts have taken different views, with the confusing effects pointed out by the federal supreme court. In view of the policy of quieting titles, as shown forth in the shortening of the time for bringing these real property actions, we should follow *Sohn v. Waterson*, and hold that in this case the respondent's title would have become perfect (the facts of possession being assumed to be sufficient) December 1, 1891, unless the next consideration to be mentioned should have some effect.

It is suggested that section 760 of the Code of 1881, reading, "No action or proceedings commenced before this Code takes effect, and no right accrued, is affected by its provisions," continued the 20-year statute in full force as to all such rights of action then existing; but, inasmuch as it is not necessary that we decide the latter

point, we prefer to leave it open until a case is presented in which it shall be the governing test. We hold, therefore, that the appellant was entitled to have his title quieted, as prayed for; and the decree is set aside, and the cause remanded to the superior court for that purpose.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

(5 Wash. 712)

BAUM v. SWEENEY et al.

(Supreme Court of Washington. Feb. 14, 1893.)

APPEAL FROM COUNTY BOARD.—TIME OF TAKING  
—PUBLIC PRINTING.

1. 2 Code, § 119, first enacted in 1881, which requires an appeal from an order of the board of county commissioners to be taken within three months, must prevail over 1 Code, § 298, first enacted in 1863, and re-enacted for the last time in 1879, which requires such appeals to be taken within 20 days, since, in case of conflicting statutes, the one last enacted must be held in force.

2. The fact that the county auditor had failed, before the meeting of the county board for the May term, to advertise for proposals for public printing for the ensuing year, as required by 1 Code, § 2937, does not deprive the county court of jurisdiction to let the contract at an adjourned meeting after the proposals have been properly advertised for, and bids from all the papers within the county have been actually submitted, since everything was accomplished by such advertisement that could have been accomplished, had it been published previously.

3. Where the only two newspapers in the county submit to the county board proposals for the public printing for the ensuing year, and the contract is let by the county board to one of them, which has not been published for six months, as required by 1 Code, § 2936, the superior court, on appeal from the order of the board, has power to direct the contract to be awarded to the paper which has been published for the required period, though its bid is higher than the one submitted by the paper to which the board let the contract.

Hoyt, J., dissenting.

Appeal from superior court, San Juan county; John R. Winn, Judge.

Frank P. Baum appealed to the superior court from an order made by Joseph Sweeney and others, as a board of county commissioners of San Juan county, awarding the county printing for 1891 to one J. C. Wheeler, and rejecting the bid of the appellant. From a judgment of the superior court setting aside the order of the board, and directing them to relet the contract as provided by law, the board appeal. Affirmed.

Johnson & Moody, for appellants. J. N. Maxwell, for respondent.

SCOTT, J. This was an appeal from an order of the board of county commissioners awarding a contract for the county printing of San Juan county for the fiscal year of 1891 to one J. C. Wheeler, publisher of a newspaper printed in said county, known as the "Islander." The respondent Frank P. Baum, was the publisher of another paper printed in said county, known as the "San Juan Graphic," and he took an appeal from said order to the superior court of said county. The board of com-



missioners moved to dismiss the appeal because the same was not taken within 20 days after the making of said order, as is provided by section 298 of volume 1 of the Code. This motion was denied by the court, and, judgment being rendered in favor of the appellant, the commissioners appealed from said judgment to this court; and the first ground of error alleged is the refusal of the court below to dismiss the appeal upon their motion, made as aforesaid. The respondent here contends that the ruling of the lower court was right, because section 119, vol. 2, Code, provides that an appeal may be taken from such orders within three months.

It is apparent that there is a conflict between these two sections, and the question here is as to which must prevail. Under the decision of this court in *Graetz v. McKenzie*, 3 Wash. St. 194, 28 Pac. Rep. 331, the section which was passed latest in point of time must be held in force. By reference to the Session Laws of the state and territory, it is found that section 298, limiting appeals in such cases to 20 days, was originally passed January 27, 1863, and that it was substantially re-enacted from time to time down to and including November, 1879; the limitation being placed at 20 days, within which such appeals might be taken, during all of this time. Section 119, authorizing appeals within three months, first makes its appearance in the Code of 1881; and, having been the last enactment, it follows that the same must govern, and that the appeal was taken within the requisite time. Therefore the action of the superior court in refusing to dismiss the appeal was well founded.

The order aforesaid, awarding the contract for the county printing to the publisher of the *Islander*, was made on the 15th day of June, 1891, at a session of the board of commissioners then held; the same being an adjourned session from the regular May session of said board. Section 2936, vol. 1, of the Code, provides that the contract for county printing shall be let at the May session of the board, and section 2937 provides that it shall be the duty of the county auditor, at least five weeks, and not more than eight weeks, before the meeting of such board at the May term, to advertise for proposals for the public printing for the term of one year, which advertisement shall be inserted for four consecutive weeks in the official newspaper of the county, etc. This notice had not been published prior to the meeting of the board at its said May session, whereupon the commissioners directed a notice to be published that such bids would be received and entertained at the adjourned session of said May term, and that the same would be received up to 10 A. M. of the 15th day of June, 1891. The facts upon which the cause was tried in the superior court were agreed to by stipulation, and were as follows: That there were but two newspapers published in said San Juan county, being the newspapers before mentioned; that both of them submitted bids for the county printing to the board of commissioners; and that

both of said bids were within the limits as to prices prescribed by law. It further appears, beyond question, that the *San Juan Graphic* was the only newspaper published in said county for six months preceding the May session of said board, as provided by said section 2936. The *Islander* had been published in said county for a period of time less than three months prior to the letting of the contract, and was clearly ineligible to enter into such contract. The bid of the publisher of the *Islander*, for such county printing, however, being considerably lower than that submitted by the publisher of the *Graphic*, notwithstanding the provisions of the statute, the board of commissioners awarded the contract to the publisher of the *Islander*. Upon this state of facts the superior court entered a judgment setting aside the action of the board of commissioners, and directing them to proceed to relet the contract as provided by law. This was, in effect, directing the board to award the contract to the publisher of the *Graphic*. The board of commissioners allege that the action of the superior court was erroneous, because the board had no jurisdiction to act in the premises, in consequence of the notice not having been published at the time required by law, and that the action of the board in awarding the contract to the *Islander* was void. The respondent insists that the board cannot set up their own illegal action, and undertake to take advantage thereof. It is well settled, however, that the doctrine of estoppel does not apply, as against public officers acting in behalf of the public, but the point is not a material one in this case. The appellants do not seek to justify or uphold their action in awarding the contract to the *Islander*, but insist, for the reasons stated, that the superior court had no jurisdiction to render any judgment in the cause, and especially to direct the board to proceed to award the contract.

The determination of this point must depend upon the fact as to whether the failure to publish the notice at the prescribed time was fatal to the jurisdiction of the board. A number of authorities have been cited by appellants as supporting this proposition, but none of them are in point, when compared with the facts involved here. Ordinarily, where, as a prerequisite to the letting of the contract, a notice is required to be published, the notice must be published, in order to sustain the action of the board in entering into the contract. But in this case everything was accomplished by the publication of the notice at the time it was published that could have been accomplished had it been published previously. It appearing beyond all controversy that there were but two newspapers printed in said county, and that both of these newspapers submitted bids for the county printing, the object of the notice was fully attained. We do not think that the failure to give notice at the time prescribed ought to be held fatal. In fact, where the bids were received as fully and completely, and the rights of the public were as fully protected, without a notice, as the same could

have been with one, it seems to us that the failure to give any notice would not have been fatal. It is the policy of the law that some paper should be designated for the county printing, and this should not be defeated upon some mere technical ground, where the rights of the public have in no way been infringed. The object of giving a notice, in such cases, is that bids may be received from all competent parties, in order that the public may get the county printing done in a desirable paper at the lowest expense. While the statute provides that the contract shall be let to the best and lowest responsible bidder, it stands admitted here that the bid of the publisher of the Graphic was a competent one in all respects. The provision of the law requiring the notice to be published prior to the May session of the board, we think, should be treated as directory, and that the failure to publish the same at said time should not preclude the board from thereafter publishing notice. Matters over which the board have no control may prevent the giving of the notice at the time prescribed. The time is not the essential thing, but rather that the contract should be let.

In his appeal to the superior court the respondent filed a paper which he designated as a "complaint," setting up the facts, and the allegations therein were admitted to be true by the stipulation of the parties. In this complaint he prayed that the action of the board in awarding the contract to the publisher of the Islander should be set aside, and that the board should be compelled to proceed and relet the contract in accordance with law. It was somewhat in the nature of a mandamus to the board, to compel them to proceed and award the contract for the county printing to him, as the publisher of the Graphic; and upon the facts submitted he was entitled to this relief, as the said newspaper was in every way qualified, and the bid was a competent one, and the only possible competent one, under the law. So that the board of commissioners had no discretion in the premises, in any manner, but simply a ministerial duty to perform, under the facts submitted,—to award the contract for the county printing to the publisher of this paper. The board had no right or authority to entertain a bid from the publisher of the Islander. While this paper might have been otherwise competent, and fully as desirable a paper as was the Graphic, to publish the county printing in, in point of circulation and otherwise, yet the law has prescribed an arbitrary time during which such a newspaper must be published prior to the meeting of the board, and that time was fixed at six months. It is not questioned but that the legislature had authority to make this limitation, and consequently the board, at its meeting, had nothing to do, except to accept the proposition of the publisher of the Graphic, providing it had any authority at all to award the county printing at that time. We think it had authority, and that it was its duty to award the contract at said time, under the circumstances, and that the order of the superior court in directing them to

proceed to award the contract in accordance with the law was, in effect, directing them to award the contract to the publisher of the Graphic, which would have been a proper one to have made, the publication of that paper being still continued. Therefore the decision of the superior court is affirmed.

DUNBAR, C. J., concurs. ANDERS and STILES, JJ., concur in result. HOYT, J., dissents.

(6 Wash. 693)

#### MURRAY v. MEADE, Sheriff.

(Supreme Court of Washington. Feb. 7, 1893.)

PLEADING AND PROOF—ASSIGNMENT OF JUDGMENT—SURETY OF JUDGMENT DEBTOR—RELEASE OF LEVY BY SHERIFF.

1. Where evidence is admitted without objection on the ground of variance from the allegations in the complaint, the court, on motion for a nonsuit, ought to consider the complaint amended to correspond with the facts proven.

2. Payment of the full amount of a judgment and costs by a surety of the judgment debtor, in consideration of a surrender by the judgment creditor of all control over the judgment and the execution issued thereon, constitutes an assignment of the judgment and the execution to the surety.

3. Code Proc. § 760, which provides that so much of the judgment as remains unsatisfied may be prosecuted to execution for the use of the judgment debtor's surety who has made any payment which is applied on the judgment, preserves to the surety not only the judgment, but also the benefit of a levy on the judgment debtor's property under an execution issued on the judgment.

4. The levy on execution of sufficient property to pay the judgment does not divest a surety of the judgment debtor of all interest in the judgment, so as to render his subsequent payment of the judgment a voluntary payment, and to deprive him of all recourse against the sheriff for the latter's wrongful release of the levy.

5. A sheriff who is notified of the assignment of a judgment, and who is directed by both the judgment creditor and the assignee to proceed, for the assignee's benefit, with the sale of property levied on under execution issued on the judgment, is liable to the assignee for releasing the property and returning the execution unsatisfied, though he does so by the direction of the attorney of record for the judgment creditor, since a client has a right to control both his attorney and the sheriff.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by David Murray against A. A. Meade, sheriff, for false return of an execution unsatisfied. From a judgment for defendant, plaintiff appeals. Reversed.

Pruyn & Ready, for appellant. H. J. Suively, for respondent.

STILES, J. One Loudon, having commenced an action in the superior court of Kittitas county against Randall and Caruthers, partners, caused an attachment to be issued and levied upon certain personal property. Thereafter the plaintiff in this action, with another, executed and delivered to the sheriff a forthcoming bond, and the property was returned to the judgment debtors. After obtaining his judgment, Loudon issued an execution, which was delivered to the sheriff, who

was defendant in this action, and the sheriff levied upon property of the judgment defendants sufficient to pay the amount named in the execution. While the property levied upon was in the hands of defendant under the execution, the plaintiff paid into the hands of Loudon the sum of \$437.47, which was the full amount of the judgment and costs, then a lien upon the property in the hands of the sheriff. The plaintiff took from Loudon a document reading as follows: "Louden against Randall and Carruthers. To A. A. Meade: Please be directed and governed in all matters pertaining to the judgment and execution issued in this case by the direction of David Murray, and no one else." This paper plaintiff delivered into the hands of the sheriff, together with one signed by himself as follows: "Louden against Randall et al. To Sheriff A. A. Meade: You will proceed to sell the property levied upon under the execution issued out in this cause, and satisfy the judgment out of the property levied upon." The attorney for plaintiff, at the time that he delivered said notices to the sheriff, informed him of the transaction between Murray and Loudon, and further directed the sheriff to proceed and sell the property levied upon, and satisfy the execution. Subsequently the sheriff, under the direction of the attorney for Loudon in the original case, released the levy, and returned the execution into court unsatisfied. This action was brought against the sheriff for damages upon a false return, and the court below, after hearing the plaintiff's testimony, entered a nonsuit. The complaint contained the following allegation: "(5) On the 27th day of April, 1891, plaintiff, as surety, paid the execution creditor, Loudon, the full amount of the judgment, and at once gave defendant sheriff immediate notice of that fact, which was also done by Loudon, and defendant was required to proceed in all things further in the interest of this plaintiff, to retain the goods and expose them for sale." In the statement of facts we find the following, certified to by the court below as the proof introduced to sustain the foregoing allegation in the complaint: "On the 24th day of April, 1891, the above-named plaintiff in this case, to wit, David Murray, as surety on said bond to release said writ of attachment so levied upon the goods and chattels of the said J. B. Randall, as aforesaid, paid said George W. Loudon, the plaintiff in said execution, the sum of four hundred and thirty-seven & 45-100 dollars, said sum being the full amount of said judgment and costs rendered in said action, in consideration that the said George W. Loudon, the plaintiff in said execution, would surrender to the said David Murray control over the judgment and execution in said cause of Loudon against Randall & Carruthers, partners as the Ellensburgh Trading Company; that, in consideration of the payment of the said sum of four hundred and thirty-seven & 45-100 dollars by the said plaintiff in this action, the said George W. Loudon did surrender to the said David Murray control over said judgment and execution, and George W. Loudon signed the

following notice," etc. There was, perhaps, a variation between this proof and the allegation of the complaint of the payment of the judgment, but it would appear that the evidence showing the facts to be as they are stated in the statement of facts was admitted without objection, and, therefore, upon a motion for a nonsuit, the court ought to have considered the complaint amended to correspond with the facts proven. This suggestion does away with the point made by the respondent that the complaint did not state facts sufficient to constitute a cause of action.

The matters in controversy here are two: First, Did the transaction between Loudon and Murray amount to an assignment of the judgment and execution to the latter? Upon the facts as stated, we are constrained to hold that they do. The appellant maintains that, inasmuch as Murray was merely a surety, the moment that it is admitted that sufficient property of his principal had been levied upon to pay the judgment, the judgment was satisfied as against him, and that he had no further relation with the matter, and was a mere volunteer in paying any money to Loudon. If the facts showed a mere voluntary payment, the general doctrine of the authorities might perhaps sustain the position taken. *Freem. Ex'ns*, § 269; *Mulford v. Estudillo*, 23 Cal. 95; *Howerton v. Sprague*, 64 N. C. 451. Still our statute (Code Proc. § 730) has this to say in cases of this kind: "When any defendant, surety in a judgment, or special bail or replevin, or surety in a delivery bond or replevin bond, or any person being surety in any bond whatever, has been or shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, \* \* \* so much of the judgment as remains unsatisfied may be prosecuted to execution for his use." Against this statute it is urged, however, that it is not the execution which is preserved for the benefit of the surety, but the judgment only,—a refinement of the language of the statute which we do not think should be supported. If an execution has been issued, and property levied on thereunder, we see no reason why the surety should not have the benefit of the levy. The argument that, inasmuch as property sufficient has been levied upon to satisfy the judgment, the surety can have no interest in paying off the judgment, and therefore should be treated merely as an intermeddler if he does so, is not well sustained. It may be that the surety, through mere friendly feeling for the judgment debtor, may desire to postpone for a lawful time the sale under the execution, in order to give the debtor an opportunity to save his property from sacrifice, and that alone would be a sufficient motive for his paying the creditor the full amount of the judgment, and having himself subrogated in the place of the creditor; a thing which he might not do at all if immediately upon his payment the execution were necessarily to lapse, since there might be in the hands of the officer other subsequent executions which would thereby ob-

tain priority and perhaps cause the loss of all that he had paid. However this may be, as was before stated, it is our view that the facts of the transaction between Louden and Murray constitute an assignment from the former to the latter of all his rights under the judgment in execution, and that, when notice of this transfer had been given to the sheriff, he was bound to proceed with the execution as directed by Murray. This must be so, unless the next point made by the respondent is well taken, viz. that the sheriff was justified, after he had received the notices from Louden and Murray, in obeying the direction of Louden's attorney to return the execution unsatisfied. The authority of an attorney over an execution issued in a case wherein he has obtained a judgment extends beyond a doubt to the control of the execution, but it is not alone that may control the execution. The cases cited by respondent—*State v. Boyd*, 63 Ind. 428, and *Read v. French*, 28 N. Y. 293—are cases where the attorney's control of an execution had been exercised without any interference on the part of the execution plaintiff; and it may be that in New York an attorney has a larger measure of control of an execution than elsewhere, since in that state the attorney himself issues the execution without resort to the formal act of the clerk of the court. This appears from the case cited. But in the Indiana case it is said: "The attorney of the plaintiff has a right to control the service of an execution by virtue of his original retainer, and both the plaintiff and his attorney may authorize the sheriff to depart from the regular and ordinary course of executing it." That both attorney and client may direct the sheriff is sustained by *Crocker on Sheriffs*, § 412, and numerous cases there cited. In a case like the one at bar, where the sheriff is informed that the judgment has been assigned, and is directed by the execution plaintiff and his assignee in writing to proceed with the execution for the benefit of the assignee, and these directions remain unrevoked, whatever may be the authority of the attorney of the plaintiff before the assignment, the sheriff should not be excused when he so far departs from his instructions as to release the property in his hands, and return the execution unsatisfied. A client, unless the attorney has some interest in the judgment more than that involved in the making of the money upon an execution for the benefit of his client, has a right to control both his attorney and the sheriff. The judgment is reversed, and the cause remanded for a new trial in accordance with this opinion.

DUNBAR, C. J., and HOYT, ANDERS,  
and SCOTT, JJ., concur.

(5 Wash. 807)

BELLINGHAM BAY & B. C. R. CO. v.  
STRAND et al.

(Supreme Court of Washington. Feb. 7, 1893.)

COSTS ON APPEAL—MOTION TO RETAX.

1. A motion in the supreme court to retax costs of an appeal, made nearly eight months

after the judgment was rendered, and nearly six months after the remittitur and execution were issued, will not be entertained.

2. A motion to retax costs on appeal, which gives no notice of the particular items objected to, is too indefinite.

On motion to retax costs. Refused.

For former report, see 30 Pac. Rep. 144.

PER CURIAM. This is a motion to retax costs, and the motion is as follows: "Come now the above-named respondents, and respectfully petition the above-entitled court for an order retaxing the costs taxed by the clerk of the above-entitled court herein, on the ground and for the reason that said costs have been improperly taxed by the clerk, and on the further ground that said costs have been improperly allowed to the appellants by the clerk of this court." The judgment was rendered in this cause May 12, 1892, the remittitur issued July 30th, and execution issued August 18th, so that nearly eight months have elapsed since the opinion was rendered, and nearly six months since the execution was issued. Under the circumstances, the motion for retaxation of costs will not at this time be entertained by this court. Further, the motion is so indefinite that the opposite party has no notice of what particular items of costs are objected to. For these reasons the motion will be refused. The other questions raised in the discussion of the case we do not now pass upon.

(5 Wash. 686)

McCONNELL et al. v. KAUFMAN.

(Supreme Court of Washington. Feb. 7, 1893.)

ATTACHMENT—EXCESSIVE LEVY—EFFECT ON SHERIFF'S SALE — PURCHASE FROM ATTACHMENT DEBTOR.

1. Where an attachment is otherwise valid, the excessiveness of the levy by the sheriff will not render it void, even as to the excessive portion, so as to prevent the title from passing to the purchaser at the sheriff's sale, as against one claiming under the attachment debtor by a sale subsequent to the levy.

2. In the absence of a statutory provision prescribing the method by which to determine whether or not a levy under a writ of attachment is excessive, a mere demand on the sheriff, by the attachment debtor or his assignee, to release all but sufficient of the property levied on to satisfy the judgment, will not defeat the levy, so as to prevent title from passing to the purchaser at the sheriff's sale; the remedy of the attachment debtor or his assignee being by application to the court from which the attachment issued.

3. An order of court, directing the sale of attached property, made on motion of a creditor claiming under a levy subsequent to the sale of the property by the attachment debtor, is not invalid, as to the purchaser at such sale, where prior attachment creditors join in the motion, and the order of sale, in terms, recognizes the prior attachment.

4. Purchasers of attached property from the attachment debtor are chargeable with notice of the fact that the court may order its sale, as provided in Code Proc. § 303, unless they furnish bond to the sheriff for the release of the property, or unless they pay the claim of the attachment creditor; and notice of their rights, acquired by virtue of such purchase, given at the sheriff's sale under the attach-

ment, will not prevent the title from passing to the purchaser at such sale.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Theodore W. McConnell and another against David Kaufman for the conversion of a stock of goods claimed by plaintiffs under a bill of sale from the former owners, and by defendant by virtue of a sale under attachment issued against such former owners. From a judgment in plaintiffs' favor, defendant appeals. Reversed.

P. P. Carroll and Thomas R. Shepard, for appellant. Thompson, Edsen & Humphries, for respondents.

STILES, J. On December 28, 1889, the firm of McConnell, Parker & Co. had had their property attached by the sheriff of King county, at the suit of the Leak Glove Manufacturing Company, for the recovery of \$494.65. Two days later, and before any other attachments had been placed in the sheriff's hands, the plaintiffs in this action took from McConnell, Parker & Co. a bill of sale of the goods levied upon by the sheriff, and then in his hands. The plaintiffs thereupon notified the sheriff of the transfer of the property to them, and demanded that he set aside enough goods to satisfy his attachment, and release the remainder to them. This he refused to do, and the goods remained in his possession. Subsequently other attachments were delivered to the sheriff for levy, and they also were levied upon these same goods. In all, some seven or eight attachments were placed in the hands of the sheriff. At a subsequent date, upon a showing by attaching creditors that the property, which consisted of a stock of boots and shoes, was in great danger of deterioration in value by reason of its situation, which was in a tent, where it was greatly exposed to fire and dampness, the court ordered the sheriff to sell the entire lot, and hold the proceeds to await such judgments as might thereafter be entered in the attachment suits. Under this order the sheriff sold the property to the defendant in this action for \$2,500. At the sale the plaintiffs gave notice that they claimed to own the goods, and that any person buying them would get no title. This action is brought against the purchaser at the sheriff's sale for the value of the goods, less certain amounts either received by the plaintiffs themselves, or paid for their use. Upon the trial it appeared that the manner in which the plaintiffs obtained their claim to be the owners of the goods was as follows: On December 28, 1889, and for some time theretofore, McConnell, Parker & Co. had been indebted to the plaintiffs upon various notes, and, both before and after the attachment of the Leak Glove Manufacturing Company, plaintiffs had been pressing for a settlement of their demands. On the second day after the attachment was levied, it was agreed between plaintiffs and McConnell, Parker & Co. that the latter should sell and deliver to the plaintiffs the goods then in the sheriff's hands in consideration for the surrender to them of all of the evidences of in-

debtedness held by the plaintiffs, and in consideration of the plaintiffs' notes, payable at a future period, in the sum of \$2,190. It was also agreed by the plaintiffs that they would pay off and satisfy the claim of the Leak Glove Manufacturing Company, and the claims of certain other creditors of McConnell, Parker & Co. Plaintiffs endeavored to raise money to pay off the Leak Glove Manufacturing Company's attachment, but were unable to do so, and it remained unpaid until satisfied by the proceeds of the attachment sale. Subsequent to the sale of the goods by the sheriff, the attaching creditors obtained judgments against McConnell, Parker & Co.; and the Leak Glove Company's attachment was satisfied in full, and the remainder of the \$2,500 was paid on other judgments. These matters appeared from the plaintiffs' case, and at its conclusion the defendant moved the court to direct a verdict in his favor upon the following ground, viz.: "That by reason of the order read in evidence, directing the sheriff to make a sale of the property as in case of execution, under the attachments, and to hold and apply the proceeds according to subsequent judgments, the title of the purchaser at the sheriff's sale related back to the lien of the first attachment, which antedated the bill of sale and transfer from the attachment debtors to the plaintiffs, and the sale therefore passed a perfect title to the whole property." This motion the court denied, and inasmuch as, in our opinion, it should have been granted, and, if granted, would settle the entire controversy, we shall confine the discussion of the case to this single point.

For the sake of the argument, it will be conceded that a judgment debtor may make a valid sale of property in the hands of an officer under an attachment, so as to vest in the purchaser the title to the property, subject to existing attachment liens, so as to cut off any subsequent attachment creditors' rights; and it will be conceded, also, that in this case the levy of the sheriff was excessive. The amount of the Leak Glove Manufacturing Company's claim was only \$494.65, but, by the time the judgment was obtained, it took \$859.05 to satisfy it. The property was probably worth six or seven thousand dollars. Undoubtedly a debtor, in case of an excessive levy, is entitled to relief, and his successor in interest would be entitled to the same relief. But the question is whether, the attachment being a valid one, the excessiveness of the levy would under any circumstances render it void as to all, or any part, of the property levied upon, so that a sale under it would prevent the title passing to the purchaser, in whole or in part. In this case we have seen that the plaintiffs contracted with McConnell, Parker & Co. to pay off and satisfy the Leak Glove Company's attachment. This they did not do, nor had they any present ability to do so, except through the efforts which they might make, and did make, to borrow the money elsewhere, sufficient to carry out their agreement. Therefore the levy of the Leak Glove Manufacturing Company continued, unless the plaintiffs' act in de-

manding of the sheriff that he release all but sufficient of the goods to satisfy the attachment was sufficient to defeat the entire levy. The statute requires the sheriff, in attachment cases, to take and retain in his possession at least 50 per cent. more than the amount which the plaintiff in his affidavit claims to be due, (Code Proc. § 296;) but there is no provision of the statute specifying the method by which it can be determined whether a levy is excessive or not. Obviously, neither the debtor nor his successor in interest, in such a case, would have a right to set up his judgment as the criterion by which property should be released. Neither can the sheriff be held to make a selection which would bind the creditor, since if, in any such case, the sheriff takes upon himself to say when he has sufficient property, he will be liable to the attachment creditor if he fails to retain enough to meet the requirement of the statute. The only reasonable way that presents itself in such cases is that the debtor or his successor in interest should make an application to the court from which the attachment issued for relief. This was the proceeding taken in *Hughes v. Tennison*, 3 Tenn. Ch. 641. The sheriff, of course, must take his chance that his levy is so excessive as to become oppressive; but we are aware of no case which holds that the excessiveness of the levy, even if it amounted to oppression, would render the whole levy void, so that a sale would not pass title to the purchaser. Nor can it be said that the levy would be good as to the proper amount, and void as to the remainder; for the writ covers every article taken under it, until there is a specific release. Failing to take legal steps to reduce the amount of the levy, the debtor must be taken to have elected to rely upon his remedy against the sheriff for damages as for an excessive levy; and his vendee is in precisely the same position.

The next point is that the order made by the court for the sale of the goods was not made in the Leak Glove Manufacturing Company's case, but was made in another case, which was the last of the series of attachments issued by the creditors of McConnell, Parker & Co. The fact about that is, however, that, although the motion for the order of sale was made and the order was entered in another case, the Leak Glove Manufacturing Company, and all the other attaching creditors of McConnell, Parker & Co., were brought into court, and actually joined in moving the court to make the order, and the order, in terms, recognized all of the attachment cases, including that of the Leak Glove Manufacturing Company, and directed the property to be sold, and the proceeds held to await judgments. At most, this could only be said to have been an irregular order. The statute (Code Proc. § 303) provides: "Whenever it shall be made to appear satisfactorily to the court or judge that the interest of the parties to the action will be subserved by a sale of any attached property, the court or judge may order such property to be sold in the same manner as like property is sold under execution." Now we take it that the

plaintiffs, having bought from McConnell, Parker & Co. after the property was attached, were bound to know that unless they protected themselves by furnishing the sheriff with a bond to release the goods entirely, or unless they paid the Leak Glove Manufacturing Company's claim, the court was liable, in the ordinary course of proceeding, to make an order for the sale of these goods. They bought with notice that such a transaction might take place, and were fully bound by the order it made, since it could not be admitted for a moment that a debtor might defeat the power of the court to make the order by transferring his title to the property attached after a writ had been levied. The sheriff sold under the order thus made, and the plaintiffs appeared at the sale, and gave notice which informed purchasers that no title to these goods would be obtained by a purchaser at that sale. This information was untrue, as we have seen, since the lien of the Leak Glove Company's attachment, if not the other liens, continued. The sale made was neither void, nor voidable, but passed the title to the defendant at the price which he bid; and, if there were irregularities in connection with it, it is the sheriff that is responsible, and not the defendant. Inasmuch as the error made was in refusing to direct a verdict for defendant, there must be a new trial of the case, unless the appellant will consent to the entry of a nonsuit, instead, within 30 days from the filing of this opinion. Judgment reversed, with costs to appellant.

HOYT, ANDERS, and SCOTT, JJ., concur.

(5 Wash. 704)

WHEELER et al. v. SMITH, (PUGET SOUND LIME CO., Intervener.)

(Supreme Court of Washington. Feb. 8, 1893.)

MINING CLAIMS—LIMESTONE DEPOSIT—SCHOOL LAND.

1. Land containing a deposit of limestone, entirely devoid of ore, cannot be located as a mining claim, either lode or placer, since the mineral land laws of the United States were enacted for the purpose of securing to miners upon public lands the title to "minerals" discovered by them. *Freezer v. Sweeney*, 21 Pac. Rep. 20, 8 Mont. 508, disapproved.

2. Act Cong. June 3, 1878, which authorizes the sale, in Washington, Oregon, California, and Nevada, of public land chiefly valuable for stone, and which expressly prohibits the acquisition of mineral land under such act, shows an intention by congress to prohibit the acquisition of stone lands under the mineral land laws.

3. Under Act Cong. March 2, 1853, § 20, which reserves sections 16 and 36 in each township to the Territory of Washington, to be applied to the common schools, followed up by Act Cong. Feb. 22, 1889, § 10, making a present grant of sections 16 and 36 to the state of Washington, to take effect on its organization, no location under the mineral laws can be made by private persons on any such sections after they have been surveyed.

Appeal from superior court, San Juan county; John R. Winu, Judge.

Action by Lee Wheeler and L. H. Wheeler, plaintiffs, and the Puget Sound Lime Com-

pany, as intervener, against Edward S. Smith, to determine a controversy as to a mining claim. From a judgment awarding the claim to the intervener, defendant appeals. Reversed, with order to enter judgment decreeing neither party entitled to the claim.

Greene & Turner, for appellant. Jenner, Legg & Williams and Tustin, Gearin & Crews, for respondents.

STILES, J. Edward S. Smith, the defendant, in 1884 located a lode mining claim upon ground situated at the S. E. corner of section 36, in township 37 N., range 3 W., and at the S. W. corner of section 31, in township 37 N., range 2 W., under the provisions of the mining laws of the United States. Subsequently, and in the same year, he took the necessary steps to obtain a patent for the land described in his claim; but upon reaching the general land office it was ascertained, in September, 1886, when his application came to be examined there, that the deputy mineral surveyor, in writing up his field notes of his survey, had located the claim in ranges 1 and 2 west, instead of 2 and 3 west, and for that reason the commissioner of the general land office peremptorily ordered a cancellation of the entry, and upon appeal to the secretary of the interior that officer, in 1888, modified the order of the commissioner in these words: "Under these circumstances, and inasmuch as the mistake in description was a clerical error, the entryman should be allowed to make entry for the land he claims upon showing that he has given proper new notices, and furnished a new plat and field notes properly describing the land." Upon the receipt of this modified order at the Seattle land office, the claimant, Smith, caused new papers to be prepared, and had taken the steps which the statute requires in the way of notice to the public, when the plaintiffs filed an adverse claim in the land office, and in pursuance thereof commenced this action.

At the threshold of the case we will say that, although the disposition we find it necessary to make of it would not absolutely require a decision of the point, yet it is our view that under no such circumstances should the claimant have been put to the trouble and expense of entirely new proceedings to entitle him to a patent in case his claim had been approved. The error made was not his error, but that of a deputy mineral surveyor of the United States, whom he was by law compelled to employ to make the survey. There seems to have been no possible reason why the mistake made by the deputy should not have been discovered in the surveyor general's office, and there corrected, before the plats and field notes were delivered to the claimant for filing in the land office and posting on the claim. The land upon which this claim was located was a part of Orcas Island, over which the public surveys had been extended. The description of the location notices showed that it was situated on the west shore of the island, and that the initial point was but 300 feet from the waters of President's channel,

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which was a fixed and prominent natural object or landmark, so that the slightest reference to the township plats would have shown the error made by the deputy. The notices posted and published clearly showed what the location actually was upon the ground, and there was no reason why these could not have been accepted, and the correction made in the land office, without any further proceedings. *Duryea v. Boucher*, 67 Cal. 141, 7 Pac. Rep. 421, *Yore v. Murphy*, (Mont.) 25 Pac. Rep. 1039. Under ordinary circumstances, therefore, we should hold that the plaintiff's claim, initiated nearly five years after the completion of the necessary proceedings in the land office, ought not to be entertained in a suit waged in pursuance of the filing of an adverse claim under Rev. St. U. S. § 2326. But this is not an ordinary mining claim, and its disposition depends upon other matters.

The location of the original claim was called the "Orcas Island Lime Mine," and it was said to be located "along the course of this lead, lode, or vein of mineral-bearing quartz." The other steps taken before application for patent were in accordance with the United States statutes governing the disposition of mineral lands. The plaintiffs, Wheeler, located over the same land two claims which they called "placer mining claims." Their notices were to the effect that they had discovered, located, and taken possession of a certain deposit of limestone, situated on portions of section 36, in township 37 N., range 3 W., and section 31, township 37 N., range 2 W., in San Juan county, Wash. The main contest between the parties was as to whether the land included within these claims was locatable as a lode mining claim or as placer mining claims. The evidence shows, and it is not disputed, that along the line between sections 36 and 31 there was a large deposit of limestone, which, as one of the expert witnesses in the case described it, had been pushed up through the mass of the country rock by some convulsion of nature in the form of what might be commonly termed a ledge of rock. It was entirely devoid of ore. Plaintiffs maintain that because of the absence of ore it was locatable under the mining laws as a placer mine, although in fact it was what is termed in mining parlance "rock in place." There are several valid reasons why we must hold both parties in error, and that no valid location could be made of such land under the mineral laws, and that, therefore, neither party is entitled to a judgment in his favor.

1. The mineral land laws of the United States were enacted for the purpose of securing to miners upon the public lands the title to mineral discovered by them, and a sufficient quantity of the land in which mineral is discovered as will enable them to prosecute the work of development and production successfully. Mines, as known to those laws, embrace nothing but deposits of valuable mineral ores, and do not include mere masses of nonmineralized rock, whether rock in place or scattered about through the soil. On this point both sides appeal with confidence to the case of *U. S. v. Iron Silver Min. Co.*,



128 U. S. 673; 9 Sup. Ct. Rep. 195, in which case, on page 679, 128 U. S., and page 197, 9 Sup. Ct. Rep., the court tersely defined the two classes of claims as follows: "By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place,—that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. By 'veins' or 'lodes,' as here used, are meant lites or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock." Each party maintains that the language used which is favorable to the other side was dictum of the court, but, whether it be dictum or not, the substance of the language constitutes a concise definition of placer and lode claims as derived from innumerable decisions of the courts of the United States and of the mining states and territories. In our judgment, a mining claim, whether lode or placer, is not established or entitled to be patented under the mineral laws of the United States unless it contains some of the metals for which mining works are prosecuted. In this connection we are not unmindful of the fact that several decisions of the land office and of the interior department have been promulgated, which hold that limestone lands may be patented as mineral claims; but, as we view these decisions, they are such strained constructions of the mineral laws as are unwarranted by their terms and by the spirit and intent of their enactment. The case of *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. Rep. 20, is also cited in support of the proposition that a rock quarry can be located as a placer claim, and that case expressly so holds. The argument there is that because the term "valuable deposits" is used in section 2320, and "all forms of deposit" in section 2329, therefore, inasmuch as limestone is a deposit, it must embrace quarries of rock valuable for building purposes. But in so deciding we think the court entirely overlooked the fact that the mining laws were intended to embrace only deposits of ore, and that the very term "mineral" excludes the idea of any nonmineralized deposit. Another consideration which seems to have weighed with the Montana supreme court was that, unless rock quarries could be embraced within the description of placer mining claims, there was no law of the United States under which lands embracing such deposits could be acquired by citizens. What this court said in *Johnston v. Harrington*, 31 Pac. Rep. 316, concerning stone taken from public lands, referred to the policy of the government in permitting stone as well as other far more valuable "minerals" to be devoted to private use, in the absence of positive prohibitory statutes. But no title to the land in which even the most precious of minerals were found was ever permitted to pass to the miner until the mining laws of 1866 were enacted. *Johnston v. Harrington* upheld the title to the stone when

severed, but had nothing to do with the land from which it was quarried, except by way of argument and illustration. This last consideration leads to the next point, viz.:

2. Whatever may be the construction placed upon the mining laws elsewhere, it is more than doubtful if it would have any application in the state of Washington. The act of congress of June 3, 1878, commonly known as the "Timber and Stone Act," provided for the sale of land chiefly valuable for stone in Washington, Oregon, California, and Nevada. The proviso to the first section of that act is as follows: "Provided, that nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said states under any law of the United States donating lands for internal improvements, education, or other purposes." By the second section the claimant was required to make oath that the land sought to be obtained was chiefly valuable for stone; that it was uninhabited; that it contained no mining or other improvements excepting for ditch or canal purposes, where any did exist, excepting such as were made by or belong to the applicant, nor any valuable deposit of gold, silver, cinnabar, copper, or coal; that the applicant under that act did not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any contract or agreement with any person whatever whereby the title which he might acquire from the United States should inure in whole or in part to the benefit of any person excepting himself. These provisions are entirely inconsistent with the idea that such lands as are chiefly valuable for stone could be taken up under any mining law. It has always been recognized as the rule that, in grants of land by the government to the states for educational or other purposes, those which contained any known mineral deposits are excepted from the same. Yet this act shows that congress supposed stone lands to be selectable by the states, and debars the taking up of deposits of stone in any land selected by them; and the affidavit required is substantially the usual affidavit which is required to be made by all entrymen of agricultural lands, to the effect that the land is nonmineral, and is not sought to be entered for speculation.

3. There is still another ground for objection to a part of these entries even under the timber and stone act, viz. one of the sections upon which this stone is found is section 36, and it appears that at all times when these parties were attempting to locate their claims the lands were surveyed. The act of March 2, 1853, entitled "An act to establish the territorial government of Washington Territory," provided as follows: "Sec. 20. And be it further enacted, that when the lands in said territory shall be surveyed under the direc-

tion of the government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said territory." This section had been followed up by section 10 of the enabling act, approved February 22, 1889, before the plaintiffs' placer locations were made, making a present grant of sections 16 and 36 to the state, to take effect as soon as the state was organized. This third point was not suggested by counsel on either side, but, in view of the interest of the state in these lands, we deem ourselves justifiable in adducing it as one of the reasons why these claims should not be sustained. The judgment of the superior court will be reversed, and the case remanded, with instructions to enter a new judgment, decreeing neither party to be entitled to the possession of the lands in question; respondents to pay costs both in the superior court and in this court.

DUNBAR, C. J., and SCOTT, ANDERS, and HOYT, J.J., concur.

(5 Wash. 703)

#### HANNAN v. GROSS et al.

(Supreme Court of Washington. Feb. 8, 1893.)

NONSUIT—FAILURE TO PROVE DAMAGES—ASSAULT—EVIDENCE.

1. In an action for assault, where plaintiff's evidence is that one of the defendants seized her by the shoulder, struck her, called her foul names, choked her, and kicked her, and that the other defendant belabored her with an umbrella, it is error for the court to direct a nonsuit on the ground that there is no proof of the amount of damages.

2. In an action for assault, evidence as to plaintiff's condition the following morning is admissible.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Mary Hannan, nee Mary Klint, against Ellis H. Gross and Johanna Gross, for assault. At the close of plaintiff's testimony the court granted a nonsuit, and then ordered the jury to find for defendants. A new trial was denied, and plaintiff appeals. Reversed.

Plaintiff's evidence was to the following effect: November 5, 1891, Mary Klint, being in the employment of Ellis H. Gross and Johanna Gross as a domestic, notified Mrs. Gross that she was intending to leave. Mrs. Gross angrily ordered her to leave, threatening her with a whipping. She left the house, and while on a public street was called back by Ellis H. Gross, to get her pay. Entering the kitchen, Gross seized her by the shoulders, began kicking her, choking her, and beating her; Mrs. Gross, with umbrella in hand, whipping her over the back and shoulders. She was then put out, and her hand satchel thrown through the window to her.

Taylor & McKay, for appellant.

DUNBAR, C. J. We are at a loss to understand on what theory of the law the

jury in this case was instructed to find for the defendants. If it was, as asserted by appellant, based on a construction of the opinion of this court in the case of Dray Co. v. Hofer, 2 Wash. 45, 25 Pac. Rep. 1072, the scope of that opinion was wholly misunderstood by the court. The witness testified that Gross seized her by the shoulders, struck her, called her foul names, choked her, and kicked her until her body was black and blue, and that Mrs. Gross belabored her with an umbrella. If this testimony be true,—and it must be taken to be true for the purposes of this case, not having been disputed,—it is plain that actual compensatory damages should follow. The proof of the amount of damages is not necessary to obtain a verdict. There has been an infraction of a legal right. This proposition established, in contemplation of law there is injury, and damages follow as a conclusion of law. This proposition is so elementary that a citation of authorities seems to us to be unnecessary. The court also erred in not allowing the witness Matilda Anderson to testify as to the condition of the plaintiff on the morning after the alleged injury was inflicted. The judgment is reversed.

SCOTT, HOYT, ANDERS, and STILES, J.J., concur.

(5 Wash. 763)

#### ST. PAUL & T. LUMBER CO. v. BOLTON et ux.

(Supreme Court of Washington. Feb. 17, 1893.)

MECHANICS' LIENS—PRIORITIES—BOND FOR DEED—NOTICE.

1 Hill's Code, § 1671, provides that the owner of land who has not contracted for the construction of a building thereon can prevent a lien on the land by posting a notice that he will not be responsible for improvements placed thereon. Section 1686 provides that liens for materials shall be preferred to mortgages or other incumbrances attaching subsequent to the time when the materials were furnished, or before, if the mortgage was unrecorded, and the lienholder for materials had no notice of it when the materials were furnished. Held, that where a person purchases land by taking a bond for a deed, duly recorded, and erects a building thereon, the owner of the legal title, though he has not posted the notice referred to in section 1671, has a lien on the land superior to liens for materials furnished subsequent to the recording of the bond, since such owner stands in the same position as if he had conveyed the land outright, and taken a mortgage back, and since the purchaser of the bond title, and not the owner of the legal title, is the owner referred to in section 1671.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by the St. Paul & Tacoma Lumber Company against William B. Bolton and another to enforce a mechanic's lien on property of defendants. There was a decree in favor of plaintiff, and defendants appeal. Reversed.

M. J. Clifford, for appellants. Griggs & Lockwood, for respondent.

DUNBAR, C. J. The appellants were the owners of a tract of land about six miles from the city of Tacoma, having water front on Puget sound. On the 15th

day of July, 1890, they sold 24½ acres of the land to Marie J. Shannon and Etta T. Cantara, for the sum of \$7,500, giving them a bond for a deed to the premises, and putting them in possession. Shannon and Cantara paid \$1,500 when the bond was delivered, and \$500 a few months later, but paid nothing further. By the terms of the bond a deed was to be executed when the land was fully paid for, and a house erected thereon, to cost not less than \$2,500. The bond was properly recorded soon after its execution, and before the building on the land was commenced. Soon after the bond was recorded, Shannon and Cantara contracted for and began the erection of an hotel on a part of the 24½ acre tract, and ordered materials for the building from the respondent, and after the work had been going on for a time, and a large amount of materials had been delivered to and used in the building, it was abandoned, and left in an unfinished state. Respondent thereupon filed its notice of lien, and this action is taken to determine the rights of the company as against Bolton and wife, the appellants herein. The statement of facts in the case admits that the lien notice is technically sufficient, and that it was properly filed and recorded, and that the amount of the claim is correct. It is agreed that the Boltons were not parties to the contract for building the house, unless they are made so by construction of law, and that their only liability, if any, arises out of the execution of a bond for a deed, and giving possession to Shannon and Cantara thereunder. The superior court ruled in favor of the plaintiff, and decreed the foreclosure of the lien and sale of 10 acres of the property to satisfy the same.

This case involves the construction of chapter 4 of 1 Hill's Code, a chapter in relation to liens of laborers and material men upon lands and buildings. It is not claimed that there is a special provision of the statute which would subject the interest of the appellants to a lien in this case affirmatively, but that such subjugation is implied in section 1671, which provides that, "should the owner or owners of any land desire to prevent the lien from attaching as herein provided for in cases where he or they have not themselves contracted for the construction, alteration, or repair of the works mentioned in section 1663, \* \* \* he or they may do so by giving a notice in writing, posted in some conspicuous place upon said land or improvement, to the effect that he or they will not be responsible for said improvement; said notice to be posted within ten days after said owner or owners come to a knowledge of the making of said improvement;" and it is contended that the owner designated in such section is the owner of the legal title. Such an implication would doubtless fairly attach if section 1671 were construed only with reference to section 1663, which provides who shall be entitled to a lien; but construing it with reference to section 1665, which provides that "the land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be re-

quired for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien if, at the commencement of the work or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered, or repaired; but, if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien,"—it becomes apparent that the owners spoken of in section 1671 are the same persons referred to in section 1665. In other words, section 1671 does not give a lien on any interest that was not given by section 1665, but simply provides a way by which persons owning interests described in that section can avoid the attachment of the lien where they have not themselves contracted for the construction, alteration, or repair of the works mentioned in section 1663. Under the authorities, and in accordance with the rules of common sense, Bolton and wife stand in the same relation to this land and to Shannon and Cantara as if they had bought the land outright, and given a mortgage back for security. The bond is simply a different form of security which some people prefer to a mortgage; but its object is the same, and in equity the parties stand in exactly the same position relatively as if they had taken the other form of security. "There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure payment." Jones, Liens, § 1108. The same principle is substantially announced in *Thorpe v. Durbon*, 45 Iowa, 192; *Boone v. Chiles*, 10 Pet. 224; and *Shelton v. Jones*, (Wash.) 30 Pac. Rep. 1061. Then, if that proposition be conceded, here is a prior incumbrance, and section 1666 provides that "the liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." The bond in this case was recorded. It is, then, a prior lien with notice, and cannot be subjected to the lien of respondent. It is true, as respondent's counsel argues, that decisions which are based on statutes essentially different from ours are of little assistance in construing our statute. But, outside of any authority, the terms of our statute forbid the construction contended for by respondent. It is contended by respondent that the statute was construed in his favor by this court in *Harrington v. Miller*, (Wash.) 31 Pac. Rep. 325; and, if counsel's segregated quotation from the opinion in that case were construed alone, it would probably bear that interpretation; but the broad statement there made, that the reputed owner meant the owner of the legal title, was made

with reference to the circumstances of the case then under consideration. In that case it was claimed that the deed was in reality a mortgage, and the court held that for the purposes of foreclosure the parties were properly designated as the "owners." But the court in that case goes on to say: "It has even been held that parties who have contracted for the purchase of property, and entered into possession, and made improvements, are, so far as the vendee's interests are concerned, 'owners,' under the mechanic's lien laws;" citing *Phil. Mech. Liens*, (2d Ed.) 69, and *Institution v. Lowe*, 1 B. Mon. 258, where it was held that a purchaser of land on a vendor's lien so reserved in the deed for the whole of the purchase money was the owner. We do not think that, under any reasonable construction of our statute, the interest of Bolton and wife can be subjected to respondent's lien, and the judgment is therefore reversed.

ANDERS, STILES, HOYT, and SCOTT, JJ., concur.

(5 Wash. 665)

**MANSFIELD v. FIRST NAT. BANK OF WHATCOM** al.1

(Supreme Court of Washington. Feb. 6, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUDULENT CONVEYANCES—KNOWLEDGE OF CREDITORS—POWERS OF ASSIGNEE—ATTACHMENT.

1. The assignment law of 1800, (1 Hill's Code, §§ 2741-2755,) relating to assignments for the benefit of creditors, repeals the insolvent law of 1881, (1 Hill's Code, §§ 2756-2793,) relating to the same subject-matter.

2. Plaintiff's assignor, being under an indebtedness to defendant bank, evidenced by a note which he had renewed several times, informed defendant of his insolvency, and to secure defendant executed a note payable on demand, secured by a mortgage on his stock of goods, to be substituted for the old note, which would not fall due for some months. Held, that defendant was not a purchaser in good faith, such transaction being a fraud on other creditors.

3. Under 1 Hill's Code, § 2753, providing that assignees shall have full power to dispose of all the estate the debtor had at the time of the assignment, and to sue for and recover everything belonging to such estate, the assignee may recover back property conveyed in fraud of creditors, even though the grantee had taken possession of such property before the assignment was made.

4. Where an assignment for the benefit of creditors has been made, the assigned property is in custodia legis, and is not subject to attachment by a creditor on the ground of fraud, even though the assignee had not reduced the assigned property to his possession at the time the attachment was levied.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Aug. Mansfield, assignee of Burrows & Anderson, against the First National Bank of Whatcom and R. L. Sabin, to recover possession of property assigned him by Burrows & Anderson for the benefit of creditors. There was judgment for defendants, and plaintiff brings error. Reversed.

Bruce & Brown, for appellant.

Rehearing denied. See 32 Pac. Rep. 999.

Cox, Teal & Minor and Kerr & McCord, for respondent Sabin.

An assignment under the act is voluntary, and creditors of the assignor can attack the assignment as fraudulent. See *Hahn v. Salmon*, 20 Fed. Rep. 801, 808; *Dawson v. Sims*, 14 Or. 561, 566, 13 Pac. Rep. 506; *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. Rep. 524. The assignment is a common-law assignment, except so far as the common-law rule is modified by statute. See *Hahn v. Salmon*, 20 Fed. Rep. 807, 808. The assignment under this act only confers on the assignee the rights possessed by the assignor at the time of the making of the assignment. See *Hahn v. Salmon*, Id. 807; *Gammons v. Holman*, 11 Or. 284, 3 Pac. Rep. 676; *Prouty v. Clark*, 78 Iowa, 55, 57, 34 N. W. Rep. 614. Nearly every state has some provisions regulating assignments for creditors, and unless there is an express power conferred on the assignee to contest and impeach, on behalf of the creditors, fraudulent transfers made by the assignor, the assignment confers no other power than that possessed by the assignor. See *Hahn v. Salmon*, 20 Fed. Rep. 807; *Burrill, Assignm.* p. 590, and cases cited; *Francisco v. Aquilro*, (Cal.) 29 Pac. Rep. 495; *Wakeman v. Barrows*, 41 Mich. 363, 2 N. W. Rep. 50; *Heineman v. Hart*, 55 Mich. 64, 66, 20 N. W. Rep. 792; *Bank v. Payne*, 88 Ky. 446, 466, 8 S. W. Rep. 856; *Rice v. Frayser*, 24 Fed. Rep. 460; *Helm v. Gilroy*, 20 Or. 517, 26 Pac. Rep. 851; *Hawks v. Pritzlaff*, 51 Wis. 160, 7 N. W. Rep. 303; *Heinrichs v. Woods*, 7 Mo. App. 236. An assignee under the Washington statute has no power to have fraudulent transfers of his assignor set aside, having only the powers of his assignor. See *Code Wash.* § 2753. The chattel mortgage is good as against the mortgagors.

(2) The right of Sabin (or Dawson, to whose interest Sabin succeeded) to attach, and to equitable relief. Property fraudulently assigned or transferred by a debtor is subject to attachment in the hands of his voluntary assignee or transferee, by a creditor defrauded by such transfer or assignment. See *Hahn v. Salmon*, supra; *Dawson v. Sims*, supra; *Bump, Fraud. Conv.* (3d Ed.) pp. 460, 461; *Hess v. Hess*, 117 N. Y. 306, 308, 22 N. E. Rep. 956.

Cole & Romaine, for respondent bank.

As to whether the mortgage is such a preference as is prohibited by our assignment law, see *Helm v. Gilroy*, (Or.) 26 Pac. Rep. 851; *Kingman v. Loyer*, 40 Ohio St. 109; *Tucker v. Clahy*, 12 Pick. 22; *Clark v. Bartlett*, 50 Wis. 543, 7 N. W. Rep. 663; *Lacker v. Rhoades*, 51 N. Y. 641; *Flower v. Cornish*, 25 Minn. 473. That fraud can never be presumed, see *Burrill, Assignm.* p. 473, § 340; *End. Interp. St.* p. 202, § 145; *Davis v. Scott*, (Neb.) 34 N. W. Rep. 353, reference being made to the notes. *Landauer v. Vietor*, (Wis.) Id. 229, with notes, and cases there cited; *Bolles v. Creighton*, (Iowa,) Id. 815; *McClurg v. Lecky*, 3 Pen. & W. 83; *Kennedy v. McKee*, 142 U. S. 606, 615, 12 Sup. Ct. Rep. 303; *Moss v. Humphrey*, 4 G. Greene, 443; *Boltz v. Engon*, 34 Fed. Rep. 445, 446; *Rice v. Frayser*, 24 Fed. Rep. 460; *Stickney v. Crane*, 35 Vt. 89. The levy

of a writ of attachment creates a specific lien on the property. See *Drake, Attachm.* (6th Ed.) § 224, and cases cited note 6; *Peck v. Jenness*, 7 How. 612, 619; *Hervey v. Champion*, 11 *Humph.* 569; and authorities cited under next preceding point. This attachment lien gives the party acquiring it a standing in a court of equity to maintain a bill to set aside fraudulent conveyances of the property so attached. See *Arms Co. v. Swarts*, 2 Wash. T. 412, 417, 7 *Pac. Rep.* 859; *Scales v. Scott*, 13 *Cal.* 77; *Conroy v. Woods*, *Id.* 626; *Hunt v. Field*, 9 N. J. Eq. 36, 39, overruling *Melville v. Brown*, 16 N. J. Law, 364; *Curry v. Glass*, 25 N. J. Eq. 108; *Stone v. Anderson*, 26 N. H. 506, 516; *Sheafe v. Sheafe*, 40 N. H. 518; *Cogburn v. Pollock*, 54 *Miss.* 639; *Hale v. Chandler*, 3 *Mich.* 531; *Ward v. McKenzie*, 33 *Tex.* 297, 315; *Kelly v. Dill*, 23 *Minn.* 435, 439; *Dawson v. Sims*, *supra*; *Hahn v. Salmon*, *supra*; *Goode v. Garriety*, 75 *Iowa*, 713, 716, 38 N. W. Rep. 150. In New York there is an apparent conflict on this question, but the later authorities sustain the jurisdiction. *Falconer v. Freeman*, 4 *Sandf. Ch.* 565; *Greenleaf v. Mumford*, 80 *How. Pr.* 30; *Rinckey v. Stryker*, 28 N. Y. 45; *Frost v. Mott*, 34 N. Y. 253; *Greenleaf v. Mumford*, 19 *Abb. Pr.* 469; and *Hess v. Hess*, 117 N. Y. 308, 22 N. E. Rep. 956,—affirm the jurisdiction, while *Greenleaf v. Mumford*, 30 *Barb.* 549, and *Brooks v. Stone*, 19 *How. Pr.* 395, deny the jurisdiction. The case of *Thurber v. Blanck*, 50 N. Y. 80, is not in point, as no actual levy was made; and the case of *Hess v. Hess*, 117 N. Y. 308, 22 N. E. Rep. 956, draws the proper distinction between 28 and 34 N. Y. and 50 N. Y. See, also, sustaining the jurisdiction of equity, *Drake, Attachm.* (6th Ed.) § 225; *Bump, Fraud. Conv. p.* 536; *Wade, Attachm.* § 33. All the proceedings in the assignment under consideration were had under the "Act relating to estates of insolvent debtors," approved March 6, 1890. There was no order of the judge, no "stay of proceedings," but simply the transfer of the property of Burrows & Anderson to Mansfield; and the very object of giving equity jurisdiction, by reason of a lien of attachment, is to remove fraudulent transfers made before the attachment. See *Drake, Attachm.* § 225; cases cited *supra*. The attachment law of Oregon, and other states whose decisions have been cited, sustaining the foregoing points, require no greater proof of claim than Washington. See *Hill's Code Or.* § 149; *McClain's Ann. Code Iowa*, §§ 4164-4176; *Gen. Laws N. H. c.* 224; *Code Civil Proc. Cal.* § 538; *Code Miss.* §§ 2414, 2415; *Revision N. J. p.* 42; *Sayles' Civil St. Tex.* tit. 9, c. 1; *St. Minn.* p. 551, pars. 145, 147. But, so far as the appellant Aug. Mansfield is concerned, the appellant Sabin has a right to defend his taking the property, in the suit brought by the assignee under the writ of attachment, on the ground that the transfer to him (Mansfield) was fraudulent. See *Hess v. Hess*, 117 N. Y. 306, 308, 22 N. E. Rep. 956; *Thurber v. Blanck*, 50 N. Y. 80, 86.

(3) The validity of the assignment. If a debtor, in making a general assignment, fails to convey all of his property, the assignment is fraudulent as to creditors;

and this includes individual property of partners where an assignment is made by a partnership. See *Moss v. Humphrey*, *supra*; *Kennedy v. McKee*, *supra*; *Clarke v. Figgins*, 27 W. Va. 663, 674; *Hubbard v. McNaughton*, 43 *Mich.* 221, 5 N. W. Rep. 293; *Simmons v. Curtis*, 41 *Me.* 373, 379; *May v. Walker*, 35 *Minn.* 194, 28 N. W. Rep. 252; *Wyles v. Beals*, 1 *Gray*, 233, 236; *In re Allen*, 41 *Minn.* 430, 433, 43 N. W. Rep. 382; *Donoho v. Fish*, 58 *Tex.* 164. Any act by an insolvent debtor in contemplation of insolvency, made with intent to thwart the law, is a fraud on the law, and the assignment is fraudulent and void. See *Hahn v. Salmon*, *supra*; *Livermore v. McNair*, 34 N. J. Eq. 478; *Berry v. Cutts*, 42 *Me.* 445; *Aaronson v. Deutsch*, 24 *Fed. Rep.* 465, 466. An assignment in violation of the statutes is fraudulent and void. See *Rice v. Frayser*, 24 *Fed. Rep.* 460. An assignment may be made by several instruments. See *Burrill, Assignm.* (4th Ed.) § 128; *Van Patten v. Burr*, 52 *Iowa*, 518, 521, 3 N. W. Rep. 524. And where a debtor contemplates making an assignment under an act for the equal distribution of his estate, but wishes to prefer a creditor, and with this intent, and in pursuance of this design, makes a mortgage securing such creditor, and, carrying out the original design and intent, afterwards makes an assignment, they will be deemed in law one transaction. See *Burrill, Assignm.* (4th Ed.) § 128; *Van Patten v. Burr*, *supra*; *Hahn v. Salmon*, *supra*; *Winnier v. Hoyt*, 66 *Wis.* 227, 28 N. W. Rep. 380; *Livermore v. McNair*, 34 N. J. Eq. 478; *Berry v. Cutts*, 42 *Me.* 445; *Perry v. Holden*, 22 *Pick.* 269; *Kellogg v. Root*, 23 *Fed. Rep.* 525, 528; *Doggett v. Herman*, 16 *Fed. Rep.* 812, 815; *Preston v. Spaulding*, 120 *Ill.* 203, 221, 10 N. E. Rep. 903. Assignments giving preferences which are not authorized by statute are construed as fraudulent and void as to creditors. See *Kerr, Fraud & M.* 285; *Van Patten v. Burr*, *supra*; *Hahn v. Salmon*, *supra*; *Berry v. Cutts*, *supra*; *Doggett v. Herman*, *supra*; *Livermore v. McNair*, *supra*; *Winnier v. Hoyt*, *supra*; *Bonns v. Carter*, 20 *Neb.* 566, 31 N. W. Rep. 381.

STILES, J. On the 6th of January, 1891, the firm of Burrows & Anderson borrowed a thousand dollars from the First National Bank of Whatcom, to secure the payment of which they gave the bank their note due in 60 days. On March 10th they gave a renewal of the note, and on May 12th a second renewal note. The last-named note would not have been due until July 14th. On May 23d, ascertaining that they were insolvent, they conferred with the bank officials, and informed them of their condition, and that it would probably be necessary for them to make an assignment at an early day. Desiring to secure the bank, they proposed a chattel mortgage as collateral to their existing note. The bank, however, while accepting the proposition for the chattel mortgage, insisted upon a new note payable upon demand. This arrangement was carried out, and a new note made and chattel mortgage executed and placed upon record upon the same day. It is an in-

disputable fact that the execution of the chattel mortgage was a part of the plan entered into by both parties to devote the property of Burrows & Anderson to the payment of their debts by means of an assignment, but with the bank holding a security for the payment of its claim in full. The debtors remained in possession of the goods until the 25th day of May, conducting the business of selling goods in the usual manner, when, apparently somewhat to their surprise, the bank took possession of their entire stock of goods under its chattel mortgage, and commenced a foreclosure suit. This proceeding was taken about 10 o'clock in the forenoon, and between that time and 12 o'clock Burrows & Anderson executed to the appellant Mansfield an assignment of their property for the benefit of creditors, under the assignment law of March 6th, 1890. On the 3d day of June, Burrows & Anderson filed their answer to the complaint of the bank in the foreclosure proceeding, admitting the facts stated in the complaint to be true, and thereupon a decree was entered against them and the property directed to be sold. On the same day the predecessor in interest of the respondent Sabin commenced an action in the same court for the recovery of a large sum against Burrows & Anderson, upon claims assigned to him by sundry creditors of that firm, and, under allegations of fraud contained in the affidavit, caused a writ of attachment to be issued and placed in the hands of the sheriff, who levied the same on the stock of goods already in his hands under the execution issued at the suit of the bank upon their decree. On the 12th day of June the assignee qualified by filing a bond, and demanded possession of the property of the sheriff. Being refused such possession, he brings this action to recover it, alleging that in the first place the chattel mortgage to the bank was void because of its having been procured as the result of fraudulent collusion between the bank and the assignors; and, secondly, because the attachment of Sabin was illegal and void under the statute. The decree of the court below was against the assignee and in favor of the bank, as entitled to a first claim, and of Sabin as entitled to the second claim, upon the proceeds of the goods which had been sold by agreement of the parties. The view which the superior court took of the matter was—First, that the chattel mortgage was not a fraud upon the creditors, and, second, that the attachment, having been levied upon goods not in the possession of the assignee, and to the possession of which the assignee had no right because they had been placed out of his reach by the act of the assignors in making the chattel mortgage, created a valid lien in favor of Sabin.

The first proposition which we have to dispose of grows out of the contention of the parties over the insolvent law contained in the Code of 1881 (chapter 143) and the assignment law of 1890, (Gen. St. p. 935.) The appellant maintains that the act of 1881 has never been repealed; the respondents claim that the act of 1890 has swept it entirely out of existence. The

point is not very material in this case, but it is suggested by both parties, and it would perhaps prevent future misunderstandings if we decide the matter now. We hold that the act of 1890 was intended to be a new law upon the same subject-matter as that treated of in the insolvent law of 1881, and that, while there are some matters in the old law which are not necessarily obnoxious to any provisions in the new one, the entire subject was legislated upon in the new law, and the old one was necessarily repealed and set aside in all its parts. But the practical question in this case is whether the act of 1890 is anything more than an act to regulate common-law assignments, and whether, if a debtor has been guilty of fraudulent transfers looking to a future assignment of his property for the benefit of creditors, his assignee, under this law, can recover the property thus fraudulently transferred. Upon the facts, as has been already indicated, we hold differently from the superior court upon the good faith of the bank mortgage. It was not a purchaser in good faith. The note which was secured by the mortgage was one substituted for the original note, which was in turn a renewal several times removed from the original loan. The terms of this note were different from that of its predecessors, inasmuch as it was made payable on demand, whereas the note for which it was substituted would not have been due until July. This change was made for no other purpose than to enable the bank, at any sign of danger through the movements of other creditors, to seize the property, and retain it for its own benefit while the debtors were making a general assignment for the benefit of other creditors.

It has been a common method of treating such transactions to call the mortgage and the assignment one transaction, and to construe the two instruments together as though the assignor had made an assignment containing a preference, which the statute says shall not be valid; but, with all deference to the use of language which frequently occurs in the cases, they are not the same transaction, nor are the instruments one. The assignee, at least ordinarily, has no privity with or knowledge of the mortgage, and all that the court, to which he is responsible, knows is the assignment. The debtors in this case, it is pretty strongly hinted in the record, did not intend to make an assignment unless it should be absolutely necessary. They claim to have relied upon some promise made by the bank to the effect that the foreclosure of the mortgage should be managed in such a way as that the property should be sold in bulk, and the possession of it returned to them for disposal in the ordinary course of their previous business; and it was not until they found the bank disregarding this alleged understanding, and taking possession of the goods, that they finally made up their minds to execute the assignment to Mansfield. But whether these are to be construed as one instrument, and the execution of them as one transaction, or not, the fact remains that the law seems to

have little regard for the one construction or the other. It is entitled "An act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors;" and, if the purpose of the act can be worked out by any reasonable construction of its provisions, it is the duty of the courts to secure that object without regard to technicalities which have no substance. The position taken by the respondents is that, notwithstanding the mortgage may have been conceived and executed in fraud of this law, the mortgagee having taken possession of the property before the assignment was made, the assignee has no power to move against the mortgage on the ground of its fraudulent character, and can therefore acquire no possession of the property covered by it. If this law is no more than an act to regulate common-law assignments, the point must be conceded to be well taken. A similar law exists in Oregon and Iowa, and in those states it has been held generally that the assignee stood in the shoes of the debtor, and could not recover property conveyed by him in fraud of creditors before the assignment. *Hahn v. Salmon*, 20 Fed. Rep. 801; *Dawson v. Sims*, 14 Or. 561, 13 Pac. Rep. 506; *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. Rep. 524; *Prouty v. Clark*, 78 Iowa 55, 34 N. W. Rep. 614. In each of those states, however, there is some difference between the statutes passed upon and our act of 1890. In Iowa there is no discharge of the debtor, and in neither state does the court or the creditors have any power to change the assignee. In both the declaration of the first section of the act is substantially the same as that of our own law, viz.: "No general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims,"—and in both there is a section substantially the same as our section 2753, viz.: "Any assignee as aforesaid shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover, in the name of such assignee, everything belonging to or appertaining to said estate, and generally to do whatever the debtor might have done in the premises."

This court, in *Bank v. Van Wagenen*, 2 Wash. St. 172, 26 Pac. Rep. 253, passed upon the substance of this question as involved in the insolvency law of 1881, and, unless the statute now in review has some materially different elements, we should be inclined to maintain the principles therein announced; but upon examination we find that the only material difference is that, under the old law, the proceeding was commenced by petition filed by the debtor, under which an order was made vesting the debtor's property in an assignee appointed by the creditors, at a meeting called under the order of the court, while under the act of 1890 the deed of the assignor conveys his estate directly to the assignee, who has no power to proceed until he has filed his bond and inven-

tory, and thus brought himself within the jurisdiction of the court. The ultimate result under each law is the equal distribution of the property of the debtor, and his discharge from his liabilities if his acts shall appear to have been uncolored by fraud. The declaration of the first section of the act, that no general assignment shall be valid unless made for the benefit of all creditors in proportion to the amount of their respective claims, must be limited, as we view the act, to—First, preferences; and, second, the effect on the debtor brought about by the denial of his petition for discharge. If it were not so, every assignment which is made would be in continual jeopardy, so long as all property involved in it is undistributed, by the discovery of some fraudulent act perpetrated by the assignor before the assignment was made. Section 2750 provides that the debtor may be summoned, upon the application of the assignee or any creditor, to submit to an examination for the purpose of discovering whether or not all his property has been listed in the inventory, and "the court may compel the delivery to the assignee of any property or estate not embraced in the assignment." But, according to the theory of the respondents, not only would the assignee be powerless to reclaim such property, but the very fact that the assignor had fraudulently placed such property out of his hands for the purpose of depriving creditors of the benefit of its distribution by the assignee would avoid the whole assignment, and open the way to any creditor to prefer himself at the expense of the others. Even in Iowa, a case of this kind occurring in *Schaller v. Wright*, 28 N. W. Rep. 460, the court held, notwithstanding *Van Patten v. Burr*, that the assignee could recover.

An illustration is contained in the body of the statute itself which, it seems to us, must overcome the claim of the respondents that the assignee could go no further than the property actually conveyed to him, or that discovered under the assignor's control, though not mentioned in the assignment. It is provided in section 2741 that such an assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of the assignment. Now, excepting for one ground of attachment, viz. nonresidence, attachments in this state are granted only upon a showing of some fraud on the part of the debtor, the gist of which is that he is disposing, or about to dispose, of property with intent to defraud his creditors. But if, in a case where fraud is the basis of an attachment lien, the assignee is permitted to step in and dissolve an attachment, and thus deprive innocent creditors of the involuntary lien which other portions of the law give them, there can be but small reason assigned why, in a case where the debtor has disposed of his property fraudulently by giving a voluntary lien, with possession, the assignee should not be permitted to retake that property. Upon consideration of section 2753, however, we think a better rule is laid down in *Pillshury v. Kiugon*, 38 N. J. Eq. 287, than is found in



either of the cases cited by the respondents. That was a case, like this, where an assignee was suing for the recovery of property mortgaged by his assignor to third persons in fraud of the assignment law. The court there reviews the whole subject of the rights of an assignor under statutes governing assignments for the benefit of creditors. The New Jersey statute bears the same title as ours; and the court in reviewing the 13th section, which is the same as our section 2753, speaks as follows: "Considering that the assignment creates a trust for the benefit of all the creditors of the assignor, and that the legislative purpose was to secure an equal and just division of the estate of the debtor among his creditors, a construction less comprehensive will defeat the legislative purpose. In virtue of the trust so created the assignee becomes the representative of and actor for creditors, and his powers should be so construed as to enable him to carry into full effect the purpose for which the statute was designed. In the English insolvent acts, under which assignees are allowed to avoid the fraudulent grants and conveyances of the debtor, the power of the assignee to sue in his own name is granted 'for the recovery, obtaining, and enforcing any estate, effects, or rights of such prisoner,'—language, in legal effect, identical with that contained in the thirteenth section of our assignment act. In *Garretson v. Brown*, 26 N. J. Law, 425, Justice Potts construed this section as enabling the assignee to sue for property fraudulently conveyed away by the debtor, and to recover it for the use of the creditors who should present their claims." The court then overrules *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163, and sustains the right of the assignee to sue to avoid the fraudulent mortgage. The case above cited is a review of the same case reported in 31 N. J. Eq. 619, where the vice chancellor laid down the opposite doctrine. These two overruled cases are both cited in the opinion of the court in *Hahn v. Salmon*, 20 Fed. Rep. 801, in support of the view adopted. The case of *Benham v. Ham*, 31 Pac. Rep. 459, (decided by this court,) is confidently cited by respondent Sabin in support of his attachment; but while some language was used in the opinion in that case which, taken alone, might be ground to infer that, if the mortgage had not been sustained, the attaching creditor in that case would have been allowed to retain his lien upon the property in the hands of the assignee, the judgment there directed shows that the whole question of the attachment was avoided by the finding that the chattel mortgage was a bona fide transaction, and that there was therefore no ground for the allegations of fraud under which the attachment was issued. The subsequent case of *Shoe Co. v. Adams*, 32 Pac. Rep. 92, (Dec. 7, 1892,) is more nearly in point, and it was therein held that the property reaching the hands of an assignee was in custodia legis, and could not be taken from him by the attaching creditor on the ground that the assignment was fraudulent by reason of acts committed by the assignor before the assignment.

There can be no difference between that case and this so far as the rights of the assignee are concerned, although here the assignee had not been able to reduce the property assigned to his possession at the time the attachment was levied. He was entitled to its possession, and only needed the interference of the court in his behalf to secure it. It follows from the foregoing that the judgment of the court below must be reversed, and the cause remanded, with directions to that court to enter judgment in favor of the appellant for the proceeds of the goods, to be distributed by him in accordance with law governing assignments.

DUNBAR, C. J., and ANDERS and HOYT, JJ., concur.

(5 Wash. 768)

### SABIN v. ADAMS et al.

(Supreme Court of Washington. Feb. 18, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ATTACHMENT BY CREDITORS—RIGHTS OF ASSIGNEE.

1. Where property in the hands of an assignee for the benefit of creditors is attached by one of the creditors, it is a technical error for the assignee to intervene in the attachment suit for the purpose of recovering the property, but he should entitle his petition in the matter of the assignment.

2. Such technical error, however, is no ground for reversing an order restoring the property to the assignee.

Appeal from superior court, Lewis county; Edward F. Hunter, Judge.

Action by R. L. Sabin against J. A. Adams and others, partners as Adams, Hart & Co. Defendants had made a general assignment to J. H. Mallery for benefit of creditors on November 2, 1891. On November 11, 1891, plaintiff issued an attachment in his action, which had been begun on November 5th, and the writ was levied on property in the assignee's hands, and on real estate owned by defendant but not in the assignee's possession. The assignee intervened in the attachment suit for the protection of his trust, and the attachment was discharged as to the property taken from the assignee's possession, but not as to the residue. Judgment was subsequently rendered in plaintiff's favor against defendants by default, and plaintiff now appeals, alleging the partial discharge of the attachment as error. Affirmed.

Cox, Teal & Minor and W. H. Winfree, for appellant. Leroy A. Palmer & Landrums and J. R. Buxton, for respondents.

STILES, J. It was technically an error to permit the assignee of Adams, Hart & Co. to file a sort of intervention in this case in order to get possession of the goods taken from him under the attachment issued by Sabin. The proceeding should have been in the matter of the assignment, and the officer and the parties behind him should have been dealt with summarily for interfering with the assignee's possession, which was the possession of the court. But we shall not order the property to be given back to the sheriff because the petition of the assignee was

entitled in the wrong case. Such an order would be to encourage a practice which seems to be growing, and which tends to fritter away every estate assigned in useless litigation, viz. that of dissatisfied creditors attacking the assignment for some fraud of the debtor. The sooner it is understood that when an estate is assigned it is in the possession of the court for orderly, pro rata distribution, and that no one can interfere with it except at his peril, the sooner creditors will be able to realize fair dividends, and the objections to the law of assignments will disappear. If creditors would, in assisting assignees to realize on the property in their hands, and in aiding the court to hold them to strict account, expend half the ability and ingenuity which they exert in their efforts to overreach each other, the result of these assignments would be far more satisfactory to all parties. The merits of this case have been fully disposed of by the decisions rendered in *Shoe Co. v. Adams*, (Wash.) 32 Pac. Rep. 92, and *Mansfield v. Bank*, (Wash.) 32 Pac. Rep. 789, and for the reasons therein set forth the order is affirmed.

DUNBAR, C. J., and ANDERS, HOYT, and SCOTT, JJ., concur.

(5 Wash. 741)

### LEWIS v. CITY OF SEATTLE.

(Supreme Court of Washington. Feb. 17, 1893.)

#### EMINENT DOMAIN—COMPENSATION BEFORE TAKING—CONDEMNATION BY CITY—OFFSETTING BENEFITS.

1. The right to compensation before land is taken or damaged under the power of eminent domain, secured to the landowner by Const. art. 1, § 16, is a right personal to him; and, where he acquiesces in the taking of his property for a street improvement without insisting on prepayment, the proceedings on the part of the city are not invalidated by failure to make prepayment of the damages.

2. In condemnation proceedings instituted by a city to take land for widening a street, appraisers were appointed by the city and the property owner to assess the benefits and damages, but such appraisers never made a report, owing to a radical change in the city charter. Held that, in view of the fact that the city charter empowered it to pay for land condemned for street purposes either by an assessment on the lands benefited or by a general tax, the property owner was not compelled to resort to mandamus to compel the appraisers to make their report, but that he could maintain a common-law action against the city for the damages sustained from the taking.

3. Where at the time of the adoption of a constitutional provision no similar provision was contained in the constitution of any other state excepting one, the interpretation placed thereon by the courts of such state should be recognized as of force by the courts of this state.

4. Const. art. 1, § 16, provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner; and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation." Held, that compensation

must first be made in all cases, including a taking or damaging by a municipal corporation; but, where a municipal corporation appropriates land for a right of way, the benefits arising to the owner from the improvement may be offset against his damages, while no such offset can be allowed in cases of appropriation by private corporations.

5. The widening of a street is a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose property is taken therefor, though landowners on the opposite side of the street are similarly benefited, and are not chargeable therewith, because none of their lands are appropriated, and no damages are claimed by them.

6. Such benefits can only be considered with reference to the particular tract from which the land appropriated was severed, and the benefits to separate parcels belonging to the same owner cannot be offset unless they all abut on the same improvement.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Bessie J. Lewis against the city of Seattle for the value of land appropriated by defendant for a street. From a judgment in plaintiff's favor, defendant appeals. Reversed.

George Donworth and James B. Howe, for appellant. Tustin, Gearin & Crews, for respondent.

SCOTT, J. This is an appeal from a judgment recovered by the respondent for the value of certain real estate appropriated by the city of Seattle for a street. The action was commenced in January, 1892, by the filing of a complaint, wherein the plaintiff alleged her ownership of such real estate on the 22d day of March, 1890; that the city had a charter from the territory of Washington (granted in 1886) up to October 10, 1890, at which time it adopted a "freeholders' charter," under the act of the legislative assembly of the state approved February 26, 1890; that on said 22d day of March, 1890, said city, by its common council, passed ordinance No. 1313, for the condemnation of such real estate as a street, in and by which ordinance all of said property was condemned and appropriated as a portion of Weller street; that thereafter, and pretending to act by virtue of said ordinance, and without paying or tendering plaintiff anything therefor, and without causing an assessment of plaintiff's damages caused thereby to be made, said city unlawfully and forcibly ousted plaintiff of her possession of said property, and entered into the possession of the same, and proceeded to and did grade the same as a street, and has thrown said property and the whole thereof open for the use of the public as a street, and completely deprived plaintiff of the use and enjoyment thereof, to her damage in the sum of \$2,500. The city admitted the plaintiff's ownership of the property, except an alley running across the same, and admitted that in pursuance of said ordinance No. 1313 it had appropriated and taken possession thereof as a street, but denied that the value of such real estate exceeded the sum of \$500, and denied that the plaintiff had been damaged in any sum whatever. It further set up two affirmative defenses, in the first of which

it pleaded said ordinance No. 1313, which provided that due compensation should be made for said real estate in accordance with sections 11 and 101 of the charter of 1886, and that the amount of said compensation should be made a charge upon the lots and parcels of land embraced within an assessment district created under the authority of said charter, which provided for the appointment of three appraisers, one of them to be appointed by the mayor, one by the owner or owners of the property subject to assessment, and one by the owner or owners of the property condemned, whose duties were to find and report the value of the land taken and the value of the land in such district benefited, so that the cost of such improvements might be assessed thereon. It further alleged in said defense that proceedings were duly had accordingly under said charter and ordinance, up to and including the appointment of such appraisers, one of whom was appointed by the plaintiff, but that no meeting of said appraisers was ever held, and that they never made any assessment, report, or award; that the defendant stood ready to pay to the plaintiff such sum as should be ascertained by the appraisers when they should make an award. In the second defense it is alleged that the land condemned was a part of block 1 in Terry's Fifth addition to the city of Seattle; that, prior to said widening of Weller street at said point, block 1 of said addition projected into Weller street a distance of 23 feet; that both to the east and west of said block said Weller street was 66 feet wide, and that by reason of the projection of said block into the street there was a width of only 43 feet of street abutting upon said block, thereby making a jog in said Weller street by reason of the irregular and defective platting of said land in the original plat of said addition. It is further alleged that at the time of the passage of the ordinance, and ever since, the plaintiff has been the owner in fee simple of the whole of said block 1, except lot 6, and also of six other lots in the immediate vicinity described in the answer; that each and every of said lots of land is situated in blocks bordering on said Weller street in the immediate vicinity of said widening and improvement, and that the plaintiff derived special, direct, immediate, and great benefit through the condemnation of the land so taken by reason of the increased value of each and every of the lots mentioned consequent upon the said widening of the street, and that the special and peculiar benefit so derived from the widening of said street, not in common with the public generally, exceeded the value of said real estate so condemned. This condemnation took place after the adoption of the state constitution, but before the city organized under a freeholders' charter. Its charter of 1886 was in force, except as modified by the state constitution. Section 16, art. 1, of the constitution, provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right of way shall be appropriated

to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation."

Appellant contends that the plaintiff cannot maintain a common-law action to recover the value of the property taken, as the proceedings were instituted and conducted under the charter of 1886, although the appraisers failed to act, and that she can only proceed by mandamus against the appraisers to compel them to proceed; that this is especially the case where, as in this instance, such payment is to be made out of a particular fund, as a recovery in this action would be a charge upon the whole city. Appellant further contends that, conceding this action can be maintained, the special and peculiar benefits derived by the plaintiff in consequence of the improvements can be offset against the value of the property taken for which the plaintiff seeks to recover. (She makes no claim for any damages to the remainder of the property, and her proofs were limited to the value of the land taken.) In *Brown v. City of Seattle*, (Wash.) 31 Pac. Rep. 313, and 32 Pac. Rep. 214, this court virtually held that under our constitutional provision, in exercising the right of eminent domain, payment must be made in advance in all cases. If this construction is to be adhered to, it follows that the provisions of the city charter relating to a postponement thereof were inoperative, for the constitution was in force when the plaintiff's land was appropriated. However, the city might have pursued the assessment scheme for the purpose of reimbursing itself. But this right to prepayment, if it existed, was a privilege which the plaintiff could and did waive. As to how far this waiver went there may be some question; but the most favorable claim upon the part of the appellant could only be that it had the effect of postponing the right of payment for such reasonable time as would allow the city to provide a fund therefor by the assessment plan which it had adopted. The right to prepayment is personal to the owner, and a failure to insist upon it would not necessarily invalidate the proceedings upon the part of the city. The plaintiff acquiesced in the appropriation, and permitted the city to proceed without first requiring payment. She affirmed the city's right to the land by bringing her action to recover compensation, and at least upon securing compensation the city's right to the land would become a vested one. *Embury v. Conner*, 3 N. Y. 511; *Soulard v. St. Louis*, 36 Mo. 546; *Railway Co. v. Fechtelmer*, 36 Kan. 45, 12 Pac. Rep. 362; *Lawrence v. New Orleans*, 12 Rob. (La.) 453; *Railway Co. v. Donahoe*, 59 Tex. 128; *Mayor v. Perkins*, 30 Ga. 154. But, treating the acquiescence of the plaintiff in this matter as a consent upon her part that the city might appropriate the land and provide a fund for her compensation in the way it was attempting to do, could she thereafter, under the circumstances of this case, maintain such an action as she instituted, or must she have

proceeded by mandamus to enforce the prosecution of the special proceeding?

In support of its contention appellant cites *Paret v. Bayonne*, 40 N. J. Law, 333. In that case, however, under the language of the decision, it seems that the city had no power to appropriate lands for streets except by making the damages a charge upon the lands specially benefited. It would not apply here, in the absence even of the constitutional provision, as section 5 of the charter of 1886 empowered the city of Seattle to condemn lands for streets, and to collect the necessary amount to pay therefor by a general tax. It could proceed in this way, or could collect the same by an assessment upon the lands benefited under sections 11 and 101 of said charter, which it did undertake to do. Appellant argues that it had performed its duties in the premises, and was no more in default than was the respondent; that the default was upon the part of the appraisers; and that an action against the city could not be founded upon the failure of the appraisers to act. To show that the plaintiff could have proceeded by mandamus, appellant quotes a clause contained in the freeholders' charter, which is as follows: "The adoption of this charter shall not operate to abate or discontinue any existing suit, action, or proceeding, in court or elsewhere, to which said city is a party." It is questionable whether this clause could be held to apply to this particular matter. Appellant did not allege that the proceedings instituted by the city under said charter and ordinance were being prosecuted or were pending. It set up the proceedings down to and including the appointment of the appraisers, and here the proceedings stopped. It alleged a total failure of the appraisers to act. They were entitled to 30 days within which to make a report, and this time had long expired. It can scarcely be maintained, upon this state of facts, that the proceedings were existing. It rather showed an abandonment thereof previous to the adoption of the freeholders' charter; and for this the city was responsible. It was incumbent on it to show that this procedure which it had set on foot was carried to an effectual termination. The plaintiff is not chargeable with any negligence or laches in the premises. She had no action to take therein beyond the right to name one of the appraisers, and this right she exercised. She had no control over them, but the city did have, and could have suspended the proceedings at any time, and have resorted to a general tax to make payment. If the proceedings were existing, and were kept alive by the new charter, still the action was properly brought in consequence of the failure of the city to prosecute them. The city condemned the land and created the assessment district. The appraisers were to report to it, whereupon the city, through its common council, was to declare the rate of assessment, and through its clerk to prepare the assessment roll and deliver it to the treasurer, and in case of nonpayment the amounts were to be collected by a suit in the name of the city. The rule obtaining in such a case as this is stated in *Lewis on*

*Eminent Domain*, (section 607:) "If no remedy is provided by the statute, or if the statutory remedy is taken away by repeal, or if the initiation is given only to the party condemning, who fails to pursue it, the owner may have his common-law action." When the radical changes made in the manner of exercising the city's governmental powers by the adoption of the new charter are considered, it is still more doubtful whether the means existed whereby to carry these proceedings to a termination if they were pending up to the time the new charter went into effect. The old officers had no further power to act. The old council had been abrogated, and in its place two legislative bodies had been created. The right to recover under the former method was at least rendered uncertain and the enforcement of it delayed, all of which is directly chargeable to the city.

The cases cited by the appellant in support of the proposition that the plaintiff could only proceed by mandamus can mostly be placed in two classes: First, where the municipality has no power to condemn except by making compensation therefor in a particular manner, as by levying a tax upon a special district, like the case of *Paret v. Bayonne*, previously cited; second, where a particular remedy has been provided by statute which may be instituted by either party, as in the case of *Liudell's Adm'r v. Railroad Co.*, 36 Mo. 543. In this case, however, the proceedings could only be instituted by the city, and, where no remedy is given at the election of either party, the common-law right of action remains intact. In a case like this, where the city fails to prosecute the particular proceeding, or where the same results in failure, the owner may bring a common-law action. *Soulard v. St. Louis*, supra; *Bigelow v. Los Angeles*, 85 Cal. 614, 24 Pac. Rep. 778; *Bentonville Railroad v. Baker*, 45 Ark. 252; *Jamison v. Springfield*, 53 Mo. 224; *Blake v. Dubuque*, 13 Iowa, 66. Some cases go further, and are to the effect, where private property is sought to be condemned and payment therefor is not necessary in advance, that nothing less than the pledge of the faith and credit of the state or one of its political divisions for the payment of the property owners will be sufficient, and this must be accompanied with practical, certain, and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment without any unreasonable or unnecessary delay; and that a remedy for compensation contingent upon the realization of a fund for benefits within a limited assessment district, the collection of which may be deferred for an unreasonably long time, does not meet the constitutional requirement; and that in such cases the owner may resort to a common-law action. *Chapman v. Gates*, 54 N. Y. 146; *Sage v. City of Brooklyn*, 89 N. Y. 189.

In considering the right to offset benefits involved in the second defense it is necessary to construe the constitutional provision relating thereto. If the clause, "irrespective of any benefit from any improvement proposed by such corporation,"

applies to municipal corporations, it must be given effect in this instance, the constitution being then in force. The constitutions of a number of the states contain substantially the first clause in ours,—that “no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner;” but in none of them where this clause has received a judicial interpretation does the constitution contain the following clause found in ours, viz.: “And no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation,”—with the exception of the constitution of the state of California, and here the language is identical with our own. In *Railway Co. v. Porter*, 74 Cal. 261, 15 Pac. Rep. 774, the provision relating to compensation irrespective of benefits was recognized as not applying to municipal corporations. It is urged by respondent that this case should not be regarded as authority in this particular because the point was not involved therein. However this may be, it was sustained by the cases there cited. The case of *Butte Co. v. Boydston*, 64 Cal. 110, 29 Pac. Rep. 511, was decided upon the theory that benefits might be deducted from damages in the case of an appropriation of land by a municipal corporation. The case of *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, is to the same purport. These cases were both decided under the constitution of California adopted in 1879, which is the one we have referred to. We also find that the case of *Railway Co. v. Porter* was thereafter confirmed in this respect in *Muller v. Railway Co.*, 83 Cal. 240, 23 Pac. Rep. 265, *Railway Co. v. Mayne*, 83 Cal. 566, 23 Pac. Rep. 522, and *Railway Co. v. Haven*, 94 Cal. 489, 29 Pac. Rep. 875. In accordance with such an interpretation of this constitutional provision the legislature of California provided that the value of land condemned should be paid for in all cases, but that the benefits resulting to the remainder of the land not taken might be offset against the damages to it. This construction was the settled law of that state at the time our constitution was framed and adopted, and that payment must be made at or before the taking of property thereunder was unquestioned. *Lamb v. Schottler*, 54 Cal. 319-324. It is a rule that where a law is taken from another state, which has there received a judicial interpretation, such interpretation should be of force and recognized in the state adopting the law. While it may be that this rule has not been observed as much in later years as it was formerly, most likely owing to the fact that laws existing in various states of substantially the same character have received conflicting constructions, and for that reason it could not be said which one the state adopting the law intended to recognize, yet here is a strong case for the application of the rule, and furnishes an instance where, if ever, it should be ob-

served, for there was no other similar provision at the time in the constitutions of any of the states excepting that of California.

It is apparent that the exception relating to municipal corporations contained in the second clause must either apply to the rule of damages, or it must have the effect of exempting such corporations from paying in advance. Appellant contends that it should apply to the rule relating to the ascertainment of damages, and argues that the decision rendered in *Brown v. City of Seattle* in effect decides that the city may deduct benefits, and that it should be permitted to do so under the weight of the authorities, there being no legislation on the subject. In that case the court held that damages which would result to adjoining property by the grading of a street must be paid for in advance. There was no attempt to discriminate between the appropriation of a right of way and a taking or damaging for any other municipal purpose in relation to the right to prepayment, nor can one be drawn from the authorities, for the appropriation of a right of way for a street has uniformly been recognized as a taking by the courts of the country regardless of where the fee remained. The respondent insists with much force that this exception should not be applied to the rule of damages, but should be interpreted as relieving municipal corporations from paying at or before the time of the appropriation, as such a corporation in exercising the right of eminent domain stands in the place of the state itself. The respondent argues that “the compensation to be paid the landowner, upon the taking, becomes eo instante a public charge; the good faith of the state, acting through the corporation, is pledged for its payment; the machinery of the state for collecting revenue may be put in operation, and all the resources of taxation may be employed in collecting the sum due the landowner. His compensation will certainly be paid, whether the city goes into possession first or last; and because the taking of property for municipal purposes is of public interest, and a delay, while estimating the damages in an action at law, might injuriously affect the public, the constitution wisely permitted the legislature to authorize the city to go into possession before the award is adjusted. But here the reason of the rule stops. There is no reason or sense or justice in saying that benefits should be taken into consideration when the city condemns property, and not be considered when any other corporation condemns it. The benefits are different neither in kind nor amount. It is a matter of public notoriety that suburban railways, cable, electric, and steam railroads, reaching out to tracts of land which would otherwise be inaccessible, largely increase the value of all property in their immediate vicinity, and add far more to the values of lots and blocks than is possible to be added by the widening of a street; and yet these corporations must pay the actual cash values of the property taken, irrespective of benefits. Is it not unreasonable to say that a different rule should apply to the city? When

we consider the mischief which this section of the constitution was aimed at—that of taking property and paying for it with speculative profits, which in most cases are never realized—it becomes clear, it seems to us, that the amount of the damage and the manner of estimating it shall be the same in all cases. No other construction is in harmony with the spirit that prompted this constitutional provision." But it is apparent that, to give this exception the effect of exempting municipal corporations from making compensation at or before the time of the appropriation, it must either override the first clause prescribing the time of payment, which purports to lay down an absolute rule and contains no exception, or a distinction must be drawn between an appropriation of a right of way and a taking for any other municipal purpose. The first clause, standing by itself, requires payment to be first made where property is taken or damaged by any corporation for any purpose.

We know of no case holding that an appropriation of land for a street is not a "taking," within the meaning of such a provision, and, if we were to undertake to make such a distinction here, further difficulties would present themselves in construing these two clauses. The word "damaged," contained in the first clause, must be held to apply to the second clause also, or the result would be that, where a portion of the owner's land is taken for a right of way, only the value of the part taken can be recovered, and there can be no recovery for any damages to the remainder, while in case none of the land is taken, but it is damaged, such damages could be recovered under the first clause. If the word "damaged" is held to apply to the second clause, so that where a right of way is appropriated the owner can recover for the value of the land taken and damages to the remainder of the land, then the condition of affairs would be presented that damages to the remainder of the land must be paid for in advance, while the value of the land taken need not be so paid for; or if, in such a case, it should be construed as having the effect of postponing payment for the value and damages also, by simply importing the word "damaged" into the second clause, then in a case where there are two adjoining landowners, and a right of way is appropriated so as to take a part of the land of one of said owners and to damage the remainder, and while not taking any of the land of the other owner, yet should damage his land, then the owner whose property was taken in part could not recover payment in advance for either the value of the land taken or the damages to the remainder, and his neighbor, whose land was not taken, but was damaged, would be entitled to payment in advance. There is no reason for any such discriminations. If the amount of the payment is to be segregated and part of it paid in advance, the value of the part taken should first be paid, and the damages to the remainder postponed, for the value of the property taken could be easily ascertained at the institution of the proceeding, but it

would be more difficult to determine in advance what damages would result from the proposed improvement. It cannot be supposed it was intended that any such anomaly should exist or be brought about as that incidental damages for the grading of a street would be recoverable where no land is appropriated, and that such damages to the remainder of the land would not be recoverable where a right of way is appropriated for a street under the second clause, which does not contain the word "damaged." By construing this constitutional provision as requiring payment to be first made in all cases, and giving the second clause the effect of laying down a rule of damages as to the appropriation of a right of way by corporations other than municipal, all conflict between the two clauses is avoided, and full force is given to each and every part. Such is the best-sustained construction it can receive.

The policy of laying down a rule with respect to benefits, which at least permits a discrimination to be made in favor of municipal as against other corporations, was addressed to the people, and they saw fit to embody it in the constitution which they framed and adopted. They laid down a special rule with regard to the payment of damages, irrespective of benefits, as to corporations other than municipal, in appropriating property for a right of way, and left room for the legislature to prescribe the rule of damages which should be observed with regard to municipal corporations. In the great majority of cases the appropriation of lands by a municipal corporation is for highway or street purposes, and there may be good reason for not laying down any absolute rule with regard to benefits by the constitution in such cases, and for leaving room for the legislature to establish the same. Until the legislature establishes a rule it will be left for the courts to determine what it shall be. In the states where no rule has been prescribed by legislation relating to the deduction of or allowance for benefits, the holdings of courts are very conflicting, one extreme holding that all benefits, either general or special, may be deducted from damages to the remainder of the land, and also from the value of the land taken; others only allow such benefits to be deducted from the damages to the remainder of the land, and require the value of the property taken to be paid; others make these same distinctions with regard to special and peculiar benefits, and allow no deductions in either case for only such general benefits as the owner receives in common with the public. *Lewis, Em. Dom. §§ 465-473; 2 Dill. Mun. Corp. §§ 616-622.* The effect of the city charter, in providing for assessments for benefits, was to allow benefits to be deducted from damages and the value of the land appropriated, the constitutional provision not applying. It is very doubtful whether there is any well-founded reason for a discrimination between the value of the land taken and the damages to the remainder in the allowance of benefits. The exercise of the power of eminent domain in the very great majority of cases is for the purpose of obtaining rights of way,

and often the damage to the remainder of the tract is of much more consequence than the value of the part taken. In some cases it would be impossible to estimate the damages and benefits to the remainder of the tract independent of each other. If the damages and benefits are blended, only the result can be ascertained, and benefits are necessarily involved, for the damage can only be estimated with reference to the ultimate condition the property will be left in. If the contiguous property is not rendered any less valuable by the improvement, there would be no damages resulting to the owner of it, for there cannot well be any damage where there is no pecuniary loss. A distinction has been drawn in some cases where benefits are not allowed to be considered, as, for instance, where one side or part of an estate is injured and the other part benefited. In those instances where benefits are not to be taken into account in arriving at the damages sustained, it has been held that the benefit to the separate part of the estate, being independent of the damage to the other part, cannot be considered; and there may be other cases where the damages can be estimated independent or separate from the benefits. But where benefits can be deducted, and the result of the appropriation of a part is a benefit to the remainder of the tract, there is no good reason for not allowing such benefit to be deducted from the value of the part taken. There may be some question, in such a case, whether the remainder of the tract could be assessed with the other property in the assessment district where one is created, and thus be compelled to further contribute to the payment of the compensation allowed, although assessments for benefits upon residues of lots, parts of which are taken for a street improvement, do not conflict with the constitutional prohibition against taking private property for public use without just compensation. (*Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. Rep. 777;) but it seems that it could not be done if it would result in making the owner pay for the same benefit twice. If public works or improvements form a part of the basis with the land appropriated of an assessment or recovery for benefits, it should be for such as are actually in existence at the time, or such, if any, as the municipality could be compelled to construct, and not for such as might exist merely in the intention or purpose of the municipal authorities which might or might not be created. Otherwise the property owner might be compelled to pay for something which would never be in existence.

In holding that benefits may be offset against the value of the land in this instance, we have attached some considerable importance to the provisions of the charter which had the effect of allowing it to be done. The constitution continued all laws in force that were not repugnant to it, and this solution of the question gives the plaintiff the benefit of the law as it existed at the time. We have not given any weight to the legislation in California relating to the rule of damages under a similar constitutional provision, in con-

sidering the question of allowing benefits as against the value of the land appropriated, although we have felt bound to some extent by the interpretation given there to the clause itself. But the constitution and the legislation stand upon a different footing. The constitution permits a discrimination to be made in favor of municipal corporations, while the legislation simply makes a particular discrimination. The respondent urges that, although benefits may be taken into consideration in arriving at the amount which the plaintiff was entitled to recover, there was no error in this instance, for the reason that in the second defense the city undertook to offset benefits to other and distinct parcels of land. We are of the opinion that the benefits could only be considered with reference to the particular tract from which the land appropriated was severed, but it need not necessarily be confined to the same lot. The general holding has been that separate parcels cannot be considered unless they all abut upon the improvement, but a distinction has been drawn where the tract embraces several lots and they are all used as one tract for a common purpose. Benefits have been assessed upon the whole of one lot where it was used for several different purposes, as, for instance, a portion of it being occupied by a store, and the balance by dwelling houses. *Lewis, Em. Dom.* § 475, and authorities there cited. And in this case, by the great weight of authority, the city would not be entitled to offset the benefits to other and distinct parcels of land against the value of the land taken. To have arrived at such a result it should have pursued the original plan of levying the costs of such improvement upon the property included in the special district created for the purposes of an assessment. It is generally held that only such benefits as are special and peculiar to the particular property can be taken into consideration; but the laying out or widening of a street may be a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose land is taken therefor, although parties upon the opposite side of the street are similarly benefited, and are not chargeable therewith, for the reason that none of their lands were appropriated, and no damages were claimed by them. *Hilbourne v. Suffolk Co.*, 120 Mass. 393; *Donovan v. Springfield*, 125 Mass. 371; *Cross v. Plymouth Co.*, Id. 557; *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. Rep. 325; *Trosper v. Commissioners*, 27 Kan. 391; *Allegheny v. Black's Heirs*, 99 Pa. St. 152. It follows that the court erred in sustaining the demurrer as to the second defense, for it alleged that the particular property owned by the plaintiff abutting upon the street at the point where it was widened was peculiarly and specially benefited thereby. The fact that other parcels were included in this defense, and a claim set up to have the benefits to such property also offset, would make no difference here, for a general demurrer would not reach this kind of a defect. The judgment is reversed.

ANDERS and HOYT, JJ., concur.



(98 Cal. 117)

**KRUMDICK v. CRUMP**, Judge. (No. 15,275.)  
(Supreme Court of California. April 8, 1893.)**CHANGE OF VENUE—DISQUALIFICATION OF JUDGE.**

Code Civil Proc. § 398, providing that if an action is pending, and the judge is disqualified, it must be transferred for trial to a court the parties may agree upon, or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, leaves the disqualified judge, in such cases, no discretion, but makes it his duty to transfer the action at once, on motion. *Upton v. Upton*, 29 Pac. Rep. 411, 94 Cal. 26, and *Paige v. Carroll*, 61 Cal. 216, distinguished.

**Department 2.**

Application by Jennette Krumdick, executrix, for a writ of mandamus to compel R. W. Crump, judge of the superior court of Lake county, to issue an order transferring a certain cause for trial to another court. Writ granted.

J. H. Seawell, Thos. B. Bond, and A. Yell, for petitioner. Clay W. Taylor and J. Chadbourne, for respondent.

**BEATTY, C. J.** This is an original proceeding by mandamus. The petitioner is plaintiff in an action (*Krumdick vs. White*) commenced in the superior court of Lake county in the year 1887. The respondent, who was the attorney for the defendant in that action, has been since January, 1891, judge of the superior court of Lake county. In December, 1891, the judgment of the superior court of Lake county in the action referred to was reversed by this court, and the cause remanded for a new trial. *Krumdick v. White*, 92 Cal. 143, 28 Pac. Rep. 219. On the 14th of January, 1892, the remittitur was filed in the superior court, and on the 16th of the same month Mrs. Krumdick's attorney duly notified the defendant White that she would on the 1st of February, 1892, move the superior court of Lake county for an order transferring said cause for trial to the nearest superior court where the like objection or cause for removal did not exist, upon the ground that the judge of the superior court of Lake county, the respondent herein, was disqualified. This notice of motion was accompanied and supported by a formal demand for a change of the place of trial of said action, and by affidavits showing the disqualification of the judge. On the 1st of February, 1892, said motion came on regularly to be heard before the respondent, but the hearing was continued by him to February 8th because the defendant in said action was not present. On February 8th, on motion of the defendant's attorney, opposed by plaintiff's attorney, the hearing of said motion was again continued to February 15th. On February 15th the hearing was continued by consent to March 14th. On that day the motion was by consent submitted on briefs to be filed by plaintiff in 10 days, defendant in 15, and plaintiff, 5. On March 19th the defendant in that action filed and served on the plaintiff an affidavit tending to show that the convenience of witnesses required that said action be not removed to another county, but be retained in Lake county to be tried before some superior judge from some other coun-

ty, to be called for that purpose. On March 21st the order of March 14th for the submission of the motion on briefs to be filed was vacated by respondent, and a new order to the same effect, extending for one week the time of the respective parties for filing briefs, was entered. Briefs were thereafter filed in pursuance of the last order. At the time of filing her reply brief, — April 20, 1892, — plaintiff delivered to the respondent all the papers in the case, and her motion was regularly submitted, but it has never been decided. This proceeding to compel the respondent to act upon said motion, and to grant it, was commenced January 7, 1893, nearly nine months after the motion was submitted. The respondent's excuse for not acting on the motion is that the affidavit filed by the defendant on March 19th, tending to show that the convenience of witnesses required the retention of the cause in Lake county for trial, presented an issue which he was disqualified to try or determine, and made it necessary that he should call another superior judge, from some other county, to decide the motion; and he says he did invite the Honorable S. K. Dougherty, of Sonoma county, to hold a session of the superior court in Lake county, to hear and determine causes in which he was disqualified; that Judge Dougherty, in pursuance of such invitation, did hold such session of court, commencing June 8, 1892; that said cause of *Krumdick v. White* was on the calendar for June 8, 1892, and regularly called by Judge Dougherty, but was on motion of the plaintiff stricken from the calendar, and never restored.

There is nothing in any of the facts here recited to justify or excuse the respondent from refusing or neglecting to perform the plain statutory duty imposed upon him by section 398 of the Code of Civil Procedure.<sup>1</sup> The case provided for by that section was clearly made out by the contradicted affidavits filed in the support of the motion; and, aside from the affidavits, the essential fact upon which the right to transfer the cause depended was necessarily within the knowledge of the respondent, whose duty it was to make the order without delay. *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. Rep. 848. There should have been no postponement on account of the absence of the defendant, no continuances, no time given for the filing of briefs, no holding under advisement, no entertaining of any counter motion based upon grounds calling for the exercise of judicial discretion. The plain injunction of the statute leaves the disqualified judge, in such cases, no discretion. He has but one thing to do, and it is his duty to do that thing at once. This case does not come within the rule of *Upton v. Upton*, 94 Cal. 26, 29 Pac. Rep. 411, in which we felt constrained to follow the decision

<sup>1</sup>Code Civil Proc. § 398, provides that if an action is pending in a court, and the judge thereof is disqualified, it must be transferred for trial to a court the parties may agree on, or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist.

in *Paige v. Carroll*, 61 Cal. 216. We did so, however, because the point of practice had been so settled, and not without serious doubts as to the correctness of the decision, which ignores what seems to be a substantial provision of the statute, designed to prevent the selection by either party to the controversy of the court and judge before whom the trial is to be had. It is not necessary here to determine whether the practice tolerated in *Upton v. Upton* and *Paige v. Carroll*, supra, can be longer recognized. It is enough to say that in those cases the court went to the extreme verge of toleration, and that the exceptions to the statutory rule will certainly not be extended. It is ordered that a peremptory writ of mandate issue, as prayed.

We concur: DE HAVEN, J.; McFARLAND, J.

(97 Cal. 644)

MORRIS et al. v. WILSON. (No. 18,057.)  
(Supreme Court of California. March 25, 1893.)

MECHANIC'S LIEN—FAILURE TO RECORD CONTRACT.

1. Const. art. 20, § 15, provides that mechanics, material men, etc., shall have a lien on the property on which they have labored or furnished material. Code Civil Proc. § 1183, provides that all contracts between the owner and contractor for work, where the amount exceeds \$1,000, shall be in writing, and recorded before the work is begun, otherwise the contract to be void, and no recovery to be had thereon by either party thereto; that the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the instance of the owner, and that they shall have a lien for the value thereof. *Held*, that a contractor who has failed to record his contract for work, where the amount to be paid therefor is over \$1,000, is not entitled to a lien.

2. The lien notice averred that the employment was under an attempted contract in writing, and the contract price to be paid thereunder exceeded \$1,000, but said contract was never filed, and was void, etc. *Held*, that such notice showed that the contractor claimed under an implied contract to recover that which, had the contract been properly recorded, he could have recovered under, and that such notice negated the contention that his demand was for extra labor, and not included in the void contract.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by W. A. Morris and Thomas Grubb against W. W. Wilson to foreclose a mechanic's lien. Judgment for plaintiffs. Defendant appeals. Reversed.

Thompson & Paulsell, for appellant. James H. and J. E. Budd, for respondents.

SEARLS, C. Appeal from a decree in favor of plaintiffs for \$356.35 and costs, and for the foreclosure of a mechanic's lien as security therefor. The cause comes up on the judgment roll. The lien of the plaintiffs is for labor and services as carpenters and builders, rendered to the defendant in the construction of a building upon a lot of land owned by the latter in the city of Stockton, county of San Joaquin.

They were not entitled to a lien. They had entered into a written contract with defendant to furnish all the materials and construct the building for the sum of \$2,000, which contract was never recorded, as required by section 1183<sup>1</sup> of the Code of Civil Procedure. Under such circumstances, the contract was void. In such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. Section 1183, supra, and section 1184. The evident intent of the statute was to make it an object for both the contractor and owner to put in writing and record their building contracts where the amount agreed to be paid is in excess of \$1,000. The penalty which attaches to the owner for failure to do so is that he may be held liable for the value of all labor done and materials furnished by persons other than the contractor, without reference to the contract price. The contractor suffers the penalty of a like failure, by being excepted from the class of persons who may take liens under the law. If a contractor, under a contract void for the reasons indicated, can perform the labor and furnish materials, and file a valid lien upon the implied promise to pay, as was attempted in this case, he can avoid the force and intended effect of the statute. It is true that our constitution (section 15, art. 20) provides that "mechanics, material men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material," etc. But the constitution is not, and does not profess to be, self-acting. It commands legislation on the subject. It is equally true that the first part of section 1183 of the Code of Civil Procedure provides for a lien in favor of a class of persons, among which contractors are included; but this must be read in connection with the context, and he who would avail himself of the benefits of the law must bring himself within its purview as to time and manner of filing. In short, he must comply with the statute to avail himself of its benefits. Plaintiffs claim that their demand is for extra labor, and therefore not included in the void contract. Their claim of lien, made a part of the complaint, negatives this position. In the notice of lien it is averred "that said employment was under an attempted contract in writing, and the contract price and amount agreed to be paid under said contract exceeded

Code Civil Proc. provides that contractors shall have liens on the property on which they have bestowed labor and materials for the value of such labor and materials; that all contracts between the owner and contractor for work, where the amount agreed to be paid exceeds \$1,000, shall be in writing, and recorded before the work is begun, otherwise the contract to be void, and no recovery to be had thereon by either party thereto; that labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the instance of the owner, and they shall have a lien for the value thereof.

\$1,000, but said contract was never filed, \* \* \* and was and is wholly void," etc.; showing that, the contract being void, they claim under an implied contract to recover that which, had the written contract been properly recorded, they could have recovered under it. The law gives them a right in such cases to recover the money on an implied contract. A mechanic's lien only exists by virtue of compliance with the statute which creates it. Plaintiffs did not comply with the terms of that statute. They must therefore rest content with a personal judgment. The judgment should be reversed, and the court below directed to enter a personal judgment only in favor of plaintiffs, without counsel fees or expenses of preparing and recording the mechanic's lien.

We concur: HAYNES, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below is directed to enter a personal judgment only in favor of plaintiffs, without counsel fees or expenses of preparing and recording the mechanic's lien.

(97 Cal. 676)

LINDSAY IRRIGATION CO. v. MEHR-  
TENS et al. (No. 18,003.)

(Supreme Court of California. March 27, 1893.)

REVIEW ON APPEAL—QUESTIONS OF FACT.

Whether a particular region is a "farming neighborhood," and whether the supplying of water to that neighborhood is a "public use," within Code Civil Proc. § 1238, providing that eminent domain may be exercised in the following "public uses:" Canals, ditches, and pipes for supplying "farming neighborhoods with water,"—are questions of fact for the trial court, and its findings thereon are conclusive, where the evidence upon which they were based was not insufficient to support them.

Department 1. Appeal from superior court, Tulare county; M. K. Harris, Judge.

Action by the Lindsay Irrigation Company against William Mehrtens and others to condemn land for the purpose of digging ditches and laying pipes for irrigation. There was judgment for plaintiff, and defendants appeal. Affirmed.

W. B. Wallace and Wm. W. Cross, for appellants. Geo. H. Smith, for respondent.

HARRISON, J. The plaintiff is incorporated under the laws of this state for the purpose of supplying water for irrigation and domestic use, and other purposes to which water may be put, to the farming neighborhood surrounding and lying contiguous to the town of Lindsay, in the county of Tulare, and seeks in this proceeding to condemn certain lands for the purpose of constructing a ditch or canal through which to conduct water from Kaweah river to said farming neighborhood. Judgment was rendered in favor of the plaintiff for a condemnation of the land sought to be appropriated by it, and fixing the amount of damage which should

be paid by it to each defendant for the land taken from him. In their appeal from this judgment the argument of the appellants is directed chiefly to an attempt to show that the land to which the plaintiff seeks to conduct the water is not a farming neighborhood, and that the supplying of water to that land is not a public use, and therefore the plaintiff cannot exercise the right of eminent domain for the purpose of taking their lands.

The right of the state to take private property for public use is an inherent element of its sovereignty, and its exercise is restrained only by the limitations contained in the constitution. The right to take the property is not conferred by the constitution, but is to be exercised in conformity with the will of the sovereign, as expressed by the legislature, and such right can be exercised only in behalf of those public uses which the legislature has authorized, and in the mode and with the limitations prescribed in the statute which confers the authority. Whoever, under the claim of an agency of the state, would deprive the owner of any of his property by virtue of the exercise of eminent domain, must show, not only that the use for which he seeks to appropriate it is a public use, but also that the legislature has authorized the taking of property for that particular use, and in the mode in which he is seeking to appropriate it. The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public, and will be recognized by courts; but whether, in any individual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of that case. Section 1238, Code Civil Proc., provides that "the right of eminent domain may be exercised in behalf of the following public uses: \* \* \* (4) \* \* \* Canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water. \* \* \*" This is a legislative declaration that the supplying of water to a farming neighborhood is a public use, and such declaration must be regarded as falling within the scope of legislative duty in providing for the public welfare. In re Madera Irr. Dist., 92 Cal. 309, 311, 28 Pac. Rep. 272, 675. "If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court." Id. In a state like California, where so great a portion of the land is susceptible of agriculture, it may well be said, in view of the climatic peculiarities, and topographical distribution of the land, that the legislature is acting for public welfare in making provision for supplying its many farming neighborhoods with water. "We are not prepared to say that the supply of water to farming neighborhoods for irrigation (and the Code evidently means for irrigation) may not be for a public use. Indeed, in view of the climate and arid soil in parts of the

state, (for this object, climate and soil may properly be considered,) it is safe to say that the supply for such use may be that which the legislature has decided it to be,—a public use. The judgment of the legislature that it is such ought not, therefore, to be disturbed by the courts." *Lux v. Haggin*, 69 Cal. 304, 10 Pac. Rep. 674.

The term "farming neighborhood" is an indefinite expression, and whether it can be applied to any particular tract of land must be determined by evidence. The word "neighborhood" is not synonymous with "territory" or "district," but is a collective noun, with the suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units. One of the definitions given in the Century Dictionary is "a district or locality, especially when considered with relation to its inhabitants, or their interests." A farming neighborhood may be defined as a region in which there are several tracts of farming land, with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors; and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not if it were held in single ownership. The term "public use" is also an expression of indefinite signification, and its application to the facts of any particular case is also to be determined from evidence. The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a public use, yet the same tract of land might be so subdivided, and held in individual proprietorship, as to render the supply of water to it a public, instead of a private, use. The same tract of land may constitute a farming neighborhood, and yet be so limited in the elements which make it a neighborhood that the supplying of water to it would not constitute a public use. *Water Co. v. Baker*, 95 Cal. 270, 30 Pac. Rep. 537. It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use. Whether the particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact, which must be determined by the court before whom the proceeding is had; and its decision thereon must be held conclusive upon this court, to the same extent as in other cases, where it is called upon to determine matters of fact. It is only when it appears that such decision is manifestly erroneous, either by an abuse of its discretion, or by making its decision without any evidence to support it, that this court will call it in question. In

the present case the court below has found that the region to which the plaintiff proposes to supply water is a farming neighborhood, and that the supplying of water to that neighborhood is a public use. There is evidence in the record tending to support both of these findings, and we cannot say that the evidence upon which these findings were made is insufficient to support them. For the purpose of determining the existence of a farming neighborhood, it is not essential that the proprietor of a tract of land therein should actually reside upon the land, or cultivate it by his own industry. It is the land to which the water is to be supplied, and the subdivision of the region into individual proprietorships is essential only for the purpose of constituting it a neighborhood, and determining whether such supply is a public, instead of a private, use. The distinctive characteristic of the neighborhood is that it be a "farming" one, and this implies the proximity of the several tracts of land, rather than of their proprietors. The same public use would exist, whether the lands were cultivated by individual tenants to whom the proprietors had leased it, or by the employees of the proprietors, who were themselves absent, as if by the proprietors residing upon the lands. Nor does the fact that the stockholders of the plaintiff are owners of land within the neighborhood change the supplying of water to that neighborhood from a public to a private use. If the farming neighborhood exists, it is no objection to these proceedings that every member of that neighborhood is a stockholder in the plaintiff. The public use would still remain, and the incidental benefit to the stockholders from supplying the water to the land would be no greater objection than in the case of a corporation formed to supply water to a town whose stockholders are inhabitants of the town. Whether a majority of the stock of the plaintiff is owned by a few persons, who are also the owners of the greater portion of the land to be supplied with water, is equally immaterial. These are questions worthy of consideration by the court in determining whether the region constitutes a farming neighborhood, and whether the supplying of water is a public use, but they are not, of themselves, determinative of the question. The judgment and order are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(98 Cal. 35)

BIGGI v. BIGGI. (No. 14,936.)

(Supreme Court of California. March 29, 1893.)

CONSTRUCTION OF CONTRACT—PARTITION.

1. The title to land was conveyed to both husband and wife, who were subsequently divorced by a decree which made no disposition of the community property. While the action was pending, the parties made a written contract that the land should be sold for not less than \$3,100, as one V. should determine, and the proceeds divided between them, and that the husband should occupy it till sold, and pay a certain sum per month to the wife. The contract also recited that the wife released all

claims to all other property other than "the one-half interest in said life estate and the one-half of the proceeds of the sale thereof." *Held*, that the contract was a release of the wife's interest in all other property but the land which they had agreed to sell, and was a recognition that the land was community property, one-half of which belonged to the wife, but did not convey the interest of the wife to the husband.

2. In an action on the contract by the wife, alleging that the husband refused to comply with its terms, and that the land could not be partitioned without great prejudice to the owners, the wife was entitled to a judgment for its sale and a division of the proceeds between the parties.

Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Theresa Biggi against Narciso Biggi to enforce a contract providing for the sale of a lot of land and a division of the proceeds between the parties. There was judgment for defendant, and, a motion for a new trial being denied, plaintiff appeals. Reversed.

Geo. W. Reed and Geo. M. Shaw, for appellant. Hall & Earl and Dodge & Fry, for respondent.

**HARRISON, J.** The plaintiff was at one time the wife of the defendant, Narciso, and in October, 1888, pending an action between them for divorce, they entered into an agreement for the division of their property, in which it was provided that a lot of land situated on San Pablo avenue, in Oakland, should be sold, and the proceeds of the sale equally divided between them, but that such sales should not be for less than \$3,100, and that, whenever an offer should be made therefor, one Vandercook should be the exclusive judge as to the value of said premises, and as to accepting or rejecting said offer, and that they would abide by his judgment, and sell the premises for such sum as Vandercook might determine. This lot of land had been purchased during the marriage of the parties, and the title thereto taken in the names of them both, but the judgment of divorce which was afterwards rendered between them was silent upon the disposition of the community property. In June, 1889, Vandercook received an offer of \$3,200 for the property, which he deemed sufficient therefor, and which the plaintiff agreed to accept, but the defendant, when requested thereto, refused to accept the offer or sign a contract of sale unless he should receive the entire proceeds thereof. The plaintiff thereupon brought this action, alleging in her complaint that the land was owned in common between her and the defendant, Narciso, setting forth the foregoing agreement, and the refusal of the defendant to comply with its terms, and asking for a sale of the land and the division of the proceeds between them. The defendant in his answer denied that the plaintiff had any interest in the land, and also denied that he had refused to accept the offer which the plaintiff alleged had been made for the land. Upon the trial the court found that the defendant was the owner in fee of the entire tract of land, and that the plaintiff had no interest therein, and rendered judgment

against the plaintiff, and also a judgment in favor of the defendant, Narciso, upon his cross complaint therefor, quieting his title to the land as against the plaintiff. The court did not make any finding upon the issue of the defendant's refusal to accept the \$3,200 offer.

The finding of the court that the defendant was the owner in fee of the entire tract, and that the plaintiff had no interest therein, is contrary to the evidence. The conveyance of the land to the husband and wife made it presumptively community property, and their subsequent divorce without any disposition of that property in the decree left them tenants in common thereof, (*De Godey v. Godey*, 39 Cal. 157;) and the fact that the title had been conveyed to them both caused each of them to be thereafter the holder of the legal title to one half of the land. The agreement between them prior to the decree of divorce was a recognition by the husband that it was community property, and that the plaintiff was entitled to one half thereof. The contention by the respondent that by the aforesaid agreement between the parties the plaintiff conveyed to the defendant whatever interest she had in the land in question, and that her rights against him are only an obligation on his part to pay her one half of the proceeds of any sale that he may make, is contrary to a proper construction of the instrument. The provision therein that until the property should be sold the husband should be entitled to its possession and occupancy, and should pay to the plaintiff six dollars per month therefor, and the further provision that "the parties hereto agree to abide by the judgment of said Vandercook, and to sell said premises for such sum, offered or not, as said Vandercook may determine," are inconsistent with the proposition that the plaintiff's title to the land passed to the defendant by the instrument, and show that, whenever a sale should be made in accordance with its terms, it was to be made by both parties, and that the consent of the plaintiff, as well as of the defendant, was necessary to effect the sale. The clause relied upon by the respondent, wherein the plaintiff "releases and acquits said party of the first part from all and every claim of every character and kind whatsoever to other property, other than said one-half interest in said life estate, and the one-half of said net proceeds of said sale, as aforesaid," when read in connection with the other portions of the instrument, and the purposes for which the parties recite that they have executed the agreement, must be construed as relating to "other" property than that enumerated in the instrument, and not as a release of her interest in the property out of whose sale she was to receive one half of the proceeds. For the purpose of ascertaining the intention of the parties, and the interpretation to be given to the instrument, all of its parts must be considered, and, when so considered, it is to be construed as a mutual, executory agreement on the part of both parties that they will consent to a sale of the land for such sum, not less than \$3,100, as may be

approved by Vandercook, and that upon such sale each will accept one half of the proceeds thereof. As in the case of any other executory agreement, its breach by one party gave to the other the right to treat it as rescinded or to seek for its enforcement. It may be conceded that, until a breach by either party, the right to a partition of the land between them was superseded or suspended, but the refusal of the defendant to perform the agreement, and his denial of the right of the plaintiff to its performance, gave her the right to disregard the agreement, and either bring an action for the partition of the land, or treat the agreement as existing, and seek its enforcement against the defendant. For this purpose the plaintiff alleged in her complaint the facts constituting the breach by the defendant, and the court should have made a finding upon this issue, as the evidence in the record is ample to sustain her allegations. Upon such finding, inasmuch as her allegation in the complaint that the land could not be partitioned without great prejudice to the owners thereof was not denied, her right to a judgment for its sale and the division of the proceeds between them would have been established. The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; PATERSON, J.

(98 Cal. 89)

McDANIEL et al. v. PATTISON et al. (No. 14,280.)

(Supreme Court of California. April 1, 1893.)

EQUITY JURISDICTION—PROBATE OF WILL—SETTING ASIDE DEED.

A complaint by certain devisees of a will alleged that another devisee fraudulently suppressed the will, and altered a deed, whereby testator had conveyed to him a small portion of land, so as to include the entire property of the testator, and demanded that the deed be set aside and the property distributed in accordance with the will, which, it was alleged, could not be probated under Code Civil Proc. § 1339, providing that no will shall be proved as lost or destroyed unless its provisions are clearly and distinctly proved by at least two credible witnesses. *Held*, that a court of equity has no jurisdiction to probate a will, though such relief is sought only incidentally to the main equitable relief; and the fact that the devisees are also alleged in the complaint to be heirs at law will not enable them to obtain the relief demanded, since, having alleged a will, their rights arise only from it. *Beatty, C. J., and De Haven, J., dissenting.*

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Sarah E. McDaniel and others against J. H. Pattison and another to set aside certain deeds, etc. Judgment for plaintiffs. Defendants appeal. Reversed.

For former opinion, see 27 Pac. Rep. 651.

J. L. Murphey and Anderson, Fitzgerald & Anderson, for appellants. Chapman & Hendrick, for respondents.

PER CURIAM. We are satisfied with opinions filed and the conclusion reached

by department 1 when this case was before it for decision, and the judgment is therefore reversed.

In their petition for a rehearing respondents claim that they are entitled to assert their rights as heirs, but it is evident from the pleadings, findings, and decree that the parties and the court below proceeded upon the theory that plaintiffs were claiming as devisees, and not as heirs. The decree, therefore, cannot be modified, but we think there is enough in the complaint to justify an order allowing the plaintiffs to amend their complaint, if they desire so to do, so as to assert any claim they may have by reason of their heirship. The judgment and order are reversed, and the cause is remanded, with directions to allow the parties to amend their pleadings, if they be so advised.

BEATTY, C. J. I dissent. The opinion of the department originally filed in this case, which has now been adopted by the court, decides two propositions, which, in my opinion, are untenable, and which, if incorrectly decided, not only operate unjustly in this case, but establish a most unfortunate precedent for others.

1. It is decided that the complaint fails to state any cause of action,—is so fatally defective, in other words, that, in the absence of even a general demurrer, it will not support a decree limited in its operation to the annulment of the fraudulent deeds therein mentioned. The sole ground upon which this conclusion is reached is that the complaint, although it shows clearly that the plaintiffs are heirs to the decedent, with an undoubted right, in the absence of a will, to maintain the action in that capacity, also shows that they are named as devisees of the same estate in a will which has been suppressed or destroyed by the defendant, and which has not been admitted to or denied probate. Reduced to its simplest terms, the proposition is that, under such circumstances, the heir has no title to the property whatever upon which he can maintain an action to recover its possession or prevent its fraudulent alienation. He has no title as heir, because he may be proved to be a devisee; and he has no title as devisee, because the will has not been admitted to probate. The title, in short, pending a decree of the probate court establishing the will or the intestacy of the decedent, is nowhere. There must, it seems to me, be some fatal flaw in the reasoning which leads to such a conclusion. The fallacy evidently consists in the assumption that on a given state of facts a man may be, in legal contemplation, a devisee, and at the same time not a devisee; for it is only upon this assumption that the plaintiffs can be denied all relief. One door is closed against them on the ground that they are devisees, another on the ground that they are not devisees.

To me it seems a sounder argument to say that upon the facts alleged in the complaint the plaintiffs either are or are not devisees. They must be either the one or the other, for there is no room for a third category in which to place them. If they are devisees, they may maintain the action

in that capacity; if they are not devisees, their title as heirs is undoubted. To hold that they are just sufficiently devisees to destroy their title as heirs, but not sufficiently so to enable them to make title under the will, is to draw too fine a distinction for the ends of justice,—a fact made strikingly apparent by the results of the doctrine in this case, and its inevitable consequences in other cases that may be easily supposed. The probate of an existing will, even when regularly and formally executed and uncontested, requires some time. At least 10 days' notice of the time and place fixed for hearing the proofs must be given, and in the matter of protecting estates from spoliation even so short a delay as 10 days might be of most serious consequence. But when a will is contested, or when it has been fraudulently suppressed or destroyed, so that, if proved at all, it must be proved in the face of all the difficulties that attend the establishment of a spoliated or contested will, months, and even years, may elapse before a final decree establishing the will or the fact of intestacy. In such a case the heirs of the estate, whether named as devisees or not, could maintain no action for its preservation or protection until the decree of the probate court became final; for clearly, if they have no title as heirs when named as devisees in an unproved will, they would, a fortiori, have no title as heirs if the estate was devised to others. But I need not concern myself about the latter case, the question here being as to the right of an heir who is at the same time named as devisee in an unproved will to protect the estate which in any event belongs to him from spoliation or destruction, pending a final decree of the probate court admitting the will to probate or establishing the intestacy of his ancestor.

The decision of the court is that, under such circumstances, he cannot maintain an action to set aside and declare void a forged deed purporting to convey his ancestor's estate to the forger. In other words, although years may elapse before a final decree in probate, the heir must stand by, while the forger, vested with an apparently fair record title of the property, makes use of his opportunity to victimize an innocent purchaser. Or, if the case were different, if the deed, instead of being a forgery, conveys no title, has merely been obtained by some fraud or deception which will authorize a court of equity to set it aside at the suit of the heir or devisee, but in the mean time will enable the fraudulent grantee to pass a good title to an innocent purchaser for value, there will be the same inability on the part of the heir to sue. He cannot commence an action and file notice of its pendency, but must wait until his status is determined,—until it is settled whether he owns the estate as heir or devisee. When that is done, he finds that the estate is vested in an innocent purchaser by a transfer which he has been denied all opportunity of preventing; and, if he could not maintain such an action, neither could he maintain an action to oust an intruder, or to enjoin the most destructive waste or spoliation. He is, in other words, utterly impotent to protect

property which is certainly his by one title if not by the other, merely because it has not been determined which is the good one. I cannot forbear to express my dissent from a doctrine which, to my mind, is so unfounded and so destructive of the most valuable rights of heirs. It is scarcely necessary to point out the broad distinction between this case and *Castro v. Richardson*, 18 Cal. 490, and other similar cases cited in the opinion of the court. In that case the only claim of title was based upon a devise in an unproved will. I venture to say if the complaint had alleged that the plaintiff was also an heir it would not have been held that it showed no title. My conclusion upon this branch of the case is that the complaint did disclose facts sufficient at all events to warrant a decree annulling the several deeds of conveyance therein mentioned. It most assuredly stated a cause of action, and the most that can be said of the allegations with respect to the will is that they rendered it ambiguous or uncertain as to the measure of relief to which the plaintiffs were entitled; but, conceding that they had that effect, all objections on the ground of ambiguity or uncertainty were waived by the failure to demur.

The opinion of the court just filed, while adopting the original opinion of the department, adds a clause allowing the plaintiffs to amend their complaint so as to assert their right as heirs. This permission appears to be entirely inconsistent with the decision. The record shows that the existence of an unproved will was as clearly established by the testimony at the trial as it was alleged in the complaint. The only amendment which the plaintiffs can possibly make is to omit from their complaint allegations of fact which are established by plenary proof. By doing so they may make a *prima facie* case, but all that the defendants will have to do to defeat their action will be to allege and prove the same facts,—as they can easily and will most certainly do; for, if the allegation of these facts by plaintiffs shows that they have no right of action, the facts are necessarily material, and when they are alleged and proved by the defendants, the action must inevitably be dismissed.

2. It is also held in the opinion of the court that the devisee in a spoliated will can have no relief in equity against the spoliator unless he first establishes the will in probate. This part of the decision ignores the well-established distinction between the proceeding in rem, by which the probate court establishes a will so as to bind the heirs generally and the whole world, and a suit in equity by the party injured against the spoliator to charge him as a trustee with respect to the property gained by his fraud. I admit the correctness of the doctrine that a court of equity, as such, has no power to establish a will, even in a case of spoliation, so as to bind the heirs generally, although there are cases of spoliated wills where such power has been asserted and exercised. *Bailey v. Stiles*, 2 N. J. Eq. 220. The current of authority, however, is the other way, and I think the sounder and more reasonable view is that for the establishment of



a will in the strict sense the jurisdiction of the probate court is exclusive. But the same law writers who uphold this doctrine admit an exception or distinction in case of a spoliated will. Prof. Pomeroy, for instance, who is cited in support of the prevailing opinion, when discussing this specific point, uses the following language: "When instruments have been fraudulently suppressed or destroyed for the purpose of hindering or defeating the rights of others, equity has jurisdiction to give appropriate relief by establishing the estate or rights of the defrauded party;" and he gives the following illustration: "If an heir should suppress a deed or will, equity would confirm the title of the grantee or devisee." Pom. Eq. Jur. §§ 919, and note. Other law writers state the doctrine in substantially the same terms. 6 Waite, Act. & Def., 377; 3 Redf. Wills, c. 1, § 7; and see authorities cited at page 239, 2 N. J. Eq. The only case which I have found which holds that a court of equity can afford the defrauded devisee no relief against the spoliator is the case of *Morningstar v. Selby*, 15 Ohio, 345, cited in the opinion of the court. None of the other decisions there cited was made in a case of spoliation, and the general expressions therein contained to the effect that a court of equity, as such, has no power to establish a will, have no application to an action by the defrauded legatee against the spoliator. Not only the weight of authority, but every consideration of justice and expediency, would seem to support the view that a court of equity is not without the power to afford a remedy for so gross a wrong, where, by the very act of the spoliator, the injured party has been deprived of all other remedy.

It is contended that, since the probate court is invested with power to take the proof of lost or destroyed wills, there is no necessity for resorting to equity in such a case, and no ground for its interposition. It is true that a lost or destroyed will may be proved and established in the probate court if there is sufficient evidence of its execution and its terms, and this is a wise and necessary provision for the enforcement of the rights of devisees and legatees against heirs generally. But for the protection of innocent heirs, and the prevention of frauds, the law has at the same time wisely provided that a lost or destroyed will shall not be admitted to probate unless its provisions are clearly and distinctly proved by two credible witnesses. Code Civil Proc., § 1339. Now, it might often happen, as it has happened in this case, that there would be but one living witness by whom a bequest or devise in a spoliated will could be proved. In such a case the will could not possibly be admitted to probate so as to bind innocent heirs, no matter how clear the evidence of its existence and its destruction by another heir, because, as to the innocent heirs for whose protection the law was enacted, there would not be sufficient evidence of its provisions. But as to the spoliator, the case would be different, because the rule of evidence would be different. Everything is presumed against the spoliator, and, the spoliation being clearly

proved, comparatively slight evidence of a bequest thereby defeated would be satisfactory as against him, and therefore sufficient. To hold otherwise would be to convert a provision intended as a shield for the innocent into an instrument of fraud. A will could be destroyed by an heir, and he could admit or even boast of the act, but, unless the provisions of the will could be clearly established by two credible witnesses, the legatee or devisee could have no relief against the actual perpetrator of the fraud. I am unwilling to admit that a court of equity is powerless to grant relief in such a case. It seems, on the contrary, to be precisely the case in which equity is bound to interpose, upon the ground that there is no remedy elsewhere. The result of its interposition is not to usurp the functions of the probate court by establishing the will in a strict sense, so as to bind all the world, but merely to fasten a trust upon the property coming to the hands of the spoliator in favor of the person defrauded. Civil Code, § 2224. The case is strictly analogous to the numberless cases in equity arising under the statute of frauds in which rights in lands have been effectuated upon the ground of implied or resulting trusts in the absence of the written evidence of the right required by the statute. Section 1339 of the Code of Civil Procedure, requiring the evidence of two credible witnesses to establish a lost will, is nothing more nor less than a statute of frauds, and can no more be used as a protection for fraud in a court of equity than other statutes designed to effect the same purpose.

DE HAVEN, J. I concur in the foregoing opinion of the chief justice.

(98 Cal. 30)

CLAIBORNE v. CASTLE et al. (No. 18,071.)  
(Supreme Court of California. March 29, 1893.)

VERIFICATION OF PLEADING—WAIVER OF VENDOR'S LIEN.

1. A verification of a pleading by one co-defendant is a compliance with Code Civil Proc. § 446, providing that the verification must be by affidavit of a party, or, under certain conditions, his attorney.

2. Civil Code, § 3046, provides that one who sells real property has a vendor's lien thereon, independent of possession, for the unpaid price, unsecured otherwise than by the personal obligation of the buyer. Section 5 provides that the provisions of the Civil Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof. *Held*, that the act and conduct of a vendor, which indicate a waiver of the lien, may be shown by parol, since the common-law character of the lien is not changed by the Code provisions.

3. A vendor's lien is a simple equity, and a consideration is unnecessary to support a waiver of it.

4. Where the owner of land executes a deed to N., taking his note for the price, and, before recording the deed, N. sells the land to C., when, by agreement of all concerned, and in consideration of the payment by C. of the interest due on the note, the deed to N. is destroyed, and the owner executes a deed of the land to C., and agrees to look to N. personally for payment, neither the owner nor his repre-

sentative can be heard to say, in a court of equity, that there was no consideration for the waiver of the vendor's lien.

Department 1. Appeal from superior court, Tulare county; Ansel Smith, Judge.

Action by Gilbert B. Claiborne, executor of George Crossmore, deceased, against George H. Castle, Jr., and others, executors of George H. Castle, deceased, and Hayes Nicewonger, to foreclose a vendor's lien for the purchase price of real estate. There was judgment in favor of defendants, and a motion for a new trial being denied, plaintiff appeals. Affirmed.

Aug. Muentner and John B. Hall, for appellant. Baldwin & Campbell, (Reddy, Campbell & Metson, of counsel,) for respondents.

GAROUTTE, J. On April 5, 1884, George Crossmore, now deceased, was the owner of the real estate in the complaint described, and on that day he sold the said real estate to defendant Nicewonger for the sum of \$8,000, taking his promissory note therefor, payable four years from that date, with interest. Crossmore executed a grant, bargain, and sale deed for said premises to Nicewonger, but said deed was never recorded. It appears that Nicewonger was indebted to one Castle in a sum of money exceeding \$10,000, and about the 28th day of February, 1885, Castle, Crossmore, and Nicewonger met, and it was agreed between them that Nicewonger would surrender up his deed, and that the same should be destroyed, and that Crossmore should execute a deed of said land to Castle, direct; that Castle should pay \$8,500 for the land, by paying to Crossmore \$480 interest on the note, and to Nicewonger \$20, and by crediting Nicewonger with the sum of \$8,000 on his indebtedness to him, (Castle,) and that Crossmore should keep the note of Nicewonger, and hold it for payment of the land, and look to Nicewonger personally for payment; and under that agreement the deed was executed by Crossmore, and accepted by Castle. After this date, Crossmore did not intend to claim, and did not claim, any lien whatever upon the land and premises in the complaint mentioned, for the purchase price thereof, but looked entirely to the note of defendant Nicewonger for payment therefor. The foregoing facts were substantially found by the court, and are fairly supported by the evidence. This action is brought by the executor of the last will of Crossmore, against Nicewonger and the executors of the last will of Castle, to enforce a vendor's lien upon the realty, based upon the original transfer to Nicewonger. Plaintiff appeals from the judgment and order denying his motion for a new trial.

1. It is insisted that the default of the defendant Castle should have been entered, for the reason that the answer was verified by Nicewonger alone, he stating that he also made the affidavit on behalf of his codefendant. The necessity for the verification of the pleading arises from the statute alone, and the solution of this question is dependent entirely upon the construction of section 446 of the Code of Civil Pro-

cedure. Without entering into a detailed analysis of that section, it is quite apparent, taking it as a whole, it was contemplated by the legislature that a verification of a pleading by one coplaintiff or codefendant would be sufficient to meet the demands for such legislation. Such has been the practice in this state. To our knowledge it has never been questioned, and we are not disposed to disturb it. Conceding that cases may arise where the real party in interest would thus be able to shift the responsibility of the verification of the pleading upon his nominal coplaintiff or codefendant, the evil should be remedied by legislative enactment, rather than by judicial construction.

2. It is insisted that a vendor's lien cannot be waived or released as long as the obligation exists, by parol declarations of the lienholder. Appellant concedes that prior to the Codes the text-books and authorities were against his contention, but claims that a vendor's lien is now a statutory lien by virtue of section 3046 of the Civil Code, and consequently stands upon a higher plane, and is endowed with greater capabilities, than the ordinary vendor's lien, recognized by equity courts. Section 3046 declares: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." But this section is but a repetition of the common law, as are hundreds of other sections found in the Codes. When it uses the term "vendor's lien," it refers to the same old vendor's lien proper that is treated of in the text-books, both modern and ancient. If other provisions of the Code limit or enlarge rights under it to that extent, it is not the vendor's lien of the past, but to that extent only. Section 5 of the Civil Code provides that its provisions, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." See *Churchill v. Improvement Co.*, 96 Cal. 490, 31 Pac. Rep. 560. The recent cases of *Avery v. Clark*, 87 Cal. 619, 25 Pac. Rep. 919, and *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. Rep. 608, and 26 Pac. Rep. 789, fully discuss this subject, and, in effect, hold that the Code provisions do not change the character of the lien. While in those cases the title still remained in the lien holder, yet the matters discussed were fairly involved, and we again assent to the law as there declared. It is settled beyond dispute that the acts and conduct of a vendor, which indicate a waiver of the lien, may be shown by parol. The California cases all point directly to this conclusion, and the doctrine is clearly announced in *Moshier v. Meek*, 80 Ill. 79; *Jurman v. Farley*, 7 Lea, 141; *Jones, Liens*, § 1073.

3. It is insisted that Crossmore's agreement with Castle and Nicewonger to waive the lien was made without consideration. The evidence indicates to the contrary, but as said in *Avery v. Clark*, supra: "A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by

courts for the benefit of the vendor of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor." If it is a simple equity or privilege, purely personal,—something dependent for life upon no agreement of the parties,—a consideration is unnecessary to support a waiver of it. Under any view of the case, Crossmore cannot be allowed to come into a court of equity, asking to have a vendor's lien foreclosed upon Castle's land, and claim that his release of the lien thereon was made without consideration. His promise to release the lien was the moving consideration to Castle to purchase. Without it he never would have bought the land. Crossmore's conduct placed Castle in his present position, and it would be most unfair if he should be allowed to make such a showing, and thereby visit loss upon an innocent party. Equity will not listen to a plea of "no consideration" upon any such state of facts. For the foregoing reasons, let the judgment and order be affirmed.

We concur: HARRISON, J.; PATERSON, J.

(98 Cal. 45)

BENSON v. CENTRAL PAC. R. CO. (No. 13,290.)

(Supreme Court of California. March 30, 1893.)  
INJURY TO PERSON ON RAILROAD TRACK — NEGLIGENCE—PROXIMATE CAUSE.

1. When the engineer first discovered plaintiff, a child six years old, on the track, her father had her by the hand and was leading her towards the other parallel track. After reaching that she became frightened, and, breaking away, went in front of the moving train. The train was going only 15 miles an hour, and immediately after she put herself in peril every effort was made to stop the train. *Held*, that there was no negligence on the engineer's part, as plaintiff's action could not have been anticipated.

2. Carrying plaintiff beyond her destination and leaving her at the next station was not the proximate cause of her injury, she being struck by a train while walking back to her station along the track, the only direct way.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by Elvine M. Benson, by I. B. L. Brandt, her guardian ad litem, against the Central Pacific Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry E. Highton and I. B. L. Brandt, for appellant. W. H. L. Barnes, for respondent.

PER CURIAM. This action is brought by the plaintiff, an infant, to recover damages for personal injuries alleged to have been sustained by her while walking upon the roadway of defendant, by being run into by a locomotive operated by defendant. The case was tried by a jury, which returned a verdict for defendant, and the appeal is from the judgment and from an order refusing a new trial.

Plaintiff's evidence tended to prove the following facts: Plaintiff, a child

of but six years of age, with her father and the other members of her family, took passage on a train of defendant for Watt's station, in Alameda county. As the train approached Watt's station the whole family arose and took positions at the door of the car so as to be able to step off the train without delay, and immediately on the stoppage of the train at the station proceeded to leave it; but the stop was so short that but part of the family were able to get off, and the train moved away with the father and the plaintiff and her brother still on it. While the family was thus endeavoring to get off, the conductor of the train was on the platform of the car, and, when the train began to move, the father asked him, "Why didn't you let me off?" and the conductor thereupon told the father: "You cannot get off here. You have got to go to the next station, only a short distance, and you can walk back when you get to the next station." When the next station (Emery) was reached, the father, with plaintiff and her brother, left the train. The father had never before been on the part of the railroad between Watt's and Emery Stations, and on stepping off looked up and down the railroad. He saw no cars. He could observe no other route than the railroad to get back to Watt's station, and in fact there was no other way; one side of the railroad right of way being the waters of the bay, and the other a slough, running through marsh and swamp. There were two tracks, and supposing that if a train should come along behind him it would be on the east track, as the train which he had just left was occupying the west track, the father started to walk southerly along the east track to Watt's station, carrying the baby on one arm and holding plaintiff by the hand; and he had thus proceeded for a distance of 500 or 600 feet south of Emery when he heard a noise back of him. Looking in the direction of the noise he saw a train, but owing to the existence of a curve in the road it was impossible for him to determine on which track the train was running. A moment later he looked again at the train, and saw that it was on the east track,—the same on which he was walking. He then left that track, crossing to the west track, and had entirely cleared the east track, continuing all the time to hold plaintiff by the hand, when the plaintiff, frightened by the approach of the train, while it was yet 150 or 200 feet from her, broke away from her father and ran back to and on the east track, where she was struck by the flying train, and received the injuries complained of. The accident happened in broad daylight; the view of the railroad between the two stations, a distance of 2,062 feet, was unobstructed; and a person standing at either station could see to, and some distance beyond, the other; and a person on the spot where plaintiff and her father were when the latter first heard the train, namely, 600 feet south of Emery station, could easily be seen from the latter place. Plaintiff and her father were in fact noticed by the fireman of the train, according to the latter's

evidence, while they were still on the track on which the train was approaching them, and were seen by him to cross over to the other track, and they were observed by the engineer when about 100 yards from the train; notwithstanding which the train, which had pulled out of Emery station at a speed of 15 miles an hour, continued such speed. No bell was rung, or whistle blown, or other signal given plaintiff, and no attention paid to her presence on the track, until the train was within 150 feet of her, when an endeavor was made to stop it, but too late to be of use. To which must be added the uncontradicted testimony introduced by defendant that when the engineer first saw plaintiff's father he was in the act of stepping off the track upon which the train was traveling, towards the other track, and succeeded in getting entirely clear of the track and out of danger, and, further, that the engine was provided with the best equipment known for stopping the train; that the engineer kept his eye upon the plaintiff and her father, and, as soon as she unaccountably broke from her father and ran across the track in front of the engine, every possible effort was made to prevent the injury.

Appellant contends that various erroneous instructions were given by the court, to her injury, and that several instructions asked for by her were wrongfully refused; that because of these errors the question of negligence was not properly submitted to the jury. But we think there was no evidence of negligence on the part of the defendant, and that a verdict for the plaintiff, had one been rendered, could not have been sustained; and in considering this question we shall adopt the rule laid down in *Wilson v. Railroad Co.*, 62 Cal. 172, that where the evidence of negligence consists of circumstances from which inferences may be drawn for or against it, it is the province of the jury to determine whether there was negligence or not. There were no houses along this roadway at the point where the accident occurred, or for some considerable distance either way. The roadbed was about 25 feet wide, on one side of which was water and on the other marsh. Two tracks were laid over it. It is matter of common knowledge that 15 miles per hour is not more than one half the usual speed between stations, outside of cities and towns. No one would think such speed reckless or dangerous under ordinary circumstances over this road at that point. The defendant had a right to the use of its track, and may ordinarily presume that no one is upon it to be injured. It owes to persons wrongfully there no duty to look out for them that they may not be injured. Whatever duty it owes such persons arises after and because they have been discovered there by its servants. When the engineer first discovered plaintiff she was in the custody and control of her father, and was in the act of stepping from the track towards the other parallel track. The party did get off and reach a place of security. It is difficult to see why, under such circumstances, the defendant's engineer should have made any attempt to

check the speed of the train. Counsel suggest because of the fright to the child, which they assume should have been anticipated. But the child was apparently and in fact in the custody of a person of mature years, her father, who testified that he held her by the hand. Unfortunately she broke from him and ran in front of the engine. We do not think this could have been anticipated, or was caused by any negligence on the part of defendant's servants. As soon as she put herself in peril every possible effort was made to prevent the injury. So far we think, negligence on the part of defendant could not be reasonably inferred from the circumstances.

But appellant's counsel contend that plaintiff was not wrongfully upon the roadway, but was there through the fault of defendant's servants, who carried her beyond her station, in violation of the contract of defendant, and put her off at another point on their road, telling her that she could walk back; that there was no other way to reach the station save by the roadway, and therefore the acts of defendant's servants in failing to permit her to alight at Watt's station, and leaving her at Emery station, directly and proximately caused the accident. The failure of defendant to permit plaintiff to alight at Watt's station, leaving her at Emery station instead, was a violation of defendant's contract for which plaintiff was entitled to an action for damages. She might have insisted upon her contract and perhaps have refused to alight anywhere else, or might have taken the next return train for Watt's station, and insisted upon her right to be left at Watt's station free of charge, but it is difficult to see how such wrong on the part of the defendant gave her a right to go back over the track to Watt's station.

The real contention here is that, defendant having carried her beyond her destination and left her, the defendant must be held to have intended that she should walk to the station, and, there being no other obvious way, the wrong of defendant was the proximate cause of the danger to which she was exposed; and, as a child of six years cannot be guilty of contributory negligence, the defendant must be responsible. When it is said that there was no other way back, it must be understood that there was no direct way. We cannot suppose that Emery station was entirely isolated from the general road system of the country. The testimony of plaintiff's father also shows that he knew that a return train was then expected, upon which they could have taken passage. The cases cited by counsel for appellant in support of this contention are cases where the common carrier violated another obligation imposed by his contract, that is, to furnish a safe place for alighting. *Hutchinson on Carriers*, which is referred to, says, (section 617:): "Such carriers must be equally careful not to pass beyond the alighting platform station, and thus to require or make it necessary for the passengers to alight without returning to it. When this has been done it is a breach of the carrier's contract, and

the passenger may demand a return to the platform or station before leaving the train, and if the servant of the company in charge, without sufficient cause, refuse to return with him, but leaves him to get back by other means, the passenger will be entitled to an action and to the recovery of damages. \* \* \* If there should be no demand to be taken back or refusal to do so, and no attending circumstances of aggravation, and the passenger voluntarily leaves the car, all that the passenger could rightfully claim would be compensation for the inconvenience to which he has been put. \* \* \* But nevertheless where the passenger is carried past the platform or usual alighting place, and is required, either expressly or impliedly, to leave the car without assistance and to find his way unaided to the station, during which time he receives injury, the carrier is liable." This is evidently because the passenger was left in an unsafe position. This is made evident by the cases cited in its support. *Railroad Co. v. Doane*, 115 Ind. 435, 17 N. E. Rep. 913. A lady passenger was carried some 40 rods beyond the station, and ordered to alight. The roadway was fenced by a wire fence. She discovered no way of getting out except to walk back to the station. In doing so she had to pass a cattle pit, into which she fell. It is said: "It is also the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars, and passengers to safely alight when they have accomplished their journey." It is also said that, when passengers are required to alight at any other place than the platform, the company is liable for injuries received in leaving such place to the same extent as it would be for defects in its own premises. The facts in this case and the reasoning of the court clearly show that it can have no application to the case in hand. *Adams v. Railway Co.*, 100 Mo. 555, 12 S. W. Rep. 637, and 13 S. W. Rep. 509; *Winkler v. Railway Co.*, 21 Mo. App. 99; and *Franklin v. Motor Road Co.*, 85 Cal. 63, 24 Pac. Rep. 723,—are of the same character, and have only to be read to show their inapplicability to the case under consideration. Here the plaintiff was left at a different station from that to which the defendant had agreed to carry her, but she was not left in a position of danger. When she left the car without asking to be carried back and left where she ought to have been left, the contract relation between her and defendant ceased. She had a right of action against the company for the breach of their contract, but they owed her no special care because of it. It must follow that the failure to leave plaintiff at Watt's station and carrying her to Emery station was not the proximate cause of her injury.

The judgment and order are affirmed.

(98 Cal. 63)

BARROWS et al. v. FOX et al. (No. 14,643.)  
(Supreme Court of California. April 1, 1893.)

WATER COURSES—APPROPRIATION—AMOUNT OF  
DIVERSION.

A decree enjoining an appropriator of water against diverting from a stream any

greater quantity of water than will flow through an iron pipe, of a certain size, which is found to be the amount required by him, is erroneous where the water is conducted in an open ditch or flume; as in such case the amount which reaches the place of use is not the same as that diverted, and the appropriator is entitled to such an amount, allowing for waste, as will yield the amount required at the place of use, and he is not obliged to substitute iron pipes.

In bank. Appeal from superior court, Ventura county; B. F. Williams, Judge.

Action by Barrows and others against Fox and others. From a decree defining the rights of the parties, and from an order denying plaintiffs' motion for a new trial, plaintiffs appeal. Reversed.

Blackstock & Shepherd, (Chapman & Hendrick, of counsel,) for appellants. H. L. Poplin, for respondents.

BEATTY, C. J. The plaintiffs in this action are successors in interest to an appropriator of running water. The appropriation was made at a time when all the lands affected were public lands of the United States, and by means of a ditch and flume through which the water diverted from the stream was conducted to the lands now owned and occupied by the plaintiffs, where it was applied to irrigation, watering stock, and domestic purposes. The diversion and use of the water for these purposes and by these means had been continued for more than 13 years prior to the trial of the action in October, 1890. The defendants, long subsequent to the appropriation by plaintiffs' grantor, became the owners of riparian lands through which the stream flows in its natural course below the dam maintained by plaintiffs for the purpose of forcing the water into the head of their ditch. The lands of plaintiffs are not on or adjacent to the stream, and no surplus or waste water will flow from their lands back into the stream, above or within the limits of defendants' lands. In the summer of 1890 the defendants, for the purpose of diverting the water from the plaintiffs' ditch and flume, and bringing it upon their own lands, tore out plaintiffs' dam, whereupon this action was commenced for damages, injunction, etc. The defendants answered, contesting plaintiffs' claims, and asserting their own claims, not only as riparian owners, but as appropriators, and praying for affirmative relief. The cause was tried by the court, and a decree rendered, defining the rights of the respective parties, and enjoining each from interfering with the other. From this decree, and from an order denying their motion for a new trial, the plaintiffs appeal.

The appeal from the order may be disposed of in few words. There was no error—none certainly that could possibly have prejudiced the plaintiffs—in any of the rulings made by the superior court during the trial, and we find in the record evidence sufficient to sustain the findings which are attacked. The principal objection to the findings is that they limit too strictly the extent and character of plaintiffs' appropriation. In effect, it is found that the appropriation did not exceed 11

inches of water, and that this quantity cannot be beneficially applied for the purpose of irrigation on plaintiffs' lands more than 15 days in each month during the irrigating season, i. e. from June to November, inclusive, in each year. There is evidence to sustain this finding and to support the conclusion that the diversion by plaintiffs of the entire 11 inches during other months, or for more than 15 days in each irrigating month, would merely result in a waste of the waters of the stream upon nonriparian lands. It is also found that for domestic purposes and for watering stock the plaintiffs require no more water than will flow through a three quarter inch iron pipe laid from the point of diversion to plaintiffs' lands on the grade of their ditch and flume. There is evidence, not very satisfactory perhaps, but sufficient to sustain this finding in the terms in which it is made, the only difficulty being that it fixes no quantity of water, and is incapable of fixing it in the absence of a pipe such as that described; and the fact is that the plaintiffs have not, and have never had, a pipe of any description, but only an open flume and ditch. This difficulty, however, does not result from lack of evidence to support the finding, though it does, as we shall see, affect that portion of the decree which is based upon it.

We come next to consider the points urged in support of the appeal from the judgment.

1. The superior court did not err in enjoining the plaintiffs from diverting the whole amount of water appropriated by them for purposes of irrigation at times when it is found they could not use it beneficially for that purpose, and when, as a necessary consequence, it would run to waste on nonriparian lands. The extent of an appropriation is limited, not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator to a beneficial use; and as to any surplus the riparian proprietor below the point of diversion has a right to demand that it should flow in the stream as it has been accustomed to flow. Civil Code § 1411; *Perego v. McKissick*, 79 Cal. 572, 21 Pac. Rep. 967.

2. But we think the decree of the superior court in attempting to enforce this principle goes in one respect too far, and is in another particular too uncertain and indefinite to be capable of enforcement. The findings nowhere determine the quantity of water diverted by plaintiffs. All that they establish is the quantity which plaintiffs have a right to use on their lands for irrigation and other purposes. But plaintiffs are enjoined against any diversion from the stream in excess of the quantity which they are found to be entitled to use on and at their lands. There is always and inevitably a difference between the quantity of water diverted from a stream and the quantity which reaches the place of use when conducted for any distance through an open ditch or flume, and, when the only fact found is the quantity of water used, this is not a sufficient basis for an injunction limiting the diversion. These remarks apply with especial

force to that part of the decree which limits plaintiffs' right of diversion for stock and domestic purposes to the quantity of water which will flow through a three quarter inch pipe. The plaintiffs, as we have seen, have no pipe of any dimensions, and they are not only not obliged to put in a pipe, but they have no right to do so, in the lands of other parties through which their ditch is shown to extend. *Allen v. Water Co.*, 92 Cal. 138, 28 Pac. Rep. 215. The quantity of water which they are allowed to divert at all times for stock and domestic purposes is therefore undetermined, and incapable of determination except by means legally impossible, and the decree is therefore erroneous. It is also erroneous for the further reason that the plaintiffs have the right to divert from the stream a quantity of water sufficient to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily so lost in a ditch and flume well constructed and kept in good condition. Ditches and flumes are the usual and ordinary means of diverting water in this state, and parties who have made their appropriations by such means cannot be compelled to substitute iron pipes, though they may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste. The judgment is reversed, and the cause remanded to the superior court, with directions to modify its decree to conform to the views herein expressed, and for that purpose to take such additional testimony and make such additional findings as may be necessary.

We concur: HARRISON, J.; GAROUTTE, J.; PATERSON, J.; FITZGERALD, J.

(98 Cal. 110)

CLARK et al. v. CHAPMAN. (No. 18,006.)  
(Supreme Court of California. April 8, 1893.)

VARIANCE—FORECLOSURE SALE—GUARANTY.

1. In an action on a contract of guaranty which recites that it is made by defendant in consideration of the execution and filing in court of a certain agreement to arbitrate, to which defendant, one H., and others were parties, where it appears that H.'s name was erased, by mutual consent, before filing, no objection can be made to introducing the agreement, as filed, to identify the subject-matter on which defendant's liability is based, since the variance is not such as will mislead defendant.

2. Where land worth \$3,500 is incumbered of record with mortgages for \$3,200, a bid of \$25 at an execution sale is not disproportionate to the value of the property, after deducting the apparent liens.

3. Where a creditor has recovered a judgment against the principal debtor, which remains unsatisfied, a guarantor against whom judgment is recovered on his guaranty is, on payment thereof, entitled to an assignment of the judgment against the principal, but such assignment is not a condition precedent to a recovery from the guarantor.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. M. Clark and W. H. Mc-

Kenzie against E. W. Chapman on a contract of guaranty. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. M. Demont and Newman Jones, for appellant. Van Meter & Warlow, for respondents.

SEARLS, C. This is an appeal from a final judgment in favor of plaintiffs, and from an order overruling a motion for a new trial. On the 24th day of May, 1888, J. G. Wofford, the assignor of the respondents, S. G. Boyd, E. W. Chapman, the appellant, and E. H. Fleming entered into a written agreement of arbitration of certain differences existing between them, growing out of and relating to certain commissions claimed by Wofford from Chapman and Fleming for the sale of fruit and ornamental trees and cactus hedge plants; for salary claimed to be due him; also, for an amount claimed to be due him and Boyd from all the others on account of moneys, notes, etc., received by such others from the sale of cactus hedge plants in Merced county, where said Wofford and Boyd claimed an interest in the sales. The name of one J. H. Hamilton was originally written in the body of the agreement of arbitration, as a party thereto, but was erased therefrom, as appears by a note at the bottom of the instrument, which note is as follows: "Name J. H. Hamilton erased wherever occurring in this instrument. [Signed] H. S. Dixon. S. W. Gels. G. G. Goucher." Dixon was the attorney of Chapman, and Gels and Goucher were attorneys of Wofford. On the day of the execution of the agreement to arbitrate, viz. May 28, 1888, E. W. Chapman, the appellant, entered into a written agreement with J. G. Wofford, in the following language: "In consideration of the execution and filing in the superior court of the state of California, in and for the county of Fresno, by him, of a certain agreement of submission to arbitration, dated this day, to which J. H. Hamilton, E. W. Chapman, S. G. Boyd, and E. H. Fleming are parties, submitting to arbitration the divers matters specified therein, and of the faithful performance by him of all his obligations entered into under and by virtue of said agreement, I, E. W. Chapman, of the county of Fresno, state of California, do hereby covenant and agree with J. G. Wofford, of the same place, that I will and shall save him, said Wofford, harmless against all loss of any and all lawful claims he may establish before the arbitrators appointed in said agreement by reason of his surrender to them of any of the property or effects involved in said controversies so to be decided, and that I will and do hereby guaranty said Wofford that he shall have immediate payment of any and all sums found by said arbitrators due him upon the settlement of the affairs and accounts involved in the matters submitted to said arbitrators by said agreement, upon the final determination of the matters so submitted to said arbitrators. E. W. Chapman. Fresno, 24th May, 1888." On the same paper, below the foregoing agreement, the following ap-

pears: "I hereby obligate myself to said Wofford in manner and form above written. Ed. H. Fleming." The agreement of submission to arbitration was filed in the superior court of Fresno county on the day of its execution, viz. May 24, 1888. The arbitrators named in the agreement met, received from Wofford a surrender of certain horses, wagons, harness, promissory notes, and other assets, as provided in the agreement of arbitration, and on the 18th day of July, 1888, filed their findings and award in the proceedings with the clerk of the superior court of Fresno county, in which, among other things, the sum of \$1,454.11 was found to be due to J. G. Wofford from E. H. Fleming. The agreement to arbitrate provided therefor, and such proceedings were had thereupon that on the 27th of July, 1888, judgment in favor of Wofford, and against E. H. Fleming, for \$1,454.11, was entered in the superior court of Fresno county. At the date of the entry of judgment the defendant therein, E. H. Fleming, was the owner of lots 11, 12, and 13, in block 107, of Fresno City, valued at about \$3,500, upon which there was of record mortgages amounting to \$3,200, although in fact one of them, for \$1,500, had been paid. Fleming, on the 7th of August, 1888, conveyed these lots to one Burns. Execution issued on the Wofford judgment September 22, 1888, was levied upon the three lots above mentioned; and, at a sale thereunder on the 10th of November following, they were bid in for \$25 by Wofford, from whom they were redeemed by Fleming on the 8th of May, 1889. At the date of the sale, and ever since said date, Fleming has been insolvent, and had no property except the lots in question. On the 17th of October, 1888, Wofford assigned to Clark and McKenzie the guaranty from Chapman, receiving therefor the entire amount due him, viz. \$1,454.11 and interest. No payments having been made thereon, the assignees brought this action, and recovered judgment in the court below.

As will appear from the foregoing statement, the name of J. H. Hamilton is mentioned as a party to the contract of arbitration in the guaranty of defendant, Chapman, while in the agreement to arbitrate, filed in the superior court, the name of Hamilton does not appear. Defendant objected, when the contract of arbitration was offered in evidence, upon the ground that this variance was fatal, and his objection being overruled, and the agreement admitted in evidence, he afterwards made the same point on motion for a nonsuit, which was denied; and these rulings are the basis of the first error assigned. Appellant admits that an agreement to arbitrate was filed in the superior court, but claims that, inasmuch as the name of J. H. Hamilton did not appear as a party thereto, it was not the agreement specified in the guaranty. Section 489 of the Code of Civil Procedure provides that "no variance between the allegations in pleading and the proof is to be deemed material unless it has actually misled the adverse party." Was the defendant misled by the variance? The object of the reference to the contract to arbitrate in the contract



of indemnity was to identify the subject-matter upon which defendant's liability was based. It described the contract of submission to arbitration accurately as to date, as to questions to be submitted, property to be surrendered to the arbitrators, court in which the submission was to be filed,—in short, in all respects, identically, except that, as filed, the name of Hamilton was erased. When we consider that this seems to have been done by the mutual consent of all the parties; that the attorney of defendant witnessed the erasure of Hamilton's name from the contract of submission; that the matter was arbitrated without objection, so far as appears; that Wofford surrendered the property in his possession, as provided in such agreement,—it is hard to see that Chapman was misled; non constat but that the insertion of the name of Hamilton in the two instruments was a mere clerical error, which might be disregarded or corrected by the parties thereto, at their will. The question is not one in which the variance is as to the measure of defendant's liability, but rather as to the identity of the subject-matter upon which that liability is founded. The responsibility of defendant, as measured by his guaranty, was founded upon a certain arbitration, and the results flowing therefrom, and any indices identifying that arbitration with certainty are deemed sufficient. *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 264, was a case in which the defendants were sued as common carriers for the loss of a draft sent through them, and described as being signed by "John Q. Jackson." The proof showed that it was signed "John Q. Jackson, Agent," and the court held the variance between the allegation and proof immaterial. *Smith v. Morse*, 9 Wall. 76, was an action upon a breach of covenant to perform the award of arbitrators. The agreement to refer to arbitrators contained this clause: "as provided in articles this day executed." The declaration in the case counted on the submission omitting the sentence quoted; and on the submission being offered in evidence, containing the quoted clause, its admission was objected to on the ground of variance. In fact, no articles of submission had ever been executed, and it so appeared at the trial, whereupon the court held there was no variance. I regard the error assigned as not well taken.

2. It is urged that there was no sufficient consideration for the contract of guaranty entered into by defendant. The first specification of insufficiency is based upon the theory that defendant's guaranty was based upon the consideration of the execution and filing in the superior court of the contract of submission containing the name of J. H. Hamilton, whereas in fact no such agreement was ever executed and filed. This allegation of error is answered in the discussion of the question of variance, in which it is held the contract of submission was substantially the same as specified in the contract of guaranty, and varied therefrom only as by consent of all the parties, defendant included. A further consideration for the guaranty is to be found in the surrender to the arbitrators

by Wofford of the property in his possession, as provided for therein. The second specification, as to the sufficiency of evidence to justify the findings and decision, is based upon the supposed agreement between Wofford and Chapman that the former should purchase the town lots of the judgment debtor, Fleming, at the face of the judgment, on a sale under execution, and upon full payment by Chapman should assign the certificate of sale to the latter. The evidence as to this agreement involved a substantial conflict. The finding was against the defendant, and, upon well-established principles, will not be disturbed by this court. Wofford exhausted the lien of his judgment upon all the property of the defendant therein, and the sum bid, \$25, was not disproportionate to the value of the property after deducting the apparent liens thereon. The fact that one of the mortgages had in fact been paid, although not so appearing of record, does not seem to have been known at the date of the sale and purchase by Wofford. A guarantor, like a surety, is entitled to be reimbursed by enforcing any remedy which the creditor then has against the principal; and, if defendant satisfies the judgment herein, he will be entitled to an assignment of the judgment against Fleming; but such assignment is not a condition precedent to recovery. I am of opinion the conclusion reached by the court below was correct, and advise that the judgment and order overruling the motion for a new trial be affirmed.

We concur: BELCHER, C.; HAYNES C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(51 Kan. 167)

ATCHISON, T. & S. F. R. CO. v. BRASSFIELD.

(Supreme Court of Kansas. April 8, 1893.)

**INJURY TO EMPLOYEE—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE OF DAMAGES—RECORD ON APPEAL—INSTRUCTIONS.**

1. A section man employed by a railroad company suffered an injury while unloading ties from a car for the purpose of repairing the company's track. It was claimed that the injury was caused by the negligence and mismanagement of a coemployee. *Held*, in an action against the railroad company, that there is sufficient evidence to sustain the claim of the person injured, and that the employment and work in which they were engaged bring the case within the terms of chapter 98 of the Laws of 1874, making a railroad company liable for the negligence of a coemployee.

2. The injury inflicted was rupture and varicocele, and a competent physician and surgeon who had examined the injury was called as an expert, and testified that such injuries were generally the result of more or less violence. He had heard the injured plaintiff testify how the injury was caused, and he was asked to state whether, in his opinion, the plaintiff's injury could have been produced in the manner stated. Over objection he answered that it could, and must have been done by violence. *Held* not to be prejudicial error.

3. The charge of the court is a "proceeding" in a cause, and, where there is a statement in a case made that it contains all of the proceedings in the cause, it will be *held* that all of the instructions are embodied therein.

4. An instruction given to the jury, that "direct and positive evidence of negligence, as a fact, is not required. Any circumstance from which negligence may be reasonably inferred may be sufficient,"—is held not to be misleading or erroneous.

(Syllabus by the Court.)

Error from district court, Johnson county; J. P. Hindman, Judge.

Action by Theodore A. Brassfield against the Atchison, Topeka & Santa Fe Railroad Company to recover for personal injuries sustained while in the employment of defendant. There was judgment for plaintiff and defendant brings error. Affirmed.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. A. Smith Devenney, for defendant in error.

JOHNSTON, J. Theodore A. Brassfield, who was employed by the Atchison, Topeka & Santa Fe Railroad Company in the capacity of a section hand, was injured while unloading ties from a car, which they were about to use in the repair of the company's track. The injury is alleged to have occurred through the negligence of a coemployee who was assisting in unloading the ties. It is stated that Brassfield had taken hold of one end of the tie, and the coemployee carelessly took hold of the other end, and jerked and turned it over so as to throw Brassfield off his balance, causing a heavy strain on him, which produced inguinal and femoral hernia, and also varicocele. It is averred that the injury is of a permanent character, and was produced without fault or negligence of Brassfield. He laid his damages at \$5,000, and upon a trial the jury awarded him \$700. The errors assigned relate to the admission and sufficiency of the evidence upon which the verdict rests, and also to the instructions given to the jury.

The employment in which Brassfield was engaged was such as would entitle him to recover for any injuries sustained in consequence of the negligence or mismanagement of a coemployee. *Railroad Co. v. Harris*, 33 Kan. 418, 6 Pac. Rep. 571. It is claimed that the plaintiff below failed to show negligence or mismanagement on the part of the company or the coemployee, Hackley, who assisted him in handling the tie, but we think there is evidence upon this point which tends to support the verdict. The ties were water-soaked, and weighed 300 pounds or more. There is testimony to the effect that Hackley first took hold of one end of the tie, and just as Brassfield took hold of the other end, and before he had straightened up and obtained a good hold, Hackley carelessly turned the tie, and pulled it so as to strike Brassfield's body, and cause the injury complained of. Although there was contradictory testimony, the jury specially found, upon the whole evidence, that the injury was the result of Hackley's negligence, and, as their finding and verdict have been approved, the controversy, so far as the sufficiency of the evidence is concerned, is closed.

Objection is made to testimony given by Dr. Holmes, a physician and surgeon of extended practice in the treatment of ruptures or hernia, and who had made an ex-

amination of Brassfield's case. He described the nature of the injury, and stated that such injuries may be produced without great violence or a great shock, but that he had never seen a rupture of that character except as the result of more or less violence. He was asked if he had heard Mr. Brassfield's testimony, stating how the injury was inflicted; and, after an affirmative reply, he was further asked to state whether, in his opinion, Brassfield's condition could have been produced or brought about in the manner which he had detailed to the jury. Over the objection of the company, he answered that it must have been done by violence. There is nothing substantial in this objection. The witness had shown himself to be fully qualified to testify as an expert in such cases, and to state what force or violence would produce such an injury as was suffered by Brassfield. It would have been more regular to have put the facts to him in a hypothetical form, and obtained his opinion upon them, instead of asking him for his opinion upon the facts testified to by Brassfield. The testimony of the latter on this question, however, was not obscure or involved, and, being very brief, the company can have suffered no prejudice from this irregularity.

Complaint is made of the instructions in the case, but the defendant in error insists that this question cannot be examined, as it does not affirmatively appear from the record that it contains all the instructions which were given. There is no statement in the record which, in terms, states that it contains all the instructions of the court, but there is a statement at the end of the case made that "the above and foregoing are all the proceedings had in said cause." The term "proceedings," in its general sense, in law parlance, means all the steps or measures adopted in the prosecution or defense of an action. *Gordon v. State*, 4 Kan. 501; 19 Amer. & Eng. Enc. Law, 220. In a judicial sense, it fairly includes the instructions given to the jury, and hence it must be held that all of the instructions are contained in the record.

In one of the instructions it is charged that "direct and positive evidence of negligence as a fact is not required. Any circumstance from which negligence may be reasonably inferred may be sufficient." It is contended that the instruction is misleading and erroneous, but we fail to see any serious objection against it. A charge of negligence, like any other fact, may be established by circumstances as well as by positive testimony. The jury were not permitted to infer negligence from any circumstance related in evidence, but were, in effect, limited to such circumstances, only, as justified a reasonable inference of negligence. The instruction might have been elaborated with profit, but no fuller statement of the law upon the subject was requested, and we cannot say that the court committed any error in giving the instruction quoted.

Some other objections are suggested against the charge of the court, but we find nothing substantial in them, nor do we see any reason why the verdict should be disturbed. All the justices concurring.

(51 Kan. 222)

**LAWRENCE et al. v. GUARANTY INVESTMENT CO.**

(Supreme Court of Kansas. April 8, 1893.)

**MORTGAGE—NOTICE OF LEGAL TITLE—FRAUD.**

1. Where an owner of land negligently allows the legal title to go to another, and clothes him with apparent power to convey and incumber the same, and such person mortgages it, as security for a loan, to one who takes the mortgage in good faith, and without notice of the fraud, the mortgage will be held valid, and in force, as against the original grantor.

2. The equitable rule that, where one of two innocent persons must suffer by the fraud of a third person, he who trusted the third person, and placed the means in his hands to commit the wrong, must bear the loss, is held to be applicable to the facts of the decided case; and it is further held that there is sufficient testimony to sustain the finding and judgment of the court.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by John B. Lawrence and another against the Guaranty Investment Company to set aside certain conveyances fraudulently obtained from plaintiffs. There was judgment sustaining two mortgages held by defendant, and plaintiffs bring error. Affirmed.

The other facts fully appear in the following statement by JOHNSTON, J.:

Action by plaintiffs to cancel and set aside certain conveyances, the execution of which was alleged to have been obtained through fraud and deceit practiced upon plaintiffs. At a trial without a jury, the following conclusions of fact and of law were made and returned: "Conclusions of fact: (1) The plaintiffs, John B. Lawrence and Betsey B. Lawrence, are Kickapoo Indians. Both ignorant, uneducated. Cannot read or write, nor understand the English language, only as it is communicated to them through an interpreter. The defendant Joshua Saunders is a white man, who for a long time prior to the controversy herein was loafing around and stopping with the Indians, without any means of support whatever. The defendant Josie Saunders was his niece, who resided in the state of Texas, but during the latter part of the year 1886, and the first part of the year 1887, was visiting relatives in Buchanan county, Mo., occasionally being in the city of Atchison, and was so visiting in Buchanan county, Mo., at the time the controversy herein arose. The defendant A. F. Groves was an attorney at law, and in the month of December, 1886, was practicing law in Atchison county, Kan. The defendant the Guaranty Investment Company is a corporation for the purpose of loaning money, and its principal place of business is at the city of Atchison, Kan. (2) For some thirty or forty years prior to the 24th day of December, 1886, John B. Lawrence and Betsey B. Lawrence had been cohabiting and living together as man and wife in the state of Kansas, and eight children were born as the result of that union, three of whom are at home; the other children having married, and are settled and living in and near the plaintiffs, and other parts of the country. No

marriage ceremony was ever performed by any person at the time they commenced living together, but Betsey B. Lawrence, whose squaw name was 'Betsey Batese,' was living with her uncle, Cosamosa; her mother being dead. Her uncle Cosamosa gave her to John B. Lawrence, according to the custom of the Kickapoo tribe of Indians, since which time they have lived and cohabited together as husband and wife. (3) That for more than ten years last past the plaintiffs, in the relation of husband and wife, have occupied the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, and the southeast quarter of the southeast quarter, of section five, (5,) township number five, (5,) range number seventeen, (17,) in Atchison county, Kan., being one hundred and twenty (120) acres of land, more or less, lying contiguous, and constituting in fact one body of land, and during all such time have used and occupied the same as an improved farm, except about seven and one half acres in the northeast corner of the said southeast quarter of the northeast quarter, which for some years last past has been and still is occupied by L. H. Duff under a parol agreement with the plaintiffs, and for which he was to pay the sum of \$264, which said seven and one half acres used by said L. H. Duff is for the greater part under fence, and a slaughterhouse built thereon. (4) Of the one hundred and twenty acres above described, the legal title to the said southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, of said section five, (5,) has been in John B. Lawrence, to whom the same was patented,—he, the said John B. Lawrence, having before that time become a naturalized citizen of the United States,—being in all eighty acres; and the right to the southeast quarter of the southeast quarter has been in Betsey B. Lawrence, as allottee thereof, under provisions therefor of the treaty of the United States with the Kickapoo Indians,—in all, forty acres. (5) That the house in which the plaintiffs resided was situated upon the forty-acre tract belonging to Betsey B. Lawrence, all of which said tract was under fence, together with about thirty acres of the eighty-acre tract, belonging to John B. Lawrence, and which was situated immediately north and adjoining and contiguous to the forty-acre tract. (6) On the 28th day of January, 1886, the plaintiffs, being indebted to one Jesse N. Roach in the sum of \$552, drawing twelve per cent. interest, made and delivered to said Jesse N. Roach a mortgage on the eighty acres of land belonging to John B. Lawrence, as hereinbefore described, and which said mortgage on the 24th day of December, 1886, was a valid, subsisting mortgage on said eighty acres. (7) On the 1st day of December, 1886, the plaintiffs' dwelling house, situated on the forty acre tract belonging to Betsey B. Lawrence, was burned, and from that time until about the month of April, 1887, the plaintiffs lived with their daughter Mrs. Joseph Greemore, at her house on an adjoining piece of land in said

county. During the time they lived there, they went backward and forward to their farm to attend in and upon the feeding of stock, and taking care of the same. (8) That while the plaintiffs were so temporarily staying at Mrs. Joseph Greemore's, and, to wit, on the 24th day of December, 1886, the defendants Joshua Saunders and A. F. Groves, taking with them one Joseph Wamego, an Indian and an interpreter, went to the house of Joseph Greemore, and by misrepresentation, and in fraud of the rights of the plaintiffs, knowing that said plaintiffs were indebted to Jesse N. Roach, made representations to them that they could let them have the money at a less rate of interest, to wit, ten per cent., to pay off the Roach mortgage. That the defendant A. F. Groves took from his pocket a paper which was there represented to be a mortgage for about the amount of the Roach mortgage, which at that time was said to be \$600, and that, unless said Roach mortgage was paid off, he, the said Roach, would foreclose the same, and take their land from them. That, relying upon the representations made to them by said defendants Joshua Saunders and A. F. Groves, they there signed said paper, supposing it to be a mortgage, and as it had been so represented to them by the defendants Joshua Saunders and A. F. Groves, through the interpreter, Joseph Wamego. That after they signed said paper the said Joshua Saunders and J. C. Wamego signed the same as witnesses. That after said paper was executed the said defendants Joshua Saunders and A. F. Groves took the same away with them, and that instead of said paper being a mortgage, as it had been so represented, it was in fact a warranty deed to the defendant Josie Saunders for all said one hundred and twenty acres, and was afterwards, on the 27th day of December, 1886, filed in the office of the register of deeds of Atchison county, Kan., and is recorded therein. The original deed was not produced on the trial of this case. The acknowledgment of the grantors of said deed was taken by and before defendant A. F. Groves, a notary public. (9) That afterwards, on the 28th day of December, 1886, Josie Saunders made application for a loan of \$1,200 to the defendant the Guaranty Investment Company, upon one of their blank forms of said application, the blanks of which were all filled up in the handwriting of A. F. Groves, and Josie Saunders signed and made affidavit to the truth of the same before A. F. Groves, notary public, and upon producing to the Guaranty Investment Company an abstract of the title to said property described in said application for a loan, and being the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, of section number five, (5,) township number five, (5,) range number seventeen, Atchison county, Kan., and being the eighty acres formerly in the name of the plaintiff John B. Lawrence. And thereupon the defendant the Guaranty Investment Company, without any knowledge whatever of the facts and circumstances as to how the title had be-

come vested in said Josie Saunders, otherwise than as the abstract and records show, and being satisfied from the abstract of title and the report of the appraisers as to the value of the property, in pursuance of their rules and regulations, they let the said Josie Saunders have the sum of \$1,200, for which, on the 28th day of December, 1886, she made and delivered a first mortgage bond, with interest coupons thereto attached, for the sum of \$1,200, and a mortgage, securing the same, upon the eighty acres of land described in her application for a loan, and also on the same day, to wit, December 28, 1886, she executed and delivered a promissory note for \$50, payable to the Guaranty Investment Company, which said note was also secured by mortgage on the same premises, both of which said mortgages were afterwards filed for record on the 31st day of December, 1886, in the office of the register of deeds of Atchison county, Kan., and were duly recorded therein. And thereupon, on the 8th day of January, 1887, the Guaranty Investment Company paid to Jesse N. Roach the sum of \$618, being the amount of the note and interest of John B. Lawrence and Betsey B. Lawrence held by him; and the said note, and mortgage securing the same, was delivered up and canceled, and the mortgage discharged of record. That the balance of said \$1,200, with the exception of \$6.50 paid for certificates of liens, recording mortgages, etc., was paid by the Guaranty Investment Company to A. F. Groves, attorney for Josie Saunders. (10) After the deed of John B. Lawrence and Betsey B. Lawrence to Josie Saunders, obtained in the manner hereinbefore found, and after the same had been filed of record, and on, to wit, the 28th day of December, 1886, Josie Saunders executed and acknowledged before the same A. F. Groves, a notary public, a general power of attorney to Joshua Saunders, thereby granting to Joshua Saunders, as her attorney in fact, the right to convey all real estate in Atchison, Kan., in the name of Josie Saunders, which power of attorney was not recalled until the 3d day of May, 1887, when the same was filed for record in the office of register of deeds of Atchison county, Kan., and recorded therein. In pursuance of said power of attorney, said Joshua Saunders on the 19th day of April, 1887, in consideration of the sum of \$3,500 named therein, made a general warranty deed in the name of Josie Saunders, by Joshua Saunders, her attorney in fact, to the defendant Fred W. Fleming, thereby conveying to him the southeast quarter of the northeast quarter, and east half of southeast quarter, of section five, (5,) township five, (5,) range seventeen, (17,) in Atchison county, Kan., and being the same land which was conveyed to Josie Saunders by the plaintiffs John B. Lawrence and Betsey B. Lawrence, through the misrepresentations of the defendants Joshua Saunders and A. F. Groves, on the 24th day of December, 1886, at the house of Joseph Greemore, in Atchison county, Kan., which said warranty deed was acknowledged by and before Charles L. Botsford, a notary public in and for

Atchison county, Kan., on the 19th day of April, 1887; and thereupon, on said 19th day of April, 1887, Fred W. Fleming executed back to the said Josie Saunders a mortgage upon the same property conveyed to him by Joshua Saunders, attorney in fact for Josie Saunders, purporting to secure a promissory note of the same date for the sum of \$2,150, payable five years after date, with interest, at six per cent., payable annually, and signed 'Fred W. Fleming,' which said mortgage was given subject to a prior mortgage of \$1,250, as stipulated therein, and which said mortgage was acknowledged by said Fred W. Fleming before Lewis R. Irwin, a notary public within and for the county of Jackson and state of Missouri. (1) The first mortgage bond executed by Josie Saunders to the Guaranty Investment Company, as well as the interest coupons thereto attached, and the mortgage securing the same, all bear date upon their face as of the 1st day of December, 1886, but they were executed by Josie Saunders on the 28th day of December, 1886. Conclusions of law: (1) Each and all of said instruments so of record, as hereinbefore described in the several conclusions of fact, are without consideration, and are null and void, and should be set aside, except the said two mortgages to the Guaranty Investment Company, which are valid; and the eighty acres, with the exception of seven and one half acres in the northeast corner thereof, in the name of the plaintiff John B. Lawrence, should be subjected to their payment, with the accruing interest. (2) The seven and one half acres of land, together with the improvements thereon, in the northeast corner of said eighty acres, sold to J. B. Duff under parol agreement, upon his payment of the price thereof, to wit, the sum of \$264, should be conveyed to him by the plaintiffs, free and unincumbered by the lien of the two mortgages of the Guaranty Investment Company herein. (3) That the plaintiffs pay the cost of this proceeding." Motions were made by plaintiffs for judgment on the findings, and also for a new trial, which were overruled by the court, and judgment entered in favor of the Guaranty Investment Company in accordance with the conclusions stated by the court. Plaintiffs bring the case here for review.

Seneca Heath and W. W. & W. F. Guthrie, for plaintiffs in error. Waggener, Martin & Orr, for defendant in error.

JOHNSTON, J., (after stating the facts.) The findings and judgment of the court leave but little for our determination. Those findings which are challenged are based upon conflicting evidence, and are therefore conclusive on this court. Through the misrepresentation and fraud of third parties, the plaintiffs placed the apparent title in Josie Saunders, who put their deed—valid upon its face—upon record, and subsequently incumbered it with a mortgage. They parted with the legal title, believing the instrument which they had signed was a mortgage; and, while they were grossly deceived, they clothed

the grantee with the apparent ownership and power of disposition of the land. On the apparent validity of this title, and in good faith, as the findings show, the investment company loaned its money on a mortgage made by the fraudulent grantee. The prior incumbrance, amounting to more than \$600, which plaintiffs had given upon the land, was paid by the investment company before the Saunders mortgages were accepted by it. The difference between the loan which was discharged and that made by the investment company, which is a little over \$600, is the plaintiff's loss, if the judgment is sustained. Who was most to blame, and who should bear the loss? The plaintiffs' action in negligently allowing the legal title to go to another, with the apparent power to convey and mortgage the land, has been the means by which the investment company was deceived. By their conveyance the grantee was held out to the world as the owner of the land, and innocent persons were thereby invited to deal with her as such owner. The rule in equity which controls is that, where one of two innocent persons must suffer by the fraud of a third person, he who trusted the third person, and placed the means in his hands to commit the wrong, must bear the loss. *Jordan v. McNeil*, 25 Kan. 459. In that case it was held that a conveyance obtained through fraud and deceit is not a nullity, but that a conveyance from the fraudulent grantee to a third person, who purchased the property in good faith, and for a consideration, will be held valid as against the first grantor. In *McNeil v. Jordan*, 28 Kan. 7, this same doctrine was reaffirmed, and it was held that the grantor of the fraudulent deed must suffer loss, rather than an innocent purchaser, or some one who in good faith had obtained a mortgage from the fraudulent grantee. The same subject received consideration in *State v. Matthews*, 44 Kan. 596, 25 Pac. Rep. 36, where it was said that, "upon this same principle, it is almost universally held that whenever an instrument is procured from one person by the fraud or villainy of another, even if such fraud or villainy should amount to a criminal offense, if all the rights which the instrument apparently gives should at that time or afterwards be transferred to another, who should be an innocent and bona fide holder for value, the innocent and bona fide holder could enforce the instrument against the maker, although the maker might also be an innocent person. In such a case the maker would be estopped from claiming that the instrument was void as against the innocent, bona fide holder."

There is some contention that the deed in question was never in fact signed by the plaintiffs, but that it was a forgery, and therefore absolutely void, and ineffectual to convey title, under any circumstances. The record, however, does not sustain the claim. In the plaintiffs' petition it appears to be conceded that the instrument obtained for and placed on record by Josie Saunders was the deed executed by the plaintiffs, and it is alleged that it was obtained from them through fraud

and deceit. More than that, there is sufficient testimony in the record to sustain the finding made by the court, that the deed was actually signed by them, and that it was obtained through a violation of their confidence, and by the deception and fraud of Saunders and Groves.

It is further contended that the investment company cannot be held to have been without knowledge or notice of the fraud practiced upon the plaintiffs. The claim is that Groves was an agent of the company in procuring the loan, and that, he having knowledge of the transaction, and of the means by which the title was obtained, the company should be bound to have knowledge of the same facts. It is said that he must be held to be an agent, under the admissions of the pleadings. The petition, after alleging the manner in which the deed was obtained, sets forth the execution of the mortgage to the grantee investment company, and then avers that "the grantee investment company acted upon the information, advice, and, in fact, through the agency, of said defendant A. F. Groves, and by collusion therewith." The company denies this averment, but there is no verification of the answer, and it is therefore said that the agency is admitted. There is no averment of an appointment of Groves by the company, nor that it had conferred any authority upon him. It is not such an averment of appointment or authority as requires a verified denial. Neither can we hold, under the testimony and findings, that Groves was the agent of the company in either the acquirement of the title by Josie Saunders, or in any transaction by which his knowledge should be binding upon the company. There is testimony to the effect that he was the agent and attorney of Josie Saunders throughout all the transaction. As such agent he prepared and presented the papers upon which the loan was obtained, and these included the appraisers' and examiners' reports, such as are returned by the correspondents of the company. The company was in the habit of accepting loans presented by parties living in the city where their general offices were kept, and allowing the commission on the same to them, and that was done in this instance. The testimony, however, is direct and positive that Groves was in no way connected with the company, as attorney or agent, and that they had no knowledge whatever of the means by which the title was obtained, nor had they any personal knowledge of the grantee. They simply knew that she presented a written application for a loan through her agent and attorney, and, upon an examination of the abstract, they found she had a perfect record title, and, relying upon that, they accepted the loan, and paid out their money. There is testimony to sustain the conclusions reached by the trial court, and, under a familiar rule, they cannot be overthrown or disturbed. The judgment of the district court will therefore be affirmed.

ALLEN, J., concurring. HORTON, C. J., not sitting.

(18 Colo. 233)

PEOPLE ex rel. JONES et al. v. DISTRICT COURT OF WASHINGTON COUNTY.

(Supreme Court of Colorado. March 21, 1893.)

MISJOINDER OF PARTIES—WAIVER—BONDS OF COUNTY COMMISSIONERS.

1. Where the misjoinder of parties is apparent upon the face of an original petition, and is not objected to by demurrer, the misjoinder is waived, and thereafter is not available as a ground of demurrer, nor as a defense to the petition as amended.

2. When a person duly elected to the office of county commissioner has executed his bond as required by law, when said bond has been approved by the judge of the proper district, and when the person so elected and qualified has actually entered upon the duties of his office, the district court or judge thereafter has no jurisdiction to order said commissioner to give a new bond, with further sureties, to be approved by said court or judge, and, in default of compliance with such order, to declare such commissioner's office vacant.

(Syllabus by the Court.)

Petition for writ of certiorari and prohibition by the people on the relation of Jones and Prindle against the district court of the thirteenth judicial district and James Glynn, judge, to reverse an order of said court declaring the offices of relators as county commissioners of Washington county vacant, and to stay further proceedings against relators in the premises. The rule staying further proceedings is made absolute.

The other facts fully appear in the following statement by ELLIOTT, J.:

The petition of relators, Jones and Prindle, represents, in substance, that the judge of the thirteenth judicial district, while holding court in the county of Washington, in said district, made an order upon the relators, Prindle and Jones, requiring them to file a new, good, and sufficient bond as county commissioners of Washington county, to be approved by the judge of said court; and, further, that said judge afterwards, in pursuance of his former order, found that said Prindle and Jones had not given bonds as required, and thereupon declared their offices as county commissioners vacant. Upon the filing of the petition a rule was entered by this court to show cause in accordance with the usual practice, and staying further proceedings by the district court in the premises against relators pending the hearing of this application. Demurrer to the original petition was sustained, and relators, by leave of court, filed amendments to their petition. Demurrer to the petition as amended was interposed upon the ground, inter alia, that there is a misjoinder of parties, there being no joint cause of action on the part of Prindle and Jones. This demurrer was overruled. Answer and replication having been filed, the cause is now submitted for final determination upon the pleadings.

H. B. Johnson, for petitioners. Stuart & Murray, for respondents.

ELLIOTT, J., (after stating the facts.) The misjoinder of parties was as apparent upon the face of the original petition as upon the petition as amended. Such mis-

joinder, not having been objected to by demurrer in the first instance, was waived, and thereafter was not available as a ground of demurrer nor as a defense to the petition as amended. Code, §§ 50-55. This controversy will therefore be disposed of upon its substantial legal merits.

By the pleadings it is admitted that the relator Prindle was elected commissioner of Washington county, Colo., on November 5, 1889; that he executed his official bond on January 11, 1890; that said bond was approved by the then acting district judge of the thirteenth judicial district, as provided by law; that said bond was filed in the office of the clerk and recorder of said Washington county, and that thereupon said Prindle took the oath of office, and entered upon the discharge of his duties as such county commissioner. A similar admission is made in respect to the election, qualification, and entry upon the discharge of the duties of county commissioner by the relator Jones the following year. This proceeding was commenced in June, 1892. Upon the admitted facts the question to be determined may be stated thus: When a person duly elected to the office of county commissioner has executed his bond as required by law, when said bond has been approved by the judge of the proper district, and when the person so elected and qualified has actually entered upon the duties of his office, has the district court or judge thereafter jurisdiction to order said commissioner to give a new bond, with further sureties, to be approved by said court or judge, and, in default of compliance with such order, to declare such commissioner's office vacant? A determination of this controversy requires the consideration of several statutory provisions. Prior to the act of 1881, hereinafter cited, county commissioners were not required to give bonds. See chapter entitled "Official Bonds," Rev. St. 1863, p. 483; Gen. Laws 1877, p. 662; Gen. St. 1883, p. 740; 2 Mills' Ann. St. p. 1847. The presiding judge of the district court of each district or county is authorized by the act above cited to examine and inquire into the sufficiency of the official bond of the clerk in open court on the first day of each term, and, if found insufficient, to give a new bond, with sureties, to be approved as in case of an original bond. The same examination and order is authorized in respect to the bonds of masters in chancery of said court. The statute further requires the board of county commissioners at each regular term, on the first day of each term, to examine and inquire into the sufficiency of the official bonds of the county judge, justices of the peace, constables, county treasurer, sheriff, coroner, county assessor, county clerk, and county surveyor, and all other official bonds given or to be given by any county officer, as required by law, and to require any such officer or officers to give new bond, with sufficient surety, in case the old bond is deemed insufficient. It is further provided that the judges and boards of commissioners shall enter upon their respective records the fact that an examination and inquiry into the sufficiency of the official bonds within their cognizance have been

made, and that they are deemed sufficient or insufficient, as the facts may justify; and that when any officer shall fail to file a new bond within the prescribed time, when so required by order as aforesaid, the officer in default shall be deemed and held to have vacated his office, and the vacancy thus created shall be filled as in case of a vacancy by death or resignation of such officer. By the act of 1881, (Sess. Laws, p. 96.) county commissioners of the several counties are required to execute an official bond in a certain amount, and under specified conditions, to be approved by the judge of the district court, and to be filed and recorded in the records of such county. Gen. St. 1883, §§ 564, 569.

Under the foregoing acts it is contended in behalf of respondents that the district court or judge is invested with jurisdiction to examine into and pass upon the sufficiency of the bond of any county commissioner subsequent to the time of his original qualification and entry upon the duties of his office, and that if, upon such examination, the district court or judge shall find any such bond insufficient, he may require the commissioner to give a new bond, with additional sureties, to be approved by said court or judge within a reasonable time, and that, in default of so doing, the office of such commissioner shall be declared or deemed vacant. In behalf of relators it is contended that no such duty, authority, or jurisdiction is devolved upon the district court or judge after the approval of the original bond of a county commissioner, and after the due qualification and entry upon the duties of his office as such commissioner. Upon careful consideration of the question thus presented, we are of the opinion that the contention of the relators is correct. Nowhere do we find that any authority or jurisdiction has been conferred by law upon district courts or judges to make examination or inquiry into the sufficiency of the official bond of any county commissioner after his original bond has been approved, and after he has duly qualified, and actually entered upon the duties of his office. Such summary proceedings by the district court are authorized in respect to the bonds of clerks and masters in chancery of the court, but not in respect to the bonds of county commissioners. The statute expressly authorizes the board of county commissioners to make such examination and inquiry in respect to the "official bonds given or to be given by any county officer;" and it may be that this provision should be held to include the bond of a county commissioner, since a county commissioner is unquestionably a county officer. But it is urged that, when section 6 of the chapter on official bonds was passed, bonds of county commissioners were not contemplated by it, because such officers were not then required to give bonds. This argument cuts both ways; it applies to sections 5 and 9 of said chapter as well as to section 6. If, for such reason, the old statute is not sufficient to vest the commissioners with jurisdiction over bonds required by the new act, then it is not sufficient to vest the district



courts with such jurisdiction. It is further urged that it could not have been intended that the commissioners should examine and inquire into the sufficiency of the bond of one of their fellow commissioners; that such examination and inquiry would not be impartial and disinterested. This may be a valid argument against the expediency of the statute, but not against its validity. Such an investiture of power may be inexpedient, but it is not illegal. The inexpediency of the statute is a subject for legislative, but not for judicial, correction. But we need not decide that the jurisdiction in question is vested in the board of county commissioners. It is sufficient for this case that the jurisdiction is not vested in the district court. Our conclusion is that the order of the district court or judge declaring the offices of relators as county commissioners vacant, as set forth in the petition herein, was without authority. The same is accordingly reversed, vacated, and altogether held for naught; and the rule staying further proceedings by the district court in the premises is made absolute.

(18 Colo. 321)

CROSS et al. v. PEOPLE.

(Supreme Court of Colorado. April 3, 1893.)

LOTTERIES—GRATUITY.

The gratuitous distribution of business cards to all persons calling or writing for the same, whether they purchase goods from the donor or not, which entitle the holders to a chance in a piano, to be disposed of as the holders may elect, is not a "lottery or gift enterprise," prohibited by Gen. St. p. 677, § 2196, since no valuable consideration need be paid, directly or indirectly, for a chance to draw the prize.

Error to criminal court, Arapahoe county.

Daniel K. Cross and William F. Cross were convicted of promoting, advertising, and carrying on a lottery and gift enterprise, and they appeal. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

The indictment charges plaintiffs in error with promoting, advertising, and carrying on a lottery and gift enterprise in the city of Denver, county of Arapahoe, and state of Colorado. The cause was heard at the September term, 1888, before a jury, upon the following agreed statement of facts: "It is agreed that on the 27th day of June, A. D. 1888, in the city of Denver, county of Arapahoe, and state of Colorado, the defendants were engaged in the business of selling and disposing of shoes, boots, and such like articles of wear; that there had been inserted in a newspaper published in the said city of Denver the following card, (marked 'Exhibit A:') 'Given Away. D. K. Cross & Co. give away pianos to advertise their shoe store, 1552 Larimer street, Denver, Colorado. Every customer receives our numbered business cards, or one will be sent to any address on receipt of stamp for postage, or given to each adult person registering their name at our shoe store. The seventh piano will be given Nov. 1, 1888. Or-

der shoes of us,'—which said advertisement or business card was in publication at that date. That on the 27th day of June one Charles T. Linton did purchase at the place of business of said defendants articles of merchandise, the price of which exceeded the sum of one dollar, paying therefor the amount of said price. That, in addition to the receipt for the articles so purchased and paid for as aforesaid, there was given him by the defendants the following card, (marked 'Exhibit B:') 'D. K. Cross, the Original Piano Shoe Store, 1552 Larimer Street, Denver, Colorado. Branch Store, 1548 Lawrence Street. Save this business card until Nov. 1, 1888. We carry the largest stock of boots, shoes, and slippers to be found in Colorado, and sell at the lowest prices. Send for catalogue. We have given away six pianos, 3250. (Over.)' 'Who will get the seventh? Save this card until Nov. 1, 1888. The following persons received a piano from us, free of cost: W. H. Scott, Mrs. L. P. McKee, Mrs. Hollingsworth, Mrs. Carrie Stephens, Lottie Hildebrand, Mrs. F. G. England, (the sixth piano.) D. K. Cross & Co., 1552 Larimer Street, Denver, Colorado. Sole agents for W. L. Douglas' \$3.00 shoes for men and \$2.00 shoes for boys. Cross' \$3.00 kid button for ladies is equally as good as the Douglas shoe for men. Ladies' and gentlemen's fine shoes a specialty. Send for catalogue. P. O. Box 2670. We buy pianos from the King Piano Company. (Over.)' That it was understood that on the 1st day of November, A. D. 1888, that any and all persons holding such cards would have turned over to them by the defendants a piano, which should be disposed of by all those persons present holding cards, by any means that they might adopt, to determine which one of the persons present or not present, holding these cards, should receive the same, by some device or game of chance, to be adopted by the holders of the ticket of the like kind of the one heretofore set out, (Exhibit B.) It is further agreed that any person who would make application to the defendants for one of these tickets could secure the same without the purchase of goods, and could have a like chance to secure said piano, the same as though the tickets had been issued upon a sale of goods to the value of one dollar. And the foregoing was all the evidence introduced upon the trial of said cause." The jury returned a verdict of guilty as charged in the indictment. Motions for a new trial and in arrest of judgment were filed and overruled, and defendants sentenced to pay a fine, with costs. Defendants bring the case here for review.

Coe & Freeman and C. E. & F. Herrington, for plaintiffs in error. S. W. Jones, Atty. Gen., H. Biddell, Joseph H. Maupin, and Eugene Engley, for the People.

GODDARD, J., (after stating the facts.) The principal question, and the only one of practical importance to the people and the plaintiffs in error, is presented by the fourth and fifth assignments of error; and, since it is decisive of the case, it is unnecessary to notice the other errors assigned.

The decision of this case depends upon the meaning to be given to the terms "lottery and gift enterprise," used in section 2196 of the General Statutes, p. 677, and whether the facts admitted constitute a violation of that section. The term "lottery" is said to have no technical significance in the law, but to ascertain its meaning we are to consult the common usage of the language. The definition given by Worcester is: "A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value." Bishop defines a lottery as "a scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor." Bish. St. Crimes, § 952. The accepted doctrine by the court of appeals of New York is that given by Folger, J., in *Hull v. Ruggles*, 56 N. Y. 424: "Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery." It may be accepted as the result of the adjudicated cases that a valuable consideration must be paid, directly or indirectly, for a chance to draw a prize by lot, to bring the transaction within the class of lotteries or gift enterprises that the law prohibits as criminal. *Buckalew v. State*, 62 Ala. 334; *State v. Bryant*, 74 N. C. 207; *Com. v. Wright*, 50 Amer. Rep. 306; *State v. Clarke*, 66 Amer. Dec. 725; *State v. Shorts*, 90 Amer. Dec. 668; *Wilkinson v. Gill*, 30 Amer. Rep. 264; *Governors v. Art Union*, 7 N. Y. 228; *State v. Mumford*, 73 Mo. 647; *Hull v. Ruggles*, 56 N. Y. 424; *Thomas v. People*, 59 Ill. 160; *U. S. v. Olney*, 1 Deady, 461; *Yellowstone Klt v. State*, (Ala.) 7 South. Rep. 338. The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived, directly or indirectly, from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent. By the admitted facts it is shown that the plaintiffs in error gave business cards, which entitled the holders to a chance in a piano, to be distributed as the holders of such chances might elect. These tickets or chances were given indiscriminately to persons, whether they purchased goods of plaintiffs in error or not, to those who registered their names at their shoe store, and to those who, from a distance, sent the return postage. While it is admitted that Charles Linton purchased goods to the amount of one dollar at their store, and received one of these cards, it is admitted that such purchase, or any purchase of goods, was not a condition upon which the card was delivered. The fact that

such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute. The judgment of conviction is reversed, and cause remanded, with directions to dismiss the proceeding. Reversed.

(18 Colo. 400)

## ST. KEVIN MIN. CO. v. ISAACS.

(Supreme Court of Colorado. March 21, 1893.)

MECHANICS' LIENS—MONEY JUDGMENT—APPEAL—CONFLICTING EVIDENCE—HARMLESS ERROR.

1. Under the mechanic's lien act of 1883 the court has power to enter a money judgment for services performed and materials furnished, though the claim for lien is abandoned. *Cannon v. Williams*, 23 Pac. Rep. 456, 14 Colo. 22, followed.

2. In an action for services, where the issue is as to whether plaintiff, after a continuous employment for two years, was discharged on account of his helpless condition, physically and mentally, plaintiff's evidence, corroborated by several other witnesses, that the president of defendant company repeatedly told him not to worry because he was doing so little work, as his salary was going on just the same, warrants a finding by the jury in plaintiff's favor, though the president testified that, as soon as plaintiff was able to discuss business matters, witness notified him that he was no longer in the employ of the company.

3. The striking out of competent evidence is cured by subsequently admitting similar testimony by the same witness.

4. The declaration of third persons as to plaintiff's physical and mental condition shortly before his discharge are incompetent as hearsay.

Appeal from district court, Lake county.

Action by James P. Isaacs against the St. Kevin Mining Company for services. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

The other facts fully appear in the following statement by HAYT, C. J.:

This action was commenced in the district court of Lake county to recover the sum of \$11,390.70. The appellee alleges in his complaint that this amount was due for work and labor performed, and materials furnished, upon the property of the St. Kevin Mining Company, at its special instance and request. He seeks to establish a mechanic's lien upon certain real property of the defendant company for the amount of his claim. Afterwards, and before trial, plaintiff abandoned his claim for a lien, and proceeded only upon the money demand. A trial to a jury resulted in a verdict and judgment in his favor for the sum of \$2,314.59. Appellant, in this court, admits owing appellee, for services rendered, the sum of \$991.59, but claims

that, in so far as the judgment is in excess of this sum, it is unfounded.

F. A. Dickson, for appellant. J. Stanley Jones, for appellee.

HAYT, C. J., (after stating the facts.) This being an action to enforce a mechanic's lien under the statute, the appellant contends that a judgment for money is not warranted, the claim of a lien having been abandoned. This was undoubtedly, at one time, the law in this state. See *Hart v. Mollen*, 4 Colo. 512. But in the case of *Cannon v. Williams*, 14 Colo. 22, 23 Pac. Rep. 456, a majority of the court held that this rule was changed by the mechanic's lien act of 1883; and, although the writer of this opinion did not concur in that conclusion, nevertheless, it having been pronounced by a majority of the court, it must now be considered as controlling the practice in this state. The present action having been begun under the lien law of 1883, the power of the court to enter a money judgment, notwithstanding the failure of the plaintiff to sustain his lien, is *stare decisis*.

At the trial it was conceded that plaintiff was employed and rendered services for the defendant company for a number of years. There was much contention, however, as to the terms of this employment, and as to the length of time it continued; the plaintiff contending that he was employed at the rate of \$150 per month until such time as the mines of the company should be running smoothly, and that then he was to receive the usual compensation allowed mining superintendents at Leadville. The defendant claims the contract to be that the plaintiff was to receive \$150 per month until such time as the mines of the company should reach a dividend-paying basis, and that, as no dividends had ever been paid, the amount of his compensation was to be computed upon the basis of \$150 per month, only. Plaintiff claims that he commenced work for the defendant company, under his contract, on the 1st day of September, 1885, and continued in the discharge of his duties as superintendent until the 1st day of October, 1888. The defendant, while admitting that plaintiff commenced work at the time stated, claims that he was discharged by the company on the 1st day of January, 1888, and rendered no service after that time for which the company could be held liable. It is apparent from the record that the jury disregarded the plaintiff's claim for an increase of compensation, but found that his employment continued until the 1st day of October, 1888, i. e. for nine months beyond the time at which it is claimed by appellant that he was discharged. The evidence as to the duration of plaintiff's services for the company is quite conflicting. It appears, however, that he remained in the employment of the defendant company, as superintendent of its property in Lake county, on the premises, up to the 12th day of December, 1887; that shortly prior to this date he was requested by the company to go to New York to assist in selling the mine. In pursuance of this request he went to New

York. He testifies that on several occasions after that date, at the request of the company, he went with its president to interview different parties for the purpose of selling the mine; that he remained in New York until the 19th day of September, 1888, at which date he had some disagreement with the president; and that a few days after he left, and returned to Leadville. The plaintiff, upon the witness stand, denies positively that he was ever discharged. He says that he was never spoken to with reference to the company dispensing with his services, and states that, on frequent occasions during the time he was in New York, Mr. Hassell said to parties, in his presence, that he (plaintiff) was in the employ of the defendant company, and that he need not worry because he was doing so little work; that his salary was going on just the same. This testimony is corroborated by several other witnesses. As against this testimony, we have the testimony of Mr. Hassell, to the effect that when plaintiff arrived in New York, in December, 1887, he was in a helpless condition, physically and mentally; that he remained in that condition about two months, under the care of the doctor, and under the influence of chloroform, more or less; that, as soon as plaintiff was able to discuss business matters, witness notified him that he was no longer in the employ of the company, and that he could not return to Leadville in any official capacity whatsoever in connection with the St. Kevin Mining Company; that his service with the company had ceased. This witness is indefinite as to the time at which he claims he made these statements to the plaintiff. This is practically all the testimony in reference to the alleged discharge of the plaintiff, and under the circumstances it is not a matter of surprise that the jury found that he had not been discharged, and allowed him to recover his salary as superintendent until the 1st day of October, 1888. A continuous employment for upward of two years having been shown, the burden was upon the defendant to show a termination of such employment. The preponderance of evidence, however, seems to be in support of the findings of the jury to the effect that such employment was not terminated as claimed by the company. A circumstance going to show that plaintiff was not discharged, as claimed by Mr. Hassell, is found in the fact that it is admitted by all parties that nothing was said about any settlement, although the company at the time was admittedly owing the plaintiff in the vicinity of \$1,000. If there had been a discharge, it is reasonable to conclude that something would have been said in reference to the payment of the amount due.

The appellant company contends that the court erred in the rejection of certain evidence offered by it. It claims as one ground why it sought to terminate the services of the plaintiff on January 1, 1888, that, some time during the preceding month, plaintiff, by reason of sickness, old age, and mental infirmities, became unable to perform the services he had undertaken to perform. To establish this fact the witness G. L. Hassell was asked: "What was

Mr. Isaacs' condition, physically and mentally, at the time that he reached New York; and when did you first learn of his condition at that time?" In answer to this question the witness stated that plaintiff, at the time, was neither mentally nor physically competent to do anything. This answer was stricken out, upon motion, and to this ruling an exception was duly reserved. If this was error, it was immediately cured, as the witness was permitted, in answer to further interrogatories, to state fully plaintiff's condition at the time, as will appear from the following questions and answers appearing in the record: "Question. Now, Mr. Hassell, what, if anything, did you say to Mr. Isaacs after his return from Leadville in December, 1887, about terminating his relations with the company? (After objection, the witness answered:) Answer. Well, I could not state just how soon it was. In the course of a couple of months, perhaps, after he returned; having been under the doctor's care, the doctor visiting him daily, and the physician had told me that he was in a precarious state, and never would be able to go there. I waited until he was in a calm state, when he wanted to return here, and I told him he never could return to Leadville in the capacity of any official whatever for the St. Kevin Mining Company. Q. You think that was about two months after he got back? A. Just as soon as he was able to hear it. Q. Now, why was it that you—Did you make the communication to Mrs. Isaacs soon after their return, and, if so, when? A. I told her, perhaps, within the course of a week after the return, of course he would never be able to go back there again, from the fact my letter brought him on as much as anything else from what we got from Mrs. Isaacs, and the fact that he was losing his mind. She told Mr. Knowlton that, and Mr. Knowlton will testify to it. Q. Now, Mr. Hassell, why was it that you did not notify him sooner? State what the condition of his mind was as to receiving such news. A. Well, he had been kept under chloroform for two months,—under the influence of chloroform because he was in such pain. He had a bad eye, besides. He would be delirious a great deal of the time. He would talk about everything. He was in no condition to talk to. Q. It was because of his inability to understand anything? A. It was simply useless to talk to a man in his condition at that time, but I told his wife." It was admitted by appellant that plaintiff was entitled to pay for his services until the 1st day of January, 1888, and from the foregoing it will be seen that he was allowed to testify fully in regard to appellee's condition after that date; and even, without objection, volunteered the alleged statements of others, made to him with reference to his condition prior to leaving Colorado.

The court refused to allow witnesses to testify as to what third parties had said in reference to plaintiff's physical and mental condition before leaving Leadville, and this ruling is assigned for error. Such testimony was clearly hearsay, and therefore incompetent. The trial judge refused to

allow other witnesses to testify as to plaintiff's condition of health early in the month of December, 1887. Such testimony could have no bearing upon the issues presented to the jury, except, possibly, in so far as it might have tended to establish his condition after the 1st day of January, 1888. As there was an abundance of direct evidence showing his condition after that date, the exclusion of the evidence cannot justly be regarded as prejudicial or reversible error. The judgment will be affirmed.

GODDARD, J., did not sit in this case.

(18 Colo. 336)

### PASCOE v. GREEN.<sup>1</sup>

(Supreme Court of Colorado. Feb. 20, 1893.)

TOWN-SITE ENTRIES—OCCUPANCY OF LOTS.

The partial building of a rough board shanty on one of several lots, which building remained unfinished and uninhabitable, and the placing of posts around a portion of the lot, is not such a bona fide occupancy as will entitle one to a conveyance of lots under the townsite act.

Error to district court, Pitkin county.

Action by Thomas P. Green against Samuel R. Pascoe to determine the right to a conveyance of lots in the town site of Aspen. There was a judgment that neither party is so entitled, and defendant brings error. Affirmed.

Statement by the court:

This action was brought in the district court of Pitkin county, under section 3283, p. 953, of the General Statutes, to determine the right to a conveyance of lots F, G, H, and I, in block 86, in the town site of Aspen. It appears that the town site was entered June 2, 1881, by J. W. Dean, the then county judge of Pitkin county; that the entry was suspended, and the issuance of the patent thereby delayed, until the 3d day of March, 1885, when a patent was issued to Dean and his successors in trust, for the Aspen town site; that, in 1887, M. G. Miller, then county judge, as successor in trust, gave the notice required by law, and within the 90 days these parties filed their statements setting forth their respective claims to the lots in controversy. The court below found, among other things, as follows: "Tenth. That, at the time of the entry of the town site of Aspen, neither the plaintiff nor the defendant nor their grantors were possessed of or entitled to the possession or occupancy of lots F, G, H, and I, in block 86 of the town site of Aspen;" and adjudged and decreed that at the commencement of this action neither the plaintiff nor the defendant had the prior and paramount right to the possession and occupancy of said lots under and by virtue of the entry of the town site. Pascoe, the defendant below, brings the case here for review, and assigns as error that the tenth finding of fact, and the judgment dismissing the action, are against the evidence and contrary to law.

W. W. Cooley, for plaintiff in error. Aaron Helms and W. O'Brien, for defendant in error.

<sup>1</sup>Rehearing denied April 17, 1893.

**PER CURIAM.** By the letter of the town-site act and the decisions of this court "the trust closed upon the entry of the town site." (Cook v. Rice, 2 Colo. 131; Clayton v. Spencer, Id. 378; Adams v. Binkley, 4 Colo. 247,) and the rights of the respective parties as beneficiaries thereunder must be determined as of that date. It is clear that the defendant in error shows no right based upon an equity existing at the time of entry. The plaintiff in error derives his right, if any, from his grantor, who had, as the evidence discloses, partially built a rough board shanty upon one of the lots in April or May, 1881, and placed posts around a portion of that lot. This building was never completed, and remained unfinished and uninhabitable until some time in 1885, when it was removed by some one. We think the trial court might fairly hold that such facts did not constitute such possession or right as the town-site act requires to constitute a bona fide occupancy, and such as entitles a person to a conveyance of lots under the town-site act. The purpose of the act is to give to actual occupants of town lots the right to purchase them at the minimum price, and such occupancy must be of that character which evidences an intention to utilize them for either residence or business purposes, and not to hold them for speculation merely. The acts relied on by plaintiff in error fall far short of evidencing such intention, and the court below was clearly justified in so holding, and its judgment is affirmed.

(18 Colo. 321)

**JOHNSON et al. v. EATON MILLING & ELEVATOR CO.**

(Supreme Court of Colorado. April 3, 1893.)

**LIABILITY OF SURETY—PRINCIPAL ACTING IN DEFERENT CAPACITIES.**

A surety in a bond given by the principal for the faithful performance of his duties as the treasurer of a corporation is not liable for defalcations made by the principal while acting as general manager, and not as treasurer.

Appeal from district court, Weld county. Action by the Eaton Milling & Elevator Company against Bruce F. Johnson and William H. Nice, on the bond of Nice, as treasurer of plaintiff corporation. From a judgment in plaintiff's favor, defendants appeal. Reversed.

The other facts fully appear in the following statement by HAYT, C. J.:

Appellee, the Eaton Milling & Elevator Company, a corporation, was organized in 1887. At the first meeting of the directors, Benjamin H. Eaton was elected president, William B. Grant secretary, and appellant William H. Nice treasurer, and also manager. The company entered upon active business operations on July 20, 1887, and carried on for a time a milling and elevator business at Eaton, Colo. It succeeded to the business of B. H. Eaton & Co., a firm consisting of B. H. Eaton and appellant William H. Nice. The copartnership business, however, was continued in part for a time after the organization

of the corporation, Mr. Nice continuing to act as managing partner of the firm of B. H. Eaton & Co. The by-laws of the company, adopted at its first meeting, provided, inter alia, that the officers of the company should consist of a president, vice president, secretary, treasurer, and manager, and that such officers might be required to give bond for the faithful performance of their duties, as the board of directors should direct; and it is further provided by the by-laws that the treasurer shall be the custodian of the funds of the company, until the same shall be disposed of by order of the board of directors, and that the manager should have control of the company's business, under the direction of the board of directors. At a subsequent meeting of the board of directors, an order was entered of record "that the manager and secretary be allowed until next meeting to get their bonds." At still another meeting, held September 27, 1887, the minutes show that the president reported his approval of the treasurer's and secretary's bonds. The bonds thus approved were the only bonds ever given. That given by Nice is conditioned upon the proper discharge by him of his duties as treasurer. In only two instances other than those already mentioned do the records disclose any mention of the treasurer prior to the defalcation herein set forth, viz.: The minutes of a meeting of the company held August 23, 1887, show the following: "That Mr. Nice, as treasurer, be authorized to borrow for the use of the Eaton Milling & Elevator Company such sums of money as may be needed from time to time, not to exceed \$30,000, signing therefor, 'W. H. Nice, Treasurer';" and, second, at a meeting held September 27, 1887, the following: "That Mr. Nice, as treasurer, be authorized to borrow for the use of the Eaton Milling & Elevator Company such sums of money as may be needed from time to time, not to exceed \$35,000, in addition to \$30,000, provided for on August 23, 1887, signing therefor, 'W. H. Nice, Treasurer.'" Mr. Nice continued to act as treasurer and manager for the company from its first meeting, in September, 1887, until July 7, 1888, at which time it came to the knowledge of the company that he had misappropriated its funds to the amount of several thousand dollars, and he was immediately removed from both of said offices. The district court found that Mr. Nice was short to the amount of \$8,418.86, and entered judgment for this sum and interest against both principal and surety upon his bond as treasurer. To reverse this judgment, the case is brought here by appeal.

H. N. Haynes, for appellants. McCreery & Bates, for appellee.

HAYT, C. J., (after stating the facts.) As applicable to this case, the following principles with reference to the liability of sureties upon official bonds may be stated. They are founded in sound reason, and supported by authority. First. The liability of a surety is to be strictly construed, but this rule does not exclude a fair consideration of the instrument from

which the obligation is derived. Second. Where there are several officers of an institution, as of a bank, and it is the customary and usual course of business at such institutions for one officer to temporarily discharge the duties of another in case of the latter's absence or sickness, a surety of the former is usually liable for default made while his principal is thus temporarily filling the place of another officer. Third. Where the same person holds two separate positions, each requiring distinct and independent duties from the other, a surety upon a bond given to cover the acts of the principal in the discharge of the duties devolving upon such principal while acting in one of such capacities cannot be extended so as to cover defaults occurring in the other. *Association v. Conkling*, 90 N. Y. 116; *Bank v. Elwood*, 21 N. Y. 88; *Bank v. Ziegler*, 49 Mich. 157, 13 N. W. Rep. 496; *Rogers v. Odom*, 86 N. C. 432; *Cooper v. People*, 85 Ill. 417; *Orman v. City of Pueblo*, 8 Colo. 292, 6 Pac. Rep. 931.

The claim of the appellants is that the record fails to disclose any omission or improper conduct on the part of Nice in his capacity as treasurer, but that the improper conduct complained of occurred in connection with his office as general manager for the company, for which office no bond was given. The office of manager was the principal office created by the by-laws of the company. This officer was given control and management of appellee's business. It is true that this was nominally under the direction of the board of directors, but, as the directors met only at rare intervals, the general manager was allowed to exercise almost absolute control in directing the details of the company's business. He with the secretary were the only officers of the corporation allowed salaries; the former at the rate of \$2,000, and the latter at the rate of \$1,200, per annum. It is shown that it was the custom of the corporation to purchase grain through the firm of B. H. Eaton & Co., the latter buying the grain from the farmers, and in turn selling it to the milling and elevator company. An open account was kept by the latter with the former, and Nice advanced large sums of money to the copartnership, of which the president of the milling company constituted one member, and he (Nice) the other. The advances were made without authority, but were made in the course of transactions in grain, entered into by the general manager. The shortage for which the surety was held responsible is made up almost entirely of advances so made. While it is true that Nice, as treasurer, executed notes, and procured the same to be discounted, he placed the proceeds thereof to the credit of the company. The raising of money and the placing of the same with the depository designated seem to have constituted his only transactions as treasurer, and these were undertaken in pursuance of authority expressly conferred by resolution, duly adopted. This resolution also provided the manner in which such deposits should be checked out. The resolution reads as follows: "Resolved, that all moneys received by the company shall

be deposited in the name of the Eaton Milling & Elevator Company, and that William H. Nice be, and is hereby, authorized to check the same out for the uses of this company, signing, 'The Eaton Milling & Elevator Company. By William H. Nice, Manager.'" This resolution was expressly authorized by the by-laws of appellee. By it the disbursement of the funds was given entirely in the charge of the general manager. Applying the principles of law above stated to these facts, the liability of the surety on the bond of the treasurer cannot be upheld. The misconduct complained of grew out of the improper disbursement of the company's funds. In paying out this money, Nice acted as general manager, and not as treasurer. His acts in so doing do not come under the principle governing in cases where an officer, by reason of holding one position, and as incidental thereto, temporarily performs the duties usually devolving upon another. It was the express intention of the company to require Nice also to give a bond for the faithful performance of the duties of general manager. If such bond had in fact been given, it would without doubt have covered the transaction now complained of. The fact that, through the neglect of other officers of the company, such a bond was not required, furnishes no reason why the obligation of the surety upon this bond should be extended so as to cover his transactions as general manager. The condition of the obligation made the basis of this suit reads as follows: "That whereas, the said William H. Nice has been appointed by the said Eaton Milling & Elevator Company as treasurer for said company: Now, if the said William H. Nice shall well and faithfully discharge his duties as said treasurer, and shall faithfully account for all moneys, property, and other things which may come into his possession or under his control and management as such treasurer, then the above obligation to be void; otherwise, to remain in full force and virtue." The recital in the bond shows that Nice had been appointed treasurer of the corporation, and his surety promised only that he would be responsible for the faithful performance of the duties appertaining to that office. Adopting the language of the court of appeals of New York in *Association v. Conkling*, supra: "That was the office brought to the attention of the surety, and which he had in mind when he executed the bond. The recital in such bond, undertaking to express the precise intent of the parties, controls a condition or obligation which follows, and does not allow it any operation more extensive than the recital which is its key." The facts in the case before us are much stronger in favor of the surety than in the New York case, for there the letter of the condition following the recital was more extended than the recital itself, but such is not the fact in the case at bar. There is nothing in the bond before us to indicate that it was executed for the purpose of indemnifying the company for any act of Nice as general manager. The judgment of the district court is accordingly reversed.

(18 Colo. 211)

ST. VRAIN STONE CO. v. DENVER, U. &amp; P. R. CO.

(Supreme Court of Colorado. April 3, 1893.)

PAROL EVIDENCE—FRAUD—TRIAL—FINDINGS—RECEPTION OF EVIDENCE.

1. A written contract for the payment of money to a railroad company obligated the company to locate its road through a certain canon, if, upon survey, it should be found practicable, and provided that the line through the canon could be constructed at an expense of not more than \$1,000 in excess of constructing the same without the canon. *Held*, in an action on the contract by the railroad company, which had constructed its road without the canon, that parol evidence was not admissible to show that the company, before the execution of the contract, had fraudulently represented to defendant that the route through the canon was practicable, and that the road would be located there.

2. When the court has found as a fact that the construction of a road through the canon would be more than \$1,000 in excess of its construction without the canon, the failure of the court to find whether the route through the canon is practicable is immaterial.

3. A party cannot be relieved from express and definite conditions voluntarily inserted in a written contract on the mere ground that at the time of executing the contract verbal conditions were agreed to, contradicting the writing.

4. When a pleading contains both material and immaterial allegations, it is not error to overrule a demurrer to the pleading as an entirety, and on the trial disallow testimony offered in support of the immaterial allegations, and admit it as to the sufficient and material allegations.

Appeal from district court, Arapahoe county.

Action by the Denver, Utah & Pacific Railroad Company against the St. Vrain Stone Company on a written contract. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

The other facts fully appear in the following statement by HAYT, C. J.:

The appellee, the Denver, Utah & Pacific Railroad Company, commenced this action in the district court upon a written contract, the terms of which are, in substance, as follows: (1) The St. Vrain Stone Company agrees to sell and convey to Stout, Gallagher & Lay 80 acres of land and some personal property in Boulder county, Colo. (2) Stout, Gallagher & Lay agree to pay therefor \$3,000 in cash, and give four promissory notes,—two for the sum of \$750 each, payable in six months, and two for the sum of \$750 each, payable in one year,—with interest at 8 per cent. per annum; notes to be secured by deed of trust. (3) Upon the completion of the above requirements the St. Vrain Stone Company was to indorse to the Denver, Utah & Pacific Railroad Company, without recourse, one of said notes for \$750 payable in six months, and one for the like sum payable in one year, and also pay said railroad company, in cash, the sum of \$1,000. (4) In consideration of these notes and the cash payment mentioned, the Denver, Utah & Pacific Railroad Company agrees to "commence as soon as may be, and with all convenient speed construct, a branch of its railroad from Stone Canon switch to the above-

described eighty acres of land, and to locate the same, if practicable, through what is known as 'Crooked Canon,' and said Crooked canon shall be located as the route of said railroad if upon the survey it be found practicable to there locate and construct a line which can be afterwards conveniently operated, and provided, further, that the said line through Crooked canon can be constructed at an expense of not more than \$1,000 in excess of the expense of constructing the same without the canon." It is admitted that Stout, Gallagher & Lay, parties of the second part, complied with the obligation imposed upon them by the agreement, by depositing in the First National Bank of Denver \$3,000 in cash to the credit of the St. Vrain Stone Company, the first party to the agreement; also, their four promissory notes and deed of trust, as provided by the terms of the contract. The third party to the agreement, the Denver, Utah & Pacific Railroad Company, alleges that it constructed a branch of its railroad as it had agreed to do, and demanded of the St. Vrain Stone Company the \$1,000 in cash, and two notes of \$750 each, and upon refusal brought this action to recover from the St. Vrain Stone Company damages for its failure to comply with the terms of its contract. The answer of the defendant, the St. Vrain Stone Company, admits making the agreement and failure on its part to comply therewith, and admits that said Stout, Gallagher & Lay have deposited \$3,000 in cash and the four promissory notes in the bank, as they had agreed to do. It alleges, however—First. That Stout, Gallagher & Lay and the Denver, Utah & Pacific Railroad Company conspired together to defraud it by inducing it to sell its property at much less than its true value. Second. That the Denver, Utah & Pacific Railroad Company agreed with the St. Vrain Stone Company that if the stone company would sell the 80 acres of land to Stout, Gallagher & Lay for \$6,000, and would contribute and pay plaintiff \$2,500, partly in cash, and partly in notes, plaintiff would build a railroad from Stone Canon switch to defendants' lands, and transport over said road, when completed, stone from defendants' quarries. Third. That, to induce the St. Vrain Stone Company to execute the said agreement, the railroad company verbally assured defendant that the route through Crooked canon was a practicable route, except that, by reason of the abruptness of the curves and the difficulty of the grade therein, it might be impracticable to operate the same conveniently, but that with an additional expense, not exceeding \$500, the roadbed could be made entirely practicable through the canon, and that if, upon full examination, it should be found impracticable to construct a roadbed through said Crooked canon which could afterwards be conveniently operated, the plaintiff would afterwards, at its own cost and expense, construct switches connected with its railroad leading to and into the said Crooked canon and into the lands of defendant aforesaid, at both ends of the said canon, and would thereby afford the defendant all the serv-



ice it might require for the transportation of stone. Fourth. That plaintiff and Stout, Gallagher & Lay made an agreement to the effect that, by means of such fraudulent representations and pretenses, plaintiff should procure defendant to convey to Stout, Gallagher & Lay said 80 acres of land, which were to be operated as a stone quarry, with exclusive privileges to said Stout, Gallagher & Lay for transporting their stone, and would, to prevent defendants from being a competitor, refuse to construct said railroad in the agreement in the complaint mentioned, or any switches. Fifth. That, after the written agreement was executed, plaintiff made a further survey, and notified defendant that it was practicable to construct said railroad through said Crooked canon, and thereby caused defendant to have executed deeds from the several proprietors of lands for a 50-foot right of way, and did likewise deposit in said bank its own deed for right of way. Sixth. That Stout, Gallagher & Lay, on June 7, 1887, took possession of the land mentioned in the complaint, and of the personal property thereon, and began to work and quarry the same, and have ever since continued to do so. Seventh. That the railroad might practically have been constructed and conveniently operated through Stone canon. The demurrers of Stout, Gallagher & Lay and of the Nebraska & Colorado Stone Company to this pleading were sustained, and as to them the cross complaint was dismissed. The answer of the Denver, Utah & Pacific Railroad Company to the cross complaint admits that it did not locate said railroad through Crooked canon because upon a survey it was not practicable to locate or construct it therein, and because it could not have been conveniently operated if it had been so constructed, and, further, because it would have cost more than \$1,000 in excess of the expense of constructing it without said canon; denies all other allegations of the cross complaint. A trial to the court without a jury resulted in findings for the plaintiff, and a judgment in its favor for the amount of plaintiff's demand. The defendant brings the case here by appeal.

Wells, McNeal & Taylor, for appellant.  
Wolcott & Vaile, for appellee.

HAYT, C. J., (after stating the facts.) A question is raised with reference to the form of defendant's pleadings, but, as the determination of such question can in no way affect the result, the merits of the controversy will be considered without any reference to it. Counsel for defendant offered evidence at the trial tending to show that it was orally agreed that the road should be constructed through Crooked canon, at the time the written contract was executed; in other words, the claim is that a written agreement to locate the line within the canon upon certain express conditions can by parol be changed to an absolute agreement to do so. The rule that a written contract cannot be varied or contradicted by evidence of a contemporaneous oral agreement is

elementary. This rule precluded the admission of the evidence proposed. The written contract provides that said road shall be located through Crooked canon "if upon survey it be found practicable to there locate and construct a line which can be afterwards conveniently operated, and provided, further, that the said line through Crooked canon can be constructed at an expense of not more than \$1,000 in excess of the expense of constructing the same without the said canon." This agreement, providing, as it does, for a survey as a basis for the location of the line, and for the construction of the line without the canon if certain conditions are found to exist, will not admit of such proof. By the oral evidence proposed it is attempted to show that the canon location was certainly and definitely agreed upon, to the exclusion of the route outside of the canon. This is in direct contradiction of the terms of the written agreement. If such proof is admissible under the claim of fraud, then any oral agreement would be admissible to vary and contradict the terms of a written contract. This cannot be permitted. The rule contended for would, if adopted, introduce an element of uncertainty into written contracts that could only be productive of strife between the parties. After a written contract has been executed, oral negotiations leading up to such a contract cannot be shown for the purpose of changing or contradicting its terms.

As this is the only proof of fraud to be found in the evidence, and the consideration for the written contract sufficiently appearing, but one question is left for review. It was contended by defendant that no practicable route for the road could be found within the canon. This was disputed by the testimony of witnesses introduced by the plaintiff. The record displays a large amount of conflicting evidence upon this question of practicability, and complaint is now made because the trial court failed to determine upon which side lay the preponderance. The determination of this question is entirely unimportant, the court having found from the evidence that to build any line that could be operated within the canon would necessitate the expenditure of more than \$1,000 over and above the cost of the constructed line outside the canon. It being shown that the latter route is practicable, and the written contract providing, as it does, that a line was only to be constructed within the canon in case the expense to be incurred thereby should not be more than \$1,000 in addition to the expense of constructing the line outside of the canon, the plaintiff was released from constructing the line within the canon by the express finding of the court upon the question of cost, this being one of the conditions of the written contract upon which the plaintiff had a right to rely. The defendant, without doubt, failed to realize the benefits which were expected to result from the construction of the railroad. The courts cannot, however, afford relief, as this would necessitate the making of a new contract for the parties in place of the one they deliberately

entered into. Although there is serious conflict in the evidence as to the amount of the additional expense required to build a railroad in the canon, we cannot set aside the finding of the trial court that it would exceed \$1,000, supported, as the finding is, by competent evidence. The judgment is accordingly affirmed.

#### On Rehearing.

PER CURIAM. It is urged as a ground for rehearing that, while the district court overruled a general demurrer to the cross complaint interposed by the defendant, the St. Vrain Stone Company, the court, nevertheless, upon the trial (another judge presiding) refused to admit testimony in support of certain allegations of the cross complaint. This apparent inconsistency is not difficult of explanation. The pleading demurred to was very lengthy. Many of its averments were entirely immaterial. Among other things, however, it contained the following: "And defendant avers that in truth and in fact the said railroad from Stone Canon switch aforesaid to the lands so by defendant sold to the said Stout, Gallagher and Lay might practicably have been located and constructed through the said Crooked canon, and might afterwards have been conveniently operated, and could, presently after the making of the contract in the complaint mentioned, have been constructed through the said Crooked canon at the expense of not more than one thousand dollars more than the expense of constructing the same without the said canon." This allegation undoubtedly constituted a good defense to plaintiff's action, and so it was not error to overrule the demurrer. It may be that all material matters averred in the cross complaint might have been given in evidence under the general denial of the answer. If so, it would not have been error to have sustained the demurrer; but as the demurrer went to the whole pleading, and, as no motion to strike out "redundant, immaterial, or insufficient" matters was interposed, it was not error to allow the whole pleading to stand, and then, on the trial, disallow testimony offered in support of immaterial allegations, so long as all competent evidence in support of material and sufficient allegations was admitted. Code, § 60; *Smith v. Salomon*, 1 Colo. 176; *People v. Lothrop*, 3 Colo. 428; *Railroad Co. v. Blake*, Id. 417. Counsel for appellant state the controversy interrogatively as follows: "If it be true, then, as alleged in the cross complaint, that before or at the time of the making of the written contract sued on plaintiff represented to defendant that the route through the canon was a practicable one, and that a road could be constructed there within \$1,000 of the cost of one without, and thereby induced defendant to enter into the writing which allows plaintiff to construct without in case it could not, within the conditions named, be constructed within the canon, and the finding of the trial court is correct that in fact the line could not be constructed within the conditions named, was not the representation, according to the decisions cited and the simplest principles of honesty, a

fraudulent representation?" This question, as a legal proposition, is not difficult to answer. Notwithstanding the prior survey alleged to have been made by plaintiff through Crooked canon before the execution of the written agreement, and the representations alleged to have been made by plaintiff that the route through said canon was practicable with a slight additional expense not exceeding \$500, it appears that the parties signed the contract containing the express agreement that "said Crooked canon shall be located as the route of the said railroad, if upon the survey it be found practicable to there locate and construct a line which can be afterwards conveniently operated, but provided, further, that the said line through Crooked canon can be constructed at an expense of not more than \$1,000 in excess of the expense of constructing the same without the said canon." The cross complaint admits that defendant executed the written agreement, and makes no claim that its contents were not understood; and further alleges that plaintiff, "at the time of the preparation and execution of the said agreement, and before that, also, verbally assured and promised defendant (but, subtly contriving to deceive and defraud this defendant, refused to insert such promises in the said written agreement) that if, upon full examination, it should be found impracticable to locate and construct a line of railroad through the said Crooked canon which could afterwards be conveniently operated, nevertheless it, the said plaintiff, would afterwards, at its own cost and expense, construct switches connected with its said railroad leading to and into the said Crooked canon and into the lands of the defendant aforesaid." These averments are wholly inconsistent with the theory that defendant executed the written agreement relying unconditionally upon plaintiff's representation that it had already made a survey, and that it could and would build its road through Crooked canon.

The cases relied upon by counsel to sustain their view of the controversy are not altogether in point. In the case of *Peterson v. Johnson*, 22 Wis. 21, the action was upon a promissory note against the maker by one having only the rights of the payee. The defendant was permitted to show by parol a partial failure of consideration of the note sued on. His defense was that at the time he executed the note he had been garnished at the suit of a third party against the payee, and that it was agreed that whatever sum he might be required to pay by virtue of such garnishment should be deducted from the amount of the note. The note, however, was absolute in its terms. Chief Justice Dixon, delivering the opinion of the court, declared that, as partial failure of consideration is a defense pro tanto against an action upon a promissory note, obviously parol evidence must be admitted to prove such failure. The learned judge further says: "The true consideration for a promissory note never appears on the face of it. The words 'value received' are merely formal, and not conclusive. If we would know, then, what the real consideration

was, and whether the whole or any part of it was wanting, we must learn it by extrinsic verbal or written evidence; and such evidence must come down to the very point of time when the note was executed, showing the dealings and relations of the parties, and what was then said and done by them. To hold that such a defense may be made, and yet that such evidence is inadmissible, would be, as was well observed by the court in *Morgan v. Fullenstein*, [27 Ill. 32,] to exclude the defense altogether. It is for this reason that parol evidence to show a partial or total failure of consideration is not within the rule which excludes such evidence to vary or contradict the terms of a written contract." Suppose the parties in the *Peterson-Johnson Case*, instead of executing a promissory note, had executed a written contract stating therein fully certain conditions upon which the debtor might be excused from payment. In an action by the creditor, or one having only his rights, against the debtor upon such written contract, would either party have been at liberty to contradict or vary the conditions thus stated in writing on the mere ground that there was an oral agreement different from the writing? The question is so plain that to state it is to answer it in the negative. The case of *Cake v. Bank*, 116 Pa. St. 264, 9 Atl. Rep. 302, was also an action by the payee of a note against an indorser, and the defendant was allowed to show by parol evidence that, when the note was made, indorsed, and delivered, the payee's agent procuring the note agreed with defendant that he should not be held liable upon his indorsement, but that the payee should look to collateral security agreed to be given. This is an extreme case. Without approving or commenting upon the doctrine thus announced, it is sufficient to say that it is not analogous to the case now under consideration. In *Coal Co. v. McShain*, 75 Pa. St. 238, the action was brought by McShain to recover the price of transporting coal. The defendants pleaded that McShain had agreed to transport 10,000 tons of coal at an agreed price; that he had failed to transport the whole amount; and that thereby they had been obliged to secure the transportation of the coal by other means at a greater price, whereby they had been damaged, and asked to have such damages set off against McShain's action for the coal actually carried by him. The defendants gave in evidence the following paper: "Philadelphia, July 28th, 1868. To the Powelton Coal and Iron Co.—Gentlemen: I hereby agree to transport from Greenwich to New York, at such times as you may desire, ten thousand tons of coal for the sum of one hundred and thirty cents per two thousand two hundred and forty pounds. Very respectfully, Manuel McShain." In reviewing the case the supreme court of Pennsylvania said: "McShain testified that the absolute condition upon which he signed the agreement was that the company should furnish the coal by the 1st of October. He says, after speaking of their previous parol arrangement: 'Mr. Berwind showed me the paper.

I was in a great hurry. I picked it up. I glanced over it and said, 'Mr. Berwind, this is one sided. It don't mention that you will furnish the coal by the first of October.' He said, 'That is understood; we will not only furnish that, but expect to furnish five or ten thousand more by that time.' I made answer, 'If that is understood, I will sign it.'" This piece of evidence showed a distinct and material condition by which McShain was induced to sign the contract. To say, then, that this contract might be enforced without regard to the express parol stipulation under which it was signed would be to disregard long and well established legal principles, as well as the plainest demands of common honesty." It is obvious that the agreement by McShain to transport the coal at such time as the Powelton Company might desire required some further stipulation in order to make the contract definite as to time. Otherwise, the obligation on the part of McShain might have continued indefinitely. The correctness of the McShain case need not be questioned. But suppose the written agreement had provided that McShain should transport the coal at any time before the 1st day of December; would he have been at liberty to show that, though he executed the written agreement in that form, it was, nevertheless, verbally agreed that he was only to transport such coal as should be furnished by the Powelton Company before the 1st of October? Certainly not. In the case of *Milliken v. Thorndike*, 103 Mass. 382, the action was upon a lease by the landlord against the tenant for rent, and the defendant was allowed to show as a defense that he was induced to execute the lease by fraudulent representations of the plaintiff as to a material point in the construction of the demised premises. The representation was that the drains to the building were where they were to be according to the plans in every particular. This would seem to be a clear case of a fraudulent representation whereby a party was induced to execute a contract; for the landlord was bound to know whether the building was constructed as he represented in respect to the drains, and the tenant had a right to rely upon such representation as an inducement to the execution of the lease. The case of *Boynton v. Hazelboom*, 14 Allen, 107, is a case where a false representation was made whereby a party was induced to execute a written contract for the exchange of real estate. The plaintiff made a false representation to defendant in regard to the rents of certain houses to be conveyed by him in exchange for defendant's land. The written contract was silent on the subject of rents, and the court held that, as defendant was induced to sign the contract for the exchange upon such false representation,—in other words, that as defendant assented to the contract under a misapprehension occasioned by plaintiff,—equity would not compel specific performance.

There is a clear distinction between a false representation as to an existing fact and a false promise as to something to be done or performed in the future. A false

verbal representation as to an existing fact, upon the faith of which a party not knowing, and not having the means of knowing, the truth in respect thereto, is induced to enter into a written contract silent or indefinite upon the subject of such representation, may furnish ground of relief in an action upon the contract. Nevertheless, a party cannot be relieved from express and definite conditions voluntarily inserted in a written contract on the mere ground that at the time of executing the contract verbal conditions were agreed to, contradictory of the writing. We cannot undertake to review all the cases cited by counsel. After much consideration it seems to us that the hardship complained of by appellant must be attributed, not to any fraud in the execution of the contract of which the courts can take cognizance as a matter of law, nor to any such violation of the contract as would justify this court in overruling the finding of the trial court upon a question of fact, but to appellant's own voluntary act in consenting to the terms and conditions of the contract. The petition for a rehearing must be denied.

(18 Colo. 328)

**THOMPSON v. CROCKER et al.**

(Supreme Court of Colorado. April 3, 1893.)

**MORTGAGE FORECLOSURE—DECREE FOR SALE—ERRONEOUS DESCRIPTION.**

In foreclosure proceedings, an interlocutory order for the sale of the "mortgaged premises mentioned in complainant's bill" is not void because followed by an erroneous description, where the premises are correctly described in the bill, in the master's report of sale, which was confirmed by the final decree, and in the master's deed of the property, and the grantee in such deed acquires a valid title to the property.

Appeal from district court, Arapahoe county.

Action by Almira A. Thompson against William Crocker and others to quiet title. From a judgment in defendants' favor, plaintiff appeals. Reversed.

John A. Perry, for appellant. Browne, Putnam & Preston, for appellees.

**HAYT, C. J.** Action to determine title to the north one third of lot 11, in block 2, west division of the city of Denver, Arapahoe county, Colo. The plaintiff, to show title in herself, relies upon a title secured through the foreclosure of a mortgage given upon the property in controversy. This mortgage was executed by Salathiel W. Thompson, at the time the owner in fee of the premises. George H. and William N. Thompson are the mortgagees named in the instrument. It conveyed all of "the north one third, ( $\frac{1}{3}$ ), and the undivided one half, ( $\frac{1}{2}$ ), of the center one third ( $\frac{1}{3}$ ) of lot eleven, (11,) in block two, (2,) in the west division of the city of Denver, Arapahoe county, Colorado." It was foreclosed by suit in the probate court of Arapahoe county; this court having jurisdiction of the subject-matter, and the person of the defendant. The bill of complaint in the foreclosure suit alleges that said mortgage, among other lands, conveyed

the north one third ( $\frac{1}{3}$ ) of lot eleven, (11,) in block two, (2,) in the west division of the city of Denver, Arapahoe county, Colo., to which was attached a copy of the mortgage.

The principal question in the case arises upon the language of the interlocutory decree in that suit. By that decree it is ordered "that the mortgaged premises mentioned in the complainant's bill, viz. 'All of the north one third ( $\frac{1}{3}$ ) of the undivided one half ( $\frac{1}{2}$ ) of the center one third ( $\frac{1}{3}$ ) of lot eleven, (11,) in block No. two, (2,) situate in the west division of the city of Denver, Arapahoe county, territory of Colorado,' be sold," etc. This is followed by the master's certificate of purchase, which recites that, in pursuance of the above-mentioned interlocutory decree, he sold the following land, or parts of land, in said decretal order mentioned, viz. describing the premises as "the north one third ( $\frac{1}{3}$ ) of lot numbered eleven, (11,) in block No. two, (2,) of the west division of Denver, Arapahoe county, territory of Colorado," to George H. and William N. Thompson. The master's report also recites that he was by the interlocutory decree ordered to sell the property described in the certificate. The final decree of the county court recites the filing of the foregoing report, and approves the same. Afterwards the master's deed to the property, correctly describing the same, was duly made to the purchasers. The defendants below (appellees here) objected successively to the introduction of the interlocutory decree, the master's certificate of purchase, the master's deed, the master's report of sale, and the final decree, upon the sole ground that said interlocutory decree did not order the sale of the property in controversy. All these objections were sustained in the district court, and exceptions reserved. The decisions sustaining these several objections constitute the principal errors assigned in this court.

The only objections urged to the proceedings in the probate court are that the interlocutory decree is void by reason of the uncertain description of the property ordered to be sold. The decree orders that the mortgaged premises mentioned in the complainant's bill be sold. By a familiar principle of the law, words to which reference is made in an instrument are to be given the same effect as though incorporated therein. Hence the decree contains an accurate description of the property, without the words following the videlicet. The ambiguity or uncertainty which, in the opinion of the trial court, vitiated the interlocutory decree, arises wholly from the words following. Construing all the orders of the probate court together, there is no doubt but that the court intended to order the sale of the property here in controversy; the error in the decree arising from the insertion of the preposition "of" in place of the conjunction "and" before the words, "the undivided one half." By the construction given the decree is made operative, while by that given by the district court it is necessarily made inoperative; and we think it should be construed so that it may be of validity, rather than be lost. Moreover, the complainant's bill

filed in the probate court contains an accurate description of the property. So, also, does the master's report, his certificate of sale and deed, and the final decree of the probate court. Salathiel W. Thompson, under whom appellees claim, was the sole party defendant in that suit. The record discloses that his appearance was duly entered, and that he was present when the final decree was made. He did not object to the confirmation of the master's report, or the final decree, and to such decree no writ of error was sued out, and no appeal taken therefrom. The decree of the probate court is in all respects a final judgment. The court in which the proceedings were had was a court of general common-law and chancery powers. It had jurisdiction of the subject-matter of the action, as well as jurisdiction of the parties. It had power to either affirm the sale made by its officer, or annul the same, and order a new sale. Its order affirming the sale, under the circumstances, is final and conclusive upon the parties and their privies, and it cannot be impeached in this collateral proceeding. *Kilgensmith v. Bean*, 2 Watts, 486; *Evans v. Spurgin*, 6 Grat. 107; *Cockey v. Cole*, 28 Md. 276; *Water Co. v. Middaugh*, 12 Colo. 434, 21 Pac. Rep. 565. We are of the opinion that the title acquired as the result of the foreclosure proceedings should have been admitted. With this, appellant's chain of title to the property in controversy is complete. The judgment of the district court is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion.

(3 Colo. App. 198)

**GODDING v. DECKER et al.**

(Court of Appeals of Colorado. March 27, 1893.)

**PUBLIC LANDS — CERTIFICATE OF PURCHASE — DEFECTIVE TITLE — APPEAL FROM LAND COMMISSIONER — RESCISSION OF CONTRACT — JUDGMENT.**

1. Under Gen. St. § 1310, providing that the certificate of the register and receiver shall be deemed evidence of title, and superior to all other evidence of title, to government land, except a patent for the same tract, a person holding a receiver's receipt for the purchase money of land has a marketable title thereto.

2. Rev. St. U. S. § 2273, provides that appeals may be taken from the decision of the register and receiver of the land district on questions as to the rights of pre-emption arising between settlers of the same tract, and that his decision shall be final, unless appeal be taken therefrom to the secretary of the interior. *Held* that, since such statute expressly gives to settlers the right of appeal, it, by implication, excludes all other classes of persons, and an attempted appeal, which is unauthorized by a mere protestant from a decision of the commissioner of the general land office, awarding a person a receiver's receipt for land, is not a defect which will entitle his vendees to rescind the contract, and to defend in an action for the purchase money.

3. A docket entry in proceedings had before the register and receiver, "Appeal filed November 19th, 1889, and transmitted to the commissioner G. L. O. December 24th, 1889," is not competent to show that an appeal was taken from the decision of the commissioner of the general land office to the secretary of the interior; the notice of an appeal in accordance with the rules and practice of the land office,

or a certified copy of it, being the only legitimate evidence of such appeal.

4. Where a contract is made for the sale of land, and the vendees know that the grantor's title thereto is a receiver's receipt issued after a protest had been filed in the local office, they cannot allege fraudulent misrepresentations as to such title as a ground for rescission of the contract, or as a defense against an action for the purchase money.

5. Where, in an action for the purchase money, the vendees, in their answer, allege fraudulent misrepresentations as to title, and ask for a rescission, a failure to allege therein a restoration of, or an offer to restore, the land, or release, or offer to release, the grantor from his contract, is fatal to their right to a rescission.

6. Where an action was commenced against one of the vendees for the purchase money, and the other, on motion of his coveegee, was brought into the suit by service of process, a decree in favor of one of the vendees, granting rescission of the contract as to him, and not making any adjudication as to the other vendee, is irregular and void, in that, he being before the court, no final judgment could properly be entered without disposing of the case as to him, also.

7. Where an action is brought to recover the balance of the purchase price of land sold to two persons jointly, one of them cannot maintain a cross complaint for one half of the purchase price already paid, in that, the contract being joint as to the vendees, such cross complaint could only be maintained by them jointly, and not by one alone.

Error to district court, Prowers county.

Action by John E. Godding against James W. Decker and Frank C. Descent to recover on notes given for the balance of the purchase price of land. Decker filed a cross complaint alleging failure of title, and seeking rescission of the contract, and recovery of the purchase money paid by him. There was judgment in his favor, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by BISSELL, J.:

In January, 1888, John E. Godding, plaintiff in error, brought suit against James W. Decker on two promissory notes. The first was dated June 28, 1887, for \$700, due 60 days after date, at the Bank of Lamar, and signed by Decker, Descent, and Godding. According to the pleadings and proof, this note was substituted for one dated March 8, 1887, due three months after date, for the same sum, signed by Decker and Descent. This latter note was not paid at maturity, and the one sued on was given to take up and protect the unpaid paper. These facts are of little consequence, save to make the transaction intelligible. The second note bore date March 8th, was for the same sum, and due six months after date. Neither note having been paid at maturity, and the renewal promise of June 28th likewise remaining unpaid, the present suit was brought on both notes against Decker alone. On his motion Descent was made a party defendant, but failed to answer. Decker answered, admitted the execution of the notes, and set up that these notes were given in performance of a contract entered into between Godding, of the one part, and Decker and Descent, of the other, whereby Godding sold, and Decker and Descent bought, blocks 40, 41, and 42 in an addition to the town of Lamar.

The defendant then averred that he was induced to enter into the contract by the fraudulent representations of Godding concerning his title to the property. At the date of the contract,—March 8th,—Decker and Descent paid Godding \$700 in cash, and executed these two notes for the balance of the consideration. Decker averred that Godding was without a valid and marketable title, and that the title was in the government. Decker admitted his refusal to pay the notes, and based his refusal upon the failure of title. In the prayer with which his answer concluded, he asked that the contract be adjudged null and void, and that it be rescinded as to him, and offered to reconvey his undivided one half of the premises. The answer contained no statement that the possession of the premises had been surrendered, or any offer to surrender or reconvey, other than what is contained in the prayer as stated. The defendant Decker then undertook to set up a counterclaim on his own behalf, and in it substantially averred that, on the 8th of March, he, with Frank Descent, made a contract with Godding whereby, in consideration of \$700 cash paid, and \$1,400 more to be paid in two installments, three and six months from the date of the contract, Godding agreed to sell to them the described property. Decker then averred that, for the purpose of defrauding him, Godding fraudulently represented that he had a good title, and would convey. These averments were followed by an allegation that Godding had no valid and marketable title, but that it was at the time of the contract, and afterwards, in the government of the United States. He averred damage in the sum of \$350, which was one half of the sum paid on the original contract, and prayed that the contract be adjudged null and void and rescinded, and offered to reconvey, and asked judgment for the specified sum. The counterclaim contained no statement concerning the possession or surrender, and was without any averment of an offer to rescind, or an offer to reconvey, prior to the suit. The plaintiff replied, and denied all the allegations, and then set up that when the bargain was made, and the money paid, he executed a bond to Decker and Descent, in the penalty of \$4,000, which recited that Godding had agreed to sell Decker and Descent certain described property, and that the bond had for its condition that if Decker and Descent should pay the notes at maturity, and the taxes on the blocks, Godding should, on the completion of the payments, execute and deliver a good and sufficient warranty deed to Decker and Descent, or to such persons as they might name. The bond recited that, in case of a failure to pay, Godding could treat Decker and Descent as tenants holding over, or might enforce the payment of the notes. The bond further provided that, if the purchase money should not be paid according to the tenor of the notes, then Decker and Descent should forfeit that part of the consideration paid. In his reply Godding stated that, on the 8th of March, he held a receiver's receipt for the land, and that no

contest respecting his entry was pending in the land office, although he admitted that one Carrie Myton had filed a protest in the land office at Lamar, protesting against the making of any title to him. The protest was dismissed, and the receiver's receipt issued, prior to the time the contract was made, and these facts seem to have been fully known and discussed between the parties at the time of the sale. The case was tried largely on a stipulation which disclosed the issuance of the receipt on the 23d of February, 1887, the platting of the land, the making of the contract as stated in the pleadings, and its performance to the extent mentioned. The bond was set out, the record of the receiver's receipt stated, and by express agreement the controversy was narrowed to the consideration of four matters: First, the circumstances of the execution of the paper signed by Decker, Descent, and Godding; second, Godding's representation as to his title to the premises; third, the knowledge which Decker and Descent had concerning the situation of the title; fourth, the proof as to the title which was to be attacked. This was to be made subject to objections by the production of a transcript from the land office in the matter of Carrie Myton's protest, and sundry letters from the officers of the land department of the government concerning the protest and its disposition.

Descent and Decker were fully informed concerning the status of Godding's title, and they bought and took the bond knowing that he held a receiver's receipt, issued after a protest had been filed by Carrie Myton in the local office where Godding's application was pending. The only evidence offered under the stipulation concerning the proceedings in the land office may be conveniently subdivided into three parts: The first, called "Exhibit C," appears to be a kind of a docket recital of what was done in the local land office. It is a chronological statement by the register of the land office of what was done, but contains no copies of any instrument filed, nor any copies of papers showing what was done, otherwise than as may appear from these docket entries. The evidence was objected to, but admitted. The defendant followed this proof by a copy of a letter from the commissioner of the land office, reviewing the proceedings of the local officers, and concludes with an order which, in effect, undertakes to suspend the entry, and reinstate the case for hearing. A rehearing was had, the original action of the local officers reaffirmed, and this action was apparently again subjected to review in the land office at Washington. The plaintiff introduced the commissioner's letter showing that the department sustained the action of the local officers, and affirmed the validity of the entry. This last letter was dated August 31, 1889, and was some five months prior to the final decree in the case. It is contended that an appeal was taken from this decision of the commissioner to the secretary of the interior, who is the head of the land department, but it is proven only by this recital in Exhibit C: "Appeal filed November 19th, 1889, and transmitted to the com-

missioner G. L. O. December 24th, 1889." The evidence disclosed that Decker and Descent went into the possession of the property at the time of the making of the contract, and dealt with it as owners, and negotiated with divers parties with reference to the sale of a portion of the lots embraced in the blocks which they purchased. On this record and proof a decree was entered which substantially recited that Godding was indebted to Decker for \$350, with interest at 10 per cent. from March 8, 1887; that he should recover nothing on his promissory notes, and that the contract between Godding and Decker and Descent should be rescinded, and be held null and void as to Decker, and that Decker should reconvey an undivided one-half interest in the property acquired by virtue of the contract. An execution was ordered accordingly. There was no finding, disposition, or determination of the controversy, in so far as regarded Descent, although it appeared that a summons was issued to him on October 4th, and served October 9th. Descent was thus brought into the case by process, but his rights and interests, and Godding's rights and interests as to him, were left wholly undetermined. To review this judgment and decree, Godding sued out a writ of error.

Steele & Malone, B. L. Carr, and F. P. Secor, for plaintiff in error. Clarence Way, Pence & Pence, and Jas. S. McGinnis, for defendants in error.

BISSELL, J., (after stating the facts.) In many particulars the contract under consideration was executory. It had not been concluded by the transfer of title, and the balance of the consideration was to antedate in its payment the delivery of the deeds. It therefore follows that Decker and Descent are not brought within the scope of the principle which obligates them to resort to the covenants in the deed for their remedy, but they are entitled to set up a want of consideration, and the defects in the title, if any, when sued for the purchase price. Their right to insist upon a marketable title is equally clear. It is now almost universally conceded that an agreement to make a good title is implied in every executory contract for the sale of lands, and that the purchaser cannot be compelled to accept one that is defective, unless he has expressly agreed to receive whatever the vendor may be able to convey. *Powell v. Conant*, 33 Mich. 386; *Murphy v. Scovell*, 41 Minn. 262, 43 N. W. Rep. 1; *Moore v. Williams*, 115 N. Y. 586, 22 N. E. Rep. 233; *Swan v. Drury*, 22 Pick. 485; *Rawle, Cov.* (4th Ed.) p. 43. The agreement concerned real property, and, by the terms of the bond, Godding agreed to sell to Descent and Decker the premises named in the instrument. The implied obligation raised by the terms of the instrument was that he should transfer title without defects of which the defendants could lawfully complain. It must be ascertained what title Godding had, and what the record discloses concerning its alleged imperfection. It must be conceded that the fee was in the government. Godding only held the receiver's

receipt for the purchase money. That this is a good title, concerning which parties may contract, and which a vendee will be bound to take, if it be evidenced by receipts properly executed by the officers of the government, can scarcely be questioned. This matter is fully covered by the statute, and amply settled by a long course of federal adjudication. The Colorado statute declares, in section 1310, that the certificate of the register and receiver of the purchase of any tract of land shall be deemed and taken as evidence of title. It is declared to be superior to all other evidence of title to government land, except a patent from the government for the same identical tract. Land thus entered has always been held to be the subject of contract and sale, and the receipt of the money, and the issuance of the certificate, have universally been held to be such a segregation of the land from the public domain as to entitle the party to his patent, and to warrant legal proceedings for the purposes of procuring it. *Carroll v. Soffard*, 3 How. 441; *Myers v. Croft*, 13 Wall. 291; *Simmons v. Wagner*, 101 U. S. 260; *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95. Under these authorities, Godding had a title concerning which he had a right to bargain. It was marketable, and it was not, in legal contemplation, clouded by defects of which the vendees had a right to complain, unless, in some legitimate manner, it was established that the Myton protest constituted such an imperfection. There are many reasons why this cannot be true. There is a broad distinction between the rights of a contestant, and those enjoyed by one who simply files a protest to inform the government that the applicant is without right to enter the land. If the register and receiver see fit to take the applicant's money, and issue him a receipt which evidences his purchase of the land, the effect of that certificate cannot be destroyed by any subsequent appeal which may be taken by the protestant. It is undoubtedly true, under the federal statutes, (sections 453, 2478, Rev. St.,) that the disposal of the public land is committed to the authority of the officers of the interior department, and they may withhold the certificate of purchase pending a subsequent hearing concerning the right of the claimant to enter. It is equally true that if the certificate has been issued the land office may, under certain circumstances, cancel the entry. *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122. This concession does not affect the present case, since the question here is whether the title was rendered defective by the appeal which it is contended the protestant took from the decision of the commissioner of the general land office to the secretary of the interior. It is not discussed, nor is it decided what effect on the title the action of Commissioner Sparks in suspending the entry had with regard to it, since subsequent to this action the entry was affirmed, and the action of the local land officers sustained. This was done prior to the trial of this suit; so that when the proofs were made, and the decree entered, Godding had a title evidenced by an unsuspended receipt,



which was in full force, and affected by nothing, unless by the alleged appeal. The right of appeal is only given in those cases where questions arise as to the right of pre-emption between different settlers. Rev. St. U. S. § 2273.<sup>1</sup> The right of appeal being thus expressly conferred upon certain classes of persons, it must, by the very force of the expression, be held to exclude protestants from the class to which the right is given. The legitimate result of this reasoning is that the attempted appeal by Myton from the commissioner to the secretary did not constitute a defect which entitled the vendee to insist upon the rescission of the contract, and permitted him to defend in an action for the recovery of the purchase money. If this conclusion were unsatisfactory, and not so adequately sustained, it would still be held that there was no proof of any legal defect justifying a rescission. The exhibit which the defendant offered in evidence to show that an appeal had been taken was not competent proof of any such fact. The notice of an appeal in accordance with the rules and practice of the land office, or a certified copy of it, if admissible, was the only legitimate evidence of the taking of that step.

With respect to the character of the title, it only remains to consider whether it is enough for the vendor to be able to make a good title at the time of the decree, or whether his title must have been perfect at the time he entered into the agreement. It seems to be well settled that the court is not authorized to decree a rescission if, at the time of the hearing, the plaintiff is able to remedy the defect complained of, and make the title which he originally undertook to convey. *Kimball v. West*, 15 Wall. 377; *Diggs v. Kirby*, 40 Ark. 420. It is conceded that this principle is necessarily subject to some modifications, and that the plaintiff must respond to whatever damages the vendee may have sustained by reason of the delay in the completion of the agreement. The exception need hardly be stated, since the record is barren of testimony respecting this matter. It is only referred to, lest, on the subsequent trial, the rule may be assumed to have been too broadly stated. The force and application of these principles is not destroyed by the form of the defense, nor affected by the circumstances that Decker alleged fraud in the procurement of its execution. In respect of this particular feature of the case, the record is barren of any evidence which even tended to show misrepresentation on the part of the vendor concerning his title. Decker stated on the stand that the situation and the character of Godding's title had frequently been made the subject-matter of discussion prior to the purchase, and that the

execution of the agreement had only been delayed to await the delivery of the receiver's receipt, which both parties assumed would make a valid title, concerning which they might contract. In respect of this matter the present seems to be one of those cases where what appeared like a valuable acquisition at the time it was initiated, turned out to be a bad bargain, from which the vendee would like to escape. Decker was not entitled to defend the action for the consideration money because of the character of the title which Godding was able to convey. He was equally without right to insist on the rescission of the contract because of the alleged fraud of the vendor. That part of the decree which rescinds the contract is not justified by the record. It is quite generally held that a party may not rescind a contract without at least returning, or offering to return, the fruits of his agreement, and restoring so far as he may, either in fact or by tender, the other to his original possession. Decker's answer contained no allegation that he had surrendered, or had offered to surrender, possession, or that he had reconveyed, or offered to reconvey, any title which he had, or that he had released, or offered to release, Godding from his contract. *Martin v. Chambers*, 84 Ill. 579; *Dennis v. Jones*, (N. J. Err. & App.) 14 Atl. Rep. 913; *Garrett v. Lynch*, 44 Ala. 324; *Knuckolls v. Lea*, 10 Humph. 577; *Warv. Vend. c. 31*, p. 849. The defendant was negligent in his proof, as he was in his plea, for he failed to show any offer to perform on his part, or any demand to rescind, and at the date of the trial remained in possession and control of the property. He did not, therefore, entitle himself to a decree for the rescission.

There is another reason equally fatal to the decree entered. It is in the form of a judgment in favor of Decker, and against Godding, for the rescission of the one half of a joint contract, and the recovery of an aliquot part of a joint right in favor of one who occupies the position of a plaintiff in an action. The action, as originally brought, was on two promissory notes against Decker alone, to recover that which under our statute he was severally liable to pay. It was no defense to him that the joint maker was not sued. It appears that, after the institution of the action, Descent was, on Decker's motion, served with process, and brought into the suit. This may be of small consequence in the determination of the question which will be discussed, but it is referred to to show the anomalous character of the result arrived at. Descent never appeared in the action. Having been served with a summons, it was indispensable that some action be taken concerning this defendant. Descent was before the court, and no final judgment could properly be entered without disposing of the case as to all the defendants served. *Bissell v. Cushman*, 5 Colo. 76.

Regardless of this technical defect, which would necessitate the reversal of the judgment, it must be adjudged, upon a broader basis, that Decker's cross complaint cannot be sustained. It will be recollected that after setting up his defense

<sup>1</sup>Rev. St. U. S. § 2273, provides that the register and receiver of the land district in which land is situated shall determine all questions as to the rights of pre-emption arising between settlers of the same tract, and that appeals from their decision as to such rights shall be made to the commissioner of the general land office, whose decision shall be final, unless appeal be taken therefrom to the secretary of the interior.

of a want of consideration, and fraud inuring in the agreement, Decker filed a cross complaint setting up the same fraud, and thereby sought to recover from Godding the one half of the \$700 which he and Descent originally paid as part of the purchase price. This he was permitted to do, and judgment passed in his favor. From the cross complaint it appeared that the agreement was between Godding, of the one part, and Decker and Descent, of the other, and that the only promise which Decker made was to convey to them jointly on the payment of the consideration specified. It necessarily follows that if the cause of action set up in the cross complaint grows out of the contract entered into between Godding, of the one part, and Decker and Descent, of the other, it was a joint right running to Decker and Descent, and not a several contract running to each. It was universally true, at the common law, that wherever a contract, whether written or verbal, was made with two or more persons, and their legal interest was joint, all the obligations, covenantees, or promisees, if living, must join as plaintiffs. There was no such thing as a joint and several right, corresponding to the joint and several liability of various promisors. It was either several, so that one only could sue, or joint, so that all must sue. This legal distinction has not been varied by any statute in this state, except in one particular. Doubtless, according to one provision of our Code of 1887, § 12, under some circumstances, where parties jointly interested refuse to join as plaintiffs, they may, with proper pleadings, be made defendants, and the sole plaintiff thereby overcome this limitation on his right to sue. Decker did not attempt to bring his cross complaint within the scope of that provision. He simply filed a cross complaint, and sought to recover his half of a joint cause of action. This he could not do. The proofs amply demonstrate that it was a sale to both, a contract with both, and whatever was done concerned their common interest. If any cause of action came to them by reason of the contract, it came to them jointly, and they must unite in whatever action they would bring. This principle was plainly recognized in *Bank v. Ford*, 7 Colo. 314, 3 Pac. Rep. 449, where the court construed that section of the Code which authorizes an action to be brought against one when there may be a liability on the part of several. It is wholly unnecessary to enter into a discussion to establish that, where one party files a cross complaint, he thereby becomes a plaintiff, and can only maintain his remedy under that pleading by proof which shall show that he on whose behalf it is filed has a cause of action which he is entitled to maintain against the plaintiff in the suit. This did not appear in the present case, and therefore, under the cross complaint, the court could not rightfully enter a judgment in favor of Decker for the one half of the money originally paid. The judgment for the one half of the purchase money necessarily depends on that part of the decree which rescinds the contract. When it is determined

that neither the alleged fraud, nor the character of the title, brings this right to Decker, it concludes him as to the payment which was made when the contract was entered into. By the express terms of the agreement, the vendees were to forfeit what they paid on the 8th of March, if they failed to pay the balance of the agreed price. So long, then, as the agreement was untainted by fraud, and there was no breach of the implied covenant to convey a good title, no cause of action for any part of what had been paid could arise in favor of Decker and Descent, or either of them.

These are all the questions which it is deemed necessary to consider, either for the purposes of the present decision, or with respect to any subsequent trial which may hereafter occur. For the errors committed by the court with respect to the matters discussed, this judgment must be reversed and remanded.

(3 Colo. App. 236)

### MANDERS et al. v. CRAFT.

(Court of Appeals of Colorado. March 27, 1893.)

#### PLEADING—COMPLAINT—SEPARATE COUNTS— BROKER COMMISSIONS.

1. Civil Code, § 49, which declares that "the complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without unnecessary repetition," leaves to the discretion of the court to determine whether it is unnecessary repetition to state the same cause of action in two different counts.

2. It is not an abuse of that discretion to allow a plaintiff suing for commission for the sale of land to describe his cause of action in two counts,—one alleging employment for which he was to receive a reasonable compensation, and that his services were worth \$712.50; and the other alleging that the value of the property sold was \$26,000, on which he was to receive a regular commission and that such commission amounted to \$712.50.

3. A real-estate broker, who brings together parties who make an exchange of lands, and whose action terminates with bringing them together, the terms of the exchange being settled by the principals themselves, is entitled to collect commissions from both parties where both have agreed to pay.

Appeal from district court, Arapahoe county.

Action by William T. Craft against R. F. Manders and others. Plaintiff obtained judgment. Defendants appeal. Affirmed.

Hartzell & Patterson, for appellants.  
Elery Stowell, for appellee.

REED, J. The action was brought by appellee to recover commissions alleged to have been earned as a real-estate agent in the exchange of a ranch property in the vicinity of Ogden, Utah, for property in the town of Ogden. The case was tried to the court, resulting in a judgment for plaintiff for \$662.50, from which an appeal was taken.

Appellants contend—First, that the court erred in overruling defendants' motion to compel plaintiff to elect upon which of the two counts contained in the complaint he would proceed; second, that the

testimony showed that appellee was employed by and received a commission from the other party which legally precluded him from recovery against the defendants. Both counts were for the same cause of action; the first—a quantum meruit—alleging the employment for which he was to receive a reasonable compensation, and that the services were worth \$712.50; the second, that the value of the property sold was \$26,000, on which he was to receive a regular commission, and that such commission amounted to \$712.50. This may also be considered in the nature of a quantum meruit. No price was fixed that he was to receive for his services. The transaction was not a sale, but an exchange, and it depended upon proof of a general custom and proof of the percentage, also, of the value of the properties exchanged. The contention is based upon section 49 of the Civil Code, as follows: "The complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without unnecessary repetition." In Mr. Boone's work upon Code Pleading (section 16) it is said: "The facts constituting each cause of action must be concisely stated, without unnecessary repetition. Counts in pleading, technically speaking, are entirely unknown to the code system, and the plaintiff is restricted to a single statement of his cause of action. Thus a plaintiff is not allowed to set forth, in different counts, in his complaint, several distinct causes of action against the defendant for the same indebtedness. If the complaint contains but one cause of action, there can be but one statement of it. The facts cannot be subdivided so as to present fictitiously two or more causes of action." In Bliss upon Code Pleading (section 119) occurs the following: "But it is generally required that the different statements of a complaint under the Code should contain causes of action different in fact. The statute requires that the facts shall be stated without repetition, or unnecessary repetition. With a few exceptions, this requirement is held to forbid a duplicate statement, in different form, of the same cause, and, if such statements are made, the plaintiff will be required to elect upon which to go to trial, or the court will strike out all but the first statement." In Boone the rule is stated much stronger than the decisions warrant. The words "without unnecessary repetition" would, of themselves, in many instances, modify the rule as stated. What is and what is not unnecessary repetition must, of necessity, be determined by the court. The obvious intention of the system of code pleading is that it shall be more equitable than that of the common law. To so construe it as to render it more restrictive would defeat the intention. In Bliss it will be observed that the rule is considerably modified. The language is: "But it is generally required," showing that it is not regarded as arbitrary and mandatory, but that there are many exceptions, and this is supported by the context of section 119 and subsequent sections. In Plummer v. Mold, 22 Minn. 16, it was said: "On the trial the court

required the plaintiffs to elect whether they would rely upon the special contract alleged in the complaint or the value alleged. In *Hawley v. Wilkinson*, 18 Minn. 525, (Gil. 468,) this was held to be in the sound discretion of the court, and we adhere to the rule there laid down." See, also, *Birdseye v. Smith*, 32 Barb. 217; *Snyder v. Snyder*, 25 Ind. 399; *Stearns v. Dubois*, 55 Ind. 257; *Whitney v. Railroad Co.*, 27 Wis. 327. The statute prohibits unnecessary repetition, but does not prohibit repetition entirely. *Jones v. Palmer*, 1 Abb. Pr. 442; *Pearson v. Railroad Co.*, 45 Iowa, 497. There may be, and undoubtedly are, many cases where the party should be required to elect. Where one count is a quantum meruit and the other on a specific contract to pay a certain sum designated, both should not stand. There are also many cases where the arbitrary application of the rule would prevent justice. It would seem that to leave to the discretion of the court to determine whether or not the repetition is unnecessary is the better interpretation of the law. In this case it cannot be said that the discretion was abused, hence no error was committed in refusing the motion.

The second contention cannot be sustained. It is true, and the rule of law is well settled, that an agent acting for both parties, for each without the knowledge of the other, can collect commissions from neither; and it rests upon a principle of sound public policy that the party cannot be at the same time both seller and purchaser; the duties are incompatible. It is the object of the seller to get all he can, of the purchaser to buy as cheaply as possible. But this rule is only applicable to agents stricti juris, not to middlemen. *Finerty v. Fritz*, 5 Colo. 176; *Stewart v. Mather*, 32 Wis. 344; *Shepherd v. Hedden*, 29 N. J. Law, 334; *Mullen v. Keetzleb*, 7 Bush, 253; *Anderson v. Weiser*, 24 Iowa, 430; *Merryman v. David*, 31 Ill. 404. In this case there was, technically, no purchase or sale; no money passed. It was an exchange of one kind of real estate for another. With the prices, details, and trade the agent had nothing to do, and the arrangement was that he should not have. His sole action and employment terminated with bringing the parties together, which he did. The trade was made by the principals, consequently the agent is not obnoxious to the charge of double employment under the law. There was nothing in the relation of the agent to either to prevent compensation from both if both agreed to pay. That they did is found as a fact by the trial court, and, although the evidence was rather unsatisfactory and conflicting, we do not feel at liberty to question the finding.

The judgment will be affirmed.

(3 Colo. App. 227)

BENJAMIN v. MATTTLER et al.

(Court of Appeals of Colorado. March 27, 1903.)

DECEIT—AGENT—PLEADING—STATUTE OF FRAUDS.

1. In an action against a real-estate broker for deceit in representing himself to be the

agent of the owners of certain land, and thereby inducing plaintiff to make a contract with him for its purchase, an answer which practically admits all the allegations of the complaint, and seeks to avoid their effect by alleging that defendant acted in good faith, and that plaintiff had opportunity to ascertain defendant's want of authority, is demurrable.

2. Since such action is not based on the contract, the fact that such contract is void, under the statute of frauds, constitutes no defense, especially where the statute is not pleaded.

Error to district court, Arapahoe county.

Action by Darius R. Benjamin against John Mattler, W. L. Beardsley, William W. Watson, and W. C. Mead. Defendants obtained judgment on the pleadings. Plaintiff brings error. Reversed.

The other facts fully appear in the following statement by REED, J.:

Defendants in error, John Mattler, W. L. Beardsley, William W. Watson, and W. C. Mead, partners doing business as real-estate agents in the city of Denver, made the following memorandum or contract in writing, and delivered it to the plaintiff in error: "Denver, Colo., Oct. 23, 1888. Received of Darius R. Benjamin the sum of two hundred dollars as part payment for the following described real estate, to wit, lots one (1) and two, (2,) in block twenty-one, (21,) Hartman's addition to the city of Denver. The entire price to be paid for said above described real estate is \$3,400, (thirty-four hundred dollars) and is to be paid as follows:  $\frac{1}{2}$  cash,  $\frac{1}{4}$  in one year, and  $\frac{1}{4}$  in two years. Title to be perfect, and good and sufficient warranty deed to be executed and delivered by the said W. A. Pratt to Darius R. Benjamin, his heirs or assigns, on or before the third day of November, 1888, together with an abstract showing clear title: provided, however, that the payment of \$933.33 is tendered or paid at said date. If the said payment of \$933.33 is not tendered on or before the said 3d day of November, 1888, then this contract is to be void, and of no effect, and both parties released from all obligations herein, and in that event the said two hundred dollars paid on this date is to be held by W. A. Pratt as liquidated damages. [Signed] John Mattler & Co., Agt's for Owners." Plaintiff tendered full performance under the contract. Defendants failed and refused to fulfill the contract, the sale was not perfected, and plaintiff brought suit for damages for nonperformance. It appears by the complaint that before bringing suit against the defendants the plaintiff brought suits for specific performance, —one against Nellie P. Carpenter, and one against Eva L. Wiley, each of whom was the owner, individually, of one of the lots, —in both of which plaintiff was beaten, and the suits dismissed; it appearing upon the trial, conclusively, that the defendants had never been appointed the agents of either, or been given authority to sell the property. The damages claimed by plaintiff against the defendants for the breach of the contract were costs paid in the suits against Carpenter and Wiley, \$49.63; attorneys' fees in prosecuting the suits, \$100; recording contract, \$1; his

own loss of time and trouble in attending to the suits, \$200; damages on failure to get the property, \$3,000; total, \$3,350.65. The defendants answered generally, denying the allegations of the complaint, and specially as follows: "For a further and second defense to the cause of action in the complaint alleged, these defendants say that heretofore, to wit, on the 23d day of October, 1888, as agents for Eva L. Wiley and Nellie P. Carpenter, the defendants entered into a contract with the plaintiff of the tenor following, to wit: [Copy of contract.] That, at the time the defendants entered into said contract with the plaintiff, they did not have, nor did they at any time have, authority in writing from the said Eva L. Wiley or Nellie P. Carpenter or either of them to enter into the same. The defendants for a third defense says that at the time they entered into the contract in the second defense set out with the plaintiff the title to the said lots one and two in block twenty-one, Hartman's addition to the city of Denver, county of Arapahoe, and state of Colorado, stood in the names of Eva L. Wiley and Nellie P. Carpenter upon the records of said Arapahoe county, kept on file in the office of the clerk and recorder in said county for the recording of deeds to real property; that the plaintiff had the same access to, and knowledge of, the contents of such records, as was possessed by the defendants; that the said Eva L. Wiley and Nellie P. Carpenter at the time lived in the state of Illinois; that Dr. W. A. Pratt, of Elgin, Ill., was said to be a brother of said Eva L. Wiley and Nellie P. Carpenter; that the said Dr. W. A. Pratt listed said property with the defendants, as real-estate brokers, for sale; that on, to wit, September 19, 1888, the said W. A. Pratt wrote to defendants that said lots one and two, above described, were for sale. That believing that the said W. A. Pratt had authority for his two sisters, the said Eva L. Wiley and Nellie P. Carpenter, to sell the same, the defendants, without concealing their authority in the premises, in good faith, entered into the contract with the plaintiff set out in the second defense, after informing him of the authority that they possessed, as such agents, to make such contract; that at the time the said contract was entered into the plaintiff possessed all the information relative to the authority of the defendants to enter into the same possessed by the defendants themselves; that after the making of the said contract of sale the defendants did all in their power to induce the said Eva L. Wiley and Nellie P. Carpenter to convey the said real estate therein described to the plaintiff, but their failure to so convey, and so comply with the said contract, was through no fault whatever of these defendants; that, upon the refusal of the said Eva L. Wiley and Nellie P. Carpenter to convey the said lots in accordance with the provisions of the said contract, the defendants returned to the plaintiff the sum of two hundred dollars, theretofore paid them as a part of the purchase price of said lots, together with interest thereon at the rate of ten per cent. per annum during the time the same

was in their hands." There was another special defense, numbered 4, which is not involved, as a demurrer was sustained to it. To these special defenses a general demurrer was filed, in substance, that the matters stated did not constitute a defense. The demurrer was overruled as to the second and third, and sustained as to the fourth. Judgment was entered for the defendants on the pleadings, and the suit dismissed.

Howze & Willsea, for plaintiff in error.  
D. V. Burns, for defendants in error.

REED, J., (after stating the facts.) The suit was brought to recover damages alleged to have been sustained by the plaintiff by the wrongful acts of the defendants. It is in the nature of an action on the case, at common law, for deceit. The nature of the action is plain and unmistakable. The allegation in the complaint is: "The defendants willfully and falsely represented to the plaintiff that they (the defendants) were the agents of the owner of the following land, \* \* \* and that as such agents the defendants had lawful authority to sell, and make contracts of the sale of, the said lots of land to the plaintiff at and for the price and on the terms following, to wit: that the plaintiff, relying upon such representations, purchased the lots from the defendants, and made a payment of \$200. And, in substance and effect, that defendants were not the agents of the owners of the property; that they had no authority whatever to contract a sale or sell the property; that the lots were not owned by the party represented by the defendants as the owner, and on whose behalf they assumed to contract, but by other and different parties; their refusal and inability to comply with their contract, and a statement of damage by the plaintiff by reason of the wrongful acts of the defendants. These allegations state a clear and unquestionable cause of action. The nature of the action appears to have been misconstrued or misunderstood, and probably quite naturally, by plaintiff embodying in the complaint a copy of the contract in writing executed by the defendants. It seems to have been regarded as an action based upon the contract, or growing out of it. On this error much of the argument of defendants is based, while in fact the contract in question can legally only be regarded as a part of the evidence of the plaintiff necessary to make his case. Technically, setting it out in the complaint was bad pleading.

The first defense is a general denial of all the allegations in the complaint, including the making and delivering of the instrument in writing, which certainly could not have been intended; for in the first paragraph of the special defense following the making of the contract is admitted, and a full copy of it incorporated. One allegation of such paragraph should not pass unnoticed. It is said, "as agents for Eva L. Wiley and Nellie P. Carpenter, the defendants entered into a contract with the plaintiff." This contradicts the contract as set out, and made a part of their answer. Instead of entering into the con-

tract as the agents of Wiley and Carpenter, as alleged, the contract shows them to have been acting as agents of one W. A. Pratt; the language of the contract being, "title to be perfect and good, and sufficient warranty deed to be executed and delivered by the said W. A. Pratt."

The special defenses 2 and 3 are certainly peculiar. They were demurred to because the facts stated constituted no defense. They certainly fail to traverse any allegation in the complaint, or interpose any bar to recovery. They appear to be more in the nature of attempted pleas in "confession and avoidance" confessing the facts as alleged, but setting up no legal defense in avoidance. The contract whereby they represent themselves as the agents of Pratt, as owner, and as having authority from him to sell, and to bind him to a contract of sale in writing, is admitted. That he was not the owner was admitted; also, that two other individuals, in no way connected with the transaction, and from whom they had no agency or authority whatever, were the owners. These admissions establish every important allegation in the complaint, and, unless they are avoided by subsequent matter, are conclusive. What are the supposed defenses? In the second there are none at all. In the third, first, that record title to the property was in Wiley and Carpenter, as shown by the county records, to which the plaintiff had the same access as the defendants. Admit it, and how does it operate as a defense? The defendants were representing themselves as the agents for the same of that specific property for the owner or owners, claiming and exercising authority to bind the owner by an instrument in writing in which they agree, not only that the owner shall convey clear title by deed, but that they will furnish an abstract showing a clear title. As agents, they must have had a principal, an owner of the property sold, and should have known who it was. To say they did not know their own principal, nor in whom the title stood, and that the plaintiff could have found out by going to the records, as well as they, was no defense, and, if of any legal bearing, supported the allegations of the complaint, that "they willfully and falsely represented \* \* \* that they were the agents of the owners." The agents were legally supposed to know. It was their duty to know. No such duty was imposed upon the plaintiff, nor was he expected to know, until the abstract, which was never furnished, should be examined. Then follow asseverations of good faith, good and honest intentions, and an earnest effort to get the owners to make the sale, and their refusal. Admit it, and the facts stated neither traverse nor avoid any allegation in the complaint, and interpose no defense whatever,—seem to be purely exculpatory.

Counsel for defendants, in an able argument contends that under the authorities no action could be maintained, but the authorities cited and relied upon do not sustain him. In *Smout v. Ilbery*, 10 Mees. & W. 1, it is said by Alderson, B.: "There is no doubt of the personal liability of the agent in all cases where he falsely affirms

that he has authority, as he does when he signs the instrument as agent of his principal, and knows that he has no authority." Again: "If a person represent himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, the damage is the same to the party who confided in such representation, whether the party making it acted with a knowledge of its falsity or not. In short, he undertakes for the truth of his representation." Again: "First, when he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable; for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge. In *Hall v. Lauderdale*, 46 N. Y. 75, cited and relied upon by counsel, it is said: "The rule that the agent is liable when he acts without authority is founded upon the supposition that there has been some wrong or omission on his part, either in misrepresenting or in affirming, or concealing the authority under which he assumes to act." Viewed in the light of these authorities, the pleadings show a good cause of action.

It is ably urged in argument that no action could be maintained for the reason that the contract or memorandum executed by the defendants was void under the statute of frauds. It is said: "If the contract, as made, was not one the law would enforce against the principal, if it had been authorized by him, there is no liability on the part of the agent." There is no question in regard to the correctness of this principle in a case where the action is based upon the contract, and specific performance is sought, or damage for failure to perform, but in this case it has no application. The assumed agents had no principal,—no authority. The action is based upon the misrepresentations and assumption of authority to the injury of the plaintiff. The action is not based upon the contract, but upon the wrongful and false assumption of authority to make it. The action, before the Code, at common law, is an action for deceit,—a "special action on the case," (see *Polhill v. Walter*, 3 Barn. & Adol. 114,) and the nature of the action remains the same under the Code; and, as said above, the contract is only evidence to establish the wrongs complained of. Consequently, whether valid or void under the statute of frauds is a question of no importance. It certainly would be competent evidence of the claim of agency and authority by the defendants, deceiving and misleading the plaintiff. Of the correctness of this conclusion I am very confident, but, if incorrect, there is another conclusive reason why the contention cannot prevail in this case. The judgment is upon the pleadings, and it is only to them that we can look to determine its correctness. The statute of frauds is not pleaded. The question is only presented in argument. If, as supposed by counsel, the contract was the basis of the suit, and plaintiff's right to recover de-

pended upon its validity,—the contract being set out in the complaint at length and its execution being fully admitted in the answer,—the statute of frauds should have been specially pleaded, if relied upon in defense. *Wood, St. Frauds*, § 538; 2 *Reed, St. Frauds*, § 520 et seq.; *Trustees v. Wright*, 12 Ill. 441; *Chicago, etc., Co. v. Liddell*, 69 Ill. 640; *Anter v. Miller*, 18 Iowa, 410; *Middlesex Co. v. Osgood*, 4 Gray, 447. In England, see *Catling v. King*, 5 Ch. Div. 660. The plea of the statute of frauds is a personal privilege. If not pleaded, it will be regarded as waived. *McCoy v. Williams*, 6 Ill. 584; *Dock Co. v. Kinzie*, 49 Ill. 289; *Rickards v. Cunningham*, 10 Neb. 417, 6 N. W. Rep. 475.

For these reasons we think the court erred in allowing judgment for the defendants upon the pleadings. The demurrers to the special pleas should have been sustained. No demurrer was interposed to the complaint. Consequently, no question is raised in regard to the items of damage alleged. As defendants never claimed to represent Wiley and Carpenter, or act for them, in any manner, I do not see upon what theory costs, etc., of volunteer suits against them could be made the basis of an action for damages against the defendants; but as the question is not raised we express no conclusive opinion upon it. The judgment will be reversed, and the cause remanded.

RICHMOND, P. J., concurring.

BISSELL, J., (concurring specially.) I assent to the reversal of the judgment. I concur only in that part of the opinion which is based on the necessity to plead the invalidity of the contract under the statute of frauds if the defendant would escape liability for the deceit because he was without written authority from the principal to negotiate or effect the sale of the lots contracted about.

(3 Colo. App. 220)

#### MARTIN v. PITTMAN.

(Court of Appeals of Colorado. March 27, 1893.)

#### TRESPASS TO REALTY—PUBLIC LAND.

Under Gen. St. c. 90, which declares that a settler upon public land may maintain trespass for injuries thereto, provided that his claim is so marked out that the boundaries may be readily traced, and provided also he is in actual occupancy of the claim, or has made improvements on it to the value of \$100, a settler who has merely had his tract surveyed, put in a cabin foundation worth \$10, and grubbed the land for 11 days, and who has never resided on the land, cannot bring trespass against one who cuts hay on the land during his temporary absence.

#### Error to Grand county court.

Action by James E. Pittman against Samuel Martin. Plaintiff obtained judgment. Defendant brings error. Reversed.

W. C. Fullerton, for plaintiff in error. O. D. Bryan, for defendant in error.

REED, J. The defendant in error, on April 29, 1889, filed a pre-emption claim upon certain land in Grand county; had the

tract surveyed; put eight logs in the foundation for a cabin, valued at \$10; worked upon the place about 11 days, grubbing, which was all the improvement; never resided upon the land; about July 15th left the neighborhood for a temporary absence; returned about August 20th. During his absence plaintiff in error entered upon the land and cut wild hay growing on some part of it; also "picketed" his horses, and destroyed the hay upon another part. Martin refusing to pay for the damage, Pittman brought suit before a justice of the peace, and obtained a judgment. Martin appealed to the county court; a trial was had to a jury, resulting in a verdict and judgment for Pittman of \$1.60 and costs, stated to be \$316.70.

The only question presented here for determination is whether the possessory title of Pittman to the land was such as to enable him to maintain an action for the entry and damage. There is no conflict in the testimony. The alleged entry, cutting of hay, and picketing of horses is apparently admitted, but from the evidence it seems impossible to understand the tenure of the claim by which the land was held by Pittman. He says that he filed upon it as a pre-emption at a certain date, which would indicate a filing in the United States land office, and an attempted holding under the law of congress, yet no such proof is made, nor does it seem to have occurred to either party that if such were the fact his possessory title was dependent upon compliance with the pre-emption act. In the absence of all evidence, and both parties having regarded and treated the action as one arising under chapter 40, Gen. St., entitled "Public Lands," it must be so regarded in this court. By section 8 of the act, "any person settled upon any of the public lands belonging to the United States may maintain trespass quare clausum fregit, trespass ejectment, forcible entry and detainer, unlawful detainer, and forcible detainer, for injuries done to the possession thereof," but as conditions precedent to the right to maintain any action for the invasion of his possession, by section 10 of same chapter he is required to have such claim "marked out, so that the boundaries thereof may be readily traced, and the extent of such claim readily known," and must be in the actual occupancy of the claim, or have made improvements on it to the value of \$100. Pittman's testimony showed he was neither occupying nor had made the requisite improvements, and there was no evidence of any marking out and proper defining of the boundaries. The action is purely statutory. The statute is in derogation of the common law. A party to avail himself of its benefits, must prove strict compliance with its requirements. "When a new right, or the means of acquiring it, is given, and an adequate remedy for violating it is given in the same statute, the injured parties are confined to that remedy." Potter, Dwar. St. 275; Smith v. Lockwood, 13 Barb. 209; Thurston v. Prentiss, 1 Mich. 193; Bassett v. Carleton, 32 Me. 553; Renwick v. Morris, 7 Hill, 575; Adkison v. Harwick, 12 Colo. 581, 21 Pac. Rep. 907. Several other supposed errors, occurring

upon the trial, are assigned, but it will not be necessary to dispose of them. The failure to establish the right to maintain the action by showing strict compliance with the statutory requirements is conclusive of the case. The judgment must be reversed, and cause remanded.

(3 Colo. A. 177)

# BOARD OF COM'RS OF LARIMER COUNTY v. LEE.

(Court of Appeals of Colorado. March 27, 1893.)

## EXPERT WITNESS—COMPENSATION.

1. An expert witness, who testifies for the people in a criminal case in obedience to a subpoena, without making in advance any demand for special compensation, is entitled to recover only the statutory witness fees.

2. Where there has been no application to the county board to make a special contract with such witness, and it is not affirmatively shown that the refusal to pay him extra compensation would result in a miscarriage of justice, the court trying the case has no power to order payment of extra fees to the witness.

Appeal from district court, Larimer county.

Action by E. A. Lee against the board of commissioners of the county of Larimer to recover witness fees. Plaintiff obtained judgment. Defendant appeals. Reversed.

Robinson & Love, for appellant. E. A. Ballard, for appellee.

BISSELL, J. This case is the outgrowth of that cause celebre known as the Millington Case. The Millingtons were indicted for the murder of one Avery by the administration of poison. To determine the effects of certain poisons, the symptoms by which they were manifested, and their resultant operations on the physical system, necessarily became an important subject of inquiry on the trial. It is impossible to ascertain from the present record exactly when, or under what circumstances, the appellee, Lee, was called as a witness, but it is easily gathered from the agreed state of facts on which the case was tried that at some time during the progress of the trial the district attorney applied to the court for an order to subpoena 13 persons as expert witnesses to testify on these medical and toxicological questions. The witnesses were not subpoenaed, put on the stand, or asked to testify prior to the time the order was made. They came in obedience to the subpoenas, and, in evident reliance upon the validity of the order, voluntarily gave evidence touching the matters about which they were interrogated. They did not insist that their fees should be paid before testifying, nor did they refuse to testify on the ground that their professional opinions could not be sought without additional compensation. These latter distinctions are expressed to illustrate in the subsequent discussion the difference between the present case and the authorities relied upon by Lee to support his action. When the trial was concluded, Lee presented his claim to the board of county commissioners of Larimer county for fees at the rate of \$25 per day for thir-



teen days, and 20 cents per mile for 75 miles of travel. The board refused to allow this claim as presented, but did audit it at the sum of \$1.50 per day and mileage at 10 cents per mile, which are the rates and costs fixed by statute as the compensation of an ordinary witness attending a criminal trial. Thereafter, by regular statutory proceedings, the matter came before the district court for adjudication, and that court decided that the judge presiding over the trial of the Millington Case had power to make the order allowing these expert witnesses additional compensation, and rendered judgment against the county for the amount which Lee claimed. The board brings the case here, and insists that no cause of action came to plaintiff for his extraordinary compensation by reason of the order.

The question presented is one of first impression in this state. The subject has received judicial consideration in other tribunals, and the authorities are not uniform on the subject. Wherever the matter has been presented, it has come up under circumstances which show that the witness when subpoenaed refused to testify until his expert fees had been paid. The courts have then considered the question in the light of the right of a witness to refuse to express his professional opinions before he is paid an additional and greater compensation than that fixed by the statute as the pay of the ordinary witness, who testifies as to facts. This circumstance may possibly make no difference in the application of the rule which will be announced, but it presents undoubtedly a very palpable distinction between those cases and the one at bar. The authorities which adjudge additional compensation to be the right of the expert, and which assert his privilege to refuse to testify until paid, are not in harmony as to the basis on which their conclusions are rested. Some declare that he is entitled to the extra pay because his professional opinions are his own property, which cannot be extracted from him except for an honorarium, which shall be satisfactory to the witness; and others, on the ground that the time of a professional witness called as such has a value beyond that of a witness who is called to testify to a fact regardless of his business or his status. The line of authorities adjudging the contrary are on reason and principle much more satisfactory, and would undoubtedly be followed by this court were the question presented under the identical aspect exhibited in those decisions. They hold that when a professional witness attends in obedience to an ordinary subpoena he may be compelled to express his opinions on hypothetical questions, or on general medical and toxicological subjects, as an ordinary witness is compelled to testify on questions of fact within his knowledge, and for the same statutory fees. These authorities undoubtedly concede, as does this court, that if the witness be legally required to do any particular thing,—as to analyze the contents of a stomach, or perform a post mortem operation,—in these and similar cases such services cannot be compelled by the ordinary process of subpoena, or the

labor required by the payment of an ordinary witness fee. These exceptions, however, do not modify the general rule that the professional witness, in the discharge of his duty as a good citizen, is like any other person, whether he be laborer, merchant, broker, manufacturer, or banker, compellable to attend in obedience to process, and to testify as to what he may know, whether it be observed facts, or accumulated knowledge acquired by study and experience. The rule is a sound one, and commends itself to our judgment. It is apparently nothing but a question of relative value, and it frequently happens that the loss of time is a less serious one to the professional witness than to the person engaged in the more active business walks of life. *Summers v. State*, 5 Tex. App. 365; *Ex parte Dement*, 53 Ala. 389; *State v. Telpner*, 36 Minn. 535, 32 N. W. Rep. 678.

These conclusions do not entirely dispose of the present controversy. It still remains to be decided whether the court making the order, under the circumstances indicated, possessed the power to bind the county of Larimer to the payment of the fees expressed in the mandate. It is a matter of common learning that costs are a creature of statute. In ancient times, neither in civil nor in criminal cases, did the plaintiff or the state have judgment for anything in the nature of costs. As Sir Edward Coke says in 2 Inst. 288, speaking of the statute of Gloucester, 6 Edw. I.: "Before this statute, at the common law, no man recovered costs of suite, either in plea real, personal, or mixt; by this it may be collected that justice was good cheap of ancient times, for in King Alfred's time there were no writs of grace, but all writs remedial were granted freely." *County of Franklin v. Conrad*, 36 Pa. St. 317; *Haynes v. Mosher*, 15 How. Pr. 216; *Faulkner v. Hendy*, 79 Cal. 265, 21 Pac. Rep. 754; *Mark v. City of Buffalo*, 87 N. Y. 184; *Pugh v. Good*, 19 Or. 85, 23 Pac. Rep. 827; *Person v. Ozark Co.*, 82 Mo. 491; *Noyes v. State*, 46 Wis. 250, 1 N. W. Rep. 1.

The recovery cannot be supported by express legislative enactment, for none has ever been incorporated into the law of the state. In some states, notably Indiana and Iowa, where a similar controversy had arisen, the legislature remedied the difficulty, and enacted a statute granting to the judge who might preside at the trial power to allow to expert witnesses such additional compensation as, in his judgment, might seem reasonable. We gather from this fact, as well as from the character of the reasoning of the courts holding the other doctrine, that it was never a question entirely free from obscurity. It therefore follows that unless the court possessed the inherent power to enter an order of this description it was without jurisdiction for the purpose, and the entry could give to the appellee, Lee, no right of action against the county. Nothing but an evident and an unavoidable necessity should lead to the conclusion that any such power is vested in the court. It is wholly unessential to the safe or successful administration of justice. Power to enforce the attendance of

witnesses, and authority to compel them to testify to whatever they may know, will, in the light of judicial experience, always suffice to conserve the purposes of justice. Wherever extraordinary expenditures seem prudent, necessary, or indispensable, the legislature has clothed another and an independent body with broad and ample authority to do whatever ought to be done. Under the statutory plan which divides the state into counties, and regulates the government of those territorial subdivisions, all power to fix, control, determine, or in any manner dispose of the funds of a county is devolved on the board of county commissioners. They alone have the right to disburse the public moneys, and to decide in what cases, and under what circumstances, such funds shall be paid out, unless it be in those cases where fixed rights are conferred by statute. In and of itself this fact should be decisive of the present inquiry. Wherever a broad, universal, and sweeping power is thus given to a governing body, it cannot be conceded that by implication any other body, whether it be a court or one resembling the board of county commissioners, should likewise have power to dispose of the public revenues. Under some circumstances, it might be very strongly argued that this power should be decided to be inherent in the court, since otherwise there is liable to be a manifest failure and miscarriage of justice, springing from the prejudices which may infect the people of a county, or coming from an unusually economical and parsimonious board, which would prefer to see crime unpunished rather than the public revenues wasted. The present case, however, does not come with any such argumentative or possible exception. It is enough at present to say that the record does not show that there was any application to the board of county commissioners to contract with the witnesses, or to authorize an expenditure of the money. The application to the court was not based upon such facts, coupled with the showing that justice would manifestly miscarry if the order was not made. We therefore hold that, in a case like the present, the court was entirely without power to make an order which should bind the county, and give to the witness a cause of action for this extraordinary compensation. Since he is unable to point to any statute which gives him such fees, he must be satisfied with the compensation which the statute specifies, whether it be mileage or per diem. The judgment which the court entered in favor of the appellee, Lee, for \$25 per day and 20 cents mileage, is erroneous, and must be reversed.

(3 Colo. App. 264)

**ABBOTT v. SMITH et al.**

(Court of Appeals of Colorado. March 27, 1893.)

**PARTNERSHIP—DISSOLUTION.**

Plaintiff and defendants made an agreement for partnership prospecting, plaintiff and one of the defendants to furnish the necessary

supplies, and the other defendant to do the prospecting, the mines discovered to be owned by the three jointly. Plaintiff furnished all the supplies for years, and finally notified the defendant who was to furnish them with him that they must have a settlement, but he afterwards furnished defendants with more money, and was treated by them as a partner. Held, that plaintiff's act did not dissolve the partnership, and that he was entitled to a share in mines afterwards located, while defendants were still using supplies furnished by him.

Error to district court, Chaffee county.

Action by Charles H. Abbott against George L. Smith, N. C. Creede, E. R. Naylor, David H. Moffat, and the First National Bank of Salida. Judgment for defendants. Plaintiff brings error. Reversed.

Libby & Martin, for plaintiff in error.  
G. K. Hartenstein, for defendants in error.

**RICHMOND, P. J.** By the complaint in this case it is alleged that the plaintiff in error, Abbott, and the defendants in error Smith and Creede, did, in the early part of the year 1885, enter into what is commonly understood as a prospecting partnership contract. Abbott and Smith were to contribute money and supplies, and Creede to prospect and locate and work mining claims, and the claims located were to be located and recorded in the names of Abbott, Smith, and Creede jointly. That on August 26th, 1889, and while this contract was in force and effect, Smith and Creede discovered and located two mining claims called the "Holy Moses" and the "Cliff." That at the time of the discovery and location of these claims Smith and Creede were using food and other supplies purchased with the partnership funds; that they neglected to include the name of Abbott in the discovery notice and recorded certificate of location as one of the owners of the claim. On the contrary, they did include the name of E. R. Naylor. Since that time Smith, Creede, and Naylor have sold the mining claims to the defendant in error Moffat for the sum of \$70,000, and have received and divided among themselves \$11,000 of this sum. That a deed conveying the mining claims to Moffat is in escrow with the First National Bank of Salida, to be delivered to Moffat upon the deposit by him in said bank of the sum of \$55,000. The financial irresponsibility of Smith and Creede is set forth. The purpose of the suit is for an accounting, and for a decree adjudging Abbott to be the owner of one third of the mining claims, subject to the right of Moffat to complete his purchase, thus securing to Abbott a one-third interest of the purchase price. Creede and Smith answer, alleging the existence of the contract up to the 20th day of June, 1889, at which time it is insisted Abbott voluntarily withdrew from the partnership. No decree is sought against Moffat, and since the institution of the suit claim against Naylor's interest has been abandoned. So that it can be said that Abbott seeks to obtain a decree adjudging to him the one third of the two thirds of the purchase price belonging to Creede and Smith. The cause was tried to a court without a jury, against the protest

of defendants, resulting in a finding favorable to them, and upon which judgment was entered. To reverse this judgment Abbott prosecutes this writ of error.

This case presents no unusual features. Such contracts have been productive of much litigation. The testimony shows that for a period of four years Abbott had continuously furnished capital for himself and Smith to Creede, aggregating the sum of \$2,000; and, that when the parties started on the prospecting tour which resulted in the location of the claims, they were amply provisioned, and well supplied with tools, purchased with funds furnished by Abbott, and that at the identical time of the location and the subsequent development of the property to the extent of showing that the mines were of some worth, they were sustained and assisted by the means thus provided. They had been prospecting in the location where the mines were discovered for several months prior to August, 1889. In June, 1889, it seems that Abbott felt that he was being called upon for too much money, and that Smith, who was obligated to furnish an equal portion of the funds, was not doing his share. He insisted upon a settlement, and Smith, being unable to pay the money at the time of the settlement, executed his note, thus evidencing the amount of money due to Abbott. Abbott testified that in the spring of 1885 the agreement was entered into, and that from that date up to the institution of these proceedings it was continued; that Smith and himself were to furnish the funds to develop any property that Creede might find, paying him \$1.50 a day, and allowing him so much for grub; that Creede was to have one third interest in all claims located, Smith one third, and Abbott one third; that in 1885 they located properties on the South Gunnison and Willow creeks, and that the yearly expenses incident to this enterprise amounted to between \$350 and \$400 each. It is needless for us to give in detail the testimony of Abbott. It is sufficient to say that in substance it shows that he had visited the location where the mines were discovered, had inspected various properties previously located, and caused assays to be made, and done all, in fact, that Creede or Smith had required of him. He positively asserts that the settlement of accounts relative to money advanced by him was not to be considered as an abandonment of his agreement, but only the result of a desire on his part of a settlement with Smith, to which Creede was in no sense a party. The testimony of Abbott is certainly corroborated by letters of Smith. In this connection it must be borne in mind that Smith insists that the dissolution of partnership took place in June, 1889, yet the record shows that on October 20, 1889, Smith writes a letter to Abbott, in which he says, "I wrote you some time since that Naylor and myself would visit our new find, and I would report on my return." He gives a description of the vein, the character of the ore, and asks for advice in reference to the best method of transporting the ore from the mine to the railroad. August 31, 1890,

he writes another letter, in which he says: "I received a letter from you yesterday, and I judge from the date on it, it has been traveling over the country for the last week. \* \* \* I have been doing my level best to sell our mines over on Rio Grande, but up to date have failed. Another party is after it now that I think will do some good. I shall start over tomorrow. Will be gone about ten days. I will let you hear from me when I get back. I tell you, Chas., I am awfully anxious to sell it, for I am in debt; consequently I am in misery." It must be borne in mind that Creede was one of the partners,—the one who was expected to find the property, and to locate it in the names of all the parties. He had been paid for his services, and furnished with his provisions for a period of years. He was then receiving his compensation from Abbott and Smith. Abbott furnished the bulk of the money, and it nowhere appears in the record that Creede ever understood that Abbott was out. Nor had there been any conversation with him concerning the matter. In fact Creede fortifies the position of Abbott. He testified that "I started prospecting for Smith, Abbott, and myself in May, 1885;" that in June, 1889, Abbott came across the range; that he, Smith, and Abbott went to Cascade cabin and Spring creek and Willow creek; that his understanding was at this time that he was to keep on prospecting in the same way he had been doing, and that this was the understanding of Abbott; that Abbott had been sending him money for a couple of years, and that he naturally looked to Abbott for money to carry on the business; that Abbott never had sent him word that he had withdrawn from the partnership; that Smith and Abbott left about the 13th or 14th of June, and that Smith joined him on Powder Horn, and they went prospecting south, and were out 8 or 10 days. On the first trip they located the Holy Moses mine, about 9 or 10 miles south from the cabin. They had 10 or 15 days' supplies for two, and had no supplies, tools, or powder except those purchased with money furnished by Abbott. That he used partnership tools and powder on the Holy Moses, and supported himself with the provisions furnished from the same source; and that the first information he had received of the dissolution was from Smith. In his cross-examination he says: "I think in conversation Abbott claimed an interest perhaps a month before I discovered the Holy Moses. Smith was in camp, and we were virtually together." That the grub in Cascade cabin, when Smith came back, was worth \$75; the value of the tools that he and Smith took, \$30, at a rough guess; and that when he staked the Holy Moses he did not think it was of any special value. In addition to this it is shown that Abbott paid on July 12, 1889, succeeding the time when Smith claims that he had abandoned the partnership, for assaying ores from these mines, the sum of \$24.50, and reported the result of the assays to Smith. There are other circumstances in the record, detailed in the evidence, which we think add

additional strength to the contention of Abbott. To rebut this, Smith testifies that Abbott voluntarily retired, and declared that he would have nothing further to do with Creede, and exhibits a letter written by Abbott subsequent to the location of the mine, wherein some expressions are used calculated in an indirect way to support his testimony. But we are certainly of the opinion that after the discovery of the mine, even up to so late a date as October of the same year, Smith did not believe that Abbott had withdrawn from the partnership. If he did, it is singular he should speak of the property in his letters to Abbott as "our" property; that he should advise him that he would report on his return from his prospecting tour, and should treat him as one who was entitled to information concerning the operations of himself and Creede. Abbott's explanation of his letter is certainly consistent with his contention. He says he did not mean to say he was out of the enterprise, but that he was done furnishing money for the time being, and that it was the duty of Smith to proceed with the enterprise, and furnish such money as might be required in the subsequent prospecting.

The rule concerning the rescinding of such an agreement as is here under consideration is that the circumstances must show an absolute abandonment of the contract as to future enterprises, and proof of negotiations for an abandonment is insufficient to establish a rescission of the agreement. The parties cannot treat the contract as binding and rescind it at the same time. *Chadbourne v. Davis*, 9 Colo. 581, 13 Pac. Rep. 721. Accepting this rule as correct, and applying the evidence as we find it in the record, we are unable to concur in the conclusion reached by the court below. The testimony does not show an absolute abandonment on the part of Abbott, but it does show that, during the entire period up to and including the location of the mines, Creede, as well as Smith, considered Abbott as still interested in the prospecting enterprise. Creede positively asserts it, and Smith absolutely admits it by his letters. And had the mines proven without value, or the prospecting tour fruitless, it cannot be doubted but that Creede at least, if not Smith, would have insisted upon Abbott's paying his proportion of the expenses, including the sum due Creede for services. The evidence does not show that a demand on the part of Creede and Smith or by either of them was ever made upon Abbott, nor does it show that there was a necessity for so doing, because of the fact that the supplies and tools then on hand were amply sufficient to carry on the enterprise up to the time when the location of the mines was made. This case is somewhat similar to *Meagher v. Reed*, 14 Colo. 335, 24 Pac. Rep. 681, wherein it is determined "that the existence of a partnership does not depend upon the fact that each partner has in all things complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced and carried on to any extent, there is a partnership." In this case, as

in that, we say defendants had a remedy if he did not comply with his agreement. They could have asked for a dissolution, paid him back the amount he put in, and formed a new partnership. They could have demanded the performance of the agreement, the contribution of his share of the expenses. But they had no right to assume that Abbott, who had furnished the money,—not only his portion, but that of Smith,—that because Abbott demanded a settlement with Smith he thereby dissolved the partnership between Smith, Creede, and himself. In the case of *Eagle v. Bucher*, 12 Morr. Min. R. 330, the court, in passing upon a question similar to the one here under consideration, used this language: "The principle relied upon by defendant's counsel, that a partnership may be dissolved by the act of one of the partners, we do not, in the view we take of this case, intend to impugn. That is too well settled to be now questioned. But to effect that purpose the act must be done with a view to its accomplishment. It should be communicated at once to the other members of the firm. They must be advised of the new relations created by the withdrawal of a member, or a transfer of his interests in the concern. Their future relations towards each other, and their pursuits of the particular enterprise, depend upon the acquisition of such knowledge." This principle is directly applicable to the parties in interest, and supports the conclusion we have reached. In addition to this, we may call attention to the fact that Creede was to do the prospecting, for which he was to receive provisions and \$1.50 per day, to be provided and paid by Smith and Abbott. This is their relation as shown by the record, and stands uncontradicted. It occurs to us, therefore, that it matters little what Smith may have understood from Abbott, when Creede himself testifies that he considered Abbott in the enterprise, and looked to him to furnish money under the agreement. And the record fails to show that Smith had ever furnished, or was at the time of the location of these mines furnishing, money or means wherewith to support or compensate Creede for his labor. This fact, of itself, makes it clear to our minds that, if any individual name of this partnership should have been left out of the location, it should have been that of Smith, rather than Abbott. At any rate, under the principle last recited, it cannot be said in the light of the testimony that the prospecting partnership had been dissolved. And we think that if Creede was fortunate in his location, if his hopes were more than realized by his good luck, he ought to have borne in mind that the aid Abbott rendered him had mainly contributed to his good fortune; that in reality without Abbott, and the employment of the means furnished by him to engage in the enterprise, the possibility of the discovery of the mines would have been very remote. In *Boucher v. Mulverhill*, 12 Morr. Min. R. 350, the court, in considering a prospecting contract, said: "There is no dispute but that said Barrette and Lowthier were the discoverers; that plaintiffs furnished the money and provisions for some time before

the discovery, to continue the prospecting for gold, and that they were living on these provisions when they made the discovery." And under these circumstances the conclusion of the court was that the parties were entitled to maintain their rights to their interests in the mines. "An agreement to engage in the business of prospecting for and the development of lode mining property for the joint use of all is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other in prosecuting the joint adventure." *Lawrence v. Robinson*, 4 Colo. 567. The evidence, in our judgment, is wholly insufficient to support the finding of the court. And this conclusion, therefore, brings this case within the rule laid down by the supreme court of this state: "Where the verdict is clearly and manifestly against the evidence, it should be set aside in furtherance of justice." *Keating v. Pedee*, 2 Colo. 526; *Bugh v. Rominger*, 15 Colo. 452, 24 Pac. Rep. 1046. In *Cross v. Kistler*, 14 Colo. 572, 23 Pac. Rep. 903, the doctrine is announced that where the evidence does not tend to support the finding the judgment will be reversed as being against the evidence. In *Mitchell v. Reed*, 16 Colo. 109, 26 Pac. Rep. 342, the court uses this language: "It is the opinion of this court that the judgment was manifestly against the evidence, and is without support from the testimony, which is not satisfactorily contradicted and explained." Under these circumstances, however much the court may regret the necessity for a reversal, and whatever may be the pressure of the general rule restricting interference with judgments upon this court, it is obvious that in obedience to its conviction the case must be reversed. The judgment is reversed, and the cause remanded.

(3 Colo. App. 212)

**BLOOM et al. v. WEST et al.**  
(Court of Appeals of Colorado. March 27,  
1893.)

**IRRIGATION—WATER RIGHTS—EVIDENCE.**

1. Water used in irrigating land is not appurtenant to the land. *Strickler v. City of Colorado Springs*, 26 Pac. Rep. 313, 16 Colo. 61, followed.

2. Where the owner of a tract of land, and of a water right used therewith, sells the land in separate parcels to two different persons, and by common consent the water right passes to them without any formal conveyance thereof, each vendee takes an interest in the water right proportioned to the amount of water previously used on the land bought by him.

3. In a suit between the vendees to determine their respective interests in the water right, the plaintiff need not prove title to the land claimed by him, since the land is merely the measure of his interest in the water.

Appeal from district court, Las Animas county.

Suit by Ed West and others against F. G. Bloom and others. Plaintiffs obtained a decree. Defendants appeal. Modified.

The other facts fully appear in the following statement by REED, J.:

A suit in chancery was brought by appellees, to be declared to be the owners of

one eighth of the water carried by an irrigating ditch known as the "Hoehne Ditch," and, in addition to one eighth, of an indefinite quantity, described in the complaint to be "the owner of the right to use for irrigating [certain lands described, amounting to 40 acres or more] that portion of said water conveyed by said ditch, necessary for the proper irrigation for agricultural purposes of said land, and is the owner of the right to use said ditch for conducting said amount of water, necessary for the irrigation of said land for agricultural purposes, to the same." It appears by the pleading and evidence that other parties, who were made defendants, were the owners of three fourths of the ditch; that their ownership and rights were conceded,—the contest being over the remaining one fourth, claimed to have been owned by appellee West and Bloom and his associates in common, their respective rights and ownership of the one fourth never having been determined. Plaintiffs asked to be decreed to be the owners of the interests as above stated, and that the defendants (appellants) be enjoined from in any way interfering with it. The defendants answered, admitting, by inference, the ownership of plaintiffs of one eighth of the ditch; admitting, also, that they were the owners of one eighth, as stated in the complaint; but denying the right of the plaintiffs to any interest in such eighth, or to the use of any such water right from it, as claimed in the complaint for the use of the lands described; and for further answer, and what may be regarded as a cross complaint, filed the following: "That on or before the 31st day of October, 1879, one Michael Bashor was the owner of an undivided one-fourth interest in said Hoehne irrigating ditch; that at said time, and prior thereto, he used the water conveyed by said ditch, equal to one fourth thereof, to irrigate the northeast quarter of section five, and the southwest quarter of the southeast quarter and the north half of the southeast quarter of section five, township thirty-two south, of range sixty-two west; that on or about the said date the said Bashor conveyed to the plaintiff West an undivided one-sixteenth interest in said ditch, but that it was provided in said conveyance that said Bashor should retain the use of said water conveyed to said West at all times when the said West did not desire to use the same. The defendants further allege, upon information and belief, that said West never appropriated the use of said water, above specified, but for a temporary use and purpose of dipping sheep, which required but a few days during the season; that at all other times said water was used and appropriated by said Bashor upon the lands above described, and more particularly upon the lands hereinafter described, which were conveyed by said Bashor to these defendants; that on March 29, 1883, said Bashor conveyed to these defendants the west one half of the southeast quarter and the west one half of the northeast quarter of section five, and by said conveyance, also, an undivided one-eighth interest in said irrigating ditch, and that by said convey-

ance the said Bashor also conveyed all the appurtenances appertaining or belonging to said lands; that said Bashor had prior to said time conveyed the east two thirds of the east half of the northeast quarter of section five, together with an undivided one-sixteenth interest in said ditch; that defendants are informed and believe that the remainder of said water, equal to one fourth of the water conveyed by said ditch, continued to be appropriated upon the other lands owned by said Bashor up to the time the same were conveyed to these defendants. The defendants further allege, upon information and belief, that the amount of land in cultivation, upon which said water was used for irrigation upon that proportion of the lands conveyed to these defendants, was greater than the amount of land in cultivation upon all the other lands owned by said Bashor. The defendants further allege that there had never been a partition or division of the water used upon said lands purchased by Stanton and Presnell, to wit, the east two thirds of the northeast quarter of section five. The defendants allege, upon information and belief, that there was a greater amount of water used and appropriated upon that portion purchased by these defendants, equal to a one-twentieth interest in said ditch. The defendants further allege that the said West has claimed the right to appropriate one eighth of the water conveyed by said ditch upon the land owned by him, as described in the complaint. Wherefore, defendants demand judgment against the plaintiffs for a decree of this court establishing their right to use that portion of the water conveyed by said ditch in addition to the one eighth owned by them, equal to the proportion greater than one eighth which was used, consumed, and appropriated upon the lands which they now own, and for such other and further relief as may be meet and proper." To which new matter of defense and cross complaint a replication and answer were filed, traversing all the material allegations. A trial was had to the court, a finding in favor of the plaintiffs, and a decree entered, the material part being as follows: "Now, therefore, it is hereby ordered, adjudged, and decreed that the plaintiff West is the owner of an undivided one-eighth interest in said ditch, and the waters conveyed thereby, and in addition thereto is the owner of the right to conduct through, over, and along said ditch sufficient water to irrigate for agricultural purposes the said west third of the northeast quarter of southeast quarter of section five, township thirty-two south, range sixty-two west, as an appurtenance to said land, which sufficiency is one seventy-second of the water conveyed by said ditch, and that the defendants, Bloom and J. A. and Malon D. Thatcher, are the owners of an undivided one-eighth interest in said ditch, and the waters conveyed thereby, less and subject to the right and interest of plaintiff West to take from said last-mentioned one eighth sufficient water to irrigate the said west one third for agricultural purposes, which sufficiency is hereinbefore defined as one seventy-

second of the water conveyed by said ditch, and to the same, through, over, and along said ditch to said land, as an appurtenance thereto. It is further ordered and decreed that the defendants be and are hereby perpetually enjoined from interfering with the interest in said ditch hereby decreed to plaintiff West. It is further ordered that each of the parties pay one half the costs of this proceeding." The defendants were also perpetually enjoined from interfering with the water so decreed. An appeal was taken from such decree.

J. M. John, for appellants. Waldron & Hillhouse, for appellees.

REED, J., (after stating the facts.) It appears that, as early as 1872, Michael Bashor owned or had possessory titles or claims and the possession of the lands now owned by both parties litigant; also, that the Hoehne ditch was in existence, and carrying water; and it appears to have been conceded that Bashor was the owner or had the right to one fourth of the water carried by the ditch, for the use of his lands. In course of time, Bashor's lands were divided, and passed by conveyances, so that, at the time of instituting this suit, each of the parties were owners of a portion of it. Neither the date of the construction nor capacity of the ditch are given. It is not shown how Bashor became the owner of one fourth, or that he at any time had any evidence of title. It is only shown that he was the owner of the water, and that it was used by different tenants, occupying different parcels of the land. The quantities of water separate parcels were entitled to, were very indefinitely defined, if at all. West, for instance, it appears, was using his place for sheep raising, and for a long time only used water for "dipping sheep" and stock purposes. When not so used, other parties used it upon other parts of the land. The farming upon other parts of the land seems to have been some years confined to a few acres; other years, more; and some years, upon portions, no farming whatever was done. This desultory and uncertain use of water continued for several years, and the land passed into the hands of the parties to this suit. It does not appear that Michael Bashor, or any of the mesne conveyancers, ever conveyed any water or water rights whatever. Such rights appear to have passed, by common consent or understanding, with the lands, and as the original right of Bashor to one fourth of the water is, by the co-owners, conceded, and that is all that both parties claim, in the aggregate, no title is in question; the only question being how that one fourth should be divided between the two sets of landowners, respectively. In the decree it is said, after describing the land, the water decreed shall pass "as an appurtenance to said land;" and counsel, upon the trial, appear to have been in harmony with the court in regarding the water as appurtenant to the land. This view originated either in a misconception of the law, or in the unfortunate use of a word, for want of a better.

Webster defines "appurtenance" as "that which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy," etc. Blackstone defines "appurtenance:" "Belonging; pertaining; incident; as, a right of way appurtenant to land or buildings." Bouv. Law Dict.: "Things belonging to another thing as principal, and which pass as incident to the principal thing;" and this definition is sustained by numerous legal decisions, both English and American. Technically, property tangible and corporeal, capable of sale, of transfer, and of use in another place, cannot be regarded as appurtenant to land. It must be incorporeal; an easement; a servitude. In Co. Litt. 121, it is said "that nothing can be appurtenant unless the thing agrees in quality and nature to the thing whereunto it appertaineth, as a thing corporeal, properly, cannot be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal;" and this legal fact is recognized to the present day. According to the recent legal decisions, a party who owns land, and the right to use water from an irrigating ditch or canal, has two separate and distinct rights of property, either of which could pass by assignment or conveyance, regardless of the other. Hence the right to the use of water for irrigation from an artificial canal for conveying it cannot be regarded as appurtenant to the land, technically, nor at common law. The physical condition of the country, the worthlessness of land without water, and the great value of the two taken together, should go far in establishing, in all cases of this kind, joint ownership of the ditch, and its construction for the sole purpose of applying the water owned by each, respectively, to the reclamation of his own land, and applying it to that purpose; the necessity of the union of the two making them one estate, and the water right an easement, appurtenant and inseparable. Many able lawyers have so regarded such conditions, and efforts have been made, unsuccessfully, to have the doctrine established by the courts. In *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 Pac. Rep. 313, the question of the relation of water to land under conditions above stated was squarely presented, and authoritatively decided. It is there said: "It logically follows that the right to the use of the water for irrigation is a right not so inseparably connected with the land that it may not be separated therefrom. \* \* \* The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer \* \* \* would in many instances destroy much of its value. \* \* \* What difference can it make to others whether the owner of the priority in this case uses it upon his own lands, or sells it to others, to be used upon other lands?" In that case it was held that water originally applied to specific lands for irrigation could be sold; taken out at a different point; could be carried in a different ditch, in no way connected with the land; and could, by the purchaser, be applied to a different and distinct use,—clearly recog-

nizing two separate and distinct estates, entirely disconnected, one in the land, and the other in the water. At the time of the trial of this case the decision had not been made, but it will readily be seen that it is utterly repugnant to the idea of water as "appurtenant" under any circumstances. But the decree in this case may be put upon another, and the true, ground, and affirmed.

The real and perhaps the only question tried was the application of the water in question to the different parcels of land, and the priority and quantity applied, respectively, to the different parcels of land by the original claimant before the estate was divided. Much of the testimony of each side was inconclusive and unsatisfactory,—necessarily so, from the great length of time since the application of the water,—and depended entirely upon the memory of the witnesses. By section 6, art. 16, of the constitution, it is said: "Priority of appropriation shall give the better right, as between those using the water for the same purpose," etc. This is evidently intended to apply to the respective rights of different parties, claiming the same interest adversely. Where, as in this case, there is no adverse claimant, and the assumed priority is predicated upon the prior application and distribution of the water by the owner of different parcels of the same estate, there is grave doubt if it has any application whatever, when a water right is declared not to be appurtenant, but a separate and distinct property interest. Hence we cannot regard priority in the distribution and use of water on different parcels of land by the common owner as conclusive or controlling. But the controversy may be regarded as an attempt to equitably settle the respective rights of the parties, and as such the prior application and use of the water upon the respective tracts was a proper subject of inquiry. As between the parties, the right of each would seem more nearly a "prescriptive" right than any other, and the parties may be supposed to have dealt with their common grantor on the basis of water distribution as it had previously existed at the time of the respective conveyances. Viewing it in this light, we cannot agree with counsel that the decree was contrary to the law and the evidence, which are the principal errors assigned and relied upon. Although in some respects unsatisfactory, there was evidence sufficient to warrant the decree. Nor do we see that any principle of law was violated. It seems to have been simply a question of fact.

It is ably contended that appellees failed to prove by proper testimony a title to the land. If proof of title was necessary, it does not seem to have been insisted upon at the trial, and exceptions saved, so as to make it available upon appeal. The water right, if legally appurtenant, and an incident to the land, could only be established by proof of title to the land to which it appertained; but being, as declared in the *Strickler Case*, supra, a separate and distinct property right, no property in the land need have been shown, and the land, the extent, number



of acres irrigated, etc., can only be regarded as data upon which an equitable division of the water could be based. It must be conceded that it was rather an unsatisfactory manner of ascertaining what each claimant purchased, but seems to have been the best, if not the only available, method of arriving at a conclusion.

The decree of the district court, in so far as it declares the respective rights of the parties to the water, will be affirmed; but the case will be remanded to enable the court to amend its decree by confining it to declaring the share owned by each, and striking out that portion connecting it with the land, as an appurtenance. Affirmed in part, and remanded to have decree amended.

(21 Nev. 415)

**LANDER COUNTY v. HUMBOLDT COUNTY.**  
(No. 1,377.)

(Supreme Court of Nevada. April 25, 1893.)

**COUNTIES—SUPPORT OF POOR—LIABILITY TO ANOTHER COUNTY—PAUPER.**

1. The liability of a county for the relief and support of its indigent poor is purely statutory, and, to render one county liable for such relief granted by another county to one of the former's indigent residents, the case must come fairly within the statute.

2. There are none of the elements of a contract, express or implied, in a demand for the relief or support of the poor. The liability exists only in pursuance of the positive provisions of the statute.

3. A county in this state is only liable for relief furnished by another county to one of its indigent residents where such indigent is a pauper.

4. A laboring man, who has always been able to make a living, and who, until his last sickness, has never had occasion to ask or receive charity, is not a pauper, although without money or property with which to pay the expense of that sickness.

(Syllabus by the Court.)

Appeal from district court, Elko county; George F. Talbot, Judge.

Action by Lander county against Humboldt county to recover for expenses incurred in caring for an alleged pauper resident in Humboldt county. There was judgment in favor of defendant, and plaintiff appeals. Affirmed.

D. S. Truman, for appellant. M. S. Bonnifield, for respondent.

**BIGELOW, J.** Action by the plaintiff county to recover from the defendant county expenses claimed to have been incurred in the care and treatment of a pauper resident of the latter county. In sections 1981-1991, Gen. St., the legislature seems to have had in mind two classes of indigent persons who might be entitled to county aid—First, paupers, in which class it was apparently the intention to include poor persons who are unable to earn a livelihood in consequence of bodily infirmity, idiocy, lunacy, or other cause, and whose disability is likely to be more or less permanent; and, secondly, those mentioned in section 1986 as nonresidents, or other persons not coming within the definition of "paupers," who may fall sick in any county in this state, not having money or property with which to pay

for their necessary board, nursing, or medical aid. Section 1988 provides that, for relief furnished to a pauper who is a resident of another county, the relieving county may, under certain circumstances, recover from the county of which the pauper was a resident, but no provision is made for a recovery for relief furnished the class mentioned in section 1986. Then, for this kind of relief, no recovery can be had, for the liability of a county for the relief and support of its indigent poor is purely statutory, and to render the county liable the case must come fairly within the terms of the statute. *Hamlin Co. v. Clark Co.*, (S. D.) 45 N. W. Rep. 329; *Coolidge v. Mahaska Co.*, 24 Iowa, 211; *Mitchell v. Inhabitants of Cornville*, 12 Mass. 333; *Miller v. Inhabitants of Somerset*, 14 Mass. 396. There are none of the elements of an implied contract in such a case. The liability exists only in pursuance of the positive provisions of the statute. *City of Augusta v. Chelsea*, 47 Me. 367; *Hamlin Co. v. Clark Co.*, supra. The whole matter is entirely within the control of the legislature, and the duty of aiding and supporting poor people, or of relieving those temporarily in need of assistance, may be imposed by that body upon counties or towns in such manner as it may deem proper.

The district court found that the indigent on whose account this claim is made was not a pauper. The appellant assigns as error that this finding is not supported by the evidence. The facts proven were that he was a man without a family, who for a number of years had made a living by laboring upon ranches for others. He had no property, but seems to have earned the ordinary wages of a laboring man, and, so far as the evidence shows, had always been able to make a living, and had never asked for, or received, charity. In the fall of 1889 he came to Battle Mountain, and while there was treated for an affection of the foot. From this place he went to Golconda, in Humboldt county. When he arrived there he had about \$100 in money, a part of which he paid on a debt, and a part for board. He remained here some weeks, until his money was exhausted, and a friend became security for another month's board. Shortly, however, the trouble with his foot increasing, he returned to Battle Mountain, to the same physician that had formerly treated him, for further treatment, but he got no better, and after several months died. In the beginning of this last sickness, necessary care and treatment seem to have been furnished him upon his own credit; but subsequently, when it was found that the case was likely to prove quite serious, those about him called upon the county for assistance, and it is the expense then incurred by Lander county that forms the basis of this action. Certainly, this evidence falls short of proving that this man was a pauper. He was rather of the class mentioned in section 1986,—a nonresident who had fallen sick in Lander county, not having money or property with which to pay for necessary care and medical aid. In such a case the legislature has placed the duty of relief-

ing the unfortunate person upon the county in which he may be found. Under the statute it was as much the duty of Lander county to care for him as for one of their own poor, and for such care it has no recourse against the county of his residence. It may be supposed that in the long run the account will be equalized by Humboldt county doing the same for one of Lander's unfortunates.

It is said, and there is some evidence to support the contention, that he did not fall sick in Lander county, but in Humboldt county, and afterwards came to Lander county, but this is immaterial. As we have seen, the only liability that exists between the counties under our statute is where relief is granted to a pauper; and, as the indigent in this case does not come within that class, no liability exists, no matter where he may have fallen sick, or under what circumstances the relief was furnished him. Our statute was doubtless substantially copied from a statute of Illinois which was construed in the case of *Supervisors of La Salle Co. v. Reynolds*, 49 Ill. 186, and the distinction we have suggested as existing between paupers and persons falling sick within a county, not having money or property, fully recognized and sustained. In *Lee Co. v. Lackie*, 30 Ark. 764, it was held that a strong, able-bodied young man, who hired as a laborer, was not a pauper, although unable to pay for his medical attendance while sick. As these considerations lead us to the conclusion that the action cannot be maintained by Lander county, it is unnecessary to consider the other assignments of error made in the record.

The judgment is affirmed.

MURPHY, C. J., concurs.

(4 Wyo. 133)

# In re BOARD OF COM'RS OF JOHNSON COUNTY.

(Supreme Court of Wyoming. April 24, 1893.)

CONSTITUTIONAL LAW—STATUTES—TITLE OF ACT—CREATION OF JUDICIAL DISTRICT—JUDGE.

1. Act Feb. 9, 1893, divides the state into four judicial districts, thereby in effect creating a new one; assigns the different counties to the different districts; provides for terms of court in the different counties of each district; for the appointment by the governor of a judge of the new district to hold office until the next election, and for the possession by him of the proper qualifications; for his taking the oath of office; for the final determination of matters pending in the organized counties of the new district by the district courts of such counties; and repeals all but one section of the last preceding act on the subject. *Held*, that the subject of the act is sufficiently expressed in its title, which is "An act to define the judicial districts of the state, and prescribing the time for holding the terms of the district court in the several counties of each judicial district."

2. The act does not contain more than one subject, within the meaning of the constitution.

3. Though the constitution does not specially provide for the filling of a vacancy in the office of judge of the district court by appointment by the governor, as it does in the case of supreme court judges, the act of February 9, 1893, providing for the appointment by the gov-

ernor of a judge of the new judicial district thereby created, to serve until the next election, was authorized by Const. art. 4, § 7, which provides that "when any office, from any cause, becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill the same by appointment."

4. When a new office is created there is a vacancy therein, within the meaning of the constitution, authorizing the governor to fill vacancies by appointment.

5. In proceedings to determine the validity of an act creating a new judicial district, and the right to office of a judge thereof, appointed by the governor under the act, it will not be determined whether the legislature had the power to authorize, as it did, the appointment of a judge to hold office until the next election of district judges, three years hence, instead of the next general election, one year hence, it being sufficient if the appointee is rightly in office at the time of the proceeding.

6. The validity of an act (Act Feb. 9, 1893) creating a new judicial district, and providing for the appointment of a judge thereof, is not affected by the fact that it neither makes any provision for the judge of the new district and the other judges holding court for each other in case of disqualification, nor repeals a former act making such provision for the judges of the old districts.

7. The courts will not inquire into the necessity for an act creating a new judicial district, as that is purely a legislative question.

Application by the board of commissioners of Johnson county for an order directing the attorney general to institute certain proceedings in the nature of quo warranto. Denied.

M. C. Brown, Charles H. Burritt, and Alvin Bennett, for relators. Lacey & Van Devanter and A. C. Campbell, amici curiae.

GROESBECK, C. J. This is an application on behalf of the board of the county commissioners of the county of Johnson to direct the attorney general to cause proceedings in the nature of quo warranto to be instituted in this court for the purpose of inquiring and determining by what right or authority one William S. Metz assumes to exercise the powers and functions of a judge of the district court within the county of Johnson, or elsewhere in this state. It appears from the application, duly verified, that said William S. Metz was appointed by the governor to the office of judge of the fourth judicial district of this state, and that such appointee has duly qualified, and is now assuming to perform the functions of such office. This application is claimed to be authorized by a section of the Revised Statutes which provides that the attorney general or a prosecuting attorney, when directed by the governor, the supreme court, or the legislature, shall commence the action in the nature of quo warranto against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, within this state, (sections 3092, 3094, Rev. St. Wyo.) and it is sought to have this court direct that such action be commenced against the said William S. Metz. Some objections were made in the argument as to the propriety and legality of this application, and as to the jurisdiction of this court to allow the writ to run to one claiming to be a district

judge, as it was contended that such an officer is not a "state," but a "district," officer, within the meaning of various constitutional provisions, our original jurisdiction in quo warranto being limited to state officers, (Const. Wyo. art. 5, § 3;) but, as the matter was finally submitted on the question of the validity of the law under which said William S. Metz was appointed and his office created, we shall pass upon these questions without determining the other points raised, upon which we express no opinion.

1. The statute challenged in this proceeding is entitled "An act to define the judicial districts of the state, and prescribing the time for holding the terms of the district court in the several counties of each judicial district." It was approved by the governor February 9, 1893, at which time it took immediate effect. It is assailed as a violation in its body and title of the constitutional inhibition that "no bill, except general appropriation bills and bills for the codification and general revision of the laws, shall be passed, containing more than one subject, which shall be clearly expressed in the title." Const. art. 3, § 24. The grounds of the attack are that the act contains more than one subject, that it is broader than the title, and that the subject of the act is not clearly expressed in its title. The act divides the state into four judicial districts, thus in effect creating a new one,—the fourth judicial district. It assigns the different counties of the state to the different districts; provides for terms of court to be held in the several counties of each judicial district; for the appointment by the governor of a judge of the fourth judicial district, to "hold his office until the next succeeding election of judges of the district courts in the state, and until his successor is elected and qualified;" for the qualifications provided for district judges in the constitution to be possessed by such appointee; for his taking the oath of office within the time prescribed by the act; for the final determination of matters pending in the organized counties of the new district by the district courts of such counties; and repeals all but section 2 of the last preceding act, defining the judicial districts of the state, and providing for the holding of terms of court therein. Chapter 52, Sess. Laws 1890-91. It is the duty of the courts, when called upon to declare an act of the legislature unconstitutional, which has been passed with all the forms and ceremonies requisite to give it force, to approach the question with great caution, and to consider it with the utmost care and deliberation. Before an act of the legislature is pronounced void, it should appear that there has been a clear and palpable evasion of the constitution. The judiciary ought to accord to the legislature as much purity of purpose as it claims for itself, as honest a desire to obey the constitution, and also a high capacity to judge of its meaning. *Ewing v. Hoblitzelle*, 85 Mo. 64-70, citing a number of Missouri cases. The objections should be grave, and the conflict between the act and the constitution palpable, before the judiciary should disregard or annul a leg-

islative enactment upon the sole ground that it embraces more than one subject, or, when it contains but one subject, on the ground that it is not sufficiently expressed in its title. *Suth. St. Const. § 83*, citing *Montclair v. Ramsdell*, 107 U. S. 155, 2 Sup. Ct. Rep. 391. The courts in those states having the same, or substantially the same, provision as that invoked in this action to defeat the act, hold that such provision must be reasonably and liberally construed. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *People v. Goddard*, 8 Colo. 432, 7 Pac. Rep. 201; *Clare v. People*, 9 Colo. 126, 10 Pac. Rep. 799; *Dallas v. Redman*, 10 Colo. 297, 15 Pac. Rep. 397; *State v. Ranson*, 73 Mo. 78-86; *State v. Barrett*, 27 Kan. 216; *State v. Miller*, 45 Mo. 497. In construing this constitutional provision the supreme court of Colorado, in the case of *In re Breene*, 14 Colo. 401, 24 Pac. Rep. 3, say: "First, that it is mandatory. Such is the view expressly declared by this court, and, with but two or three exceptions, adopted elsewhere. *Railroad Co. v. People*, 5 Colo. 40; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. Rep. 469. Second, that it should be liberally and reasonably interpreted, so as to avert the evils against which it is aimed, and at the same time avoid unnecessarily obstructing legislation. *Clare v. People*, 9 Colo. 122, 10 Pac. Rep. 799; *Dallas v. Redman*, 10 Colo. 297, 15 Pac. Rep. 397. Third, that it embraces two mandates, viz. one forbidding the union in the same legislative bill of separate and distinct subjects, and the other commanding that the subject treated of in the body of the bill shall be clearly expressed in its title. Each of these mandates is designed to obviate flagrant evils connected with the adoption of laws. The former prevents joining in the same act disconnected and incongruous matters. The purpose of the latter is thus tersely and forcibly stated in *Dorsey's Appeal*, 72 Pa. St. 192: 'Another purpose was to give information to the members, or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill.' The provision undoubtedly deals with legislative procedure, but obedience thereto directly results in advising the people of the contents of bills that have become laws. It is quite as important to the official or the private citizen that he have the highest facilities for knowing the existing law as that he have opportunity to offer criticism or suggestion upon pending legislation. He should not be left to discover, 'coiled up in the folds' of an act apparently in no way concerning him, a provision affecting his most important interests." And again: "Nor is the constitution unreasonable in this respect, or difficult to comply with. When intelligently and carefully observed, it embarrasses proper legislation but little. The general assembly may, within reason, make the title of a bill as comprehensive as it chooses, and thus cover legislation relating to many minor but associated matters. For example, an act entitled 'An act in relation to municipal corporations' may provide for the organiza-

tion, government, powers, duties, officers, and revenue of such corporations, as well as for all other matters pertaining thereto. 'The generality of a title,' says Judge Cooley, 'is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection.' Const. Lim. (5th. Ed.) 174. It is not essential that the title shall specify particularly each and every subdivision of the general subject. Such a requirement would lead to surprising and disastrous results. Many titles would not only be absurdly prolix, but the laws themselves would be endangered by virtue of the inhibition against duplicity of subjects. *Edwards v. Railroad Co.*, 13 Colo. 59, 21 Pac. Rep. 1011, *People v. Goddard*, 8 Colo. 432, 7 Pac. Rep. 301. Efforts to cover specifically in the title all subordinate matters treated of in the act have already jeopardized legislation in this state, and only by the most liberal interpretation has the court been able to save the statutes. *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Clare v. People*, supra. It was said in this case, in *Re Breene*, supra, that the legislature had the right to contract the scope of the title to the narrowest limits, and, if it does so, care must be taken not to transcend in the body of the bill, the limit thus voluntarily fixed. It was accordingly held that where a title to an act provided "for the assessment and collection of revenue," and a provision of the act made it a crime for the state treasurer to loan out, or in any manner use for private purposes, the public funds in his hands, the act was broader than the title in respect to such provision. It is further said in the opinion that, "had the legislature been content with the title 'An act in relation to revenue,' the question before us would be relieved of the present embarrassment." So it seems in the case quoted from, if the legislature had chosen a title broader and more general than the one it did invent for the act, there would have been little or no difficulty in sustaining the provision held to be obnoxious.

Applying these principles laid down with so much care by the court of last resort of a sister state, where the same constitutional provision exists, to the matter before us, it would seem that, under a liberal and reasonable construction of the inhibition of our constitution, there is but one general or comprehensive subject contained in this act, and that that subject is clearly expressed in its title. The unit—the subject-matter of the legislation comprehended in the act—is the defining of the four judicial districts, and this defining might reasonably include the name, number, and territorial extent and operation of the courts of such judicial districts, as they are subordinate, incident, and germane to the main and general subject of the act. It would be absurd to say that, in dealing with the reorganization of the judicial districts of the state, the legislature would be compelled to enact one statute creating a new district, another providing for the appointment or election of a judge therein, and another providing

for the terms of court in the several counties in each district. All these subjects may well be grouped under one general topic or subject of legislation in one bill, with a comprehensive title. The different entireties of such legislation are not inharmonious or incongruous. No one would be misled by such a bill, while in the course of legislative gestation, or by such an act on the statute books. If one should desire to know how many judicial districts there were in this state, what territory each embraced, or of how many counties each was composed, or how many terms of the district court were to be had annually in each county and at what times, he would naturally turn to this act, even if he were not aided by an index to the subordinate subjects of the act. Such an inquirer would not find injected into or "coiled up in the folds" of this act any extraneous subject other than the one indicated by its title,—the defining of the judicial districts of the state. The purpose of the constitutional provision that the bill should contain but one subject has been defined time and again by the courts, and a consensus of the multitude of opinions construing this inhibition will disclose that it was designed to prevent incongruous and diverse legislation in one bill, to make fruitless the practice known as "logrolling," and to banish hodgepodge legislation from the statute books; to render futile the grouping together in an omnibus bill a number of distinct legislative measures, each of which could not pass on its own merits, but which, with the aid of its own adherents and those advocating the other measures, would become a law. There was no such restriction upon the legislative assembly of the territory, and many acts became laws which, under the familiar and general description in the title, "for other purposes," contained many and diverse subjects of legislation. There is no incongruity in the subjects of this act, which are but satellites of the comprehensive subject of defining the judicial districts of the state. The legislature had the right to increase the number of such districts to four and the number of judges to four, and the only limitation imposed by the fundamental law in the increase of judicial districts is that the number of districts and district judges shall not exceed four until the taxable valuation of property in the state shall exceed \$100,000,000. Const. Wyo. art. 5, § 22. The provisions for the fourth district and a fourth judge are all matters immediately and intimately connected with and incident to the division of the state into judicial districts. Before the passage of this act there were three judicial districts, and under the territorial regime there were but three. The constitution provides that "until otherwise provided by law" there shall be three judicial districts, which were temporarily defined in that instrument. Article 5, § 19. They were defined anew thereafter, but their number was not increased by chapter 52 of the Session Laws of 1890-91, those of the first state legislature. They were defined anew in this act, and their number increased to four. The title of the

act of the second legislature defining the judicial districts of the state is precisely the same as that used in the act passed by the first state legislature. The subject-matters of these acts are identical, with the exception of the creation of a new judicial district, the office of judge thereof, and the provision for additional terms of district court in a number of counties.

It was insisted in the argument that the act should have been directed solely to the organization of the fourth judicial district; but, although this would have been a proper and distinct subject of legislation, such action on the part of the legislature would have rendered necessary other enactments to fix the additional terms of court provided for in the act. The title is one that was employed in former legislation on the same subject by both territorial and state legislatures. For this reason it is insisted that no notice was given by it to the legislature and the people, by reading it, of the formation of a new district. We think this is not tenable. The defining anew of the districts would put any one interested, either in the bill during its course in each house and before the governor, on the inquiry as to whether the number of the districts were defined anew, as well as the defining anew of the former districts. In reading the title of the act we have already indicated that it was a sufficient guide to one desiring to know the number and territorial extent of each district. It was said in argument that the word "define" has a technical and common meaning, and is used to make clear and definite what was before uncertain or obscure, and relates to something that had a prior existence; hence, in defining the judicial districts of the state, it must be assumed that the legislature would do no more than to re-define or rearrange existing districts, and not create a new one. This word, so frequently used in legislation, and generally in the titles to acts, has been construed by the courts to have a broader meaning, and is not used exclusively in the sense of making clear and certain what was before unintelligible, ambiguous, or uncertain. It is frequently used in the title to acts in the creation, enlarging, and extending of the powers and duties of boards and officers, in defining certain offenses and providing punishment for the same, and thus enlarging and extending the scope of the criminal law. "If the word used by the legislature can in any of its various uses or meanings be considered appropriate or applicable, then we cannot say that they did not have the right to use it in that sense, even though we might be of opinion that a better and more appropriate one might have been chosen, and one that people generally would have better understood." *People v. Bradley*, 36 Mich. 447; *Walters v. Richardson*, (Ky.) 20 S. W. Rep. 279. In Kansas, where the constitutional provision is nearly the same as ours, an act was passed, entitled "An act defining the boundaries of counties." Under its provisions the boundaries of 79 counties were defined and established. Four years later another act was passed, entitled "An act amendatory and supple-

mental to an act entitled 'An act defining the boundaries of counties.'" Under this amendatory act the boundaries of four counties were defined and established. Two of these counties were created by the act, and the other two simply had their boundaries changed. It was held that a certain section of the act providing for an arbitrary rule of taxation for certain territory detached from one county and attached to one of the new counties created by the act was foreign to the title, and was not expressed in it, but the court did not question the validity of the act or of its title in other respects. It says: "Neither the act of 1868 [the original act] nor the act of 1872 [the amendatory act] mentions any subject except that of 'defining the boundaries of counties.' This title is probably broad enough to authorize the changing of county lines, the establishing of county lines, the creation of the boundary lines of new counties, substantially the creation of new counties," etc. *Commissioners v. Bailey*, 18 Kan. 600-609. And more recently, in that state, an act with this title: "An act defining the boundaries of Edwards and other counties, and amendatory of chapter 24 of the General Statutes of Kansas," etc., "defining the boundaries of counties,"—destroyed the existence of Kiowa county, although it was not mentioned in the title. It was held that "special mention of the county of Kiowa in the title was not essential to the validity of the act, and the title is sufficiently broad to include, and is fairly expressive of, what is found in the act." *State v. Commissioners of Kiowa Co.*, 41 Kan. 630-634, 21 Pac. Rep. 601. As the word "define" may be held to include something not already legislated upon, or which was not included in former legislation, but in the sense of enlarging or extending, the title of the disputed act is broad enough to include all the provisions of the act. If the title to the act amendatory of one defining the boundaries of counties can be held broad enough to include in the body of the act "substantially the creation of new counties," and another act, defining the boundaries of a particular county named in the title and other counties not named therein, to constitutionally include the abrogation of a county not named in the title, as held in the Kansas cases, *supra*, there ought to be no difficulty in sustaining this act, as its title, "to define the judicial districts of the state," is broad, comprehensive, and general enough to include the formation of a new judicial district. The title states that the act purposes to define the judicial districts of the state, and it does define them in number and territorial extent, and the creation of a new district which is defined with the others as to number and area is but a component part of the general subject of the act, is germane to it, related to it, and intimately connected with it. We must hold that the act is not obnoxious for the reason that it contains more than one subject, or because the subject is not clearly expressed in its title. The following cases cited in the brief of counsel have great weight on the matters herein discussed: *City of St. Louis v.*

Tielfel, 42 Mo. 590; Harrington v. Wands, 23 Mich. 389; Ex parte Liddell, 93 Cal. 638, 29 Pac. Rep. 251; Mayor, etc., v. State, 30 Md. 119; Kurtz v. People, 33 Mich. 282; State v. Town of Union, 33 N. J. Law, 354; People v. McCallum, 1 Neb. 194; Falconer v. Robinson, 46 Ala. 346; People v. Mahaney, 13 Mich. 481; Mauch Chunk v. McGee, 81 Pa. St. 433; State v. Atherton, 19 Nev. 344, 10 Pac. Rep. 901; Phillips v. Bridge Co., 2 Metc. (Ky.) 219; Johnson v. Higgins, 3 Metc. (Ky.) 566; Bright v. McCullough, 27 Ind. 226; Haggard v. Hawkins, 14 Ind. 299; Iron Works v. Brown, 13 Bush, 681; Com. v. Green, 58 Pa. St. 226.

2. It is further claimed that the act is unconstitutional because it provides for the appointment, and not the election, of a judge of the fourth judicial district. While there is an express provision for the filling of a vacancy in the office of justice of the supreme court in the judiciary article of the constitution, by appointment of the governor, the appointee to hold the office until the qualification of a successor to fill the unexpired term, who is elected at the next succeeding general election, there is no such special provision for filling a vacancy in the office of judge of the district court, but it is clear that a general provision appearing in section 7, art. 4, controls. It reads: "When any office, from any cause, becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill the same by appointment." The statute before us provides for filling the vacancy created by it, in the formation of the new judicial district, by the appointment of the governor, and that such appointee shall hold the office until the qualification of his successor, to be elected at the next general election for judges of district courts. This provision, in so far as it relates to filling the newly-created office by appointment, seems to us to be valid, and not hostile to the constitution. While the judges of district courts created in the constitution are to be elected, and were elected, at the first state election in 1890 for full terms, there is nothing appearing expressly or by implication in the constitution providing that the vacancy in such office may not be provisionally filled by appointment, without resorting to a special election to fill it. Indeed, the constitution provides clearly for the temporary or provisional appointment to fill the vacancy in section 7, art. 4, supra, and it further provides that no district judge can be removed from his office by the increase or change in the boundaries of judicial districts during the term for which he may have been elected or "appointed." Article 5, § 22. This provision indicates of itself that the framers of the constitution understood that district judges might be provisionally appointed.

3. Although it was claimed with much vigor, in the argument on behalf of the relator, that there could be no vacancy in the new office until once filled by an incumbent thereof, we think the converse of this provision is too clear for discussion. An old office is vacated by death, resignation, or removal. An office newly created

becomes ipso facto vacant in its creation. State v. Askew, 48 Ark. 89, 2 S. W. Rep. 349, citing a large number of cases; Throop, Pub. Off. § 132; Mechem, Pub. Off. § 431. Upon the argument, counsel for relator contended that the legislature could not in any event authorize the appointment by the governor of a judge of the fourth judicial district, to hold until the next election for district judges, to be held in the year 1896, but only until the qualification of a successor to be elected at the next general election, which will occur in November, 1894. It is unnecessary for us to decide this point. It is sufficient in this inquiry to decide that the incumbent of the office is legally in office at the time this application was made, and at the time of this hearing.

Mention was made in the argument of the existence of section 2 of chapter 52 of the Session Laws of 1890-91, which was not repealed by the act under consideration, and that, if a valid law, it would bring within its operations the judges of all the districts except the fourth. It provides that the several judges of the first, second, and third judicial districts shall, with their successors, act in their respective districts, hold the terms of the district courts therein, and for each other when the regular judge is disqualified or unable to act. No such provision appears in the new act. The constitution provides (article 5, § 11) that "the judges of the district courts 'may' hold courts for each other, and 'shall' do so when required by law." It is unnecessary to pass upon this question in this proceeding. Whether the unrepealed section 2 of the old act applies to the judge of the fourth judicial district, and compels him to hold courts for the other judges, or any of them to hold court for him, or whether this section is void because not general or uniform in its operation, does not affect the validity of the new act under consideration.

As to the necessity for the creation of the fourth judicial district, that is purely a legislative question, and this court has no right and no disposition to invade the domain of the legislative department.

The motion is denied.

CONAWAY and CLARK, JJ., concur.

(13 Mont. 164)

#### STATE v. RUSSELL.

(Supreme Court of Montana. April 17, 1893.)

CRIMINAL LAW—CHANGE OF VENUE—PREJUDICE—MURDER—HOMICIDE—DYING DECLARATIONS—REFUSAL TO CALL WITNESS.

1. On indictment for murder, defendant's application for a change of venue was supported by affidavits of his counsel showing that while a jury was being secured a large proportion of them stated that they had formed and expressed opinions as to defendant's guilt or innocence; that such statements, made in the presence of jurors who had not been challenged for cause, had the effect to prejudice them against defendant; that the people of the town where the trial was being held were prejudiced against defendant; and that this prejudice was likely to be communicated to persons summoned as jurors from its immediate vicinity. *Held*,

that it was not an abuse of discretion to refuse a change of venue.

2. On the trial the surgeon who attended deceased testified that he was mortally wounded, and, while in a dying condition, frequently said: "My God, boys! I am killed. Oh, boys! I am shot through the guts." A witness who was with deceased just before his death testified that he was rational, and talked as if he knew that he was dying; that he stated he wanted a Christian burial; that he wanted to be buried at a certain place. *Held*, that declarations of deceased as to how he was wounded, and by whom, were admissible, though the declaration did not expressly state that he had no hope of recovery, or was going to die.

3. Where the prosecuting attorney had indorsed the name of a witness on the information, but it appeared that she was not an eye-witness to the shooting, and the materiality of her evidence was not shown, it was not error to refuse to require the prosecuting attorney to call her as a witness. *Territory v. Hanna*, 5 Pac. Rep. 252, 5 Mont. 248, distinguished.

4. On the trial there was no controversy as to the shooting by defendant. Deceased was unarmed, was intoxicated, and a comparative stranger. Defendant was armed, in company with friends, and it did not appear that he was disinclined to enter into the difficulty that resulted in his killing deceased. Defendant failed to surrender himself to the officers who were inquiring in his presence for the man who did the shooting. The state's witnesses were defendant's friends, and their testimony was as strong in his behalf as they could consistently make it. *Held* that, in view of the dying declarations of deceased, the verdict of murder in the second degree was sustained by the evidence.

Appeal from district court, Yellowstone county; George R. Milburn, Judge.

Samuel Russell was convicted of murder in the second degree, and appeals. Affirmed.

Middleton & Light, for appellant. Henri J. Haskell, Atty. Gen., for the State.

PEMBERTON, C. J. The appellant was convicted of the crime of murder in the second degree at the September term, 1892, of the district court of the seventh judicial district in the county of Yellowstone; and on the 8th day of October, 1892, was, by the judgment of said court, sentenced to imprisonment in the state prison for a term of 25 years. The appellant moved the court for a new trial, which was denied. From the order refusing a new trial, and from the judgment of the court, this appeal is prosecuted.

The first important error assigned is the refusal of the court below to grant appellant's petition for a change of venue from Yellowstone county. It appears that after the trial had commenced, and considerable progress had been made in an effort to obtain a jury, the counsel for appellant came to the conclusion that a fair trial could not be had in said county, and presented a petition for a change of venue, based upon the alleged "interest, prejudice, and bias of the people of said county." This petition was supported by the affidavit of two of the counsel for the appellant. This affidavit is to the effect that during the time an effort was being made to procure a jury a large number of persons were called into the jury box, and examined as to their qualifications to act as jurors in the case; that

a large proportion of such persons, upon said examination, stated that they had formed and expressed decided opinions as to the guilt or innocence of the prisoner at the bar; that such statements by such persons on their examination, made in the presence of the jurors in the box who had not been challenged for cause, had the effect, in affiants' opinion, to prejudice such jurors as were in the box against the appellant to such an extent as to prevent his having a fair trial before such jury; that the inhabitants of Billings were especially hostile to the appellant, and prejudiced against him to such an extent that, in the opinion of affiants, he could not have a fair trial; and that the prejudice of the inhabitants of Billings was likely to be so communicated to persons summoned as jurors from its immediate vicinity as to prevent them from according appellant a fair trial, if accepted as jurors in the case; that there was considerable unfriendly talk among the people of Billings against appellant; and that for these reasons affiants believe the prisoner could not have a fair trial in that county. The court also heard oral evidence of other witnesses to substantially the same effect. To meet this evidence the court examined each juror in the box, as to whether or not the examination of persons called as jurors in their presence had an effect in prejudicing their minds against the prisoner. Each of said jurors answered in the negative. The court, in addition thereto, of its own motion, offered to excuse from the jury all persons who resided in Billings; two such persons being in the box. To this offer the counsel for the appellant objected. If it is true, as contended by appellant, that in criminal cases, where a large number of persons are examined, in the presence of each other, as to their qualifications to sit as jurors, and a large or any portion of them state that they have formed or expressed such opinion as to the guilt or innocence of the person to be tried as to disqualify them as jurors, it shall be considered as a sufficient reason to prejudice those who have no opinions, and thus disqualify them from being considered fair and competent jurors, then we are at a loss to know how a jury can ever be organized in any important criminal cases in any community. In almost every important criminal case a very large proportion of the people living in the immediate vicinity of the place where the crime is alleged to have been committed form such opinions, from becoming familiar with the facts, as to disqualify them from acting as jurors in the trial of the case, and these opinions are as likely to be favorable as hostile to the accused. But how can it be rightfully contended that the examination of such persons, and their statements that they have such disqualifying opinions, in the presence of persons who do not have such opinions, will prejudice and disqualify those that are free from such disqualifications to such an extent as to endanger a fair trial of the person accused of the crime? We do not think this position can be sustained by reason or law. The court seemed to have taken every



necessary precaution to assure the appellant a fair trial in this respect. And the verdict of the jury, finding the appellant guilty of murder in the second degree, and leaving the punishment to be fixed by the court, when they could, if so inclined, for any reason, have assessed his punishment at imprisonment for life, tends to show that the appellant and his counsel were mistaken as to the prejudice alleged as a ground for change of venue, and that the view of the court was justified in its ruling in this regard. We are unable to see that the court below abused that sound judicial discretion required of trial courts in such proceedings. The law governing change of venue is well settled in this state in *Keenon v. Gilmer*, 5 Mont. 257, 5 Pac. Rep. 847, and *Territory v. Manton*, 8 Mont. 95, 19 Pac. Rep. 387; and these authorities support the action of the court below in this case.

2. It is urged that the court below erred in admitting the evidence of the dying declaration of the deceased. The appellant objected on the ground that a sufficient foundation had not been shown to render the dying declaration admissible. The evidence does not show that deceased actually said he was without hope of recovery, or that he was going to die. The evidence of the surgeon who attended him is to the effect that a short time before he died, deceased frequently said "My God, boys! I am killed." "Oh, boys! I am shot through the guts." The evidence of the surgeon shows he was mortally wounded, and was in a dying condition when these expressions were used, and that he was rational, and appreciated his condition. Harry Ramsey, who was with him just before his death, testified that the deceased was rational, and talked to him as if he knew that he was in a dying condition, but does not remember the exact words deceased used. That the deceased stated he wanted a Christian burial; told where his money was, and who had it; that he wanted to be buried at Billings; wanted a headstone, with his name on it, placed at his grave, so that, if his friends ever wanted to take him up, they could do so. There is no evidence that indicated that he had any hope of recovery. That he stated by whom and how he was wounded, and a few moments thereafter died. The principal objection urged to this evidence is that the declaration did not expressly state that he had no hope of recovery, or was going to die. We do not think that it was essential to the admissibility of this evidence that he should have so expressly stated. In 1 Greenl. Ev. (14th Ed.) § 158, the doctrine governing the admissibility of dying declarations as evidence is thus stated: "Sec. 158. Must be under a Sense of Impending Death. It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the ex-

press language of the declarant, or to be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of declarant's mind." To the same effect, see *People v. Taylor*, 59 Cal. 640; *Hill v. State*, 41 Ga. 481; *Whart. Crim. Ev.* (8th Ed.) § 282; 7 Amer. & Eng. Enc. Law, 107, 109, note 1, and cases cited. These authorities all hold that if all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding declarant may not have said he was without hope of recovery, or was dying, or going to die, then such declarations are admissible in evidence. The facts and circumstances surrounding the declarant in this case at the time of the making of the declaration warrant the conclusion that they were made under a sense of impending death, and, we think, were properly admitted as evidence to the jury.

3. It is also urged as error in the court below that the prosecuting attorney had indorsed on the information the name of one Mollie Dalton as a witness, and that on the trial he declined to call her as a witness for the state, and that the court refused to require him to do so. The evidence shows that Mollie Dalton was not an eyewitness to the transaction, was not present at the time of the shooting, and the materiality of her evidence is nowhere shown. There is nothing in the record to show that this witness comes within the rule of any of the authorities cited or applicable to support appellant's contention. The attitude of this witness to the case does not bring her within the rule announced in the case of *Territory v. Hanna*, 5 Mont. 248, 5 Pac. Rep. 252. In that case the witness was present during the commission of the crime, and was so stated to be present by the prosecuting attorney on stating his case to the jury. The facts here are entirely different. We think the court went fully as far in *Territory v. Hanna* as it was authorized to go. But that case is not authority in this case, for the reason that the facts are widely different. In this case the evidence shows that the witness was not present at the shooting, and her examination by the appellant showed her testimony to have been immaterial. We see no error in the action of the court in this respect.

4. It is contended that the evidence does not sustain or justify the verdict and judgment of the court below. There is no controversy in this case as to the shooting, and its fatal result, or as to the identity of the slayer. The killing appears to have been unnecessary. There was no effort on the part of the appellant to avoid the killing. There is no evidence of danger to the life of appellant, or of his receiving great bodily harm at the hands of the deceased, at the time of the shooting. The deceased was wholly unarmed. He was a stranger, comparatively, in the house, at the time of the shooting, and evidently intoxicated. The appellant was armed, in the company of his friends and acquaintances; and, if

not actually inclined, certainly it does not appear he was disinclined, to enter into the difficulty that resulted in his killing the deceased. The actions of the appellant in failing to disclose himself to the officers, in whose presence he was, after the shooting, when such officers were looking and inquiring for the man who did the shooting, and his escape, are hardly consistent with the theory of self-defense or accidental shooting. The principal witnesses of the state were all intimate friends and acquaintances of the appellant, and their testimony was confessedly as strong in behalf of the appellant as they could consistently make it. But taking into consideration the dying declarations of the deceased, and all the facts and circumstances of the case, as shown by the record, we are of the opinion that the evidence amply sustains the verdict of the jury and the judgment of the court below. The judgment of the court below is affirmed, and it is ordered that the same be carried into effect according to the terms thereof.

HARWOOD and DE WITT, JJ., concur.

(3 Colo. App. 188)

KEATOR et al. v. COLORADO COAL & IRON DEVELOPMENT CO.

(Court of Appeals of Colorado. March 27, 1893.)

STIPULATIONS—LAND CONTRACT—MERGER IN DEED—VOLUNTARY PAYMENT.

1. In an action involving the construction of a contract for the sale of land, where it is stipulated that a copy of the contract may be used on the trial, provided that indorsements, writings, and figures in the original contract shall, when the same is obtained, be made a part of the copy, the copy should, in all respects, be made to conform to the original, including indorsements on the face thereof, as well as on the back.

2. A contract for the sale of land obligated the vendor to execute a deed on payment of the price on a specified date; the vendees to pay all taxes in the mean time. Held, that such contract became merged in the deed subsequently executed by the vendor, and that since the taxes assessed during the existence of the contract became a lien on the land, and created no personal liability, as against the vendor, he was not entitled to recover from the vendees for such taxes paid by him after the execution of the deed.

3. Since no personal liability rested on the vendor for the payment of such taxes, his payment was purely voluntary, and for that reason, also, he is not entitled to recover from the vendees.

Error to Pueblo county court.

Action by the Colorado Coal & Iron Development Company against M. V. Keator, D. W. Barclay, and F. A. Townsend to recover taxes paid by plaintiff on land sold by it to defendants. The action was originally brought in justice's court, and resulted in plaintiff's favor. From a judgment of the county court affirming the justice's judgment, defendants appeal. Reversed.

J. E. Rizer and D. McCaskill, for plaintiffs in error. J. M. Waldron, for defendant in error.

BISSELL, J. If the evidence produced on the trial were conceded to be admissible, it would not support the judgment entered. The action was brought by the Colorado Coal & Iron Company against the plaintiffs in error, Keator, Barclay, and Townsend, to recover \$64.12 which the company had paid as taxes on certain lots in Pueblo which had been sold to those parties prior to the payment and the suit. When the cause was tried in the justice's court, it was submitted on an agreed statement of facts, under a stipulation that the statement should be all of the evidence used during that or any succeeding trial of the case. A copy of the original agreement of sale was incorporated into the stipulation under a proviso that it might be changed to conform to the original when that should be produced. To render the decision and the controversy intelligible, the agreed statement of facts must be summarized, though much of it would have been inadmissible as evidence, had it been objected to in a proper and timely manner. From this statement it appears that in July, 1889, the company contracted to sell to Keator and his codefendants three lots in the town of Pueblo. The consideration was \$1,435, represented by certain promissory notes payable at fixed dates, and "the further payment of all taxes hereafter levied on said premises." The company agreed, on the payment of the expressed consideration, to execute a deed for the premises. It is recited that on the 9th of October, 1889, taxes to the extent of \$64.12 were levied by the proper authorities. On the 15th day of February, 1890, the company delivered to the defendants its warranty deed for the property, bearing date the 10th of February, and put them in possession. After this transfer of title and delivery of possession, on the 28th of February, the Coal & Iron Company paid to the proper county treasurer the taxes which had been levied and assessed against the property. At the time these taxes were paid the company made no demand or request that the defendants should pay them, nor did it call on the defendants to pay at any time prior to suit. The copy of the contract, which was a part of the stipulation, lacked sundry indorsements which were on the original, and the parties agreed that "whereas the defendants claim that there are certain indorsements or writing and figures on the back of the duplicate contract surrendered to plaintiff, which is in New York, when said duplicate contract is obtained, any and all indorsements, writings, figures, etc., thereon, shall be copied on the back of Exhibit A, and become part thereof," etc. When the original was produced at the trial, there appeared on the face of it these words, "Canceled by substitution of deed to property;" and the defendants asked leave to so change what purported to be a copy as to make it a duplicate according to the spirit, if not the tenor, of the stipulation. This privilege was refused, apparently on the hypothesis that the stipulation only applied to the indorsements on the back of the instrument. The county court affirmed the judgment which had

been rendered by the justice, and held that the defendants were bound to pay the taxes which the company had settled with the treasurer.

On very plain and well-settled principles, this judgment must be adjudged erroneous. In view of another trial, the questions raised and argued by counsel will be determined, though a decision of one proposition might suffice to reverse the case. The defendants ought to have been permitted to change the instrument attached to the stipulation, so that the contract set out should, in all of its particulars, recitals, and indorsements, conform precisely with the original, on which alone the case ought to have been heard and tried. It is quite possible that a very narrow, strict, and technical construction of the stipulation might suggest that the purpose of counsel was to permit only the addition of what might appear on the back of the original contract. Such is not a proper or an accurate interpretation of the language of the stipulation. The concluding phraseology provides that all indorsements, writings, figures, etc., thereon, shall be copied on the back of the exhibit. These terms do not exclude the right to place on the copy the indorsements on the original, even though they might be on the face of the instrument. They are broad enough to confer the right to duplicate all indorsements. It is manifest that this must be the proper construction, since it was the evident purpose of the parties to use a copy in place of the original, and we cannot assume that counsel entertained a covert purpose to compel the trial of the cause on an inaccurate copy. Whenever it is stipulated that a copy of an instrument may be used, and it can in any wise be gathered from the stipulation that the copy is incomplete, and that it is to be made to conform to the original for the purposes of the trial, the agreement must be construed, unless the construction is inhibited by the precise terms of the agreement, to intend that the copy may be completed, so that in all of its particulars and details it shall exactly correspond with the original paper. No other construction is consonant with good faith, and with what must be assumed to be the honest purpose of attorneys who stipulate with reference to such matters. The amendment by the addition of that indorsement should have been permitted.

It is doubtful whether the contract thus amended, more completely than the other facts contained in the stipulation, demonstrates the nonexistence of a cause of action, as against these defendants. The recited facts show that the several parties to this action entered into an executory agreement for the sale and conveyance of certain specified property, upon a definite consideration, payable at a named date, prior to the transfer of the title by the deed of the grantor, who was one of the contracting parties. There are but two things to be done,—the payment of the consideration, and the execution and delivery of the deed evidencing the title. The proof was that on the 15th day of February, 1890, the deed was delivered to the de-

fendants, who were put in possession. According to well-settled principles, the delivery and acceptance of this conveyance annulled and abrogated the prior executory agreement, which may be no longer resorted to for the purpose of ascertaining the terms on which the land was sold, unless it is shown by otherwise competent testimony that something remained to be done after the transfer of title. It is probably true that the defendants were bound to pay, not only the \$1,435 which was the expressed consideration, but likewise the taxes assessed against the property prior to the conveyance. This is evident from the terms of the written agreement, and it results from specific legislation on this subject. The statute provides that, as to all land conveyed between January and May, the grantee must pay the taxes which stand assessed against the property. On any hypothesis, then, the taxes which the company paid, and sought to recover, stood as a legitimate lien on the property conveyed to the defendants, and they took it subject to that lien, which they were bound to discharge. But the company could not recover on the production and proof of the agreement, because it was merged in the deed which they had executed, and this must be deemed to express the final and entire agreement between the parties, and to have been delivered on the payment of the purchase price, unless by competent evidence, and in some legitimate way, it be satisfactorily established that the defendants remained liable to pay a portion of the purchase price. There was no such proof in this case. The contract was surrendered and canceled, the deed executed and delivered, the premises turned over to the defendants, and they took the property burdened with the lien for the unpaid taxes, as to which no personal responsibility rested on the corporation. There is nothing in the stipulation to show that the legal effect of these various acts was at all varied by any parol or other contract between the parties, nor that, by the terms of the agreement, there was any continuing series of acts which would take the case out of the general operation of the law of merger. It must therefore be held that the company could not recover on the basis of the executed contract, which was canceled and extinguished by the act of the parties, and by the operation of this well-settled doctrine. *Williams v. Hathaway*, 19 Pick. 387; *Witbeck v. Waine*, 16 N. Y. 532; *Jones v. Wood*, 16 Pa. St. 25; *Lafin v. Howe*, 112 Ill. 253; *Bryan v. Swain*, 56 Cal. 616. Since the plaintiff was not entitled to recover in an action brought on an extinguished contract, he was equally barred to maintain the action by the circumstances of the payment. It will be remembered that the deed was executed by the company on the 10th of February, 1890, and delivered to the defendants on the 15th of the same month, when the contract was surrendered, and marked "Canceled by substitution of deed to property." At that time it is conceded that no cause of action had then arisen in favor of the company. The taxes were unpaid, and the company did not insist on an advance-

ment by the grantees prior to the transfer of title. Subsequently, and on the 28th of February, the company paid the treasurer the \$64.12 for the taxes of the preceding year, which became delinquent on the 1st of January. At that time it had parted with the title, and under our statute there remained, as against it, no individual liability to pay them. The taxes were against the property. There was a lien on it in the hands of the grantees, who held it subject to their obligation to pay. If there was any personal liability, it was rested on them. Under these circumstances, the payment of the taxes by the company was precisely analogous to the payment of a debt of one person by a stranger, and it is uniformly held that such a voluntary payment gives to the payor no cause of action against the person whose debt he may have liquidated. *Wilkes v. Harper*, 1 N. Y. 586; *Brown v. Chesterville*, 63 Me. 241; *Muller v. Eno*, 14 N. Y. 597; *McGee v. City of San Jose*, 68 Cal. 91, 8 Pac. Rep. 641; *Fowler v. Moller*, 10 R. G. W. 374. These considerations serve to demonstrate that the judgment cannot be supported upon the case made. The agreed statement of facts is insufficient to show a cause of action against these defendants, and for the reasons given the judgment must be reserved and remanded.

(3 Colo. App. 194)

DENVER & R. G. R. CO. v. MORRISON.

(Court of Appeals of Colorado. March 27, 1893.)

APPEAL—REVIEW—HARMLESS ERROR.

In an action for injuries caused by the alleged negligent construction of a water tank, the admission, under objection, of incompetent evidence showing subsequent repairs of the tank, whereby the injury was obviated, is no ground for reversal, where similar evidence had been previously admitted without objection.

Appeal from district court, Chaffee county.

Action by George Morrison against the Denver & Rio Grande Railroad Company for the overflow of plaintiff's land, caused by the alleged negligent construction of defendant's water tank. From a judgment in plaintiff's favor, defendant appeals. Affirmed.

Wolcott & Valle and C. S. Libby, for appellant. G. K. Hartenstein, for appellee.

BISSELL, J. For many years the appellee, Morrison, was the owner and occupant of a ranch along the course of a mountain stream called "Morrison Creek." The Rio Grande Railroad Company constructed its line in the vicinity of Morrison's premises, and built a water tank for the use of its trains in close proximity to Morrison's inclosures. These inclosures contained the usual stables and corrals for his stock, and a house for the occupation of his family. At a point very close to Morrison's yards, and where the tank was built, the creek made a bend, and went to one side of Morrison's premises, in its course to the river. The water sup-

ply for the tank was taken out of the creek, higher up the stream, and probably about 1,000 feet from its location. The waste pipe, which discharged the overflow, ran but a short distance from the tank to the creek, and discharged just above Morrison's yards. The use of the tank was, of course, intermittent, and water was only drawn from it as trains passed, and the engines required water. At such times the tank was partially emptied, the overflow ceased, and the discharge recommenced when the tank became full. The water was constantly running, for the purposes of keeping the tank filled, and the pipe from freezing. The result of this practice was that in the cold weather of the winter the overflow would freeze, and ultimately stop up the bed of the creek with a solid mass of ice, and leave no way for water. Under these circumstances, the water overflowed its banks, and flooded Morrison's premises.

Substantially, the judgment is not challenged because of any specific error committed by the trial court with respect to the application of the law to the facts. It has been seriously contended in the briefs and on argument that the judgment was wholly unsupported by the testimony, and that, therefore, the court erred in refusing to direct a nonsuit, and in entering judgment against the railroad company. The record is not so barren of proof of damage, nor of evidence to show that the injuries resulted from the negligent use and faulty construction of the tank, as to permit this court to reverse the judgment on those grounds. The proof is not as full and as satisfactory as might be desired, but the question at issue may fairly be said to have been determined on testimony which was conflicting, and under these circumstances we are without right to disturb the judgment for what we may regard as a slight insufficiency of proof. During the progress of the trial, it appeared that, after considerable complaint by Mr. Morrison respecting the use of the tank, the company ran its waste pipe some 600 feet, and to a point below the premises. It was shown that after the change in this construction the injury ceased, and Morrison was no longer troubled by the overflow of water. There was some complaint by counsel for the appellant respecting the admission of this testimony. Whether it would be admissible, under the peculiar circumstances of this case, on well-settled rules of evidence, need not be determined. The contention was abandoned on argument because the record disclosed that the objection was not preserved, save by an exception to the testimony given by one witness, and the whole subject had been antecedently embraced in what had been offered and received without objection. Counsel very properly conceded that the force of the objection was destroyed, and that no valid error could be predicated on the ruling of the court. These considerations dispose of all the questions which the record presents for our consideration, and, since the court committed no error in the trial of the case, the judgment must be affirmed.

(3 Colo. App. 210)

**WOODBURY v. HINCKLEY.**

(Court of Appeals of Colorado. March 27, 1893.)

**ACTION ON NOTE—PROOF OF OWNERSHIP—NON-SUIT.**

1. In an action on a note indorsed in blank after maturity, brought by the holder, where the maker is allowed to interpose any defense he has against the payee, an objection that there is no proof that plaintiff is the owner cannot be sustained.

2. In an action on a note, any error in denying a motion for a nonsuit, made by defendant, on the ground that its execution had not been proved, is cured by evidence given by defendant in his own behalf, admitting the execution and delivery.

**Appeal from Arapahoe county court.**

Action by Charles A. Hinckley against A. J. Woodbury on a promissory note, originally brought in justice's court, where there was a judgment in plaintiff's favor. On appeal to the county court, judgment was again rendered in his favor, and defendant appeals. Affirmed.

Norris & Howard, for appellant. Ralph Talbot, for appellee.

REED, J. Suit was brought before a justice of the peace upon a note of \$200, with interest, dated February 5, 1890, executed by appellant, payable to the order of George R. Smith. On July 1st following, it was indorsed in blank by the payee. It appears to have been established and conceded upon the trial that the note was indorsed after maturity, and consequently was open to any defense the maker had against the payee. Prior to February 1st, the date of the note, Woodbury, Smith, and one Simmons had been partners in business. On that date appellant bought Smith's interest in the business, and the partnership was dissolved. In the purchase of such interest, the note in question was made; also another, maturing later. At the time of the purchase and dissolution, as appeared by the partnership books, Smith owed the other members of the firm near \$200. Upon the trial appellant claimed to have bought the account from his partners, and attempted to set it off against the note. It was contended by the plaintiff that appellant assumed such indebtedness of Smith at the time of the purchase, and that the notes were given for the balance. The court so found, with the exception of one item, of about \$12, which was allowed as a set-off. An appeal was taken to the county court from the judgment of the justice of the peace; a trial had to the court; judgment for plaintiff for \$195.55, sustaining the judgment below. Appeal was taken, and the case came into this court. Upon the trial the note was offered in evidence. It was objected to because the signature of the maker had not been proved, and it was not shown that the plaintiff was the owner of the note. The objection was overruled, note admitted in evidence, and plaintiff rested. Defendant moved for a nonsuit on the same grounds contained in the objection above stated. The motion was denied, and the denial assigned

for error. This is the only error relied upon in argument.

The note was negotiable. The title passed by the indorsement. Its transfer after maturity was conceded, and the defendant allowed to interpose any defense he had against the payee. Consequently, it was to the defendant a matter of no importance who owned the note. Such questions only become important when the transfer prevents a defense. It is very doubtful, under our statute, whether plaintiff is required to prove the execution of the note, unless its execution is denied under oath, but it is not necessary to decide the question in this case. Instead of relying upon his motion for a nonsuit, defendant went on, and interposed his defense, himself testifying to its execution and delivery. "After the overruling of a motion for a nonsuit, the error is obviated by evidence of the party, in his own behalf, which supplies the defect existing in that of the plaintiff." *Railway Co. v. Henderson*, 10 Colo. 1, 13 Pac. Rep. 910; *Jennings v. Bank*, 13 Colo. 417, 22 Pac. Rep. 777. This supposed error being the only one relied upon by counsel, and the judgment being warranted by the evidence, it will be affirmed.

(3 Colo. App. 244)

**SAN LUIS LAND, CANAL & IMP. CO. v. KENILWORTH CANAL CO.**

(Court of Appeals of Colorado. March 27, 1893.)

**EMINENT DOMAIN—IRRIGATING CANALS—RIGHT OF WAY—ENTERING ON LAND BEFORE COMPENSATION IS DETERMINED—DEPOSIT IN COURT—UNNECESSARY CANALS—DECREE—DAMAGES.**

1. Const. art. 2, § 15, providing that private property shall not be taken for public or private use without compensation, "and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed," etc., does not prohibit the court from making an order permitting the petitioner in condemnation proceedings to pay into court such amount as the court or judge may deem sufficient to compensate the owner, and enter on the land pending such proceedings; especially since Gen. Laws 1883, c. 21, § 243, clearly contemplates that such order may be made. *McClain v. People*, 11 Pac. Rep. 85, 9 Colo. 190, followed.

2. Gen. St. 1883, §§ 1716-1718, provide that no improved or occupied land shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through such property to land adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch. *Held*, that such statute does not apply to an irrigating canal company, which is seeking to prevent the taking of land for, and the construction of, another irrigating canal by a different company through the same land occupied by the former company, but to the owner of such land only.

3. The fact that a contemplated irrigating canal runs parallel for many miles with a like canal, already constructed, is no reason for prohibiting the former from taking, by right of eminent domain, the necessary land for its use.

4. Gen. Laws 1883, c. 21, § 242, provides that the decree in condemnation proceedings

shall describe the lands, and state the payment or deposit of compensation, a certified copy of which shall be recorded in like manner and with like effect as a deed; and on the entry of such rule "petitioner shall become seised in fee, except as hereinafter provided, of all such lands," and may take possession of the same for the purposes specified in the petition. *Held*, that a decree which stated that the lands described "are hereby vested in" petitioner for the uses and purposes specified in the petition, and that for such purposes petitioner "be seised of said lands," and is authorized to take possession of and use the same for the "purposes specified herein and in said petition," is not objectionable on the ground that it gives petitioner too great an interest in the land taken.

5. Where, in such case, there is evidence to support the decree, it will not be disturbed on the ground that the damages are inadequate.

Appeal from district court, Rio Grande county.

Action by the Kenilworth Canal Company against the San Luis Land, Canal & Improvement Company for the condemnation of the right of way for a canal through a certain tract of land. From a decree condemning the land and awarding damages to defendant the latter appeals. *Affirmed*.

Holbrook & Brown, F. B. Webster, C. M. Campbell, and F. C. Goudy, for appellant. George Estes, C. A. Johnson, and McIntire & McDonald, for appellee.

RICHMOND, P. J. This action was commenced in the district court of Rio Grande county by the Kenilworth Canal Company against the San Luis Land, Canal & Improvement Company for the condemnation of the right of way for a canal through a certain tract of land containing about 56 acres, situate on the Rio Grande river. The petition was presented to the judge of the court in vacation, and by him set down for hearing at the succeeding term of the court. Thereafter the petitioner applied to the court for permission to enter upon the land and proceed with the construction of its canal, which permission was granted upon a deposit being made of \$250. Motion was made by the defendant company to vacate this order, which was denied. Answer was subsequently filed, and motion interposed for judgment upon the pleadings, by the defendant company. This also was overruled. The commissioners were duly appointed to review the premises, evidence was taken, and resulted in a judgment favorable to the petitioner. The total damages were fixed at \$202.50.

Several errors are assigned why this judgment should be reversed, and we will take them up in the order of their presentation by appellant; but before doing so we will say that, so far as the proceedings are concerned, they appear to have been strictly in conformity with the provisions of the act entitled "Eminent Domain."

By section 238, c. 21, Gen. Laws 1883, it is provided "that in all cases where the right to take private property for public or private use without the owner's consent, or the right to construct or maintain any railroad, public road, toll road, ditch, bridge, ferry, telegraph, flume, or other public or private work or improvement, or which may damage property not actu-

ally taken, has been heretofore or shall hereafter be conferred by general law or special charter upon any corporate or municipal authority, public body, officer, or agent, person or persons, commissioner, or corporation, and the compensation to be paid for or in respect of the property sought to be appropriated or damaged for the purposes above mentioned cannot be agreed upon by the parties interested, \* \* \* it shall be lawful for the party authorized to take or damage the property so required, or to construct, operate, and maintain any railroad, public road, toll road, ditch, bridge, ferry, telegraph, flume, or other public or private work or improvement, to apply to the judge of the district or county court, either in term time or vacation, where the said property, or any part thereof, is situate, by filing with the clerk a petition setting forth by reference his or their authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise, as appearing of record, if known, or, if not known, stating that fact, and praying such judge to cause the compensation to be paid to the owner to be assessed." Under the provisions of this section and the succeeding sections of the act these proceedings were instituted, and by the petition it is recited that both the petitioner and the defendant company are corporations duly existing under and by virtue of the laws of the state of Colorado; and we have no doubt but that the section contemplates the institution of such proceedings by one corporation against another, as well as by a corporation of a public character against the property of a private individual.

The first assignment of error is based upon the refusal of the judge to set aside and vacate the order granting permission to the plaintiff company to enter upon the land before final hearing, and in support of this contention our attention is called to article 2 of section 15 of the constitution, which provides "that private property shall not be taken or damaged for public or private use without just compensation. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein invested." We cannot see how counsel for appellant can seriously insist that this provision of the constitution prohibits the judge of the court, or the court, from making an order permitting the petitioner to enter upon the land pending the proceedings upon the petitioner's depositing what in the judgment of the judge or court is a sufficient sum to compensate the party for damages that may result to him; especially so in view of the provisions of section 243 of the said act, which clearly contemplates that such order may be entered, and especially so when it is known that this practice has most

universally obtained in proceedings instituted under the provisions of this act. The right to do so has been recognized by the district courts and by the supreme court of this state. In *McClain v. People*, 9 Colo. 190, 11 Pac. Rep. 85, this question has been determined; therefore it is useless for us to further consider it.

The second assignment of error is that the defendant should have been allowed to show that its canal was built for the purpose of irrigating, and of sufficient capacity to irrigate, all the lands proposed to be irrigated by the then proposed canal; and in support of this position our attention is called to sections 1716-1718, Gen. St. Colo. 1883, wherein it is provided "that no tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches, constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practically be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch." We are wholly unable to understand how it can be urged that the defendant company has any right under the provisions of these sections. They clearly and in unmistakable language apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act. It is also contended that because the contemplated canal of the petitioner was parallel for many miles with the canal of the defendant company, and therefore greatly damaged it, the right to these proceedings did not exist. This contention is without support in law or reason. No authorities are presented which intimate that the construction of one canal is sufficient reason to prohibit the construction of another because it runs parallel with the first. If that rule would obtain, it would result in the creation and continuation of a monopoly, against which the constitution of our state and the statutes are directly aimed; and even if there were no provisions of the constitution and statute, no court has yet held or would hold that such contention should prevail. "While the legislature may not repeal or materially modify the charter of a corporation unless the power is reserved, the property of the corporation is subject to condemnation for public uses. The taking of the property of a corporation is not an alteration, modification, or repeal of its charter. It is the enforced purchase of its property. The banking house of a bank, the bridge of a bridge company, the grounds of an academy, may be taken, as well as the property of an individual. The property is held subject to the necessities of the public. The franchise and the property, when inseparable, can be taken together, compensation being made for both. The property of a corporation, not actually in use or absolutely necessary for the enjoyment of the franchise, or which is

only convenient, and not such as the corporation might condemn, and which they had acquired by purchase, is subject to condemnation for other purposes, as the property of an individual." *Mills*, Em. Dom. § 41; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174; *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt. 590; *Trustees v. Salmond*, 11 Me. 109; *Railroad Co. v. Daugherty*, 40 Ind. 33. These authorities, we think, dispose of this alleged error.

It is further complained that the decree of the court is erroneous in this: that the court had no right or authority to vest in the plaintiff the seisin of the lands of defendant sought to be condemned, nor any greater interest than a license therein. We have carefully read the decree of the court, and we do not understand that it goes so far as to confer upon the petitioner any greater right than that contemplated by the eminent domain act. After describing the lands sought, the decree says that the same are hereby vested in the said Kenilworth Canal Company for the uses and purposes set forth and specified in the plaintiff's petition, viz. "that of building, having, and maintaining thereon an irrigating ditch or canal for the purposes of supplying and carrying water from said Rio Grande del Norte river to lands lying below the same, and that for said purposes said the Kenilworth Canal be seised of said lands, and is authorized to take and have possession thereof, and hold and use the same for purposes specified herein and in said petition." Under this decree there can be no contention that the court has gone beyond the authority expressly conferred upon it by the statute; that it has given any greater right than was absolutely necessary for the purposes for which the land was sought to be condemned. In fact, we think the court has followed the spirit and expressed letter of the statute wherein it is provided that, after due proof, the verdict of the jury, and the deposit of the compensation in court, or with the clerk of the court, the court "shall make and cause to be entered in its minutes a rule describing such lands, real estate, or claims in manner aforesaid, such ascertainment of compensation, with the mode of making it, and each payment or deposit of the compensation aforesaid; a certified copy of which shall be recorded and indexed in the recorder's office of the proper county, in like manner and with like effect as if it were a deed of conveyance from the said owners and parties interested to the proper parties. Upon the entry of such rule the said petitioner shall become seised in fee, except as hereinafter provided, of all such lands, real estate, or claims described in said rule, as required to be taken as aforesaid, and may take possession of and hold and use the same for the purposes specified in said petition." Section 242, c. 21, Gen. Laws 1893.

It is also insisted that the damages are inadequate. To this we think it sufficient to say that there is ample testimony to warrant the decree. The report of the commissioner and the testimony taken before the court satisfy us that the amount was amply sufficient to compensate the



defendant company for the land taken. The proceedings were regular; the right of the petitioner to construct the canal parallel with that of the defendant company cannot be questioned. The judgment of the court is in conformity with the provisions of the statute, and the damages allowed ample compensation for the land taken. We find no error in the proceedings which would warrant a reversal of the judgment.

The judgment must be affirmed.

(98 Cal. 134)

FLAGG v. PUTERBAUGH, Judge. (No. 19,270.)

(Supreme Court of California. April 14, 1893.)

BILL OF EXCEPTIONS—TIME OF PRESENTATION—MANDAMUS TO COMPEL SETTLEMENT.

1. Code Civil Proc. § 649, allowing a party to present a bill of exceptions for settlement at the time of the ruling in case of appealable orders made before final judgment, is merely permissive, and not exclusive; and such a bill should be settled and allowed if presented within a reasonable time, as in case of final orders, and the analogy furnished by sections 650 and 651 should determine what is a reasonable time.

2. Mandamus to compel settlement and allowance of a bill of exceptions which petitioner was entitled to have settled and allowed will be denied where the time for appealing has expired, and no appeal has been taken.

In bank.

Original application by O. S. Flagg for a writ of mandamus to compel George Puterbaugh, judge of the superior court, to settle and certify a bill of exceptions. Respondent demurred to the petition. Demurrer sustained.

O. J. Flagg and Thos. J. Capp, for petitioner. Welborn, Stephens & Welborn, for respondent.

BEATTY, C. J. This is a proceeding by mandamus to compel the respondent to settle and certify a bill of exceptions to an order dissolving a writ of attachment. Respondent demurs generally to the petition, for want of facts. From the petition it appears that the order dissolving the attachment was made October 4, 1892. Afterwards, on the same day, the cause in which the attachment had been issued was tried by the court, and taken under advisement. On October 7th, judgment was directed for the plaintiff, and, on October 13th, findings were filed, and judgment entered. On October 8th, petitioner (plaintiff in the attachment suit) served a draught of his proposed bill of exceptions on the defendants' attorneys, and on the 19th gave notice that he would on the 24th of October present the bill to the respondent for settlement. On the 24th the bill was accordingly presented, but the respondent took no action in the matter until November 4th, when he granted leave to the petitioner to amend said bill, giving him until November 9th to file and serve his amended bill, and allowing the defendants 10 days thereafter to interpose objections, or propose additional amendments. On November 7th the petitioner served on defendants, and presented to re-

spondent, his amended bill. The defendants objected to the settlement of the bill, and on January 13, 1893, the respondent indorsed thereon the following order: "The proposed bill of exceptions, not being presented in time, is disallowed, and the court hereby refuses to allow or settle the same." This action, or rather this refusal to act, on the part of the respondent is attempted to be justified on several grounds. In the first place, a distinction is claimed to exist between this case and *Tregambo v. Mill & Mining Co.*, 57 Cal. 504, because the order excepted to here is an appealable order, while in that case it was a ruling which could only be reviewed on appeal from the final judgment; and it is contended that although in the case cited the procedure prescribed by section 650, Code Civil Proc., may have been applicable, this case is wholly governed by section 649. We see no reason, arising out of the difference of the cases, for applying a different rule. The decision in *Tregambo v. Mill & Mining Co.* was a liberal ruling in favor of justice, and ought to be followed in all cases where it can be applied without violating the express terms of the statute. A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction. Taking this view of the matter, and assuming that the case is governed by section 649, that section is, in terms, permissive, and the privilege granted the party, of presenting his bill of exceptions for settlement at the time of the ruling, is not necessarily exclusive. It would frequently be extremely inconvenient to make up a bill of exceptions instantanously, and there is no reason why a court should hold itself rigidly bound to such a practice in the case of appealable orders made before final judgment, any more than in the case of similar orders made after final judgment, which are provided for in section 651. In short, we think that in a case falling under section 649 a bill of exceptions ought to be settled and allowed if presented within a reasonable time after the order excepted to, and that the analogy furnished by sections 650 and 651 should determine what is a reasonable time. The petitioner here followed the practice prescribed by those sections, and was entitled to have his bill of exceptions allowed and certified. It is only in consequence of our twenty-ninth rule that a bill of exceptions to this order is necessary. The rule does not, as perhaps it ought, prescribe any practice for the settlement of the bills of exceptions which it requires. We take the occasion, therefore, to say that, in order to comply with that rule, parties appealing from orders may follow the same practice prescribed by sections 650, 651, Code Civil Proc.

Another objection to the right of petitioner to the relief sought is that his petition shows that his original proposed bill was not refused settlement, and that the bill which was refused was filed too late.

We think it sufficiently appears that the court refused to settle, not only the bill proposed November 7th, but any bill. The first one, at least, was in time, and entitled the petitioner to a bill truly setting forth the proceedings to be reviewed. But, considering the extension of time granted by the court, we think the second draft proposed was in time, and, so far as it was true, ought to have been allowed.

The last objection is that more than 6 months have elapsed since the order dissolving the attachment, that the time for appealing was only 60 days, and that it does not appear that any appeal has ever been taken. This objection to the sufficiency of the petition seems to be well founded. It would be a vain thing to settle a bill of exceptions, if there is no appeal, and the court would not order it. For this reason, only, the demurrer to the petition must be sustained. Demurrer sustained, with leave to petitioner to file an amended petition within 10 days, if he is so advised.

We concur: DE HAVEN, J.; FITZGERALD, J.; HARRISON, J.; McFARLAND, J.

(98 Cal. 133)

PEOPLE v. WALTERS. (No. 20,094.)  
(Supreme Court of California. April 14, 1893.)

HOMICIDE—EVIDENCE—PROSECUTING ATTORNEY.

1. In a murder case, where the evidence shows that a feud existed between the families of defendant and deceased, evidence that, immediately after defendant shot deceased, he fired the other barrel of his gun, and wounded deceased's mother, who was present, is admissible to show motive.

2. It is also proper to admit the testimony of surgeons as to the number and position of the wounds on her body, as it tends to show that defendant shot at her with deadly aim.

3. For the same reason it is proper to prove that shortly after the shooting she was covered with blood.

4. Pen. Code, § 1130, providing for supplying the place of the district attorney by appointment of the court when he cannot prosecute, is not exclusive, and in such case an attorney may be employed to prosecute by the board of supervisors; and there need be no formal order of court, as required by said section.

In bank. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Elmer Walters was convicted of murder in the second degree. The court granted a new trial, and the people appeal. Reversed.

Atty. Gen. Hart and Harris & Gregg, for the People. R. E. Bledsoe, E. W. Freeman, and L. T. Farr, for respondent.

BEATTY, C. J. The defendant was charged with the murder of one Ira Wall, and was convicted of murder in the second degree. On the trial in the superior court, evidence was admitted, over the defendant's objection, to the effect that at the time of the homicide Ira Wall and his mother were together, and, immediately after shooting and killing Ira Wall with

one barrel of his shotgun, the defendant fired with the other barrel upon Mrs. Wall, and wounded her. Before judgment the defendant moved for a new trial upon the following grounds: "(1) That the court has misdirected the jury in matters of law, and has erred in the decisions of questions of law arising during the course of the trial; (2) that the verdict is contrary to the law; (3) that said verdict is contrary to the evidence." After argument the court made and entered the following order: "Defendant's motion for a new trial, heretofore submitted, is granted upon the ground that the court erred in admitting evidence regarding the shooting of Mrs. Wall, and on that ground only, and denied as to the other grounds of said motion, and the prosecution excepts." From this order the people appeal, contending that the several rulings of the court admitting evidence relating to the shooting of Mrs. Wall were free from error, and consequently that the order was wholly unwarranted. The defendant contends that the order granting a new trial is not only sustained by the ground upon which the action of the court was expressly based, but that it should have been granted upon other grounds.

In order to a proper consideration of the case, a brief statement of the leading facts is necessary: There was a controversy of some years standing between the Wall and the Walters families over the right to divert and use the waters of a small stream for the purpose of irrigating their respective lands. The Walls seem to have been the first appropriators, but the extent of their appropriation and use seems to have been disputed by the defendant and his two brothers, and there were mutual interferences in the way of turning the water in and out of the irrigating ditches of the parties. On one occasion, when several of the Walls—brothers and sisters—were present, a brother of the defendant took a gun from the hands of Ira Wall's sister, and in attempting to break it caused it to be accidentally discharged, inflicting upon himself a mortal wound. Subsequently a suit was commenced by the Walls against the defendant, in which a preliminary injunction was issued restraining him from interfering with the water; but this order was so modified as to permit the parties, pending the litigation, to use the water alternately four days at a time. Afterwards the action was tried, and decided in favor of the Walls. Pending his motion for a new trial the defendant claimed the right to use the water alternately with the Walls four days at a time, according to the modification of the preliminary injunction, and having turned the water from the Walls' ditch into his own, armed himself with a pistol and shotgun, and took his station at the point of diversion, apparently for the purpose of preventing any interference on the part of the Walls. During the night of August 10, 1892, he slept on the ground a few feet from the ditch, and was still in bed between 5 and 6 o'clock on the morning of the 11th, when Ira Wall, his mother, and a boy of sixteen, named Carver Peck, came down the canon along the

road from the Wall residence to the town of Elsinore. Mrs. Wall was in a buggy on her way to Elsinore. Ira Wall and Peck were on foot, and each had a shovel. None of them were armed. Mrs. Wall stopped her buggy about 30 feet short of the point at which the Walters ditch crossed the road. Ira Wall and Peck went to the ditch, and commenced placing some stones in it where it crossed the road, for the purpose, as they claim, of making it passable for the buggy. At this moment defendant sat up in his bed, and drawing a double-barreled gun from under the cover, with the remark, "You know what I am here for," fired at Ira Wall, and immediately swung his gun around in the direction of Mrs. Wall, where she sat in her buggy, and discharged the second barrel. About 50 shot entered the body of Ira Wall under his left shoulder blade, killing him instantly. Thirteen shot took effect in the breast of Mrs. Wall, but did not inflict a fatal wound. It is for the supposed error in the admission of evidence of this shooting of Mrs. Wall that the superior court has ordered a new trial.

The superior court did not err in admitting this evidence. It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged; but, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. These remarks are applicable to any case in which two persons are murdered or assaulted at the same time, and as part of the same transaction, and the present case affords an excellent illustration of the necessity of the exception to the general rule. On the occasion of this homicide, Mrs. Wall and her son were the representatives of one side of a long-standing controversy, which had resulted in a bitter family feud, and the shooting of the mother immediately after the shooting of the son, by a representative of the other side, was convincing evidence of the motive of the act. It showed the malice which is an essential ingredient of the crime charged, and tended strongly to disprove the claim of self-defense, which the people could anticipate if they chose to do so. Nor can the defendant complain of the rulings of the court admitting the evidence of surgeons as to the number and position of the wounds on the body of Mrs. Wall. This evidence tended to prove that he shot at her with deadly aim; and the same may be said of the evidence of another witness, who stated that when he saw Mrs. Wall at the scene of the shooting, shortly after it occurred, she was covered with blood from head to foot. The authorities cited in appellant's brief abundantly sustain the foregoing views. We do not think it necessary to refer specially to any case except *People v. Cunningham*, 66 Cal. 671, 4 Pac. Rep. 1144, and 6 Pac. Rep. 700, 846. The ground upon which the new trial was granted, therefore, does not

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sustain it, and it only remains to inquire whether either of the other grounds relied on by the defendant entitled him to a new trial.

Two points, only, are urged under this head: First, that it was error to allow attorneys to conduct the prosecution in place of the district attorney, who had not been regularly and formally authorized so to do by an order entered in the minutes of the court; second, that the court erred in refusing to allow one of the instructions requested by the defendant. The facts upon which the first point arises are as follows: The district attorney of the county had been attorney for the defendant in the litigation about the water right, and for that reason felt that he could not properly prosecute the charge of murder. At his suggestion the board of supervisors employed other counsel to conduct the prosecution, which they did without objection, but without any formal order of court, made in pursuance of section 1130 of the Penal Code. There was no error in this. Section 1130, Pen. Code, makes provision for supplying the place of the district attorney when for any reason he cannot conduct the prosecution, but is not exclusive. If his place is otherwise supplied by counsel who are guilty of no misconduct prejudicial to the defendant, he has no ground of complaint. As to the second point, it is sufficient to say that the instruction refused was so broad in its terms as to be misleading, if not positively erroneous, and so far as it was correct it was given, with the necessary qualifications, in another instruction allowed by the court. There was no ground for the order granting a new trial, and the order is therefore reversed, with directions to the trial court to enter the proper judgment upon the verdict.

We concur: HARRISON, J.; DE HAVEN, J.; McFARLAND, J.

(98 Cal. 103)

In re SANBORN'S ESTATE. (No. 18,112.)  
(Supreme Court of California. April 3, 1893.)  
WILL—WHO MAY CONTEST—PUBLIC ADMINISTRATOR.

Under Code Civil Proc. §§ 1307-1312, providing that a will can be contested on "written grounds of opposition" filed by a "person interested," a public administrator cannot contest the probate of a will, since the person contesting must be interested in the estate, and not merely in the fees of administration.

Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Petition by V. M. Peyton for the probate of the will of Israel Sanborn, deceased. J. R. Clayes, public administrator, also filed a petition for letters of administration of the estate of Sanborn. From orders admitting the will to probate, and denying the petition of Clayes, the latter appeals. Affirmed.

Nicol & Orr and E. I. Jones, for appellant. J. H. & J. E. Budd, for respondent.

McFARLAND, J. Israel Sanborn died in San Joaquin county on January 27, 1892, and on February 3, 1892, V. M. Peyton filed in the superior court of said county a petition in which it was averred that said Sanborn left a will dated April 17, 1872, by which petitioner and one Severy were named as executors. It was further stated that Severy was incompetent, and petitioner prayed that the will be admitted to probate, and letters testamentary be issued to said Peyton. Due notice was given to the heirs, and no one interested in the estate appeared to contest the probate of said will. But on February 8, 1892, J. R. Clayes, who was public administrator of said county, filed in said court a petition for letters of administration of the estate of said Sanborn, in which he averred, among other things, that he "has no knowledge whether said will was ever signed or attested by said Sanborn, or any witnesses;" that it "does not show upon its face that the same is any will or testament of said deceased;" and that he "is advised and believes that the attestation, witnessing, or publication of said paper as a will cannot be shown;" and, further, that no other will has been found, and that "to the best knowledge, information, and belief of said petitioner, said deceased died intestate." The two petitions were heard together; and the court made an order admitting the will to probate, and granting letters to the administrator, Peyton, and also another order denying the petition of the public administrator, Clayes. From these orders, Clayes appeals.

At the trial, Clayes offered evidence tending to show that Sanborn had made a later will, which could not be found. To this evidence, respondent objected, and it was admitted, "with the privilege to move to strike it out;" and afterwards the court granted a motion of respondent to strike it out, which ruling is assigned by appellant as error. This evidence was properly stricken out; and, if the court committed any error, it was in listening at all to the petition of the public administrator before it had passed upon the probate of the will. The probate of a will can be contested only upon "written grounds of opposition" filed by a "person interested,"—that is, interested in the estate, and not in the mere fees of an administration thereof. Sections 1307-1312, Code Civil Proc. A public administrator has no interest in an estate, or in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go. In *Estate of Parsons*, 65 Cal. 240, 3 Pac. Rep. 817, one J. W. Parsons had been appointed administrator, and afterwards a document was offered for probate as the will of the deceased. Parsons, as administrator, contested the probate, and afterwards charged the expenses of the contest in his account; but this court said: "This item is not a charge against the estate. It was the affair of the heirs, as such, to contest, if they wished, the probate of the document; not of the administrator." See, also, *Roach v. Coffey*, 73 Cal. 281, 14 Pac. Rep. 840, and cases there cited. If a public ad-

ministrator could legally assume the character of a standing contestant of wills, notwithstanding the wishes of heirs and devisees, he would certainly enlarge the sphere of his activities; but the limitations of the statute do not allow such inflation. Orders affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(98 Cal. 51)

SWAMP-LAND DIST. NO. 150 v. SILVA et al. (No. 18,058.)

(Supreme Court of California. March 31, 1893.)

DRAINAGE DISTRICTS—ORGANIZATION—ASSESSMENTS—CONSTITUTIONAL LAW—FORFEITURE OF FRANCHISE.

1. Where, under Act March 30, 1874, (St. 1873-74,) providing that, immediately after the passage of the act, owners of land in swamp-land district No. 150 may elect trustees, and proceed in the work of reclamation, as provided in the Code, the landowners organized the district by electing trustees, and making and recording by-laws, the organization was complete; and an attack on the validity of such organization could not be considered in an action by such district to recover assessments against land of persons lying within such district.

2. Such act is constitutional, since, under Const. art. 4, § 31, providing that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, the legislature could create a reclamation district by special act.

3. Pol. Code, § 3459, as amended by Act March 30, 1874, provides that if the original assessment is insufficient for the reclamation of the district lands, or if further assessments are necessary to maintain the reclamation work, the trustees must present to the board of supervisors by which the district was formed a statement of the work "done" or "to be done." Held that, where an assessment was levied for work "to be done," it was not rendered invalid because the trustees, in their statement to the board of supervisors, did not specify the work already done.

4. Nor was such assessment invalid because it included incidental expenses, and the sum of \$33,400 for erecting and maintaining a pump.

5. The fact that the officers of, and owners of land in, the district, failed to act as a corporation, does not destroy the corporate existence of the land district, since no acts or misconduct of the agents or officers of a corporation can operate to forfeit its charter.

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by swamp-land district No. 150 against A. J. Silva and Mary Silva. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Johnson, Johnson & Johnson, for appellants. Add. C. Hinkson and John W. Armstrong, for respondent.

PATERSON, J. Plaintiff brought this action to recover from the defendants the sum of \$953.11, the amount of an assessment levied against the land of the defendants lying within reclamation district No. 150. The act of March 30, 1874, (St. 1873-74, p. 867,) under which the plaintiff was organized as a reclamation district, provides that immediately after the passage of the act the "owners of land in swamp-land district No. 150 consisting of

what is known as 'Merrit Island,' in Yolo county, may proceed to elect trustees, and make and record by-laws, \* \* \* and they shall thereafter proceed in the work of reclamation, as provided in said Code, with the modifications herein contained." Under this act the landowners organized the district by electing trustees, and making and recording by-laws. A notice was given on the 7th day of April, 1874, that a meeting for the purposes stated would be held on the 18th day of April, and at the time and place mentioned in the notice all the landowners in the district met, and elected trustees, and adopted by-laws. This is all the act required, so far as the organization of the district is concerned, and the points made by the appellants, seeking to impeach the validity of the organization of the district, cannot be considered. A reclamation district is a public corporation for municipal purposes, and the creation thereof may be shown by acts recognizing its existence. *People v. Reclamation Dist.*, 53 Cal. 346. The validity of the organization itself cannot be collaterally attacked in an action to recover an assessment levied upon land by a de facto district. *Reclamation Dist. v. Gray*, 95 Cal. 601, 30 Pac. Rep. 779.

It is claimed by appellants that the act above referred to was clearly unconstitutional, and gave the plaintiff no power to act, but no grounds are stated upon which this claim is based. Section 31, art. 4, of the old constitution, provided that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." Under this provision the legislature had the power to create a reclamation district by special act.

It is claimed by appellants that the assessment is invalid because the trustees, in their statement to the board of supervisors, did not specify the work which had already been done. Section 3459 of the Political Code formerly authorized an additional assessment only for work necessary to complete the reclamation. It did not authorize an assessment to be made for work already done. By an act approved March 30, 1874,<sup>1</sup> this section was amended by inserting the words "done or" before the words "to be done." Unless the assessment is to be for work already done, in whole or in part, there is no necessity for a statement as to what work has been done. The assessment in this case was levied for work to be done under section 3459, *supra*. *Hagar v. Board*, 51 Cal. 477.

The contention that the assessment is invalid because it includes incidental expenses, and the sum of \$33,400 for the purpose of erecting a pump and maintaining the same, cannot be sustained. *Reclamation Dist. v. Hagar*, 66 Cal. 56, 4 Pac. Rep. 945.

<sup>1</sup>Pol. Code, § 3459, as amended by Act March 30, 1874, provides that if the original assessment is insufficient for the reclamation of the district lands, or if further assessments are necessary to maintain the reclamation works, the trustees must present to the board of supervisors by which the district was formed a statement of the work done or to be done.

It is claimed by the appellant that the district "lost its corporate existence by reason of the nonuser of its functions, and by reason of the total failure on the part of its officers and land owners to act as a corporation." But there is no such thing in this country as forfeiture of a charter of a municipal corporation through the acts or misconduct of its agents or officers. Any neglect to use the powers in which the public or individuals have an interest may be corrected by the courts. As such corporations can exist only by legislative sanction, so they can only be deprived of their existence by act of the legislature, or a judicial sentence based upon legislative provision and sufficient facts.

The court did not err in overruling the defendants' objection to the introduction in evidence of the order of the board of supervisors of Yolo county appointing commissioners. The act under which the plaintiff was organized provides that "all assessments for reclamation purposes in said district shall be made as provided in the Political Code." The act itself shows that the district is entirely within the boundaries of Yolo county. It follows, therefore, that, although the board of supervisors of that county did not form the district, yet such board is the proper tribunal to which report should be made. *Reclamation Dist. v. Goldman*, 65 Cal. 643, 4 Pac. Rep. 676.

Other errors are alleged, but we find no merit in any of the points made by the appellants. The judgment and order are therefore affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

SWAMP-LAND DIST. NO. 150 v. BUMP. SAME v. CORNISH, (two cases.) SAME v. WINTER. (Nos. 18,059-18,062.)

(Supreme Court of California. March 31, 1893.)

Department 1. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Four actions by swamp-land district No. 150 against Bump and others to recover the amount of assessments levied against defendant's land. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Johnson, Johnson & Johnson, for appellants. Add. C. Hinkson and John W. Armstrong, for respondent.

PER CURIAM. Upon the authority of *Swamp Land Dist. v. Silva*, (No. 18,058, this day decided,) 53 Pac. Rep. 866, the judgment and order are affirmed.

(98 Cal. 55)

MARSHALL v. TAYLOR. (No. 14,674.) (Supreme Court of California. March 31, 1893.)

SEDUCTION—EVIDENCE—DAMAGES.

1. In an action for seduction it appeared that plaintiff, 16 years of age, was working as a waitress in a hotel, and sleeping alone in a cottage near by; that she was on friendly terms with defendant, who was her employer, and a man of wealth and years; that defendant called on her at the cottage, after dark, and, after conversing on ordinary topics, offered her a glass of wine, which she drank,

and was soon scarcely able to stand without assistance; that defendant placed his arm around her, expressed his affection for her, caressed her, promised her future friendship and assistance, and finally assisted her to a bed, where he had intercourse with her. Held, that the evidence establishes a cause of seduction, whether plaintiff was or was not conscious at the time of intercourse.

2. Where, by reason of the intercourse, plaintiff became pregnant, and had a child, a verdict of \$25,000 was not excessive.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Jessie N. Marshall against Jacob S. Taylor for seduction. There was judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Sephens, for appellant. W. T. Williams and W. W. Holcomb, for respondent.

GAROUTTE, J. This was an action for damages, plaintiff alleging by her complaint that the defendant with force and violence made an indecent assault upon her, and then and there wickedly seduced, debauched, and carnally knew her, when and whereby she became pregnant with child. A trial resulted in a verdict for plaintiff in the sum of \$25,000, and this appeal is prosecuted from the judgment and order denying a motion for a new trial.

It is developed by the evidence that the defendant is a man of mature years, of large property interests, and at the time the alleged cause of action arose was residing with his wife and daughters at a seaside resort in San Diego county, and, among his various business callings, was there engaged in keeping a hotel. The plaintiff was an employee of the defendant, engaged as a waitress at the hotel. She was of the age of 16 years and 10 months, had seen considerable of the world, having resided with her mother in various localities, and, as indicated by her evidence and correspondence introduced at the trial, may be considered a bright and intelligent girl for her years. The proof of the seduction rests alone upon the testimony of the plaintiff, and her evidence is squarely and entirely contradicted in every essential particular by the testimony of the defendant; he denying ever having had any sexual intercourse with her at any time or under any circumstances. Indeed, at every step of the trial perjury was there in all its hideousness; but all those matters came before the jury, and, as evidenced by their verdict, her statements were believed.

It is now insisted that, conceding the facts to be as detailed by the plaintiff, no case of seduction has been made out by her evidence. Her testimony upon cross-examination as to the circumstances of the act is stronger in her behalf than her testimony in chief, and may be summarized as follows: That in the early part of October, 1888, on a Saturday evening, either the 6th or 13th thereof, about 8 o'clock, while she was in her room at a cottage alone, a short distance from the hotel, Taylor visited her, having called upon her once before, and brought her

some books. He conversed with her for a while, and then asked her if she ever drank any wine. He then handed her a glass of wine, which she drank. He poured out some for himself, and tasted it, but said it was too sweet, he did not like it. She continues: "In about five minutes from the time I took the wine I began feeling sick. At first I began to feel sick at my stomach. My head began to go around. I had sensations of tingling all over my body. I never felt that way before. I had difficulty in talking. My voice was husky. That lasted a moment or two. I got up and said, 'I am quite sick, Mr. Taylor.' I got up, but could not stand; my limbs felt so heavy and numb, I could not step. As I stood up, Mr. Taylor stood up, and I rested by hand on the front of the table. As he got up he stepped towards me. I was glad to have support, as I could scarcely stand. I didn't repulse him, because I couldn't stand up. There was in my ears a sound like the rushing of waters. My voice sounded to me very distinct and clear. His voice sounded the same. He put his arms around me and assisted me to the bed. When he put his arms around me, he bent and kissed me, and assisted me to the bed, and said that he loved me, and, 'You poor little girl, I am sorry you are sick.' He said that just before or just after he kissed me, I don't remember which. He half carried me to the bed. It was a very short distance. I didn't lay down at once. I sat on the edge of the bed. He sat beside me, with one arm still around me. I can scarcely recollect anything that happened distinctly. I asked him to get me a drink of water. As he got up I fell backwards on the bed; couldn't sit up. He got me a drink of water. He had his arm around my waist, and kissed me again. I asked him to go away, and he said he did not want to leave me if I was going to be ill. He kissed me again, and told me that he loved me. He told me that he loved me, and put his hand in my dress, and asked me if I loved him; and then he asked me if I would care if he stayed with me. I made no reply. I could scarcely speak. I don't remember distinctly what occurred after that. I don't know what happened at all until I knew he hurt me. I had not gone to bed. I know it was wine Mr. Taylor gave me, because I had seen it served to the guests at the hotel." At another stage of the proceedings, in referring to this event, she testified as follows: "Mr. Taylor assured me of his friendship, and promised me that he would also be a friend to me; that he had plenty of means, and I would never want; and he gave me his word that he would never see me in any trouble, and I then yielded. He said these things to me while I was lying in bed. I had a child which was born on August 22, 1889. The defendant was the father of that child. Until I met Mr. Taylor I was a chaste and virtuous girl."

In actions of the character under present investigation, where the plaintiff is a young girl, poor and friendless, and the defendant a man of mature years, married

and wealthy, it may well be said that the contest is an unequal one; but her youth and poverty are often weapons of victory, for frequently they form a citadel of strength in the minds of jurors, which is impregnable to successful attack by the opposition. Thus in her weakness lies her strength, while a defendant's wealth, his family, and his gray hairs are elements which, when placed before the jury, often tend only to his own destruction. These things are made plain by a perusal of the history of legal jurisprudence upon the subject, and this unequal struggle between the parties so appearing to juries has frequently caused verdicts to be rendered opposed both to the law and the evidence; and the extreme danger which arises in this class of cases that a man may be despoiled of his good name and his property demands of courts a careful consideration of the evidence which forms the basis of such verdicts. For these reasons, and from the additional facts that the case as disclosed by the record is a most peculiar one, and that the verdict rendered largely exceeds in amount any verdict returned by a jury in an action of seduction in any of the courts of this country to which our attention has been directed, we have given the record a most careful examination. As before intimated, the evidence is squarely conflicting. The plaintiff says the defendant seduced her; the defendant says he never had sexual intercourse with her at any time. The plaintiff says she was a chaste and virtuous girl; the defendant's witnesses say, in effect, she stood but little above the plane of the common strumpet. But the jury were fairly and fully instructed by the court as to the law of the case, including the rules of law applicable to the weight of evidence, and the credibility of witnesses; and upon this conflicting evidence, taken in connection with the law, they found for the plaintiff, and, under an established practice, we have not the right to disturb those findings of fact, even if we were so inclined.

Does the plaintiff's evidence establish a case of seduction? And that brings us to the inquiry, what is the meaning of the word "seduction," as used in the Code of Civil Procedure, for it is there provided, (section 374:) "An unmarried female may prosecute as plaintiff in an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor." Plaintiff's evidence may be viewed from two distinct standpoints. Viewed from one standpoint it indicates that she had lost consciousness from the effect of the wine, at the time the act was committed. If this be so, the defendant was guilty of rape; and while it is held in those states where seduction is a criminal offense that proof of a rape will defeat a prosecution for seduction, (*State v. Kingsley*, 39 Iowa, 439; *State v. Lewis*, 48 Iowa, 578; *Croghan v. State*, 22 Wis. 444,) yet no case is found in the books where a party has failed to recover in damages for seduction when the evidence at the trial disclosed the defendant guilty of the more heinous offense of rape. Such a showing but aggravates the injury, and

furnishes ample ground for exemplary damages. Perhaps it was from this standpoint of vision that the jurors viewed this case, and for that reason assessed the damages at such a large amount. It does not lie in the mouth of the defendant to say: "I am not liable to pay any damages in this action, because the evidence discloses I did not seduce the plaintiff, but committed the atrocious crime of rape." The complaint in this case is broad in its allegations, and, except as to the use of force, the elements forming the measure of damages in a case either of seduction or rape are very similar. Where a parent sues for the seduction of his daughter, and consequent loss of service, and it appears that the intercourse was accomplished by force, such a showing will not defeat the action, but will aggravate the injury. *Furman v. Applegate*, 23 N. J. Law, 23; *Kennedy v. Shea*, 110 Mass. 147; *White v. Murtland*, 71 Ill. 250. While the recovery of the parent is based upon a different principle from that involved where the female is the complainant, yet we see no bad effect to follow an application of the same rule in her case. Certainly a court will not be astute in drawing fine distinctions from the evidence in order to discover a case of rape, if such fact would defeat a recovery. For the foregoing reasons we conclude that, if plaintiff was unconscious from the effects of the wine at the time defendant had intercourse with her, her cause of action was not defeated by reason of such fact.

Assuming her to have been conscious at the time the act of intercourse took place, and consenting thereto, was she seduced? "Seduction" is not defined by our statute; and seduction, as recognized at the common law, based purely upon the loss of service to the master, is such that we are bound to hold our statute, in using the word, intended other things. We think the word is there used in its popular acceptance as recognized in this country. The court, in its instructions to the jury, declared the law upon this question as follows: "The word 'seduction,' when applied to the conduct of a man towards a female, means the use of some influence, promise, art, or means on his part, by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity based on professions of attachment, or the like, for the woman; and that, relying solely on said promises or professions of flattery or artifice or importunity, she surrendered her person and chastity to her alleged seducer; and that, relying and being influenced solely by such promises, flattery, artifice, and urgent importunity, she then being chaste, surrendered her person and chastity to her alleged seducer." After a careful examination of many cases, we are satisfied the law is fairly declared in the foregoing instruction, and that such instruction is in line with the authorities in this country. *State v. Bierce*, 27 Conn. 319; *Croghan v. State*, 22



Wis. 444; *Brown v. Kingsley*, 38 Iowa, 222. Modern lexicographers define seduction as the act of persuading a woman to surrender her chastity. In its ordinary acceptation it implies a betrayal of confidence, and for that reason a great majority of this class of cases are based upon a violated promise of marriage, but this is not a universal rule by any means; for a married man may seduce a girl, and that, too, though she is aware of his marriage. There are many cases to this effect, but they have arisen generally where the injured parties, being young girls, and easily beguiled, could not be held to the plane of responsibility occupied by women possessing a wider knowledge of the world. In the present case we have a chaste girl, not 17 years of age, making her living far distant from her few friends, stopping at night alone in a cottage. She is visited after dark by her employer, with whom she was upon friendly terms, a man of wealth and years. After a conversation upon ordinary topics, lasting some time, he gives her a glass of wine which she drinks, and her mind is seriously affected thereby. He expresses affection for her, repeatedly caresses her, makes promises of future friendship and assistance, and, after all these things have been going on for some length of time, he seduces her; at least a recital of these events would picture a case of seduction to the ordinary mind. They do not disclose a cold, deliberate transfer of virtue for a consideration. Neither do they describe a sacrifice of virtue to the demands of lustful passion; but the blameworthy, the expressions of friendship, the promises, the wine, weapons of the seducer, were all there. If the plaintiff were a woman of years, with that knowledge of the world which age brings with it at the present day, the case might present a different aspect. The struggle would not have been so unequal, and she would have been held to a stricter responsibility. But we cannot charge her with that judgment and discretion which come only with age and experience. The drinking of the wine seriously affected her, and its administration alone may well be termed an artifice that conducted to her downfall. If these things which she has said be true, (and the jury has so found the facts,) her cause of action is supported by the evidence.

We have examined in detail the alleged errors of law relied upon by the appellant in the admission and rejection of evidence by the court, and either find them not well taken, or the error, if committed, not prejudicial to appellant.

It is insisted that respondent's counsel was guilty of such misconduct during the progress of the trial as to have prejudiced defendant's case thereby in the minds of the jurors. This misconduct is claimed to have consisted in attempting to get before the jury matters not within the issues by means of asking improper questions and "offers to prove," etc. It was held in the case of *People v. Ah Len*, 92 Cal. 282, 28 Pac. Rep. 286, that this character of misconduct could be carried to such lengths as to justify a new trial, and for that reason a new trial was there ordered. The

rule is a most wholesome one, and in criminal cases especially its rigid enforcement will be maintained by the court. A trial court should always be alert to prevent an attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession. The record here presented does not disclose sufficient in this regard to justify a new trial of the case. Neither do we think the showing made for a new trial based upon affidavits sufficient.

We are not prepared to say that the damages are excessive. Courts are not disposed to make smooth the ways of the seducer. At common law, in these cases, verdicts of juries were seldom held to be excessive, and this, too, where the parent recovered damages upon the fiction of loss of service. With much greater reason should we not disturb the amount of a verdict where the party directly injured is the party plaintiff. The law is most liberal in these matters, and rightly so. Through the seducer's arts a young girl has been outlawed from society. She has been cast upon the world robbed of her innocence; an injury has been done which nothing can repair; a loss has been suffered which nothing can alleviate. For the foregoing reasons let the judgment and order be affirmed.

We concur: PATERSON, J.; DE HAVEN, J.; MCFARLAND, J.

HARRISON and FITZGERALD, JJ., not having heard the argument, do not participate in the decision hereof.

(98 Cal. 73)

Ex parte WHITWELL. (No. 20,954.)

(Supreme Court of California. April 1, 1893.)

CONSTITUTIONAL LAW — REGULATION OF USEFUL BUSINESS — JUDICIAL POWERS — PRIVATE INSANE ASYLUMS.

1. It is competent for the court to determine whether any particular regulation of a useful business is a reasonable restriction on the constitutional right of the citizen to engage in such business.

2. The business of maintaining a private asylum for the treatment of mild forms of insanity, inebriety, and other nervous diseases is a lawful one, and cannot be prohibited, either directly or indirectly.

3. Ordinance of board of supervisors of San Mateo county of March 16, 1892, regulating the business of keeping asylums for the care of persons afflicted with insanity, inebriety, or other nervous diseases, provides (section 3) that the board shall not grant a license to any person to conduct such business unless the walls of the asylum designated in his application are rendered fireproof by being constructed of brick and iron, or stone and iron, and the grounds accessible to patients are surrounded by a brick wall at least 18 inches thick and 12 feet high, and the premises are distant more than 400 yards from any dwelling house or schoolhouse. Section 4 provides that no license issued by the board shall authorize male and female patients to be cared for in the same building. *Held*, that sections 3 and 4 are unconstitutional and void, being an arbitrary exercise of the police power.

In bank.

Habeas corpus proceeding by Dr. Whitwell, who was imprisoned for conducting

an insane asylum without securing a county license therefor. Petitioner discharged.

Geo. C. Ross, for petitioner. Robert Y. Hayne and G. W. Towle, for respondent.

DE HAVEN, J. This is a proceeding upon habeas corpus, and it appears, from the return to the writ issued herein, that at the date of its service the petitioner was imprisoned by the sheriff of San Mateo county upon a charge of maintaining within that county a hospital for the treatment, for reward, of insane persons, without having procured a license so to do, as required by an ordinance adopted by its board of supervisors March 16, 1892. The ordinance referred to purports to be one "to license for purposes of regulation and revenue the business of keeping, \* \* \* within the county of San Mateo, \* \* \* hospitals, asylums, homes, retreats, or places for the care or treatment, for reward, of insane persons, or persons of unsound mind, or inebriates, or persons affected by or suffering from any mental or nervous disease, or who are suffering from the effects of the excessive use of alcoholic liquors." By the first section of this ordinance it is made unlawful to maintain within the county of San Mateo any hospital, asylum, or place for the care or treatment, for reward, of any insane person, or person belonging to either of the classes mentioned in the title of the ordinance, unless the keeper of such hospital or asylum shall have first procured a license therefor. The second section provides that, before any such license shall issue, the person desiring the same shall make a written application therefor to the board of supervisors, in which he "shall state specifically the location, purpose, place of business, its distance from the nearest dwelling house owned or occupied by any other person, with the name of the owner or occupant of such dwelling house, the class of persons that the applicant desires or intends to receive, as being the insane, or inebriates, or other persons designated in section 1 hereof, and whether the same are to be male or female," and the number of persons it is intended to care for, the name of the general superintendent, and that of the attending physician or physicians. It is further provided that such application shall be accompanied by an architect's diagram of the premises to be used in connection with such business, with a statement of the height of the ceilings from floors, and an official survey and description of the land to be used in connection therewith. The third section provides for giving notice of the time for the hearing of such application, when any person interested in favor of, or in opposition to, the granting of such license may be heard, and the sworn testimony of persons may be taken in relation to such application; and if, after such hearing, the board shall be satisfied "that the designated premises are suitable for the purpose, and that the persons designated in such application as superintendent and attending physician or physicians are

proper and suitable persons for their several stations," said board shall grant such applicant a license: "provided, however, that in no case shall such license be granted unless the board shall be satisfied \* \* \* that the building and buildings designated in such application is and are what are usually known as fireproof, by reason of being constructed of brick and iron, or stone and iron, and that such building so designated in said application is not more than two stories in height, and that the same and the land used in connection therewith, or such part of said land as any of the patients are to have access to, is surrounded by a brick or stone wall not less than eighteen inches in thickness, and not less than twelve feet in height, and in which wall there is but one opening, which opening is closed by a solid iron door, \* \* \* so constructed and fitted into said wall as that the same may be securely fastened by a combination lock, and said door is furnished with a combination lock: and provided, further, that no such license shall be granted if the premises designated in the application are within a distance of four hundred yards from any dwelling house or schoolhouse." Section 4 provides "that no license issued hereunder shall authorize male and female persons, or more than one of the classes of persons designated in section 1 hereof, to be cared for or treated in the same building, or put together in the same building, or in any inclosure connected with any building." Section 9 gives the form of the license which is to be issued, and which by its terms only authorizes the person to whom it is issued to carry on the business of keeping a hospital or asylum for the care or treatment of one of the classes of persons designated in the first section of the ordinance, subject to all the conditions, restrictions, and penalties in the ordinance contained.

The petitioner alleges that he is a physician and surgeon, and that the particular branch of the profession to which he especially devotes his attention is the treatment of insane persons, and patients with nervous and mental disorders, and inebriates, and persons suffering from the excessive use of intoxicating liquors, and that for the purpose of more effectually treating such persons he, long before the passage of said ordinance, at great expense purchased, and now owns, 22 acres of land in the county of San Mateo, on which he has erected buildings which he uses as a home or asylum for them; but such buildings are not fireproof, or of the character designated and required by the ordinance, and are also situated within 400 yards of the dwellings of other persons. The petitioner further alleges that he treats in the asylum established by him both male and female persons suffering from any and all nervous diseases and from mild forms of insanity, such as melancholia, dementia, and hysteria, but that he does not knowingly admit or treat violent or dangerous cases. It is claimed by the petitioner that the provisions of the ordinance above set out impose unreasonable restrictions upon his right to prosecute a lawful business, and to devote his

property to a lawful use, and that such provisions are therefore in conflict with the constitution of the United States and of this state, and are for this reason void. Upon the other hand, the respondent contends that the ordinance is a police regulation, designed, among other things, to protect the patients in such asylums from the danger which might result to them from fire, and also to promote the comfort and peace of the community in which such an asylum may be located, by requiring insane patients to be confined within walls, and so prevented from coming in contact with people who are entitled to be free from such annoyance; and it is further said that the nature of the business conducted in such an asylum or hospital is such as to justify a regulation that it shall only be carried on in a building removed from the dwellings of others a sufficient distance; and in this connection it is argued that the ordinance does not in either of its requirements conflict with any general law, and that the court is not authorized to declare it invalid because in its judgment the ordinance may be deemed unreasonable.

The police power—the power to make laws to secure the comfort, convenience, peace, and health of the community—is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily committed to the legislative body in which the power to make such laws is vested. *Ex parte Tuttle*, 91 Cal. 589, 27 Pac. Rep. 933. But it is not true that, when such power is exerted for the purpose of regulating a useful business or occupation, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or profession which in itself is recognized as innocent and useful to the community. As the right of the citizen to engage in such a business, or follow such a profession, is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. *Tied. Lim.* §§ 85, 194; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. Law, 236; *Com. v. Robertson*, 5 Cush. 438; *Austin v. Murray*, 16 Pick. 121. This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. Rep. 273, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." And so, also, in *Re Jacobs*, 98 N. Y. 108, *Earl, J.*, in delivering the opinion of the court in that case, said in relation to the power of the legislature to

make police regulations: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law and guide for the conduct of legislators, judges, and private persons, and, so far as it imposes restraints, the police power must be exercised in subordination thereto." And this necessary limitation upon the power of the legislature to interfere with the fundamental rights of the citizen in the enactment of police regulations was recognized by this court in *Ex parte Slog Lee*, 96 Cal. 354, 31 Pac. Rep. 245, in which case we said that the personal liberty of the citizen and his rights of property cannot be invaded under the disguise of a police regulation. This power of the courts to declare invalid what they may deem an unreasonable legislative regulation of a business or occupation which the citizen has the constitutional right to follow, although undoubted, must, from the nature of the power, be exercised with the utmost caution, and only when it is clear that the ordinance or law so declared void passes entirely beyond the limits which bound the police power, and infringes upon rights secured by the fundamental law. The rule upon this subject is thus expressed by the supreme court of the state of Missouri in the case of *St. Louis v. Weber*, 44 Mo. 547: "In assuming, however, the right to judge of the reasonableness of an exercise of corporate power, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and, when it is plainly granted, a clear case should be made, to authorize an interference upon the ground of unreasonableness." But while the police power vested in the various counties of the state need not be exercised with the highest discretion, it must be so exercised as not to trench upon the constitutional rights of the citizen.

With this general statement of the power and duty of the court, we proceed to consider whether the ordinance before us is a valid regulation of the right to maintain such an asylum or hospital as the petitioner alleges he is now conducting in the county of San Mateo. The state may, of course, make proper laws for the care, government, and safe-keeping of the unfortunate insane within its limits. This duty it owes, not only to those who are thus rendered incapable of taking care of themselves, but also to the community at large, the members of which are entitled to protection from the acts of persons not subject to the commands of reason. In *re Colah*, 3 Daly, 529; *Browne, Insan.* § 6. In the discharge of this duty the state has provided public asylums, to which persons who are so far disordered in mind as to be dangerous to remain at large may, upon satisfactory proof of such condition of mind, be committed by the judge of a superior court, but it has

made no provision at all for those of unsound mind who are not regarded as dangerous to themselves or the property or persons of others; and, even as to those who are insane to such a degree that they may under the law be committed to the state asylum, the statute provides that "the kindred or friends of an inmate of the asylum may receive such inmate therefrom on their giving satisfactory evidence to the judge of the court issuing the commitment that they, or any of them, are capable and suited to take care of and give proper care to such insane person, and give protection against any of his acts as an insane person." Section 19 of "An act to provide for the future management of the Napa State Asylum for the Insane," approved March 6, 1876. St. 1875-76, p. 133. It will thus be seen that it was not the intention of the legislature, in providing public asylums for the insane, to deprive the kindred and friends of even dangerous lunatics of the privilege of caring for them elsewhere, upon showing their ability and willingness to do so, while, as to those not regarded as dangerous to themselves or others, the law does not contemplate that they shall be confined in such asylums at all. But unfortunate persons belonging to this latter class are not to be denied the right to receive the patient attention, and often healing treatment, of a comfortable private asylum or hospital, if they or their kindred or friends are able and willing to incur the expense of such care and treatment. The business, therefore, of conducting a private asylum, in which proper care can be given to such persons by a member or members of the medical profession having experience and special skill in the treatment of such cases, is a necessary and humane one; and the right to maintain such an asylum or hospital, and to follow and practice this particular branch of the medical profession, cannot be prohibited or burdened with unreasonable and oppressive conditions.

In our opinion the ordinance now under consideration imposes arbitrary and wholly unnecessary conditions upon the right to maintain such an asylum as that which petitioner alleges he is now conducting,—an asylum in which only those afflicted with mild forms of insanity and the other diseases named in the ordinance are treated. While it is doubtless true that the board of supervisors of a county have the power, in the absence of any general legislation upon the subject, to prescribe by ordinance proper regulations for the protection of the patients in such an asylum from the danger which might result to them from the destruction of the asylum building by fire, still the requirement that such hospital or asylum shall be maintained only in a building constructed of either brick and iron, or iron and stone, without any reference to the size of such building, or the number of patients it is designed to accommodate therein, and without regard to other safeguards against fire with which it may be provided, is clearly unreasonable. It may be conceded that there would be less danger from fire in a building of the character re-

quired by the ordinance than in one differently constructed; but experience has not shown that the danger from fire in such a hospital is such an imminent peril, when reasonable care is taken to guard against it, as to justify a requirement that such hospital shall be conducted only in a building made from the materials named in the ordinance. Of course, in the management of a hospital where insane persons are treated, it is necessary to have, and it must be presumed that there will be, a sufficient number of competent attendants to prevent danger or damage from any unreasonable actions of such insane persons. Without such attendants no such asylum or hospital could be properly conducted. The fact, however, that a person is suffering from an insane delusion requiring treatment does not necessarily make him dangerous to himself or others, or render inactive in him the ordinary instincts which prompt self-preservation. On the contrary, as was said by Mr. Justice Cooley in his opinion in the case of *Van Deusen v. Newcomer*, 40 Mich. 129, "many insane persons, even after they have become hopelessly so, are to all appearance perfectly harmless, and for years continue to discharge the common duties of life in the most regular and acceptable manner, being trusted by every one in those particulars to which the insane delusion does not extend. The law takes notice of the fact that in many cases the disease leaves the person in the responsible possession and control of most of his faculties, and that the same motives influence his action in the employment of them that influence those not afflicted." It is the duty of the superintendent or attending physician of such an asylum to ascertain the nature of the delusion affecting any person received for treatment; and if there should be one admitted afflicted with pyromania, or whose actions would for any reason be difficult to control, it cannot be assumed that such person would not be properly guarded, or that the hospital would not be managed with that degree of prudence which would render the patients therein reasonably safe from danger on account of fire. Legislation of this character which imposes an onerous burden of expense upon a lawful and highly meritorious business, cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result of conducting such business, notwithstanding the exercise of ordinary care to prevent it.

The provision that no asylum in which persons suffering from any degree of insanity are treated shall be permitted within 400 yards of any dwelling or school cannot, in our judgment, be sustained as a lawful police regulation. A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surround-

ing community requires its exclusion from that particular locality; and an asylum for the treatment of mild forms of insanity is not properly classed as such. If rightly conducted, such asylum would not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of occupants of such dwellings or schools. It is not like a private asylum for the confinement of dangerous lunatics, or a hospital for the treatment of loathsome or contagious diseases; and the reasons which make it necessary and proper to exclude from the thickly settled portions of cities and towns slaughterhouses, soap factories, and tanneries, with their offensive smells, magazines for the storage of powder, and powder mills, with their attendant dangers, or any business or occupation which seriously interferes with the health or comfort of others if permitted in such localities, do not apply to a hospital whose inmates are harmless, although insane. It is possible that the maintenance of such an asylum would be to some people in its vicinity disagreeable and annoying, in the sense that it would be more or less repulsive to them, but this is not enough to justify a regulation like that under consideration. There are many unpleasant, and even annoying, things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law.

The ordinance further denies to any one the right to conduct such an asylum unless the building or buildings used for that purpose, and the grounds to which the insane persons may be allowed access, shall be surrounded by a brick or stone wall at least 12 feet high and 18 inches thick. The erection of such a wall would be costly, rendering the buildings and surrounding grounds uninviting and unsightly to the eye, and would be a manifest injury to the unfortunate persons placed therein for care and treatment. This requirement of the ordinance cannot be defended upon the ground that it is reasonably necessary for the protection of the public. Whatever justification there might be for such a provision if applied only to a private asylum in which dangerous lunatics are to be confined, it is plainly unreasonable when applied to a hospital of the character maintained by the petitioner, where only persons suffering with mild forms of insanity and who are harmless are received. Such persons, if properly attended, do not require prison walls to restrain them, and it would be barbarous and inhuman to subject them to such treatment. The board of supervisors of a county, or the legislative department of any city or town, in which such an asylum is erected, may, undoubtedly, provide by ordinance that patients therein shall not be permitted to leave the grounds upon which it is erected unless accompanied by an attendant, and may impose a penalty upon the superintendent or keeper of such asylum for a failure to conform to such regulation. Such an ordinance would be reasonable, afford-

ing all necessary protection to the public, without conflicting with the rights of any one.

The ordinance further provides that only one of the classes of persons therein mentioned shall be treated in the same building, and that a separate license shall be required for the treatment of each of the diseases named, and that male and female patients shall not be "cared for or treated in the same building." This provision is clearly invalid. The treatment of inebriates and insane persons, and of mental and nervous diseases not amounting to insanity, is a special branch of practice in the medical profession, and no reason exists why a physician desiring to maintain an asylum or hospital for the treatment of such cases should be required to erect separate buildings for the treatment of persons suffering from each of such diseases. Such a requirement is an unnecessary interference with the business of maintaining such an asylum, without any corresponding benefit to the public. If it be said that the welfare of the patients may demand this separation,—that persons suffering from nervous prostration, for instance, should not be treated in the same building with the insane,—the answer is that this is a matter which may be safely left to the judgment of the physician, whose business it is to treat such cases, and whose education and experience, it must be presumed, qualify him to superintend such an asylum. The power to pass upon such a question has not been committed to boards of supervisors of the different counties, and such a regulation of the manner of conducting the business of maintaining such a private asylum is therefore unauthorized and void. In relation to that part of the ordinance requiring the separation of the sexes, it is sufficient to say that the admission of male and female patients to a private asylum or hospital conducted in one building is not immoral per se, nor can it be made so by any legislative declaration.

It is unnecessary to further discuss the provisions of this ordinance, or to pass upon other objections which have been urged against it. Viewed separately, we think each provision discussed in this opinion invalid, and, when the ordinance is considered as a whole, the invalidity of each provision becomes more plainly apparent. The ordinance covers completely and entirely the business of maintaining such an asylum as petitioner alleges he is now conducting, and imposes upon it such burdensome, oppressive, and unreasonable conditions as in effect to amount to its prohibition. The case has been argued here, both orally and in the briefs of counsel, with great learning and ability, and we have given to the questions involved the careful consideration which their importance demands, and our conclusion is—First, that it is competent for the court to determine whether any particular regulation of a useful business or occupation is a reasonable restriction upon the constitutional right of the citizen to engage in such business or follow such occupation; second, that the business of maintaining a private asylum for the treat-

ment of mild forms of insanity, and of persons afflicted with the other diseases named in the ordinance before us, is a lawful one, which cannot be prohibited, either directly or indirectly; third, that the ordinance which petitioner is accused of violating is, in each and all of the provisions referred to in this opinion, unreasonable, and therefore void. It follows that the petitioner is entitled to be discharged. Petitioner discharged.

We concur: McFARLAND, J.; PATERSON, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

(98 Cal. 67)

FISCHER et al. v. SUPERIOR COURT OF TUOLUMNE COUNTY et al. (No. 15, 175.)

(Supreme Court of California. April 1, 1893.)

PARTNERSHIP—DISSOLUTION—APPOINTING RECEIVER.

Where property is actually owned by a copartnership, but the title thereto stands in the name of a corporation organized for the sole purpose of operating the property, in an action by one of the partners for a dissolution and an accounting, for fraud on the part of another partner, in which the corporation is made a party, the court is authorized to appoint a receiver to take charge of the property. Beatty, C. J., and De Haven, J., dissenting.

In bank. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Petition by Jacob A. Fischer and others against the superior court of Tuolumne county and others for a writ of prohibition to restrain the execution of an order of respondent court. Denied.

J. L. Crittenden, J. C. Campbell, and F. W. Street, for petitioners. Pillsbury, Blanding & Hayne, Scrivener & Schell, and Wheaton, Kalloch & Kierce, for respondents.

GAROUTTE, J. During the pendency of an action entitled Behlow et al. vs. Fischer et al., one Lane was appointed receiver to take possession of and manage certain mining property pending the result of the litigation. Subsequently a judgment was rendered for plaintiffs in said action, in which judgment said Lane was reappointed receiver with full power and authority to manage, conduct, and carry on this mining property. The present proceeding is an application for a writ of prohibition, commanding respondents to desist from acting under said order. The application for the writ and the order to show cause were made prior to the rendition of the aforesaid judgment, but that judgment includes the authority under which the receiver is now acting; and for that reason we shall address ourselves to the legal sufficiency of that authority, although the jurisdictional question presented is probably the same under either order, and the arguments of counsel so seem to concede. Petitioner's position, as stated in his reply brief, is that the "superior court acted without jurisdiction in wresting the possession of the mines from the corporation, which was the un-

disputed owner of them, and placing a receiver in charge of them, and carrying on the business of the corporation." The case of Behlow v. Fischer is now in this court upon an appeal from the very judgment in which the order appointing the receiver, and which order we are now considering, is found; and that nothing may be said in this opinion which might interfere to any degree with the full consideration of the appeal upon the merits, when it is finally submitted, we feel constrained to confine the examination at hand within narrow limits.

The action of Behlow v. Fischer may fairly be said to be a suit in equity for the dissolution of a copartnership, for an accounting, and for the setting aside of certain transfers of stock, on the ground of fraud practiced by the alleged copartner Fischer. A corporation known as the Consolidated Golden Gate & Sulphuret & Developing Company was joined as codefendant, it appearing that the title to the property over which the receiver was placed in charge stood in the name of said corporation. It will not be necessary to enter into a discussion of the principles and authorities relied upon to sustain the proposition that a court of equity cannot appoint a receiver to take possession of the property of a corporation pending litigation, for petitioner's case fails before it reaches that position. The complaint charged that Behlow, Fischer, and others were copartners, and as such owned and worked the mining property mentioned in this litigation. That said partnership has not been dissolved, but still exists. That said copartners, with the object and purpose of carrying on the business of said copartnership by said corporation, under a corporate name, organized the corporation defendant heretofore referred to. It was further agreed as to the parties who should hold the offices and conduct the various business affairs of said copartnership. That the said agreement was carried out, and the copartners transferred by deed the mining property here involved to the corporation for the purpose of carrying out the said agreement. That said corporation is merely a nominal corporation, and was organized by said copartnership merely for the purpose of carrying on its business, and is not an independent corporation. Upon issue joined the trial court found "that said so-called corporation has ever since its organization and incorporation been a mere name and agent of said copartnership; that it was not the owner of said mining property; and that said partnership is the owner, and entitled to the possession and management, of said property." The foregoing findings come fairly within the allegations of the complaint, and squarely contradict the theory of petitioner, that this mining property was the property of the defendant corporation. As indicated by the quotation from petitioner's brief, he rests his application for relief upon the theory that the corporation is the owner of the property, but he cannot be allowed the benefit of any such assumption, for the adjudication of the court is directly to the contrary, and that adjudication is ac-

thorized by the pleading. From some portions of the complaint, it may appear, inferentially, that the corporation was the owner of the property in dispute, but the allegations heretofore quoted indicate a contrary view; and in this proceeding the complaint will be deemed sufficient if any material can be found therein which will furnish support for the findings and judgment, bearing upon the question of the ownership. The court finds this property to be the property of the partnership, and that said corporation was a mere name and agent of said partnership. If a state of facts could ever arise where a corporation was a corporation in name only, and where property standing in its name as grantee was in truth and in fact the property of another, then, for the purposes of this investigation, we assume such state of facts to be present in this case. The existence of such conditions are not impossible, and, assuming them to exist, we have a copartnership, the actual owner of a large amount of property, the title to which stands in the name of another, that person possessing no interest whatever in the property. A dissolution of the partnership and an accounting are asked for. Under such circumstances this property is assets of the copartnership, and the court is authorized to appoint a receiver to take charge of the same. For the foregoing reasons let the application for the writ be denied.

We concur: MCFARLAND, J.; PATERSON, J.; HARRISON, J.

We dissent: BEATTY, C. J.; DE HAVEN, J.

(98 Cal. 105)

KLAUBER et al. v. SAN DIEGO STREET-CAR CO. (No. 19,189.)

(Supreme Court of California. April 7, 1893.)

#### REVIEW ON SECOND APPEAL.

Though a determination of the supreme court on a former appeal is conclusive on a second appeal if the record presents the same matters, either of fact or law, such judgment is not final on a second appeal if the record contains matters directly affecting the findings whereon the judgment rests, which were not before the court on the former appeal.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by A. Klauber and others against the San Diego Street-Car Company to enforce specific performance of a contract. From a judgment for defendant, plaintiffs appealed. The judgment was reversed, and judgment directed to be entered for plaintiffs. 30 Pac. Rep. 555. Defendant now appeals, and plaintiffs move to dismiss the appeal. Motion denied.

Gibson & Titus, for appellant. Parrish, Mossholder & Lewis and Luce & McDonald, for respondents.

HARRISON, J. Motion to dismiss the appeal. Upon the trial of the cause, findings of fact were made and filed by the court, upon which judgment was rendered in favor of the defendant. From that

judgment the plaintiffs appealed directly to this court, upon the judgment roll alone, without any bill of exceptions, and upon the hearing in this court the judgment was reversed, and the superior court directed to enter a judgment upon the findings in accordance with the prayer of the complaint, (95 Cal. 353, 30 Pac. Rep. 555;) and upon the going down of the remittitur the superior court caused judgment to be entered in favor of the plaintiffs in accordance with the directions of this court. Thereupon, within the time authorized by section 650, Code Civil Proc., the defendant prepared a bill containing certain exceptions taken by him at the trial, and the same was settled by the judge who had tried the case, and filed with the clerk. The defendant has now appealed from the judgment entered against it, as aforesaid, bringing up with the judgment roll this bill of exceptions. The respondents move to dismiss the appeal upon the ground that the former action by this court has become the law of the case, and that the judgment entered thereunder has become final, from which no further appeal can be taken.

The "law of the case" is a phrase which has been formulated in this state to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness. This court has no appellate jurisdiction over its own judgments, and such judgment, therefore, constitutes an estoppel of record, of the highest character, and is conclusive between the parties as to the matters adjudged. Hence it has been invariably held that, upon a second appeal in a cause, this court must accept its former determination as conclusive, and is precluded from any re-examination of the matters therein determined. As this rule is, however, applicable only to matters which have been determined by the court, it is only when the same matters that were determined on the first appeal are brought before it on the second appeal that the rule can be invoked; and, being a rule which tends to prevent a judicial consideration of the case, it is not to be extended beyond the exigencies which demand its application, and it is therefore held that whenever, upon the second hearing, the record presents a different state of facts, the former determination ceases to be an estoppel. When an appeal is taken to this court the record on the appeal is brought here by the appellant, and if the appeal is merely from the judgment the only portion of the records of the court below that he is required to bring up is the judgment roll, and "any bill of exceptions or statement in the case upon which the appellant relies." Code Civil Proc. § 950. If a judgment has been rendered in favor of the defendant, and the plaintiff appeals therefrom, the defendant is only interested in maintaining the judgment, and cannot ask this court to con-



sider any errors against him which the court below may have committed at the trial. This court will examine only the statement or bill of exceptions upon which the appellant relies, and in the preparation of such bill of exceptions, only such errors as the moving party deems essential to present his ground of reversal, and so much of the evidence as is necessary to explain them, are to be included. "Any exception taken by the prevailing party, either to the exclusion of evidence offered by himself, or to the admission of evidence against his objection, would be useless and redundant matter, and should not be allowed by the judge as an amendment to a bill proposed by the losing party. The amendments which may be proposed to the draft of a bill relate to the evidence or other matter which section 648 authorizes to be stated in the bill for the purpose of explaining the objection taken, and do not include exceptions taken by the party proposing the amendments, or any evidence or other matter necessary to explain the same." In re Gates, 90 Cal. 259, 27 Pac. Rep. 195. Upon the hearing in this court only such errors as are relied upon by the appellant for the reversal of the judgment will be considered. Hence the respondent is precluded upon the appeal from having any consideration by this court of those errors which, if the judgment had been adverse to him, might have been sufficient for a reversal; and, even though a bill of exceptions containing those errors had been settled by the judge before the appeal, it would form no part of the transcript, and would not be considered by this court upon an appeal from a judgment in his favor. As it is only when, upon the second appeal, the record presents the same matters, either of fact or of law, upon which the determination of this court was rendered at the former appeal, that that determination is held to be final, it follows that if there is presented upon the second appeal a different state of facts, or any errors that were committed by the trial court which were not presented in the former record, this court is at liberty to consider them as fully as though presented upon a first appeal. In case, therefore, the respondent upon the first appeal shall afterwards appeal from a judgment rendered against him upon a second trial, in which the same errors were committed as were committed at the first trial, he will not be precluded from having them considered by this court, even though the effect thereof should be a reversal of the second judgment, and indirectly a determination by this court that the first judgment of the court below should have been in his favor.

Section 650, Code Civil Proc., provides that a party who desires to have the exceptions taken at a trial settled in a bill may, within 10 days after receiving notice of the judgment, prepare a draft thereof, and have the same settled by the judge. A judgment is the final determination of the rights of the parties to an action or

proceeding, and, as there can be only one final judgment in an action, if for any reason a judgment that has been entered is vacated, and another judgment entered in lieu thereof, this last judgment becomes the only one in the case, and the notice of its entry is the point of time from which the right to have a bill of exceptions settled begins to run. For this purpose there is no distinction between a judgment rendered by the trial court upon its original determination of the cause, and a judgment which it enters in obedience to the direction of this court after an appeal; and a judgment entered by it in obedience to such direction has no greater sanctity upon an appeal than if it had been entered under the direction of this court to try the cause anew, and render a judgment in accordance with the opinion of this court. If, in either case, any errors had supervened prior to the entry of the judgment, and which conducted thereto, that were not presented in the record upon the former appeal, this court is not precluded from their examination. If the findings of fact upon which the judgment rests are based upon evidence that was improperly admitted, the party against whom the judgment was rendered is entitled to have those errors corrected. The statute permits an appeal from a judgment by any party who is aggrieved thereby, and it also permits him to have any exceptions taken at the trial which he desires incorporated in a bill of exceptions settled by the judge. It also makes all bills of exceptions taken and filed a part of the judgment roll, (Code Civil Proc. § 670,) and requires the appellant to bring to this court, upon an appeal from the judgment, a copy of the judgment roll, (Code Civil Proc. § 950.) If, upon such appeal, there are found in the record matters which were not determined upon the former appeal, he has the right to be heard thereon. In Heinlen v. Beans, 73 Cal. 240, 14 Pac. Rep. 855, this court had directed the superior court to enter a judgment in favor of the defendants, and when the remittitur went down such judgment was accordingly entered. The plaintiff, however, sought to procure an amendment of his complaint, which was denied, and, on his appeal from the judgment thus entered against him, brought to this court no other record than the judgment itself, and an exception to the ruling of the court refusing leave to amend his complaint. This court very properly dismissed the appeal, as there was no pretense of error in the judgment entered by the court below. The present case differs materially from that, however, in that it presents a bill of exceptions containing matters directly affecting the findings of fact upon which the judgment rests; and as those matters were not before the court upon the former appeal the "law of the case" has no application. The motion is denied.

We concur: PATERSON, J.; GAROUTTE, J.

(98 Cal. 120)

**SHAIN v. PEOPLE'S LUMBER CO. (No. 19,178.)**

(Supreme Court of California. April 8, 1893.)

**DISMISSAL OF APPEAL.—FAILURE TO FILE POINTS  
—EXTENSION OF TIME.**

Sup. Ct. Rule 2 provides that an appellant shall file his points and authorities within 30 days after the filing of the transcript, and that the time shall not be extended except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor, and in no case for more than 20 days. Rule 5 provides that if the points and authorities are not filed within the prescribed time the appeal may be dismissed, on motion, upon notice given. *Held* that, to obtain an order extending time within which to file points and authorities, appellant should have shown, by the affidavit on which he asked for such order, the date when the transcript was filed, and whether any time in addition to that limited by the rule had been given, either by order or by stipulation, and that, having failed to do this, a motion to dismiss the appeal was properly granted.

In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Shain against the People's Lumber Company. There was judgment for defendant, and plaintiff appeals. Appeal dismissed.

Blackstock & Shepherd, for appellant.  
W. H. Wilde and E. S. Hall, for respondent.

**HARRISON, J.** Motion to dismiss the appeal. The transcript in this case was filed October 20, 1892, and on November 1st the respondent stipulated with the appellant that he might have "twenty days in addition to the time allowed by the rules of this court in which to serve and file his points and authorities, \* \* \* and that the order of the court may be entered herein, in accordance with this stipulation, upon its being filed." The stipulation was not, however, filed, nor was any order obtained thereon, as was contemplated by it; but on the 8th day of December, upon an affidavit of Vincent Neale, one of the attorneys for the appellant, an order was made by the court "that appellant have twenty days' additional time to that allowed by rule of court within which to prepare and serve his opening brief herein." The affidavit did not state the date when the transcript was filed, or when the time allowed by the rules of the court for filing points and authorities would expire, nor did it state whether any order or stipulation had been made, granting time for filing points and authorities; and when the above order was asked for the words, "to that allowed by rule of court," were inserted therein before the order was signed. On the 19th of December the respondent moved to dismiss the appeal upon the ground that no points and authorities had been filed on the part of the appellant, and on the 28th of December the appellant filed his points and authorities.

Rule 2 of this court requires the appel-

lant to file with the clerk his printed points and authorities within 30 days after the filing of the transcript, and declares that the time so limited shall not be extended "except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor, and in no case for more than twenty days;" and rule 5 provides that if the points and authorities are not filed within the time prescribed the appeal may be dismissed, on motion, upon notice given. For the purpose, therefore, of enabling the court to determine whether an order extending the time to file points and authorities should be granted, the proper practice for an attorney who would seek such additional time is to show by the affidavit upon which he asks for the order the date when the transcript was filed, and whether any time in addition to that limited by the rule has been given, either by order or by stipulation, so that it may be determined therefrom whether it is within the discretion of the court to grant the time asked for. In the present case the time provided by the stipulation, as well as that granted by the order, covered the same period of time, viz. 20 days in addition to the time allowed by the rules of the court, and expired on the 9th day of December. The notice of the motion to dismiss the appeal was not served until the 19th of December, and at that date the respondent had the right, under rule 5, to a dismissal. The right of the respondent to have the appeal dismissed must be determined by the facts as they existed at the time that notice of the motion was given, and was not destroyed by the subsequent filing of points and authorities on the part of the appellant. Rules of court are designed to facilitate the business of the court, as well as for the convenience of litigants, and the rule requiring the points and authorities on behalf of the respective parties to be filed within specified times after the filing of the transcript confers rights which may be enforced by the litigants. The right of the appellant to be heard depends in the first place upon his compliance with the provisions of the Code of Civil Procedure in taking his appeal, as well in the manner as within the time provided by that Code; and after his appeal has been taken his right to a consideration thereof by this court depends upon his compliance with the rules of this court in perfecting his appeal by filing his transcript, and thereafter his points and authorities, within the time specified in those rules. The rules themselves provide for additional time to be granted if, by reason of any intervening cause, through no fault of the appellant, he may have been prevented from a strict compliance therewith; but, if the appellant would invoke such provision, he must bring himself within the terms upon which the favor is to be granted. If he neglects to procure a stipulation from the respondent, or an order of the court upon a proper affidavit, he is not in a position to resist a motion of the respondent to enforce the penalty which the rules have declared shall follow such

neglect. The motion to dismiss the appeal is granted.

We concur: BEATTY, C. J.; DE HAVEN, J.; PATERSON, J.; MCFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.

(3 Cal. Unrep. 851)

**PEOPLE v. SHERMAN.** (No. 20,922.)  
(Supreme Court of California. April 11, 1893.)  
**INFORMATION—INDORSING NAMES OF WITNESSES—**  
**LARCENY—EVIDENCE—INSTRUCTIONS.**

1. The names of witnesses examined before the committing magistrate need not be inserted at the foot of or indorsed on the information filed in court against defendant after he had been examined before such magistrate, though Pen. Code, § 943, provides that when an indictment is found the names of the witnesses before the grand jury must be so indorsed.

2. Where there is evidence before the convicting magistrate that a watch was taken from one B. when he was asleep, and when defendant and one F. were present, and it was afterwards found concealed on the person of F., so as to indicate that it must have been taken feloniously, a finding by the trial court that defendant had been legally committed by the magistrate will not be disturbed on appeal.

3. The stealing of a watch from the person of another is grand larceny, though the value of the watch is less than \$50.

4. Testimony to show improper relations between the state's witnesses, a man and woman, in order to impeach the woman's testimony, is inadmissible.

5. The court has a right to amend imperfect instructions submitted.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Al. Sherman was convicted of grand larceny, and appeals. Affirmed.

L. L. Chamberlain, for appellant. Atty. Gen. Hart, for the People.

**BELCHER, C.** The defendant and one Lulu Franks were examined before a magistrate, and held to answer upon a complaint charging them with the crime of larceny, committed in the county of Placer, on or about the 7th day of June, 1891, by "willfully, unlawfully, feloniously, and maliciously stealing, taking, and carrying away one watch of the value of \$75, the property of one S. T. Bowers." Thereafter the district attorney filed in the superior court of the county a information charging that the defendant, on or about the 7th day of June, 1891, in the county of Placer, "did then and there feloniously steal, take, and carry away from the person of S. T. Bowers one gold watch, of the value of seventy-five dollars," etc. When the defendant was called upon to plead to the information, he moved the court to set it aside upon the grounds: "(1) That the names of the witnesses examined before the committing magistrate are not inserted in or at the foot of said information, or indorsed thereon. (2) That before the filing of said information the said defendant had not been legally committed by a committing magistrate, in this: that after hearing the proofs it did not appear that a public offense had been committed, and there was not

sufficient cause to believe the defendant guilty thereof." The court denied the motion, and the defendant, reserving an exception to the ruling, then pleaded not guilty to the charge. Subsequently the defendant was tried and found guilty of grand larceny, and judgment was entered that he be imprisoned in the state prison at Folsom for the term of six years and three months. From this judgment, and an order denying his motion for a new trial, defendant appeals.

The first point made for a reversal of the judgment is that the court erred in refusing to set aside the information upon both of the grounds stated in the motion. Section 943 of the Penal Code provides: "When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court." And section 995 of the same Code provides that an indictment must be set aside, on motion, upon several grounds, and, among others, when the names of the witnesses are not inserted or indorsed as required. There are, however, no provisions requiring the names of witnesses to be inserted at the foot of or indorsed upon an information, and the only grounds stated on which an information must be set aside are: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) that it was not subscribed by the district attorney of the county." See sections of Code above cited. It is clear, therefore, that the court rightfully refused to set aside the information upon the first ground stated.

As to the second ground, it is earnestly urged that defendant had not been legally committed by a magistrate, because there was no evidence before the magistrate showing that he was guilty of the offense charged. But there was evidence showing that the watch had been taken from the person of Bowers when he was asleep, and when defendant and Lulu Franks were both present; and besides, it was afterwards found concealed upon the person of Lulu Franks, in such a way as to clearly indicate that it must have been taken feloniously. We do not think, therefore, that it can be said there was no evidence tending to show the defendant's guilt, and, this being so, the ruling of the court below cannot be disturbed on appeal.

It is next claimed that the evidence was insufficient to justify the verdict, and that at most defendant should have been convicted of petit larceny only. This claim is rested upon the fact that the principal evidence that defendant took the watch from the person of Bowers was that of Lulu Franks, an accomplice, and that the value of the watch was proved to be only "about \$45." But the testimony of the accomplice was amply corroborated by other evidence, and, if the watch was taken from the person of Bowers, the offense was grand larceny, whether its value was greater or less than \$50. Pen. Code, § 487. There is no merit, therefore, in this point.

When the prosecution rested, the defendant called as a witness Esther Brown, who testified that she had been in the county jail, and that "Miss Frank's room and mine were right alongside." She was then asked, "Did you see any one, or did you see Mr. Brisentine, enter this woman's room?" The question was objected to by the district attorney as irrelevant and immaterial, and the objection sustained. This ruling is now assigned as error, and it is said by counsel that "Brisentine was a witness for the prosecution, as was also Lulu Franks, and it was proper for the defense to show the character of Lulu Franks, and her deportment while in jail, together with the relation existing between her and Brisentine." If, as would seem from the language above quoted, the purpose was to show improper relations between Brisentine and Lulu Franks, and thus to impeach her testimony, the question was clearly irrelevant and immaterial, as that is not the way prescribed for impeaching a witness. Sections 2051, 2052, Code Civil Proc. We see no error in the ruling.

Finally, it is claimed that the court erred in modifying, and giving to the jury as modified, certain instructions asked by defendant, and in refusing to give certain others asked by him, and also in giving certain instructions of its own motion. The learned attorney, however, simply quotes the instructions, and says the action of the court in regard to them was erroneous. The defendant requested the court to give to the jury thirty-two separate instructions, and it gave twenty-two of them as requested, amended two, and gave them as amended, and refused to give eight. It also gave four instructions of its own motion. The instructions, as amended, stated the law correctly. The court had a right, therefore, to make the amendments, and its action cannot be complained of. *People v. Dodge*, 30 Cal. 448; *People v. Hall*, 94 Cal. 595, 30 Pac. Rep. 7. The instructions not given were properly refused, because some of them had already been substantially given, and the others did not correctly state the law of the case. There was, therefore, no error in the refusal. The instructions given by the court of its own motion were general statements of the law, and such as have been given in criminal cases and approved by this court many times. The instructions, as a whole, covered the case, and seem to have been full, fair, and correct. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(98 Cal. 133)

PEOPLE v. AH LEN. (No. 20,995.)  
(Supreme Court of California. April 11, 1893.)

MURDER—INSTRUCTIONS—REASONABLE DOUBT.

On a murder trial, where there is evidence that defendant and others were together

when deceased was shot, it is proper to modify an instruction that if the jury find that the evidence points as clearly to the commission of the crime by another as by defendant, and if they entertain a reasonable doubt as to defendant's guilt, they should acquit him, by adding, unless they find that such other person is the guilty party, and that defendant aided and abetted him in committing the crime.

In bank. Appeal from superior court, Los Angeles county.

Ah Len was convicted of murder, and appeals. Affirmed.

C. C. Stephens and Geo. J. Davis, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. 1. There was no error in admitting the dying declarations of the deceased, and the evidence was sufficient to show that they were made under a sense of impending death.

2. The defendant requested the court to give the following instruction: "The jury are instructed that if they find, from a consideration of all the evidence, that it points as clearly to another person who committed the crime in question as it does to the defendant, and if, after a full and fair consideration of all the evidence, the jury entertain any reasonable doubt as to whether the defendant is the guilty party, then the jury should acquit the defendant." The court gave the instruction, but at the same time modified it by adding thereto the following: "Unless you find from the evidence, beyond a reasonable doubt, that such other person is the guilty party, and that the defendant aided and abetted him in committing the crime." The court did not err in thus modifying the instruction requested by defendant. As given, the instruction correctly stated the law. The evidence upon the part of the people tended to show that the defendant and others were acting in concert at the time of the shooting of the deceased, and under these circumstances the instruction, in the form requested by defendant, was misleading; and it was the duty of the court to modify it in the respect stated, and instruct the jury as it did.

There are many other errors assigned, but none of them require particular discussion. We find no error in the record.

Judgment and order affirmed.

(98 Cal. 127)

PEOPLE v. GARDNER. (No. 20,943.)  
(Supreme Court of California. April 11, 1893.)

CRIMINAL LAW—JUDGMENT—MOTION IN ARREST—TERM OF IMPRISONMENT—EVIDENCE—ATTEMPT TO RAPE.

1. An objection that an information for attempt to rape a girl under the age of 14 years states that the girl was 11 years old, and therefore does not charge the offense, if of any merit at all, is too technical to be raised by motion in arrest, or otherwise than by special demurrer.

2. It is no ground for motion in arrest that no punishment for the offense was fixed by the statute, as such a motion, under Pen. Code, § 1185, can only be based on defects appearing on the face of the indictment or information.

3. A prosecution for attempt to commit rape is not governed by Pen. Code, § 220, providing the punishment for assault with intent to commit rape, as the offenses are different.

4. Under Pen. Code, §§ 264, 671, rape may be punished by life imprisonment, or by not less than five years; and section 664 provides that an attempt to commit an offense may be punished by imprisonment not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense. *Held*, that punishment for attempt to rape by imprisonment for five years cannot be objected to on the ground that the term of half a life cannot be calculated, and that the statute therefore prescribes no punishment for attempt to rape.

5. Such a term is within the statute, even assuming that imprisonment for life is a longer term than imprisonment for any stated number of years.

6. The testimony of a witness at the preliminary examination, where the witness is out of the state at the time of the trial, cannot be proved by the testimony of the stenographer, who was present at the examination, and heard the testimony, as Pen. Code, § 686, gives the accused the right to be confronted with the witnesses against him in the presence of the court, without any other exception than that the deposition of a witness at the preliminary examination may, under certain circumstances, be read. *People v. Chung Ah Chue*, 57 Cal. 567, and *People v. Quirise*, 59 Cal. 343, followed. *People v. Carty*, 19 Pac. Rep. 490, 77 Cal. 213, explained.

7. In a prosecution for attempt to rape, a witness may testify as to statements made to him by the prosecuting witness that she was going to get some money out of defendant if she had to put up a job on him, as tending to show her prejudice and interest in the case, provided the proper foundation had been laid while she was on the stand.

Department 1. Appeal from superior court, Sacramento county; *W. C. Van Fleet*, Judge.

Daniel Gardner was convicted of attempt to rape, and appeals. Reversed.

Grove L. Johnson and S. Solon Hall, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of the crime of an attempt to commit rape upon a girl under the age of 14 years, and this appeal is taken from the judgment and order denying a motion for a new trial.

Defendant moved to arrest the judgment upon the grounds: (1) The court had no jurisdiction to affix any penalty or render any judgment, for the reason that no punishment was provided for the offense by the statute. (2) The information did not state facts sufficient to constitute a public offense. The objectionable language of the information is: "Said Lizzie Cox being then and there of the age of eleven years." It is now insisted that the information does not show the child to have been under 14 years of age. Appellant's position has no merit, and the objection to the information, if it is objectionable, is entirely too technical to be reached otherwise than by special demurrer.

As to the remaining ground relied upon to arrest the judgment, it was not a matter that could be urged upon the hearing of such a motion. A motion of that character can only be based upon defects appearing upon the face of the information or indictment. Section 1185, Pen. Code; *People v. Fair*, 43 Cal. 147; *People v. McCarty*, 48 Cal. 559. But the question is before us upon appeal from the judgment,

and we proceed to its consideration. The defendant was sentenced to imprisonment in the state prison for the term of five years, and it is now asserted that no penalty is prescribed by statute for a conviction of the offense here charged. It will be noticed that the defendant was convicted of an attempt to commit rape, and not of the offense of an assault with intent to commit rape, for which provision is made by section 220 of the Penal Code. There is a distinction between these offenses, and the facts required to prove an attempt are not necessarily sufficient to prove an assault with intent. We had occasion to consider at some length this question in *People v. Lee Kong*, 95 Cal. 666, 30 Pac. Rep. 800, and leave the matter with a reference to that case and the case of *State v. Godfrey*, (Or.) 20 Pac. Rep. 625. Judgment was pronounced upon this defendant by virtue of section 664 of the Penal Code, which provides: "Any person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: (1) If the offense so attempted is punishable by imprisonment in the state prison for five years or more, or by imprisonment in a county jail, a person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense." In order to determine, therefore, what the punishment for an attempt to commit rape is, we must look for the longest term of imprisonment imposed for the commission of the crime of rape. Section 264 of the Penal Code is as follows: "Rape is punishable by imprisonment in the state prison for not less than five years." In such a case, where the minimum punishment only is limited, by virtue of section 671 of the Penal Code, the penalty may be affixed in terms at imprisonment for life. Therefore a defendant convicted of rape may be sentenced to imprisonment in the state prison for the term of his natural life, or he may be sentenced to imprisonment for any specified term of years not less than five. It will thus be observed that the court has the power to visit upon such defendant either one of two judgments. It is now insisted that a judgment of life imprisonment is a longer term of imprisonment than one for any stated number of years, and, the statute providing that the judgment upon the defendant should be for a term of years not exceeding one half the longest term prescribed upon a conviction for rape, it follows that the judgment should be for a term of years not exceeding one half of the defendant's life; and, such a term of years being impossible of calculation, the statute is meaningless, and consequently no penalty for this offense is found in the law. This reasoning is ingenious, but not sound. If the statute only allowed a judgment of imprisonment for a term of years not less than five upon a conviction of rape, then the judgment in this case would be strictly within the law, for it would declare a

term of imprisonment not exceeding one half the longest term that the court would have the power to impose. Again, if it be conceded that any term, no matter how long, would be a longer term of imprisonment than a judgment of imprisonment for life, then the judgment under investigation comes strictly within the law. Now, assuming appellant's position to be true, that a judgment of imprisonment for life is a judgment for a longer term than one for any stated number of years, then the judgment at bar is equally sound, for the greater includes the less; and if the judgment in this case is a valid judgment, computed upon the basis of any judgment that might be rendered for a term of years under a conviction of rape, it necessarily is a valid judgment computed upon the basis of a judgment of imprisonment for life, for, as counsel for appellant insists, such judgment is for a longer term of imprisonment than any judgment could be that prescribed imprisonment for a stated time. In other words, if the judgment of five years is not in excess of one half of the longest term that could be given, in case the statute did not allow a life imprisonment, then it cannot be in excess of one half of a life imprisonment, for that is a longer term. The evidence is sufficient to support the verdict, and in this class of cases the evidence of the prosecuting witness, if convincing the jury and satisfying the law, need not be corroborated. *People v. Mayes*, 66 Cal. 597, 6 Pac. Rep. 691; *People v. Stewart*, 90 Cal. 212, 27 Pac. Rep. 200; *People v. Fleming*, 94 Cal. 308, 29 Pac. Rep. 647.

The court erred in admitting the testimony of the witness Briar. One Stone was examined as a witness at the preliminary examination of defendant. At the trial it was proven that said Stone could not be found in the state, due diligence being used. Thereupon the district attorney attempted to introduce in evidence the deposition of Stone taken at the preliminary examination. The deposition was rejected by reason of a defective certificate thereto, and thereupon the stenographer, Briar, was called, and testified as to the evidence given by the witness Stone at the preliminary examination. One of the objections made to the admission of the evidence was that the evidence of an absent witness, given at the preliminary examination, could only be used at the trial by the introduction of his deposition taken at that time. Both reason and authority sustain this position. To permit the testimony of an absent witness to be given to the jury through the medium of the recollection of a bystander at the hearing (and the reporter occupied no different position) is to deprive the defendant of the right to be confronted by the witnesses, and to place before the jury the purest hearsay. While hearsay testimony, under certain peculiar circumstances, is allowed to be placed before the jury, the facts here divulged by the record do not place this case within the exceptions to the general rule. Whatever may be the rule of evidence regarding these matters in civil actions, as declared by section 1870, subd. 8, Code Civil Proc.,

that rule has no application to criminal cases. Section 1102 of the Penal Code provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code;" and as to these matters it is very apparent that the Penal Code otherwise provides. Section 686 declares the rights of a defendant in a criminal action; and subdivision 3 thereof provides: "To produce witnesses on his behalf, and to be confronted with the witnesses against him in the presence of the court, except that, where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has either by person or by counsel had an opportunity to examine the witness, \* \* \* the deposition of such a witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot, after due diligence, be found within the state." The law thus states that the defendant is entitled to be confronted with the witnesses against him, in the presence of the court, with but a single exception, and this case is not that exception. By rejecting the official notes the court in effect held that it was not a deposition; and, that fact being established, the exception provided by the statute requiring the presence of the witness in court at the trial was not present, and the witness' knowledge of the facts of the case could only have been produced before the jury from his own lips. This question was directly adjudicated upon, and the foregoing views supported in *People v. Chung Ah Chue*, 57 Cal. 567, which decision was followed in *People v. Qurise*, 59 Cal. 343. In those cases it was held that the official report of the witness' evidence as given at a previous trial could not be received before the jury, as it failed to come within the exception found in subdivision 3, § 686, already quoted. If such evidence is not allowed to go before the jury, for the same reasons the recollections of persons present as to what the witness said at the preliminary examination is doubly objectionable. It is intimated in *People v. Carty*, 77 Cal. 213, 19 Pac. Rep. 490, that this character of evidence is admissible, but the intimation was purely voluntary, and was not demanded by the exigencies of the case. The rule in civil actions evidently possessed the mind of the learned commissioner at the time he threw out the suggestion. No authority has been called to our attention, decided since the adoption of the Codes, that justifies the admission of the evidence here introduced. The remaining objection to the admission of the evidence of the witness Briar does not seem to be well founded in view of the last provision of section 2047 of the Code of Civil Procedure.

The proposed evidence of the witness Rich as to the statements made to him by the prosecuting witness, that she was going to get some money out of the defendant if she had to put up a job on him, was admissible as tending to show her prejudice and interest in the case, provided the proper foundation was laid

when she was on the stand, but we are not referred to the folio of the transcript where such evidence may be found. The other statement proposed to be shown by this witness was clearly not a proper matter to go to the jury.

The objections made by the attorney general to the consideration of the record in this case are technical in the extreme, and we pass them by as not demanding extended notice. We see no other matter in the record demanding our attention. Let the judgment and order be reversed, and the cause remanded for a new trial.

We concur: PATERSON, J.; HARRISON, J.

(3 Cal. Unrep. 846)

LYONS v. KNOWLES et al. (No. 18,010.)  
(Supreme Court of California. April 11, 1893.)

**INJURY TO EMPLOYEE—DEFECTIVE APPLIANCES—  
EVIDENCE.**

In an action by a servant against the master for injuries caused by the breaking of the hook of the upper block on a derrick used in moving stone, there was evidence that the hook, which was of wrought iron, broke because of crystallization. The derrick, block, and hook had been in use but a few months. Defendant's expert testified that, if the iron had been flawless, the hook could have been safely used for about five years in lifting from seven to ten tons, while plaintiff's expert testified that if the hook was new it would support six tons, which was the weight of the stone being raised when the hook broke. *Held*, that the evidence was insufficient to charge defendant with negligence.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Charles C. Lyons against F. E. Knowles and others for personal injuries. From a judgment for plaintiff, defendants appeal. Reversed.

James G. Maguire, A. A. Moore, and J. C. Martin, for appellants. Thompson & King and Church & Cory, for respondent.

TEMPLE, C. This action was brought to recover damages for a personal injury, alleged to have been caused through the negligence of defendants. It is alleged that defendants, as partners, were engaged in quarrying rock and transporting the same by railroad, and employed one Dusy to haul the rock from the quarry to the railroad station, and there load the same on the cars; that by the terms of their contract with Dusy they agreed to furnish all necessary and proper machinery and appliances for the purpose of loading and unloading the rock, and to furnish assistance in loading the rock from the ground onto the cars; that in October, 1888, while Dusy was engaged in hauling and loading granite blocks under the contract, defendants, regardless of their duty, and the lives and safety of plaintiff and others employed in loading and unloading the same, carelessly and negligently caused to be attached to a derrick a block and tackle for the purposes of loading and unloading said granite, which block and tackle was used during all of the times mentioned in the com-

plaint; that said block and tackle, and particularly the hook of the upper block, was imperfectly constructed, defective, weak, and unsafe, and wholly inadequate in strength to support the weight of a particular block mentioned in the complaint, and that defendants knew of the imperfection and unsafeness; that on the 1st of December, 1888, plaintiff was employed and hired by Dusy to load and unload said granite, and was then and there, with the assistance of defendants and employees, engaged in loading from the ground onto a car a certain block of granite, and that, while so engaged, the hook alluded to, by reason of its imperfection and inadequacy, broke and gave way, without fault of plaintiff, causing the rock to fall, crushing his foot so that amputation became necessary. After a demurrer had been overruled, defendants answered, denying that they were partners, and in effect all the allegations of the complaint. The case was tried by a jury, which returned a verdict for plaintiff. A motion for a new trial was made by defendants, one of the grounds of which was that the evidence was insufficient to support the decision. The motion having been denied, the defendants appeal from the judgment and from the order denying them a new trial.

On the trial plaintiff testified that he was employed by Dusy, but did not know the contract between Dusy and defendants; that Dusy was engaged in hauling granite from the quarry to the switch, and in loading it upon the cars; that defendants had erected at the switch a derrick, to be used in loading the granite upon the cars. Plaintiff was employed by Dusy to attend to the loading at the switch. When the cars were ready to receive the granite as it came down on the wagons, Mr. Dusy's teamsters and plaintiff loaded it from the wagons to the cars. If no cars were there when hauled, the rock was unloaded on the ground, and, when the cars came, defendants always sent men to assist him. Defendants or their clerk would designate what rock should go upon certain cars, but otherwise exercised no supervision or control of the matter of loading. Appellants urge many reasons for a reversal of the judgment, among them that the evidence shows that defendants were guilty of no negligence.

Plaintiff's account of the accident was as follows: "I was engaged in loading a large block of granite, weighing about six tons, from the ground to a flat car. Louis Knowles, the bookkeeper of defendants, his son, and Mr. Johnson, all of whom were in the employment of F. E. Knowles & Co., were helping me. We had hoisted the block of granite from the ground, and swung it around over the flat car. I think I gave all the orders that were given on that occasion. When the granite block had been hoisted to a sufficient height to swing clear of the car, I put on the brake on the winch with which we did the hoisting, and gave the lever of the brake to Mr. Louis Knowles, and told him to hold it. I then took hold of a rope attached to the granite block, and swung it around over the car and fixed it



in the position in which it should rest upon the car. \* \* \* I was holding the block of granite in position: I reached over with my right hand to get a timber to place under the end of the block of granite when lowered to the car. I had my left hand still on the block of granite, steadying it. Just as I leaned over to get hold of the timber, the hook of the upper block attached to the end of the boom, and from which the granite block was suspended, broke, and the granite block fell on my foot." He also testified that he thought the derrick was improperly rigged, because the block with three sheaves was at the bottom, and the block with two sheaves was at the top. It ought to have been reversed. Also, that the derrick had been erected by Dusy, at the quarry in May or June, 1888, and that witness had been employed by Dusy for several months prior to August of that year, and while so employed he worked with the same derrick. He also testified, on cross-examination, that he did not know the exact weight of the rock, but thought it was between five and six tons; that they had previously loaded several blocks of the same size with the one which fell on his foot with the same derrick, and the same block and tackle, and the same hook that broke. Another witness said that the derrick was improperly rigged, because the three sheaves ought to have been at the top instead of at the bottom. The weight would have been more evenly distributed, and a jolt or jar would not have caused so great a strain. He said: "Sometimes in hoisting rock the second row of coils of the rope on the drum of the winch will slip through the first row, causing a jar, and straining the derrick." There was no jar during the raising of the rock which fell and injured plaintiff.

It appeared that the hook was composed of common wrought iron, an inch and a quarter thick, and the evidence tended to show that the break was caused by the crystallization of the iron,—a defect which no one could have discovered by examining the iron. A witness was examined for plaintiff as an expert who said that he was a machinist, but did not know the breaking weight of common black iron. He was allowed to testify, however, without objection on that ground, and said he thought the hook, when new, would not sustain more than six tons as a breaking weight; didn't think it would be safe in hoisting a ton when it broke, but thought the breaking weight of such a hook would be about six tons, and its working weight about four tons. He thought from appearances that the block and tackle were old. Defendants proved by Dusy, whose testimony was uncontradicted, that the derrick and block and tackle were procured new in March of that year, and had therefore been used only a few months before the accident; and by Sheppard, a civil engineer, who claimed to be familiar with the tensile strength of iron and steel, that the lowest tensile strength of an inch bar of common black iron was 22 tons; and he said that in 30 experiments conducted by

scientific men the lowest breaking weight found was 22 tons. The hook which broke here was one inch and a quarter, and should sustain a weight in excess of 22 tons, by at least 25 per cent. He thought if the iron had been free from flaw it could safely have been used for from four to five years in lifting from seven to ten tons. The hook had not been used one year. Berchig, plaintiff's expert witness, thought it must have been old, but said, if new, it would support six tons. But, to charge defendants with negligence in allowing the hook to be used, it must not only appear that it was in fact insufficient, but that defendants knew of its defectiveness, or by the use of ordinary diligence and care could have known it. It was shown that the iron was apparently sound, and that its defect could not have been discovered by an examination. It was apparently sufficient for the purpose for which it was used. It had been frequently used in lifting blocks of the same size. Although it proved to be in fact insufficient, its continued use under such circumstances is not proof of negligence. *Sappenfield v. Railroad Co.*, 91 Cal. 57, 27 Pac. Rep. 590.

As to the rigging of the derrick, plaintiff's means of knowledge of the defect, if any, was at least equal to defendants'. It appears as a fact that he did not know of it, and, as there was no jolt or jar at the time of the accident, it is difficult to see how it could have contributed to the accident. The injury, therefore, must be attributed to accident for which no one can be held responsible. An employer does not guaranty the sufficiency of appliances furnished, but only for the exercise of such skill and diligence in providing safe machinery as discreet and prudent men would use where the risk is their own. I do not think negligence on the part of defendants could reasonably be inferred from the evidence. Taking this view of the case, it is not necessary to consider the other points raised. For the purpose of this decision it is assumed, but not decided, that defendants would have been responsible had it been shown that there was negligence in the use of the derrick. I think the judgment and order should be reversed, and a new trial had.

We concur: VANCLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

(38 Cal. 40)

RISLEY v. GRAY et al. (No. 18,013.)  
(Supreme Court of California. March 29, 1893.)

ACTION ON NOTE—WANT OF CONSIDERATION—INDORSEMENT AFTER MATURITY.

Where, in an action against the maker and payee of a note which plaintiff had purchased after maturity, it appears that the note was given in payment for a portion of a mine, and that the mine was worthless, the defense of failure of consideration, which would have

been good in an action on the note by the payee, is good as against plaintiff, who acquired the note after maturity.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by one Risley against one Gray and others on a promissory note. Judgment was entered in favor of defendants, and plaintiff appeals. Affirmed.

Sayle & Coldwell, for appellant. Church & Cory, for respondents.

HARRISON, J. Action upon a promissory note, executed by the defendant Gray to the defendant Stevens. The plaintiff's title to the note was derived by a purchase thereof after its maturity at a sheriff's sale under an execution issued upon a judgment against Stevens. The note had been executed by Gray in part payment for the purchase of an interest in a mine in Fresno county. At the time of the purchase and execution of the note, Stevens represented to Gray that the value of the ore in the mine was enough when worked out to meet the amount of the purchase price and notes given therefor, and the purchase by Gray and the execution of the note were made in reliance upon these representations. Upon working the mine it proved to be of no value, and thereupon Gray and Stevens mutually agreed to a surrender of the note and cancellation of its obligation, but the note itself was left with Stevens, and was not in fact delivered to Gray. This agreement was after the maturity of the note, and prior to the purchase by the plaintiff at the sheriff's sale. The defendant Gray, in his answer, alleged that the only consideration for the note was the purchase of this interest in the mine, and that he made the purchase upon the mutual agreement and understanding between him and Stevens that the mine was worth more than the amount paid for it, but that in fact it was of no value whatever. At the trial the court found in accordance with these allegations. These findings have not been excepted to by the plaintiff, and are sufficient to sustain the judgment. If Stevens had brought an action against Gray upon this note, the failure of consideration would have been a sufficient defense thereto, and the plaintiff, having acquired the note after its maturity, took it subject to the same defense. This renders it unnecessary to consider what would have been the effect of the failure to surrender the note to Gray in pursuance of the oral agreement between him and Stevens for its cancellation, if the note had in fact been upon a sufficient consideration. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(101 Cal. 522)

GORDON v. CITY OF SAN DIEGO. (No. 18,031.)

(Supreme Court of California. April 17, 1893.)

QUIETING TITLE—EVIDENCE—ESTOPPEL.

1. By Act Jan. 30, 1852, the city of San Diego was organized, and the board of trustees

authorized to sell as much city property as was necessary to pay certain debts. Section 11 provides that, "when the debts of the city are paid, no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so." Act Feb. 7, 1874, § 1, provides that "no deed \* \* \* made prior to the 24th day of November, 1871, for and on behalf of the city of San Diego \* \* \* for a valuable consideration, by the corporate authorities of the city, shall be invalid by reason of the want of a corporate seal." Held, in an action against said city by its grantee, to quiet title to land under a deed made in 1869, which recited that the officers who executed the same were authorized so to do by a vote of the inhabitants, such deed is admissible in evidence, though it was not attested by defendant's corporate seal.

2. In an action to quiet title to the east half of a tract of land, it appeared that defendant, being the owner of the entire tract, conveyed to plaintiff the undivided half interest therein; that afterwards, but before plaintiff's deed was recorded, defendant conveyed to another the west half of the tract in fee. Held, that the fact that defendant thus undertook to convey the entire interest in the west half of the tract did not estop it to claim its undivided interest in the east half.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action to quiet title by H. C. Gordon against the city of San Diego. Plaintiff had judgment, and defendant appeals. Reversed.

William H. Fuller, for appellant. Cassius Carter, for respondent.

SEARLS, C. This is an action to quiet title to the east half of pueblo lot 1,215, containing about 45 acres of land, situated in the city of San Diego. The appeal is taken by defendant from a judgment in favor of plaintiff, adjudging him to be entitled to said east half of pueblo lot 1,215, according to the Poole map of the pueblo lands of the city of San Diego made in 1856, and adjudging that defendant has no title thereto, etc.; also from an order denying a motion for a new trial. The city of San Diego was a municipal corporation, organized under two acts of the legislature, approved January 30, 1852, and April 23, 1852, respectively. The title of respondent is derived from the appellant, the city of San Diego, through a conveyance executed by the trustees of said city on the 27th day of February, 1869, to one Thomas Whaley, and which conveys "the undivided half of lot twelve hundred and fifteen, (1,215,) according to the official map of said city made by Charles F. Poole, A. D. 1856, and on file," etc. The deed is executed by the president and trustees of the city, who attach their private seals, it being recited that no corporate seal had been "as yet provided." Among the recitals of the deed are the following: "Whereas, the president and trustees aforesaid, by the vote of the duly-qualified electors of the said city of San Diego, at an election for the especial purpose, held in said city on the 25th day of May, A. D. 1868, in pursuance of the provisions of an act of the legislature of the state of California entitled 'An act to repeal the charter of the city of San Diego, and to create a board of trustees,' approved January 30,

1852, were directed, authorized, and empowered to sell pueblo or city lands, the property of said city; and whereas, on the twenty-seventh day of February, A. D. 1869, the said president and trustees, in compliance with said vote and said act of the legislature, sold to said party of the second part the land and premises herein-after described for the sum of twenty dollars in gold coin of the United States of America, being at the price of twenty-five cents per acre, upon the conditions provided for and prescribed in a certain resolution or order of said board of trustees, made and entered on the 8th day of June, A. D. 1868; and said party of the second part has made and completed all the improvements upon said lands by said resolutions or order required to be made, and has fully paid said sum of twenty dollars into the treasury of said city." The conveyance was duly acknowledged, and was recorded in the office of the county recorder of the county of San Diego, August 21, 1869. On the 28th day of February, 1869, the same trustees, by a like deed containing like recitals, conveyed the west half of the same lot (No. 1,215) to one J. C. Babcock, which deed was acknowledged and duly recorded March 1, 1869, viz. prior to the acknowledgment and recordation of Whaley's deed. At a special meeting of the board of trustees held June 8, 1868, it was resolved "that the only way pueblo lands will be granted is as follows." Then follow the conditions, which are, in substance, that one half of the purchase price is to be paid on securing certificate; the land to be occupied and improved within six months after certificate is taken, and it must be taken out within one month after approval of the petition; \$250 worth of improvements to be placed upon tracts of 40 acres or less, and \$400 upon tracts of 80 acres, within one year, and, if not made, previous payment to be forfeited, and land to revert to the city. When the improvements were made, the petitioner became entitled, upon payment of the residue of the purchase price, to a deed; surveys to be made at expense of purchaser.

It was conceded at the trial that title to the pueblo lands, of which lot 1,215 was a part, was at the date of the execution of the Whaley deed in the city of San Diego, and that whatever title passed by that conveyance was vested in H. C. Gordon, the respondent. Appellant objected at the trial to the introduction of the Whaley deed upon several grounds, the most important of which was that said deed was not executed on the part of the city as required by law. The specification of the reasons why not executed as required by law shows that there was no showing that the city ever passed a resolution authorizing the sale or transfer of the property described in the deed; that the property was not sold or conveyed in accordance with the charter of the city of San Diego. The Whaley deed recites the particular facts upon which the authority of the city trustees to convey is supposed to be founded.

That particular recitals in a deed are binding upon parties and privies, and that this doctrine applies to the author-

ized acts of a corporation, does not seem to be disputed by appellant. It is essential to an estoppel by deed that the deed itself should be a valid instrument; and if void, though under seal, it does not work an estoppel at law or in equity. *Calvey v. Dudgeon*, 38 Ind. 512; *Merriam v. Railroad Co.*, 117 Mass. 241. The contention of counsel for appellant is that, the deed to Whaley not being executed under the corporate seal of the city of San Diego, before it was admissible in evidence respondent should have been required to show that the corporate authorities possessed the power to sell the property, that it was sold under such power, and that the board of trustees, when assembled and acting as such, sold the property, and directed the execution of the deed to Whaley. The city of San Diego, as it existed at the date of the execution of the Whaley deed, as before stated, was organized under an act of the legislature of the state of California approved January 30, 1852, and by an act approved April 28, 1852. The first-named act provided for the election of three trustees, one of whom should be president, etc. The seventh section of the act authorized the board of trustees to sell as much of the property of the city as was necessary to pay its debts, "giving at least ten days' notice of any property to be sold, and to continue the sale from time to time until said debt is paid." Section 11 of the act provided that, "when the debts of said city are paid, no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so," etc. It appears from the act that there had been a previous corporation of the same city, the charter of which was repealed by the act first above cited, and the provisions of section 7 were intended to apply to the payment of the debts thereof. The language of section 11, that after the debts were paid "no more of the city property shall be sold, except by a vote of the inhabitants of said city they shall be authorized to do so," must be construed to empower the trustees to sell upon a vote in favor thereof. When the debts were paid, the power of the trustees under section 7 ceased, and thereafter their power of alienation came, if at all, from section 11 and the vote of the inhabitants. According to the recitals of the Whaley deed, the qualified electors, at an election for that purpose held, directed, authorized, and empowered the trustees to sell the land in question, and the board of trustees duly assembled, and, acting as such by resolution, prescribed the terms and conditions upon which sales would be made. The recitals in the deed, coupled with the law, are sufficient evidence to bind the parties and show that title passed by the deed, provided it was properly executed. We have seen before that it was executed by the trustees, who purported to act for and in the name of the city, except that they signed their names as trustees, and affixed their private seals, etc. On the 7th day of February, 1874, an act of the legislature was approved in the following language: "Section 1. No deed, conveyance, or grant of

land in fee, made prior to the 24th day of November, A. D. 1871, for and on behalf of the city of San Diego and the inhabitants thereof, for a valuable consideration, by the corporate authorities of said city, shall be invalid by reason of the want of a corporate seal, but all of said deeds, conveyances, and grants shall have the same force, effect, and validity as if a corporate seal of said city had been regularly provided and properly affixed thereto by the proper corporate authorities of said city."

It is not deemed necessary to go to any great length in discussing the question of the power of the legislature to enact valid curative laws. The field is a broad one, often involving questions of constitutional law, vested rights, retroactive laws, etc., and giving rise to distinctions sometimes too subtle to be readily grasped by the ordinary mind. Judge Cooley, in his work on Constitutional Limitations, at page 457, states concisely the rule on this subject, thus: "If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Tested by this rule, all doubt must vanish as to the power of the legislature to enact the curative law above quoted. No question has ever been suggested, so far as known, of the power of the legislative branch of government to abolish the distinction between sealed and unsealed instruments, as was done by section 1223 of the Civil Code. That a like provision might be enacted in reference to corporate and official documents can scarcely admit of a doubt. It is therefore held that the deed of conveyance to Whaley is to be taken, received, and interpreted between the parties to this action precisely as though sealed with a corporate seal of the city of San Diego at the date of its execution. Had vested rights in third parties accrued between the execution of the instrument and the passage of the curative act, a different question would be presented. That question need not concern us in the present case. Treating the deed as duly executed in point of form, under a statute conferring power upon the officers to sell and convey the lands of the city upon a majority vote of the inhabitants, the recitals in the deed that an election had been held pursuant to the provisions of the statute, at which the trustees "were directed, authorized, and empowered to sell pueblo or city lands, the property of said city," etc., is *prima facie* evidence that an election had been held. It is not here a question of power, but of proof. Many of the authorities go much further in holding to the binding force of recitals in deeds executed by municipal corporations than is necessary to uphold the con-

veyance in this case. *Jamison v. Fopiana*, 43 Mo. 565; *Devl. Deeds*, § 348, and cases cited. I am certain the court did not err in the admission of the Whaley deed. Like considerations apply to the admission of the conveyance from the city to Babcock, provided, always, that it was material testimony in the case, relevant to the issues joined therein, all of which may properly be considered in connection with the findings.

The point is made that the judgment is contrary to the findings, and not warranted by the facts as found in the case. The facts as found by the court may be epitomized as follows: (1) The city of San Diego, being the owner of pueblo lot 1,215, on the 27th day of February, 1869, conveyed in due form and by valid deed an undivided one half thereof to one Thomas Whaley; that the plaintiff herein, H. C. Gordon, is the successor in interest, by proper mesne conveyance, of the land and interest conveyed to Whaley. (2) That on the 28th day of February, 1869, one day after the conveyance to Whaley, the city of San Diego executed to one J. C. Babcock a proper deed of conveyance of the entire west half of the same lot, viz. lot 1,215. (3) The deed to Babcock was first acknowledged and recorded. Upon this state of facts the court entered judgment quieting and confirming plaintiff's title to the entire east half of lot 1,215, and perpetually restraining defendant, the city of San Diego, from asserting title thereto, and that it be decreed to have no title thereto. The position of respondent is (1) that by the conveyance to Whaley of the undivided one half of lot 1,215 he became tenant in common with the city therein. This no doubt is a correct conclusion. (2) That when, on the next day, the city conveyed the entire west half of the same lot to Babcock, it had conveyed the whole thereof, and, as a consequence, ceased to have any interest in any part of the lot. This second position is not readily apparent. No doubt two halves of a thing are equal to the whole of it; but the undivided one half and the whole of one half of a thing are not equal to the whole of it. When Whaley received a deed of an undivided one half of lot 1,215 he was a tenant in common with the city, and when on the next day the city sold the whole of the west half of the same lot, it simply attempted to convey the whole of a parcel of the lot in which it owned but an undivided half. If a grantor conveys lot A, which he does not own, I am at a loss to see how, in the absence of mistake or fraud, he can be deemed to have conveyed lot B, which he does own. If the title of Whaley failed to the west half of the lot, it was by a failure to have his deed acknowledged and recorded prior to the recordation of the Babcock conveyance.

There is, however, another and distinct theory upon which respondent contends the judgment of the court below can be upheld. Section 764 of the Code of Civil Procedure, so far as material, is as follows: "Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being an

owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be allotted or set apart without material injury to the rights and interests of the other cotenants who may not have joined in such conveyance." Under this section, or rather by analogy to it, respondent claims that where there are two tenants in common, each owning an undivided half of land, while neither can make a partition binding upon the other by assuming to convey either half specifically, yet if one does so convey, the other would be at liberty to acquiesce and to accept the remaining half; and that where he has, as in the present case, done so by conveying such remaining half specifically, the two conveyances operate as a complete and binding partition. In support of this proposition we are referred to *Freem. Coten. §§ 188, 535*, and to the cases of *Dall v. Brown*, 5 Cush. 289, and *Eaton v. Tallmadge*, 24 Wis. 223. At section 188 of *Freeman*, supra, it is said: "A deed of a specific parcel of land made by one cotenant is not binding on the others, nor can their rights be, to any extent, prejudiced by it. Such a conveyance is not void, but only voidable. It may therefore be approved and ratified by the cotenants, and thereby be made to operate as a conveyance in severalty." *Eaton v. Tallmadge*, cited supra, is substantially to the same effect as the above quotation. The same may be said of many decisions upon the same question. A parol agreement for the partition of land is void under the statute of frauds, and cannot be enforced; but where consummated and ratified by the parties it will be upheld. In *Borel v. Rollins*, 30 Cal. 409, it was held that, where an attorney in fact exceeded his authority in executing a deed of partition, his principal, who had ratified the act of partition by his own acts and conduct of solemn significance, such as the execution of deeds of conveyance, which necessarily recognized the partition as of legal validity, was estopped from saying there had been no partition. If the city of San Diego is bound by its acts in the premises, it must be upon the ground of estoppel. But estoppels must be mutual. All the authorities are to the effect that a sale by a tenant in common by specific bounds of a portion of the land held in common is not binding on his cotenant unless ratified by him. I fail to find in the record any evidence of ratification by Whaley, or those holding under him. It is true it appears that the deed to Babcock was first acknowledged and first recorded; but Babcock, for all that appears, may have taken with actual notice of the prior deed

of Whaley. Had Whaley conveyed the whole of the east half of lot 1,215, an inference might be predicated, perhaps, on that act, as tending to show his acquiescence in a partition; but so far as appears he did not do so. It was stipulated at the trial "that the plaintiff in this action succeeds by proper mesne conveyances to any title and interest in and to said pueblo lot No. 1,215, which was conveyed to Thomas Whaley by the deed dated February 27, 1869." The finding of the court is in harmony with the stipulation.

I fail to find in these points any basis for an estoppel in pais. Non constat but that Whaley or his grantees may still hold an undivided interest in the west half of lot No. 1,215. I recommend that the judgment and order appealed from be reversed, and the court below directed to enter a judgment quieting plaintiff's title to the undivided one half of the east half of pueblo lot No. 1,215, described in the complaint, and adjudging defendant to be an equal owner and tenant in common with plaintiff therein.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the court below is directed to enter judgment quieting plaintiff's title to the undivided one half of the east half of pueblo lot No. 1,215, described in the complaint, and adjudging defendant to be an equal owner and tenant in common with plaintiff therein.

(98 Cal. 123)

COCKRILL v. CLYMA et al. (No. 18,099.)

(Supreme Court of California. April 11, 1893.)

SUBSTITUTION OF PARTIES — ORDERS — RECORD — PRESUMPTIONS ON APPEAL.

1. Plaintiff sued as executrix of the will of her husband, to recover damages for the conversion of property. During the pendency of the suit the decree of distribution of the estate was made, and the causes of action were assigned to plaintiff. *Held* that, under Code Civil Proc. § 385, providing that, in case of a transfer of interest, the court may allow the person to whom the transfer is made to be substituted in the action, the court properly substituted plaintiff in her own right as plaintiff.

2. On admission by both parties in open court of the facts on which the substitution was based, the court, on application of defendant, made the order of substitution, but the record did not show whether the order was entered on the minutes of the court. *Held* that, while the order should have been entered in the minutes as a distinct order made before judgment, the fact that it was prefixed to the judgment, and recorded in the judgment book, and made a part of the judgment roll, does not affect its validity.

3. Where the record does not show that any objection was made to defendant's application for the substitution, or that the order was excepted to, and at the trial plaintiff admitted all the facts proper for making the order, and, after the decree of distribution, actually continued the action in her own right, the appellate court will assume that, when defendant made the motion, plaintiff consented thereto.

Department 1. Appeal from superior court, Sutter county; E. A. Davis, Judge.

Action by Cynthia A. Cockrill against Thomas Clyma and William Clyma to recover damages for the conversion of certain cattle. Judgment was entered in favor of defendants, and plaintiff appeals. Affirmed.

Henry Sears, for appellant. M. E. Sanborn, for respondents.

PER CURIAM. Action in the nature of trover to recover damages for the conversion, by the defendants, of certain cattle. In the original complaint, filed November 23, 1891, the plaintiff described herself as executrix of the will of Christopher Cockrill, deceased, who, she alleges, died on January 6, 1891, and whose will was probated and letters testamentary issued to her on January 31, 1891. The cause of action alleged is that on May 4, 1891, "the plaintiff, as such executrix, was the owner and in the possession of" the cattle described, of the value of \$1,208; that on that day the "defendants wrongfully took said property, and converted the same to their own use, to the damage of the plaintiff, as such executrix, in the sum of \$1,268;" and "that, by reason of the detention of said property, the plaintiff, as such executrix, has been further damaged in the sum of \$250," for the sum of which damages she prays judgment. The answer denies the alleged ownership and possession of the cattle by plaintiff as such executrix, or in any other capacity or character; but does not deny the alleged death of Christopher Cockrill, the probate of his will, nor the appointment and qualification of plaintiff as executrix. The case was tried by the court, and of the 21 findings of fact the 6th, 7th, and 8th are as follows: "(6) That since the commencement of this action, and prior to the trial thereof, to wit, on the — day of —, 1892, the said superior court of said Yuba county duly made its order and decree in the matter of the estate of said Christopher Cockrill, therein pending, finally distributing the entire estate of said Christopher Cockrill, deceased, to the persons entitled thereto, according to law and the terms of the last will and testament of said deceased, by which said order and decree the causes of action alleged in the complaint herein were duly assigned to the said Cynthia A. Cockrill, plaintiff herein, in her own right. (7) That, since the decree last above referred to, said plaintiff, Cynthia A. Cockrill, has continued this action in her own right and interest. (8) That all the foregoing facts were admitted to be true in open court by the parties hereto, and defendants have asked the court that this action be continued in the name of said Cynthia A. Cockrill." On all the issues made by the pleadings, the findings were in favor of defendants. As conclusions of law the court found "(1) that said Cynthia A. Cockrill should be substituted as plaintiff herein, in her own name and right; (2) that the defendants are entitled to judgment against said Cynthia A. Cockrill for their costs herein." The judgment, after reciting the trial and submission of the cause, and that written findings had been

filed, proceeds as follows: "Wherefore it is by the court now considered, ordered, and adjudged that said Cynthia A. Cockrill, in her own name and right, be, and she is hereby, substituted as plaintiff herein, in lieu of the said Cynthia A. Cockrill, executrix of the estate and will of Christopher Cockrill, deceased. It is further ordered and adjudged that the defendants, Thomas Clyma and William Clyma, do have and recover of and from said plaintiff, Cynthia A. Cockrill, their costs of suit herein, taxed at \$81.75. E. A. Davis, Judge of said Court." The plaintiff, C. A. Cockrill, appeals from this judgment on the judgment roll, without a bill of exceptions.

The appellant contends that the court erred in substituting as party plaintiff Cynthia A. Cockrill simply, for Cynthia A. Cockrill in her representative character as executrix, etc., whereby she was made personally liable for defendants' costs, taxed at \$81.75. There is no substantial merit in this point. Beyond question the facts found made a proper case for the substitution under section 385<sup>1</sup> of the Code of Civil Procedure. By the decree of distribution of the estate of Christopher Cockrill, pending this action, the entire cause of action had been assigned to Cynthia A. Cockrill, who, since said decree, had continued the action in her own right and interest. Upon the admission of these facts by both parties in open court at the trial, the defendants asked that the action be continued in the name of Cynthia A. Cockrill. No objection appears to have been made to this motion, and the record does not show whether any order of the court upon the motion was entered in the minutes; but the court found the facts thus admitted by the parties to be true, and, as a conclusion of law therefrom, found that the substitution should be made, and on the same day made the order of substitution. As a matter of correct practice, this order should have been entered in the minutes as a distinct order made before judgment, but the fact that it is an order prefixed to the judgment, and recorded in the judgment book, and made a part of the judgment roll, is not inconsistent with its previous entry in the minutes of the court. In its position in the judgment it appears to have been made prior thereto, and as distinct from the judgment as if it had been separately entered in the minutes of the court. It is incumbent upon the appellant to make it affirmatively appear that error was committed by the court below. The record herein does not show that any

<sup>1</sup>Code Civil Proc. § 385, provides: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

objection was made to the defendants' application for the substitution, or that the order was excepted to by the plaintiff. It appears from the findings that at the trial she did admit all the facts proper for making the order of substitution, and, in addition to this, admitted that, since the decree of distribution, she had actually continued the action "in her own right and interest." Under these circumstances, we are authorized to assume in support of the action of the court that, when the defendant made the motion, she expressly consented to the order. If the order was warranted by any possible state of facts not negated by the record, it must be presumed in justification of the action of the court that such state of facts existed. *Caruthers v. Hensley*, 90 Cal. 560, 27 Pac. Rep. 411. "All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants [plaintiff] would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not." *Parker v. Altschul*, 60 Cal. 380.

The judgment is affirmed.

(98 Cal. 155)

**THOMPSON v. BRANDT et al.** (No. 18,016.)  
(Supreme Court of California. April 19, 1893.)

**CHANGE OF VENUE—MORTGAGE FORECLOSURE.**

In an action brought in T. county to foreclose a mortgage on lands, a part of which are in T. county and a part in F. county, after presenting material issues of fact by answer, defendants moved for a change of venue to F. county, alleging by affidavit that all the parties and all of defendants' witnesses reside in F. county, except one, and that it would be as convenient for him to attend the trial at F. as at T. In reply to the motion, plaintiff denied the matters alleged in defendant's answer, but did not deny the materiality of defendant's witnesses, nor that their convenience required a change in the place of trial, nor allege that a change would cause a delay in the trial. *Held*, that the motion should have been granted.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by O. M. Thompson against Otto Brandt and Ambrose Caldwell to foreclose a mortgage. From an order denying a motion for a change of venue, defendants appeal. Reversed.

Justin Jacobs, for appellants. N. O. Bradley, for respondent.

**HAYNES, C.** Defendants moved to change the place of trial from the county of Tulare to the county of Fresno, on account of the convenience of witnesses, and this appeal is from an order denying said motion. The action is to foreclose a mortgage upon lands, a part of which are in Tulare, and a part in Fresno, county. Defendants answered, presenting material issues of fact. The affidavit upon which the motion is based was made by defendant Brandt, and shows that defendants' evidence consists of records and files in the courthouse at Fresno, including the testimony of a deceased witness, whose

name is given, and the testimony of two other witnesses, bankers in Fresno, whose names are also given; that defendants have but one witness in the county of Tulare; and that it is as convenient for said witness to go to Fresno as it would be to go to Visalia. The statement of facts expected to be proved by the two living witnesses at Fresno is sufficient, as is also the affidavit of merits as supplemented by the affidavit of Justin Jacobs. The plaintiff also lives in Fresno.

In plaintiff's affidavit in reply, he says he brought the action in Tulare county because his counsel lived there; denies the matters alleged in defendants' answer; alleges that defendant Caldwell is interested in the determination of the cause; but does not deny in any manner the materiality of defendants' witnesses, nor that their convenience requires a change of the place of trial, nor that the ends of justice would be promoted thereby; nor is it alleged that it would cause delay in the trial; nor is the good faith of defendants impugned therein. Caldwell does not make an affidavit in support of the motion, but he joined with his codefendant in the answer to the complaint, and the motion is made on behalf of both defendants by the same counsel who answered for them, and it is not shown that the motion was not made with his consent. The presumption must be that his counsel had authority to represent him in making this motion. The record does not show the grounds upon which the court denied the motion, and we are at a loss to conceive of any grounds upon which the order appealed from could be justified. The action could properly have been brought in Fresno county, in which county the greater part of the land lies; and, no reason appearing in the record against the change, the order cannot be justified upon the ground that granting such orders are in the discretion of the court, for here there was no fact or reason against the change, and hence no basis for the exercise of discretion. The order should be reversed, and the court below directed to enter an order granting the motion.

We concur: **VANCLIEF, C.; BELCHER, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the order appealed from is reversed, and the court below is directed to enter an order granting the motion.

(51 Kan. 306)

**MATLACK v. SHAFFER et ux.**

(Supreme Court of Kansas. April 8, 1893.)

**CANCELLATION OF DEED—FRAUD.**

1. Where a party living in a county in which a tract of land is situate falsely represents to the owner, who lives in a distant state, and is old and feeble in body and mind, and who has no knowledge of the location, condition, or value of the land, that he has a tax title to the same, which is so old as to be cured of any defects by the statute of limitations, and that his rights under that title are paramount, and where he further states that unless the owner receives the nominal sum offered, and executes a conveyance to him, he will never



get anything for the land, and the owner, believing this and other like representations to be true, and relying upon them, accepts the amount offered, which is greatly inadequate, and executes the conveyance, he is entitled to relief, where it is seasonably asked for, and, upon restoration of the consideration paid to him, may obtain a cancellation of the conveyance so fraudulently obtained.

2. Where the representations respecting a tax title were made with the intent to deceive, and the grantor, ignorant of their falsity, believed and acted upon them in making the conveyance, he is entitled to have it canceled and set aside for fraud, although he might have discovered the fraud by a search of the records in the distant state where the land was situate.

(Syllabus by the Court.)

Error from district court, Sumner county: J. T. Herrick, Judge.

Action by George Shaffer and his wife, Elizabeth A. Shaffer, against B. W. Matlack, to set aside a conveyance obtained from plaintiffs by fraudulent representations. There was judgment in favor of plaintiffs, and defendant brings error. Affirmed.

J. F. McMullen and L. H. Webb, for plaintiff in error. Peckham & Peckham, for defendants in error.

JOHNSTON, J. On January 19, 1887, B. W. Matlack sought and obtained a conveyance of 200 acres of real estate in Cowley county from George Shaffer and his wife, Elizabeth A. Shaffer. This action was brought by the Shaffers to cancel and set aside the deed of conveyance upon the ground that it had been obtained by misrepresentation and fraud. The Shaffers, who resided in Baltimore, and were over 70 years of age, had never seen the land, and were not acquainted with its location and value. George Shaffer had inherited the land, or an interest in the same, from his nephew, who died in 1873, unmarried and without issue. Matlack lived in the vicinity of the land, and was acquainted with its condition and value. Learning that the Shaffers had an interest in the land, he wrote to a gentleman in Maryland on December 21, 1886, stating that he had recently bought a piece of land, and, in order to make the title absolutely good, he desired to obtain a quitclaim deed from the Shaffers. He told his agent to whom he wrote that their title did not amount to much, but he would be willing to pay them \$25 each, and would give the agent \$100 to perform the work. The agent replied that the Shaffers lived in Baltimore, and that, if he would send him \$10 to pay expenses, he would go to that place, and look them up. The agent visited the Shaffers, and proposed to give them \$50 for a conveyance of the land, telling them that Matlack had a tax title to the same. The Shaffers declined to accept the offer, and their declination was reported to Matlack, who sent another letter of advice to his agent, directing him to tell the Shaffers that he held a title under a tax deed which was seven years old, and, if there were any technical errors in the same, they had been cured by the five-years statute of limitations. He directed the agent to offer them \$100, and, if they would not accept that, to give them \$150 or \$200, and that, if they refused to take

these sums, to state to them that he would commence an action against them to quiet title, in which event they would never get anything, and that these offers were made to save the trouble of a lawsuit, and to enable him to dispose of the land immediately. He inclosed a quitclaim deed, partially filled out, advising him that he "must use a little strategem in this, but do not miss the mark." In accordance with this advice, the agent again visited the Shaffers, and, after considerable persuasion and pressure, succeeded in getting them to sign the conveyance. The consideration for the same was \$200, while the land is conceded to be worth \$6,000 or over, and the interest of George Shaffer therein is worth at least \$1,500. At that time Matlack had no tax title whatever to the land, nor did he hold any tax lien on the same, neither had he any possession of the land then or at any other time. The possession and occupancy of the same were in another, who claimed title by a deed purporting to be from the sole heirs of the former owner.

The court below found that the execution of the conveyance had been procured by false and fraudulent representations, upon which the grantors relied, and but for which it would not have been executed. We think the testimony justifies the finding, and that the judgment should stand. George Shaffer, by reason of age and illness, was feeble in mind and body at the time the conveyance was obtained, and it is clear that he was deceived and overreached through the false representations made to him. He knew nothing as to the tax liens or claims upon the land, nor was he acquainted with the tax laws of Kansas. Matlack, through his agent, represented to him that he had a tax title which was good, and, if there were any defects or technical errors therein, they had been cured by the lapse of time. He was also told that it would cost him a large sum of money to send an attorney or other person out to investigate the matter, and that an action would be begun against him; and the agent told him that, from what he knew, the tax title was good, and that if he did not accept the \$200 he would never get anything. This agent, in his testimony, states that Shaffer would not have signed the deed if it had not been for these representations. More than that, he was told, and led to believe, that the description in the deed covered only 160 acres of the land, and, attention being called to the extent of the land, the agent confirmed that belief. Shaffer specially objected to signing the deed, if it contained more than 160 acres. He then employed Matlack's agent to look up and care for his title and interest in the remaining 40 acres, which he supposed were not included in the instrument of conveyance. It thus appears that he was led to believe that Matlack had a good title to the land, and that by possession, and the running of the statute of limitations, his own interest was of little or no value. But for these misrepresentations, he would not have executed the conveyance for any such trifling consideration. Some of the misrepresentations made by Matlack were of

fact, and some of them were of fact based on law. They were untrue, and calculated to mislead the Shaffers, who did not have the knowledge or opportunity to know the truth of the representations made. While they were ignorant, Matlack had superior means of information, and by the misrepresentations obtained an undue advantage from which the Shaffers were entitled to relief.

It is claimed that Matlack's statement with reference to the tax deed was not wholly untrue. It appears that the land had been sold for taxes, and it was claimed that the person who had obtained a tax deed had agreed to share his title with Matlack. The testimony with respect to this is not satisfactory, and is of little value as a support for Matlack's claim. It appeared that the tax sale upon which the tax deed was issued was only for one fourth of the 160-acre tract and for 19 acres of the 40-acre tract, and Matlack claimed that the tax title covered the whole of both tracts.

It is also said that the Shaffers had no right to rely upon Matlack's statement that he had a tax deed, because it was a matter of public record, of which they were bound to take notice. The facts with reference to the title and Matlack's rights to the land were not equally within the knowledge of both parties, or the means of acquiring knowledge possessed by both. The Shaffers were nonresidents, and more than 1,000 miles from the land, and the public records pertaining to it, while Matlack was acquainted with the land and the records, and also knew of the ignorance of the Shaffers respecting the title. In the absence of any personal knowledge, the Shaffers were, under all the circumstances, justified in relying on Matlack's representations. They had no immediate means of learning the facts by an examination of the records, and, as Matlack knew the statements to be untrue, and it appears that they have been relied and acted upon as true by the Shaffers, they are entitled to recover, although they might have discovered the fraud by searching the records. *Claggett v. Crall*, 12 Kan. 393; *McKee v. Eaton*, 26 Kan. 226; *Curtis v. Stilson*, 38 Kan. 302, 16 Pac. Rep. 678; *David v. Park*, 103 Mass. 501; *Safford v. Grout*, 120 Mass. 20.

The Shaffers tendered a return of the \$200 paid to them when the deed was executed, and, upon the whole record, we think the district court made no mistake in its conclusion that the deed should be canceled and set aside. Its judgment will be affirmed. All the justices concurring.

(51 Kan. 214)

#### WESTBROOK v. SCHMAUS.

(Supreme Court of Kansas. April 8, 1893.)

##### TRANSCRIPT ON APPEAL—DISMISSAL.

Where the record brought up for a review of the rulings of the district court is based upon a transcript, it is essential that it shall contain all the proceedings of the case as shown by the record in the court below, and that it is a complete transcript must appear from the certificate of the clerk.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action between C. E. Westbrook and Joseph Schmaus to quiet title. From the judgment Westbrook brings error. Dismissed.

Keller & Dean, for plaintiff in error. Mooney & Stratford, for defendant in error.

JOHNSTON, J. This proceeding was brought to review the rulings and judgment of the district court of Butler county in an action to quiet title. The right to a review is challenged on account of the insufficiency of the record. The petition in error is based upon a transcript, instead of a case made, and the clerk, in the certificate attached, certifies that it "is a full, true, and correct copy of certain proceedings had in said court in the case therein entitled as the same appears of record in my office." The certificate fails to show that the record contains a complete transcript of the proceedings in the cause. Nothing short of a full transcript of all the proceedings is sufficient, and that it is a complete transcript must appear from the certificate of the clerk. Within the authority of *Whitney v. Harris*, 21 Kan. 96; *Eckert v. McBee*, 25 Kan. 706; *State v. Ricker*, 40 Kan. 14, 19 Pac. Rep. 357; *Nels-wender v. James*, 41 Kan. 463, 21 Pac. Rep. 573,—the proceeding must be dismissed. All the justices concurring.

(51 Kan. 195)

#### SPARKS v. SPARKS.

(Supreme Court of Kansas. April 8, 1893.)

##### DEPOSITIONS—NOTICE—PRIVILEGED COMMUNICATIONS TO ATTORNEY—BURDEN OF PROOF.

1. Where the caption of a notice to take depositions includes the name of the court and the title of the action, and the body of the notice specifies that the deposition to be taken is "to be used on the trial of the above-entitled action," it substantially complies with the requirement of the statute that the notice shall specify the action or proceeding and the name of the court in which it is to be used.

2. A motion was made to quash a deposition because the notice specified that it would be taken at the office of "Dan. Ray," whereas the deposition showed that it was taken at the office of "Daniel E. Wray." *Held*, that "Dan." is an abbreviation of "Daniel," and that "Ray" and "Wray" are idem sonans; and, further, that the omission of the middle letter is immaterial; and, further, that, Wray being identified in the notice as an attorney at law of the place where the deposition was to be taken, and there being no claim that there was any other person of that name or having one sounding like it in that place, the opposing party could not have been misled, and that the overruling of the motion to quash the deposition was not error.

3. Communications made to an attorney who was acting for both parties, and made in the presence of both parties, cannot be regarded as confidential and privileged.

4. Where the material facts asserted by the plaintiff in his petition are admitted, and an affirmative defense is set up by the defendant, the onus probandi is upon the defendant, and the ruling of the court in placing the same upon the plaintiff is material error.

(Syllabus by the Court.)

Error from district court, Barber county; C. W. Ellis, Judge.

Action by William H. Sparks against Thomas L. Sparks to recover money due under certain contracts entered into by defendant with plaintiff's assignor. There was judgment for defendant, and plaintiff brings error. Reversed.

E. Sample and W. W. S. Snoddy, for plaintiff in error. A. J. Jones, W. S. Denton, and T. S. Brown, for defendant in error.

JOHNSTON, J. William H. Sparks brought an action against Thomas L. Sparks to recover the sum of \$3,726.08, under two several contracts made between Richard M. Sparks and the defendant. The petition was in two counts, and in the first it was alleged that on October 24, 1885, Richard M. Sparks, who was the owner of the Elm Creek ranch, consisting of 21 quarter sections, and which was stocked with cattle, sold an undivided two-thirds interest in the same to Thomas L. Sparks and John Briscoe. The amount to be paid by each of the parties was \$6,726.08, and it is averred that Thomas L. Sparks, who signed the agreement, took possession of the real and personal property so sold in pursuance of the agreement, and paid the sum of \$4,000 thereon, but had failed and refused to pay the remaining \$2,726.08, as the provisions of the contract required. It was alleged that this contract and the rights thereunder had been fully assigned and transferred by Richard M. Sparks to the plaintiff, William H. Sparks. The written contract, duly signed by all the parties, was attached and made a part of the petition.

The second count alleged the sale and conveyance of certain real estate by Richard M. Sparks to Thomas L. Sparks, under an agreement by which Thomas L. Sparks was to execute and deliver two promissory notes, due, respectively, in two and three years, of \$1,000 each. It is stated that, although the transfer of the real estate had been made, only one of the notes had been given, and that there still remained due on the transaction the sum of \$1,000, with the interest thereon, for which judgment was asked. The defendant met these allegations with a general denial, and, in further answer, he admitted that he signed the written contract mentioned in and appended to the first count of the petition, and also that he took possession of the property therein described. He alleged, however, that the contract was not executed in earnest so far as he was concerned, and that it was delivered without consideration. The circumstances under which it was executed and delivered, he avers, were that Richard M. Sparks was the owner of the property, and a near relative of his, whom he had known intimately for several years. He was desirous of selling an interest in the property, and offered one third of the same to John Briscoe and one third to the defendant. That Briscoe accepted the offer, and R. M. Sparks induced the defendant to join them in the signing of the contract, and agreed that he would not consider the same as a sale to the defendant; and, relying on this representation,

he attached his name to the contract. He further alleges that that contract was never enforced, and that subsequently R. M. Sparks, failing to find any one to purchase that interest, sold the same to the defendant for the sum of \$4,000, and that, under this agreement, he took possession of the property, and paid the full price agreed upon. In answer to the second cause of action stated in the plaintiff's petition, he admits the making of the contract therein stated, and that the deed of conveyance was then drawn up in accordance with that agreement, but that it was not delivered until a long time afterwards; that, before the delivery, the contract was, by mutual consent of the parties, rescinded and canceled, and another agreement and sale made of the same premises, for the price of \$1,000, for which defendant gave his promissory note, and it was accepted by Richard M. Sparks as the full purchase price of the land. A trial had, with a jury, resulted in a verdict in favor of the defendant. Various rulings of the court during the trial are deemed by the plaintiff to be erroneous, which will be examined.

Complaint is made of the overruling of a motion to quash a certain deposition on the ground of the insufficiency of the notice to take the same. The first ground is that the notice to take the same did not sufficiently specify the action or proceeding in which the deposition was to be used. The particular defect was that the body of the notice did not name the court or tribunal. It appears that at the beginning of the notice the court was described, and also the title of the cause, and in the body of the notice it stated that the testimony of the witnesses taken was for use "as evidence on the trial of the above-entitled action." In this way the action or proceeding and the name of the court or tribunal were sufficiently specified to meet the requirements of section 352 of the Civil Code.

The second ground of the motion to quash was that the notice specified the place at which the deposition was to be taken as the office of "Dan. Ray," whereas the deposition was actually taken at the office of "Daniel E. Wray." It is a matter of common knowledge that "Dan." is an abbreviation of "Daniel," and the names "Ray" and "Wray" sound alike, and, under the rule of *idem sonans*, are equivalent. The omission of the middle letter or a mistake in the same is immaterial. *Vance v. Wray*, 3 U. C. Law J. 69; *Rooks v. State*, 83 Ala. 79, 3 South. Rep. 720. It is clear that the defendant could not have been misled, as Wray was identified in the notice as an attorney at law of Versailles, Mo., where the deposition was to be taken, and there is no claim that there was any other person of that name, or a name sounding like his, in that place; nor is it pretended that the deposition was not taken at the identical place where the notice specified that it would be taken.

Another error assigned is in allowing the deposition of Wray to be read in evidence, on the ground that he was the attorney of R. M. Sparks, and that the matters communicated to him were confiden-

tial and privileged. No error was committed in holding that Wray was a competent witness, and in allowing his deposition to be read. Of course, communications between attorney and client are privileged when they are confidential, but there is testimony that Wray was not in any sense acting as the attorney or legal adviser of R. M. Sparks. He appears to have been employed only as a scrivener to draw a certain conveyance and notes, and was acting for all of the parties. He was not employed to give legal advice to R. M. Sparks, but only to put in legal form and phrase the agreements of the parties; and the fact that he happened to be skilled in the law will not make him incompetent as a witness, nor can the communications made by the parties to him be considered as privileged. Indeed, the matters testified about were not of a confidential character, but were made in the presence of both of the parties to the controversy. Communications made to one who is acting for both parties, and in the presence of all the parties to the controversy, cannot be regarded as confidential or privileged. *Goodwin, etc., Co.'s Appeal*, 117 Pa. St. 514, 12 Atl. Rep. 736; *Whiting v. Barney*, 30 N. Y. 330; *Britton v. Lorenz*, 45 N. Y. 51; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. Rep. 782; *Dunn v. Amos*, 14 Wis. 106; *De Wolf v. Strader*, 26 Ill. 225; *Machette v. Wanless*, 2 Colo. 169; 1 Whart. Ev. § 587.

The only remaining objection that is deemed to be material is the ruling of the court placing the burden of proof upon the plaintiff. The jury were instructed that in order to entitle the plaintiff to recover on either cause of action he must prove by a preponderance of the evidence each material allegation therein contained. From the pleadings and the admissions which they contain the onus probandi clearly rested upon the defendant; and hence the exception to the ruling and the instructions must be sustained. The plaintiff set up and relied upon a written contract purporting to have been executed by the defendant. The execution of this contract was admitted by the defendant. The plaintiff also alleged that defendant was in possession of the property sold and transferred to him under the contract, and the possession was admitted by the defendant. The plaintiff further alleged that defendant had only paid him \$4,000 of the \$6,726.08 which, under the terms of the contract, he was held to pay, and the defendant admitted that he had paid no more than \$4,000 for the property. It thus appears that the material facts asserted by the plaintiff were conceded by the defendant. No proof was required by the plaintiff in order to maintain these propositions. He is not required to disprove the facts alleged in the defendant's affirmative defense. The defendant asserts that the contracts relied upon by the plaintiff, and the making and execution of which he admits, have been changed by other agreements and understandings. The defendant has the affirmative of these propositions, and the burden of maintaining them rests upon him. The testimony on the disputed propositions in

the case appears to be close and conflicting, and this erroneous ruling of the court is deemed to be material error. The judgment of the district court will therefore be reversed, and the cause remanded for a new trial. All the justices concurring.

(51 Kan. 192)

MISSOURI GLASS CO. v. BAILEY.

(Supreme Court of Kansas. April 8, 1893.)

MOTION FOR NEW TRIAL—WHEN TO BE MADE.

A motion for a new trial, upon the grounds that the judgment is not sustained by evidence, and is contrary to law, and for errors of law occurring at the trial, and excepted to by the party complaining at the time, must be made at the term the judgment is rendered. If the motion for a new trial, for such reasons, is not presented or filed until after the term has ended and the court has finally adjourned, the supreme court cannot consider or review the errors alleged in the motion.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by the Missouri Glass Company against M. Bailey. There was judgment for defendant. A motion for a new trial was overruled, and plaintiff brings error. Affirmed.

J. B. Zeigler, for plaintiff in error. A. S. Lapham, for defendant in error.

HORTON, C. J. The Missouri Glass Company brought its action in the district court of Neosho county against M. Bailey to recover \$580, with interest. On the 24th of April, 1889, judgment was rendered against the plaintiff, and in favor of the defendant, for costs. It appears from the record that the cause was tried before the court, without a jury, on the 23d of April, 1889, and, at the conclusion of the trial, the court announced that its decision would be rendered on the next day, April 24th. On April 24th the judgment was rendered. The court adjourned for the term upon that day. After the close of the trial, on April 23d, the attorney for the glass company left Erie, the county seat of Neosho county, for Vinita, in the Indian Territory, on important business. He did not return from the territory until after the court had adjourned for the term; but upon his return, on April 27, 1889, he filed his motion for a new trial. This motion was heard and overruled on July 16, 1889, the court finding, however, upon the evidence presented, that the plaintiff below "was unavoidably prevented from filing his motion for a new trial at the term at which the judgment was rendered." The question is now properly presented, by cross petition in error, that the application for the new trial was made too late, and, therefore, that this case cannot be considered upon the merits.

Section 308 of the Civil Code reads: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly-discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be

within three days after the verdict or decision was rendered, unless unavoidably prevented." It has been repeatedly held by this court "that the application for a new trial must be made at the term the verdict, report, or decision is rendered." *Earls v. Earls*, 27 Kan. 538; *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. Rep. 670; *Powers v. McCue*, 48 Kan. 477, 29 Pac. Rep. 686. In the latter case it was said that "the party objecting to the decision of a district court must not only except at the time the decision is made, but must reduce the exception to writing, and present the same for allowance at the term the decision is excepted to, not beyond the term." But it is claimed that, as the trial court found that the plaintiff below was "unavoidably prevented from filing his motion at the term at which the decision and judgment were given," therefore he was in time. It is not alleged in the motion that any new evidence had been discovered by the party applying. The grounds for the new trial, as stated, were "that the decision and judgment of the court were not sustained by the evidence, and were contrary to law, and for error of law occurring at the trial, and excepted to at the time." The provision of the section for further or additional time for filing a motion for a new trial, on account of newly-discovered evidence, does not apply in this case. No special findings were asked or made by the trial court. That court only made a general finding. As the motion for a new trial was not filed during the term of the trial court, as prescribed in such a case as this by section 308 of the Civil Code, we cannot consider or review the errors alleged in the motion for a new trial, or in the petition in error, which presents substantially the same grounds of error. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 203)

## WESTERN UNION TEL. CO. v. MOYLE.

(Supreme Court of Kansas. April 3, 1893.)

## ACTION—DAMAGES—ERECTION OF TELEGRAPH WIRES.

Where a person or corporation enters upon the premises and building of another, and without his consent fastens a telegraph wire to a part thereof, and such wire does no particular injury or damage to the property at the time, but thereafter, on account of additional wires being connected with the pole or wire so fastened to the building, such building is greatly injured and damaged, held, that a new injury or cause of action arises from the additional wires so placed, and the injurious results occurring from such new wrong or invasion of the owner's rights may be the basis of a recovery for damages.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action by Henry Moyle against the Western Union Telegraph Company to recover for damages to plaintiff's building, caused by attaching wires thereto. There was a judgment for plaintiff before a justice of the peace. On appeal to the district court there was judgment for plaintiff, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 25th day of June, 1888, Henry Moyle brought his action before a justice of the peace against the Western Union Telegraph Company and the St. Louis & San Francisco Railway Company, alleging therein that he was the owner of lot No. 27 in block No. 25, at Augusta, in this state; that the defendants, in the construction and operation of their telegraph lines, in 1882, fastened wires to the building on the lot described, without the consent of plaintiff, the owner thereof, and continuously used the property from that date up to and including the month of February, 1887, to the great injury of the property, and on account of the use thereof that plaintiff had been damaged in the sum of \$300. On July 16, 1888, the action was dismissed as to the St. Louis & San Francisco Railway Company without prejudice. On the same day the action was tried against the telegraph company, and judgment rendered in favor of the plaintiff and against the company for \$300 and costs. At the trial the telegraph company failed to appear. On the 18th day of July, 1888, the company filed its appeal bond, and the case was taken to the district court of Butler county. On the 28th day of May, 1889, Henry Moyle filed in the district court his amended bill of particulars or petition, alleging, among other things, that the telegraph company, in the construction and operation of its line, in 1882, fastened a wire to the roof of the building owned by plaintiff on lot 27 in block 25 in Augusta, without his consent; that the wire was a stay or guy extending from the building to a telegraph pole, to which the wires running to and from the main line of the defendant company were attached; that at the time the wire was attached to the building only slight damage was caused, but that in the month of September, 1886, the telegraph company ran two more wires into its office from the main line, and attached them to the pole to which the guy wire was attached, and that this put additional strain upon the wire attached to plaintiff's building, whereby the building was greatly damaged and injured; that in the month of November, 1887, plaintiff repaired his building to make it tenantable, but the repairs were broken and destroyed and the building rendered uninhabitable by the continual strain of the wire attached thereto; that the telegraph company continuously used the building, with its wires, up to and including the month of February, 1887. The plaintiff demanded damages in the sum of \$300. The jury returned a verdict in favor of the plaintiff, Moyle, and against the defendant, the telegraph company, for \$162. Judgment was entered accordingly. The telegraph company excepted, and brings the case here.

Eaton, Pollock & Love, for plaintiff in error. Shinn & Knowles, for defendant in error.

HORTON, C. J., (after stating the facts.) It is contended that the district court had no jurisdiction in this case. It is said that

in the original bill of particulars and in the amended bill of particulars Henry Moyle attempted to make it appear that his action was based upon the use of his property, and that he sought to recover \$300 for the use only; but that upon the trial he relied upon proof establishing an action in trespass. Under the authority of *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. Rep. 631, it is urged that, as justices of the peace have jurisdiction in actions for trespass on real estate only where the damages do not exceed \$100, the district court was without jurisdiction upon the appeal. Section 6, Justices Act. It appears from the record that the question of jurisdiction is raised for the first time in this court. No attempt was made to question the jurisdiction of the trial court. Whatever construction may be given to the original bill of particulars, it clearly appears from the allegations of the amended bill of particulars or petition filed in the court below that Moyle sought to recover in that court for injuries to his real property, and alleged therein wrongful acts of the telegraph company. Perhaps a motion to have made the petition more definite and certain ought to have been sustained, if one had been presented. This was not done. The demurrer filed to the amended bill of particulars or petition alleged that it did not state facts sufficient to constitute a cause of action, and, further, that the cause of action was barred by the statute of limitations. The question now presented about jurisdiction was not called to the attention of the trial court in any way. The court had jurisdiction of the subject-matter, even if there had been no prior proceedings pending before the justice of the peace, and if no appeal had been taken. The telegraph company made a general appearance. The court therefore had jurisdiction over the subject-matter and the parties. *Railway Co. v. Lea*, 47 Kan. 268, 27 Pac. Rep. 987, and cases cited. This is not a case where the trial court had no jurisdiction over the subject-matter. In such a case an objection may be taken at any time, and is never waived.

It is next contended that the action was barred by the statute of limitations. It appears that in the year of 1882 the telegraph company attached a guy wire to the roof of the building belonging to Moyle, extending to a pole to which the telegraph wire was attached running into the telegraph office; that afterwards, in August, 1886, the company ran additional wires into their office, and attached them to the pole to which this guy wire was attached, multiplying the force on the guy wire and strain on the building many times. In November, 1886, Moyle repaired the building, put in a new front to replace the one broken out by the effect of the wire, braced the building by a partition, etc., and used efforts to prevent the further injury to his premises, and it was not until January, 1887, that he discovered the wire was operating to destroy his building, at which time it became untenable. All the damages proved or allowed were the result of the acts of the company in 1886 and 1887. This case comes clearly within the

rule laid down in *Railway Co. v. Houseman*, 41 Kan. 300, 21 Pac. Rep. 284. Although the telegraph company went upon the premises of Moyle and attached a wire thereto in 1882, and although this action was not commenced until the 23d of January, 1888, yet, as the damages complained of and found by the jury resulted from the wrongful acts of the company in 1886 and 1887,—within less than two years before the commencement of the action,—the two-year statute of limitations for trespass upon real property was not a bar. No damages were recovered for anything occurring two years prior to the commencement of the action. There is sufficient evidence tending to show that Moyle was damaged by the acts of the company in 1886 to the full amount of the verdict of the jury and the judgment rendered thereon. In *Railway Co. v. Muhlman*, 17 Kan. 224, the trespass complained of was completed when the company had dug the ditches therein referred to, but, unlike this case, no new act was committed by the company after it had acted in the first instance. The damages in that action were sustained by reason of the original wrong. In this case the cause of action is based upon the acts of the company in 1886 and 1887, and not upon the prior act of the company in 1882. Up to 1886, Moyle makes no complaint. His injuries and damages occurred upon the wrongful acts committed after that time. He had the right, if he so desired, to consent to the original act of 1882, or to waive any injury occurring from that act; but he also had the right to recover for the wrongful acts committed in 1886 and 1887 to his injury. We have examined the other questions presented, but do not think any material error was committed sufficient to cause a reversal. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 155)

**MCGREW v. STEWART**, County Treasurer.

(Supreme Court of Kansas. April 8, 1893.)

**ANNEXATION TO CITY — COLLATERAL ATTACK — IMPROVEMENTS.**

1. The limits of a city of the first class were extended so as to embrace territory through which a public highway existed. After the annexation the mayor and council caused a sidewalk to be built along the highway and assessed the cost of the same against the abutting property. In an action to enjoin the collection of the special tax it is held that, after the annexation the highway was impressed with the character of a street, and became subject to the exclusive control of the city authorities, and to the liabilities and servitudes of all other streets within the city.

2. In such an action the proceedings annexing the territory to the city, and which appear to be regular on their face, are not subject to attack.

(Syllabus by the Court.)

Error from district court, Wyandotte county; O. L. Miller, Judge.

Action by James McGrew against M. W. Stewart, County Treasurer, to enjoin the collection of an assessment made on plaintiff's land. There was judgment sustaining the assessment, and plaintiff brings error. Affirmed.

McGrew, Watson & Watson, for plaintiff in error. Buchan, Freeman & Porter, for defendant in error.

JOHNSTON, J. This action was brought to enjoin the collection of an assessment made upon the plaintiff's land for the construction of a sidewalk on a street upon which the land abutted. The plaintiff has been the owner of the land since 1871, and along the south side of the same there has been for at least 20 years a highway. Although it laid close to Kansas City, the land was outside of the city limits until January, 1888, when the limits of the city were extended so as to include the plaintiff's land. The road or street upon which the land adjoined was variously known as the "Quindaro Road," "Quindaro Boulevard," and "Quindaro Avenue." After appropriate proceedings the city required the building of a sidewalk on this street, and it was constructed along the south side of the plaintiff's property, at a cost of \$313.20, for the payment of which a special assessment was made upon the abutting land after the special assessment had been extended upon the tax roll, and the county treasurer was proceeding to collect the same when this action was begun, with the result that the special tax was sustained and the injunction denied.

The principal contention is that Quindaro avenue or boulevard, upon which this sidewalk was constructed, is not a street, as such, within the city for the improvement of which special assessments can be levied upon plaintiff's land. Plaintiff urges that the annexation of the adjoining territory did not convert the highway running through the same into a street, subject to the control of the city, and to the servitudes which may be imposed upon streets within a city. Prior to the extension of the city limits, Quindaro street was a county road, and the plaintiff, who was the owner of the fee to the middle of the road, never dedicated or conveyed the same to the city for use as a street, and the city never attempted to condemn or otherwise acquire the fee of the highway for street purposes by making compensation to the owner thereof. We are of opinion that the highway became subject to the control of the city, and to such urban servitudes as may be imposed in cities of that class, as soon as the territory through which it ran was annexed. The legislature has full power to provide for the establishment and control of highways within and without the limits of cities. Outside of cities the control of the same is placed in county and township officers, while within the city absolute and undivided control is given to the city officers. It is true that the fee of a county road is in the adjoining land owners, while the fee to the streets is in the county, in trust for the uses and purposes of the public. It is also true that the abutting owner has greater rights and privileges in a county road where he owns the fee than he does in the streets of a city where the fee is elsewhere. In either case, and wherever the fee may be, the easement is in the public for its use and benefit, and the control definitely fixed in

certain officers. In the nature of things, there can be no divided control of the streets within the limits of a city, and in the whole course of legislation there is nothing indicating a different treatment or control of the highways and streets brought in by annexation and those which were in the city previous to annexation. *City of Eudora v. Miller*, 30 Kan. 494, 2 Pac. Rep. 685; *Commissioners of Shawnee Co. v. City of Topeka*, 39 Kan. 200, 18 Pac. Rep. 161. Full power is given by the legislature to annex adjoining territory, and both platted and unplatted territory may be added. But, whether platted or unplatted, the act of annexation cannot be held to operate as a vacation of any existing highways on the added territory. Nothing in the statutes declares or implies that annexation shall operate to vacate the highways, nor, indeed, do counsel for plaintiff claim that such would be the effect. If the highways existing in the annexed territory are not extinguished by the annexation, they necessarily are subject to the laws applicable to public ways within cities. As soon as such highways are brought within the limits and jurisdiction of the city, the supervision of the city officers is exclusive. Afterwards they are impressed with the character of streets, and the city and its officers owe to the public the duty to keep them in a safe condition for public use in the usual mode, and are liable for injuries resulting from a neglect to perform this duty. Power is conferred upon the mayor and council to require the improvement of all the public ways within the city and the construction of sidewalks, and in order to carry it out they are authorized to levy and collect special taxes upon the abutting ground which is benefited by the improvement. *Gen. St. 1839*, pars. 555-559. No exception is made of such public ways as have been brought in by annexation, and which were formerly under the control of the county and township officers. Sidewalks may be as necessary on such streets as upon any other, and the benefits to the abutting property are as great in one case as in the other, and therefore, as the property is within the jurisdiction of the city, no good reason exists why those benefits should not be assessed upon the property which receives the benefits. It is true that before annexation the fee of the way was in the owner, and that after it was brought within the limits and jurisdiction of the city the fee was in the county for the use of the public; but by coming into the city the plaintiff's liabilities are enlarged, and the servitudes on his property extended. The annexation places him on an exact equality with all other owners of property within the limits of the city, equally entitled with them to all municipal rights and privileges, but equally subject to all municipal burdens and charges. As a compensation for the additional burdens and servitudes he becomes entitled to the benefit of the city schools, the protection of the city police, and against fire, and to the privileges of water, light, and other conveniences furnished by municipalities at the public expense. The greater value claimed by



plaintiff in the reversion of a county road over that in a city street is more fanciful than real. Upon the extinguishment of an easement in a county road the land of course reverts to the adjoining owner, and so it does in effect when a street is vacated within a city. It is provided in such cases that it shall revert to the owners of the real estate adjacent on each side in proportion to the frontage, except where it has been appropriated and devoted to a public use in a different proportion. Gen. St. 1889, par. 582. But even if the fee remains unchanged, the easement exists subject to the supervision of the city and to the liabilities and burdens which attached to streets in the original territory. A reference is made to *Heiple v. City of East Portland, (Or.)* 8 Pac. Rep. 907, as an authority against imposing the special tax upon a roadway, brought within the corporate limits. That decision appears to have been controlled by peculiar statutes with reference to the divided control of counties and cities over highways, and even there it is held that the case would be "different where by the act the limits of the city are extended, a new territory is acquired and subjected to the laws and jurisdiction of the municipality." Judge Elliott, in treating of this subject in his work on Roads and Streets, says: "Our opinion is that, as soon as a town or city is incorporated, the public ways—that is, ways belonging to the public, and not owned by private corporations—come within the jurisdiction and control of the new public corporation, unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must, of necessity, change character, and the servitude be much extended. This extension carries with it wider duties and greater liabilities, thus requiring an essentially different control and care. \* \* \* Where there is no statute, the corporation of a city seems naturally to imply that the highways within its territorial limits become streets, and, as such, subject to the control of the municipality." Elliott, Roads & S. 313. "Unless the legislature declares otherwise, an extension of the corporate limits imposes upon a city the same duties and liabilities as to the streets in the annexed territory as rest upon it in reference to the streets in the original territory of the city." 15 Amer. & Eng. Enc. Law, 1017. We conclude that the city authorities had the power to construct the sidewalk on Quindaro avenue or boulevard, and to assess the cost of the same against the abutting property.

Some other objections to the special tax are mentioned in plaintiff's brief, but they were not urged in the oral argument. One is that the petition for the sidewalk was insufficient because it designated the street as "Quindaro Avenue." It appears to have been known as "Quindaro Avenue," although it was variously designated in the record. It is sometimes spoken of as "Quindaro Road," as "Quindaro Boulevard," and as "Quindaro Avenue." It was designated as "Quindaro Avenue" in the petition, and by the

same name in the ordinance providing for the sidewalk. It further appears that subsequently the name was definitely fixed by ordinance as "Quindaro Boulevard." We think the designation of the street was sufficiently definite, so that no one could be misled or prejudiced.

There is a further objection that the petition did not have a sufficient number of signers. The record shows this claim to be unfounded, and, more than that, neither of these objections were brought to the attention of the district court. At the trial, counsel for plaintiff stated that there was no objection to the petition, nor to the regularity of any of the preliminary proceedings, except as to the detailed estimate of the cost of the proposed improvements which is required to be made under oath by the city engineer. Neither is there anything substantial in this last objection, as the lack of an estimate was not alleged in the petition as a ground for injunction. An inquiry was made of the city clerk if he found an estimate among the papers and records which he had in his hands at the trial. He was unable to find any, and stated that he had not made a search, but supposed there was one, as he had found estimates in all cases in which he had looked. He was asked to examine the record with reference to this estimate, but does not appear to have been ever recalled, or that any further inquiry upon the subject was made.

Another point is presented that plaintiff's land is not a part of the city, for the reason that it consisted of more than five acres, and was not wholly surrounded by platted territory; but the annexation proceedings are not open to attack in this action. The proceedings to annex, upon their face, are regular. The action of the city council and the findings and decree of the court in the extension of the limits ends the controversy as to whether the territory is rightfully within the limits of the city. Gen. St. 1889, par. 552. The judgment of the district court will be affirmed. All the justices concurring.

(61 Kan. 233)

HAZEL v. LYDEN et al.

(Supreme Court of Kansas. April 8, 1893.)

VOID SALE UNDER EXECUTION—ESTOPPEL TO DENY VALIDITY.

Where plaintiff's real property was sold under an execution from a court having no jurisdiction to issue the same, and by an officer having no authority to sell, but the purchaser at the sale acted in good faith, and paid the officer, at the time of the sale, all that it was reasonably worth, and the owner thereof, who was present at the sale, made no protest, but gave the purchaser, quietly and without objection, possession of the land, and received the proceeds thereof, and permitted the purchaser and his grantees, for nearly 12 years, to occupy the land, and make valuable improvements thereon, without objection, although living within two miles of the land, held, that such owner, under the circumstances, is estopped from denying the title of the purchaser at the sale, and from recovering the land, although, at the time of the sale, such owner did not know that the sale and the proceedings were void.

(Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Eastland, Judge.

Action of ejectment by Patrick Lyden and another against N. Hazel. There was judgment for plaintiffs, and defendant brings error. Reversed.

Ira E. Lloyd and Garver & Bond, for plaintiff in error. C. B. Daughters and D. Ritchie, for defendants in error.

HORTON, C. J. Ejectment brought by Patrick and Daniel Lyden against N. Hazel to recover the possession of the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 24, township 13, range 8, in Lincoln county, in this state. John Lyden, deceased, who died in February, 1875, was the owner, in fee simple, in his lifetime, of the land described, the title of which is in dispute. At his death, being unmarried, he made, by his last will and testament, his sister, Mrs. Mary Cannon, formerly Mary Lyden, his sole heir. On March 29, 1875, Mrs. Cannon sold and conveyed the land to her brothers Patrick and Daniel Lyden. In May, 1876, Ellen McInerney obtained judgment in the district court of Lincoln county against the estate of John Lyden, deceased, for \$160, including costs. This judgment was filed as a claim against the estate of John Lyden, deceased, in the probate court of Lincoln county. On July 31, 1876, the probate court issued execution, directed to the sheriff of that county, to collect the judgment and costs out of the property or estate of John Lyden, deceased. The sheriff received the execution on July 31, 1876, and on August 5, 1876, the property was appraised at \$640. On September 7, 1876, the land, after having been advertised, was sold by the sheriff to L. E. Farnsworth for \$610. The sale was confirmed, and Farnsworth received a deed, which was recorded on December 11, 1876. On December 8, 1879, L. E. Farnsworth conveyed the land to A. E. Doolittle, and on July 17, 1882, Doolittle conveyed the land to N. Hazel, defendant below.

Assuming that the sale to Farnsworth on September 7, 1876, was grossly irregular or void, the question for us to determine is whether the Lydens were estopped, at the commencement of this action, from questioning the sale to, or the title obtained by, Farnsworth, under whom Hazel claims title. L. E. Farnsworth purchased the land in good faith, and paid the sheriff, at the time of the sale, all that it was reasonably worth. After Farnsworth purchased the land, Patrick Lyden, quietly and without objection, gave up to him possession of the same. At the time of the sale by the sheriff, Patrick Lyden was administrator of the estate of John Lyden, deceased, and was at all times the agent of his brother Daniel Lyden. After the sale, Patrick Lyden received the proceeds thereof, applied a part to the payment of claims against the estate of John Lyden, deceased, including a claim which he had against the estate, and the surplus of such proceeds he retained for Daniel Lyden and himself, as assignees of Mrs. Cannon, the devisee of John Lyden, deceased. He knew when the land was levied upon under the execution by the sheriff, and was present

at the sale, but made no protest. He, however, did not know that the sale was grossly irregular or void until a short time before this action was commenced. After the sale, Farnsworth and his subsequent grantees occupied and made valuable improvements upon the land, with the knowledge of Patrick Lyden, and without any objection from him, although Lyden resided all the time within two miles of the premises. This action was brought on the 28th of August, 1888, nearly 12 years after the sale by the sheriff to Farnsworth.

The Lydens, having retained the proceeds of the sale, \$610,—the reasonable value of the land,—still ask to recover the land. There can be no doubt that the Lydens, after they received the proceeds of the sale of the land, would be estopped from denying the title of Hazel, acquired from Farnsworth, if, when they received the money, they knew, not only that it was a part of the proceeds of the sale, but also the circumstances which rendered the sale grossly irregular or void; but the jury found that the Lydens did not know that the sale of the land was void, at the time it was made, and it is contended that such knowledge was necessary to create an estoppel; and, further, it is contended that the Lydens have not lost their right to deny title, or claim possession, by their conduct or laches. But it seems to us that if the Lydens received the proceeds of the sale, or a part thereof, even without knowledge that the sale was void, and continue to keep the money after acquiring it, an estoppel will likewise continue. They ought not to be permitted to repudiate the sale made by the sheriff, and at the same time insist upon having the benefit of the proceeds, or a part thereof. *Brewer v. Nash*, (R. I.) 17 Atl. Rep. 857; *Maple v. Kussart*, 53 Pa. St. 348. But, further than this, the general rule is that "ignorance of the law, with a full knowledge of the facts, cannot generally be set up as a defense, nor will it protect a party from the operation of the rule in equity, when the circumstances would otherwise create an equitable bar to the legal title." *Storrs v. Barker*, 10 Amer. Dec. 316. The doctrine of this case was afterwards considered in *Tilton v. Nelson*, 27 Barb. 595; and in the opinion by Emott, J., he says, "The question is presented whether ignorance of the law will prevent the application of the rule of equitable estoppel;" and, referring to the decision in the principal case, he says that when a party thus asserts his ignorance of his title, to avoid an estoppel, he encounters two principles of law of general application: "The first of these principles is that when a party procures, or even acquiesces in, the disposition of his property by another, under color of title, and pretending to title, he shall be bound by such disposition, and shall be presumed to know the law, so far as it is applicable to the case. The other is that even if he shows that he was really ignorant of the law, and acted in ignorance, still the maxim, 'ignorantia legis neminem excusat,' will apply in favor of the other party." 10 Amer. Dec. notes, 325, 326. In *Smith v. Cramer*, 39 Iowa, 413, one who pleaded a judgment in honest igno-

rance that it was void was nevertheless held to be estopped from availing himself of a mistake of his legal rights. A strong case holding the same doctrine is *Maple v. Kussart*, 53 Pa. St. 348. There it appeared a husband and wife were seized of an estate by entireties. The husband, in his will, directed the land to be sold, and the proceeds to be divided among his wife and children. Having named no one to make the sale, the land was sold under an order of the orphans' court, and bought by two of the children, at the request of the widow, who received her share of the proceeds, in accordance with the will. After her death, in ejectment for the land by some of the heirs, it was held that they were estopped by her acts, and that the estoppel would operate notwithstanding she was ignorant of her legal rights. A somewhat similar decision was made in a more recent case. *Cox v. Rogers*, 77 Pa. St. 160. In *Reichert v. Voss*, (Ga.) 2 S. E. Rep. 558, the chief justice, speaking for the court, said: "The sale, too, occurred at a wrong time and place, and, as a constable's sale proper, counts for nothing. But we hold, with the court below, that, after the active part taken by Mr. Reichert in promoting the rendition of these judgments, and the making of a sale under them, he is estopped from pursuing the property in the hands of a purchaser who has bought honestly, and parted with his money. If the notary and the constable had not been officers at all, but only private persons, and if Reichert had authorized one to give judgment, and the other to enforce it against his property, (he accepting property for storage after seizure, and aiding to promote its removal to the place of sale,) he would have been bound by the transaction." In *Smith v. Warden*, 19 Pa. St. 424, it was decided that "equitable estoppels have place, as well where the proceeds received arise from a sale by authority of law, as where they spring from the act of the party, and the application of the principle does not depend on any supposed distinction between a void and a voidable sale." In *Mitchell v. Freedley*, 10 Pa. St. 208, it was held that, where a sheriff's sale was confirmed without objection, the application of the proceeds to the debts of the defendant in the execution "is the same thing as if paid to himself." It is fully settled, upon principle and authority, that, where a sale is made for the benefit of any one, the receipt of the proceeds by such person validated it. In such a case the supposed distinction between a void and a voidable sale is immaterial. *Wilson v. Bigger*, 7 Watts & S. 111; *Crowell v. Meconkey*, 5 Pa. St. 176; *Stroble v. Smith*, 8 Watts, 280; *Spragg v. Shriver*, 25 Pa. St. 282. In *Gray v. Crockett*, 35 Kan. 66, 10 Pac. Rep. 452, this court decided that "if one stands by, and allows another to purchase his property, without giving him any notice of his title, a court of equity will treat it as fraudulent for the owner to afterwards try to assert his title." See, also, *Hardin v. Joice*, 21 Kan. 318; *Kothman v. Markson*, 34 Kan. 542, 9 Pac. Rep. 218.

It is urged upon the part of the Lydens that the west half of the southwest quar-

ter was never levied upon, never appraised, never advertised, and never sold. It is admitted, however, that this 80 acres of land were included in the sheriff's deed recorded December 11, 1876; and, considering all the testimony in the record, it is clearly shown that this 80 acres was paid for by Farnsworth, and taken possession of by him, under the sale. Therefore, both 80 acres must be treated as similarly situated, and controlled by the doctrine of estoppel. It is possible that there is a clerical error in the execution and return embraced in the record; but, whether there is or not, there is sufficient other testimony tending to show that, if an equitable estoppel applies to one 80 acres of land, it does to the other 80. The judgment of the district court will be reversed, and cause remanded, with direction to the court below to enter judgment upon the special findings of fact for the defendant below, and against the plaintiffs below. All the justices concurring.

(51 Kan. 141)

#### REED v. MORSE et al.

(Supreme Court of Kansas. April 8, 1893.)

#### TAX DEED—VALIDITY—NECESSITY OF COUNTY SEAL.

A tax deed signed by the county clerk alone, to which the seal of the county is not affixed, is void, and lapse of time cannot cure the defect.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Gutbrie, Judge.

Action by John Reed against J. S. Morse and others. There was judgment for defendants, and plaintiff brings error. Reversed.

Cheesney & Ward and Joseph Reed, for plaintiff in error. N. B. Arnold, for defendants in error.

ALLEN, J. The only question we deem it necessary to consider in this case is whether a tax deed, signed by the county clerk, but without the seal of the county attached thereto, is void or not. The statute requires the county clerk to execute, in the name of the county, under his hand and seal of the county, to the purchaser, a deed for lands sold at tax sale. The deed under which defendants claim has the signature of the county clerk, but has no seal. While, as has been held by this court, where parties have been in possession for a long time (in this case nearly 15 years) under a tax deed, the court will construe the terms of the deed liberally for the purpose of upholding it, in this case the question is whether a tax deed was in fact executed. This question was passed on by the supreme court of Nebraska in the case of *Sutton v. Stone*, 4 Neb. 319, and a tax deed without the seal of the county was held void. In the case of *Bowers v. Chambers*, 53 Miss. 259, a tax collector's deed without a seal was held valid, but it was so held because the form prescribed by statute did not require a seal. The attestation clause in the form prescribed by our statute reads: "In witness whereof, I, C. D., county clerk, as aforesaid, by virtue of

authority aforesaid, have hereunto subscribed my hand and affixed the official seal of said county." So that case is not an authority in point. On the other hand, the case of *Day v. Day*, 59 Miss. 318, holds that an auditor's deed, without the official seal attached, is void. The requirements of the statute that a seal of the county be attached is just as positive as the requirement that it shall be signed by the county clerk, and without such seal we must hold the deed void. It is unnecessary to consider the other questions. The judgment will be reversed, and a new trial ordered. All the justices concurring.

(51 Kan. 162)

MARTIN v. SOUTHERN KAN. RY. CO. et al.

(Supreme Court of Kansas. April 8, 1898.)

RECORD ON APPEAL—BILL OF EXCEPTIONS—TIME OF SIGNING.

Exceptions were taken to the rulings of the court in charging the jury, which were reduced to writing, and presented to the court for allowance, during the term at which the trial was had. A motion for a new trial was made, which was taken under advisement until the next term of the court, when it was denied, at which time the bill of exceptions previously tendered was allowed and signed. Held that, as the exceptions were not allowed, signed, and filed until after the term of court at which the decisions objected to were made, they did not become a part of the record, and the errors predicated thereon are not available for review.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by Henry Martin, administrator of the estate of Lindley M. Carleton, deceased, against the Southern Kansas Railway Company and the Atchison, Topeka & Santa Fe Railroad Company, to recover damages sustained by the death of the intestate, caused by a runaway team frightened by defendants' trains. There was judgment for defendants, and plaintiff brings error. Affirmed.

John W. Deford, for plaintiff in error. Geo. R. Peck, A. A. Hurd, W. Littlefield, and Robert Dunlap, for defendants in error.

JOHNSTON, J. Action by Henry Martin, as administrator of the estate of Lindley M. Carleton, deceased, who was killed by his runaway team, that was frightened by a passing railway train. It is alleged that his death was caused by the culpable negligence of the railroad company, and damages were asked in the sum of \$10,000. A trial was had with a jury, which returned a verdict in favor of the railway company. Exceptions were taken to the rulings of the court in charging the jury, and these exceptions are the only ones assigned as error. The defendants insist that they are not available, and cannot be examined, for the reason that they have not been preserved and brought into the record, as the Code requires. The plaintiff has endeavored to preserve his questions by a bill of exceptions, but the record which he brings shows that the exceptions were not filed, and did not become a part of the record, during the term at

which the rulings were made. It appears that, after the verdict was returned, the plaintiff filed his motion for a new trial, and tendered a bill of exceptions, requesting that it be signed and allowed. The motion for the new trial was taken under advisement by the court until the succeeding term, at which time it was denied, and the bill of exceptions was then signed, and ordered to be filed with the pleadings and made a part of the record. Under the repeated rulings of this court the bill of exceptions was not filed within the time required by the Code, and did not become a part of the record. Exceptions, to be available, must be made at the term at which the decision complained of was made, and must be reduced to writing, signed, and filed during that term. Civil Code, §§ 300, 303. It appears in this case that the motion for new trial was filed within the statutory time, and that, within the term at which the cause was tried, the exceptions were reduced to writing and presented to the court for signing and allowance. The record does not show that any objection was made on the part of the plaintiff to a continuance of the motion for a new trial over the term, nor to the postponement of the signing and filing of the bill of exceptions to the succeeding term. It is not enough that the exceptions were reduced to writing and presented to the court during the term, but they must also be allowed, signed, and filed during the term of court at which the exceptions were taken. In *Brown v. Rhodes*, 1 Kan. 359, it was held that "a bill of exceptions filed out of term is no part of the record." A bill of exceptions must be allowed and authenticated in the manner, and within the time, prescribed by the Code, and the time cannot be extended by the court or judge, even when the consent of counsel has been given. *Gallagher v. Southwood*, Id. 143; *State v. Bohan*, 19 Kan. 28, and cases cited. In *State v. Schoenewald*, 26 Kan. 288, a bill of exceptions was reduced to writing and signed during the term at which the exceptions were taken, but was not filed with the clerk until more than nine months after it was allowed and signed; and it was held that they never became a part of the record, and the points attempted to be preserved were not available as error. See, also, *State v. Burrows*, 33 Kan. 14, 5 Pac. Rep. 449; *State v. Smith*, 33 Kan. 194, 16 Pac. Rep. 254. The subject was again examined in *Powers v. McCue*, 48 Kan. 478, 29 Pac. Rep. 686, in a direct proceeding to compel the signing of a bill of exceptions, and the former rulings were sustained. In the still later case of *City of South Haven v. Christian*, 49 Kan. 229, 31 Pac. Rep. 154, the motion for a new trial was continued beyond the term of trial, as in this case, and the bill of exceptions was not presented or allowed until after the trial term; and it was held that "the continuance of the motion for a new trial would not carry the errors over to the next term of the court so that they could be made available to the appellant, and a bill of exceptions signed after the final adjournment of the term at which the trial occurred cannot be considered as a part of the record." Under these au-

thorities the exceptions taken by plaintiff are not properly a part of the record, and cannot be reviewed. Judgment affirmed. All the justices concurring.

(51 Kan. 215)

**FIRST NAT. BANK OF EMPORIA et al. v. GENESEO TOWN CO.**

(Supreme Court of Kansas. April 8, 1898.)

**IRREGULAR JUDGMENT—DEFECTIVE SERVICE—COLLATERAL ATTACK.**

If a civil action is brought to recover money upon a nonnegotiable instrument or written order in the district court against two defendants, one of whom has signed and delivered such written instrument or order, and the other has indorsed the same in writing, and personal service is made upon the defendant who has indorsed the written instrument, in the county where the action is pending, and service of summons is then made upon the other defendant, the maker of the instrument, in another county, and the maker thereof so served does not, by motion, plea, or otherwise, take advantage of the irregular or defective service in the court in which the action is brought, and suffers judgment to go against both of the defendants, held that, although the so-called "indorser" is not a proper or necessary party defendant in the action, yet the defendant who is nonresident of the county where the action is pending, and who has permitted the judgment to be rendered against him by default, cannot treat the judgment as void; nor can another district court of this state correct or reverse the judgment on account of the defective or irregular service, or interfere by injunction or otherwise to prevent the collection thereof.

(Syllabus by the Court.)

Error from district court, Rice county; Ansel R. Clark, Judge.

Action by the Geneseo Town Company against the First National Bank of Emporia and another to annul a judgment obtained by the bank against plaintiff. A demurrer to the answer was sustained, and defendants bring error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 15th of March, 1889, the First National Bank of Emporia brought an action in the district court of Lyon county, in this state, against the Geneseo Town Company and H. C. Cross upon the following writing: "Sallina, Kansas, December 23rd, 1887. J. R. Bell, Esq., Treasurer of the Geneseo Town Company: Pay to M. N. Beatty, agent Kansas & Kanopolis Central Railway Company, seventeen hundred dollars, (\$1,700,) being the amount appropriated by our company in aid of the above-named railway. E. C. Moderwell, President. Attest: S. A. Criffield, Secretary." It was alleged in the petition, among other things, that on the 4th day of January, 1888, M. N. Beatty, the agent of the railway company, presented the writing or order to J. R. Bell, treasurer of the Geneseo Town Company, who indorsed upon the writing as follows: "Lyons, Kansas, January 4th, 1888. The above and attached order, payable to M. N. Beatty, agent of the Kanopolis & Kansas Central Railway Company, is hereby accepted on the following terms: Eight hundred and fifty dollars (\$850) payable in six months from the date hereof. J. R. Bell, Treasurer of the Geneseo Town Company." And afterwards the said M. N. Beatty,

having authority so to do, indorsed upon the writing: "Pay the above amounts to H. C. Cross. M. N. Beatty, Agent;" and for a consideration delivered the same to H. C. Cross, who thereafter became the owner and holder of the same. That subsequently H. C. Cross indorsed the written instrument as follows: "Pay to H. C. Cross, cashier, or order. H. C. Cross." That, after the writing or order was indorsed by H. C. Cross, it became the property of the First National Bank of Emporia. That it was presented for nonpayment against all the parties who were indorsers, and, although payment had been demanded thereon, they both—the town company and H. C. Cross—wholly failed, refused, and neglected to pay the same. Service of summons was obtained upon H. C. Cross in Lyon county on the 25th day of March, 1889. On the same day a summons was issued to the sheriff of Barton county, and personally served on the 26th of March, 1889, in that county, upon E. C. Moderwell, president of the Geneseo Town Company. On the 24th day of May, 1889, judgment was entered against the Geneseo Town Company as principal and H. C. Cross as surety in the case, for \$1,816.68 and costs. Execution was ordered to issue. The town company made no appearance in the case by answer or otherwise. Subsequently an execution was issued upon the judgment, directed to the sheriff of Rice county, commanding him to collect the amount thereof from the property of the Geneseo Town Company. The sheriff levied upon lands and tenements of the town company, advertised the same for sale, and was about to sell the same, when the town company brought this action in the court below against Sheldon Stoddard, the sheriff of Rice county, and the First National Bank of Emporia, alleging therein, among other things, that the judgment rendered in Lyon county was void upon the ground that the petition did not state facts sufficient to constitute a cause of action against the Geneseo Town Company; that H. C. Cross was not a proper party defendant, and that he was improperly joined in the action as defendant, and without any lawful right so to do, simply for the purpose of having service of summons made upon the Geneseo Town Company in Barton county. The defendants in the action admitted the recovery of the judgment in the district court of Lyon county, the issuance of the levy of the execution complained of, and demanded judgment for costs. The answer was demurred to, and sustained by the court. The defendants excepted and bring the case here.

C. N. Sterry, for plaintiffs in error. A. M. Lasley, for defendant in error.

HORTON, C. J., (after stating the facts.) This action was commenced by the First National Bank of Emporia in Lyon county. Service was made upon the defendant H. C. Cross in that county, and service upon the Geneseo Town Company was made upon the president of that company in Barton county. The petition alleged, among other things, that "after the paper (or written order) was indorsed by H. C.

Cross, it became, was, and is, and ever since has been, the property of the First National Bank of Emporia, Kansas; that thereafter the paper was duly presented for nonpayment against all the parties therein who were indorsers, and thereupon, and ever since said time, the said H. C. Cross has been responsible to the plaintiff, as indorser of said paper, for the sum thereof; that, although long past due, and often demanded from the said defendant the said town company and the said defendant H. C. Cross, they, and each of them, have wholly failed, refused, and neglected, and still fails, refuses, and neglects, to pay the plaintiff the amount due upon said paper, or any part thereof; that there is now due and owing to the plaintiff from the said defendants upon the said paper, and the acceptance thereof, the sum of \$1,700, with interest on \$850 from April 1, 1888, and on \$850 from July 1st to date." The town company did not appear by answer or otherwise. No motion to set aside the service of the summons upon its president was presented or made. No plea in abatement or other exception was taken to the service. Judgment was rendered for \$1,816.68 and costs against the Geneseo Town Company as principal and against H. C. Cross as surety.

It was said in *Rullman v. Hulse*, 32 Kan. 598, 5 Pac. Rep. 176: "Before a summons can be rightfully issued from one county to another, the person served with the summons in the county in which the action is brought must have a real and substantial interest in the subject of the action, adverse to the plaintiff, and against whom some substantial relief may be obtained; and the action must be rightfully brought in the county in which it is brought, and as against the person served with summons in such county." See, also, *Brenner v. Egly*, 23 Kan. 123; *Dunn v. Hazlett*, 4 Ohio St. 435; *Allen v. Miller*, 11 Ohio St. 374. Assuming, under the facts in this case, that H. C. Cross was not a proper and necessary party defendant, (*Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. Rep. 574,) the question presented is whether the judgment rendered in Lyon county was wholly void or voidable only. The petition stated a good cause of action against the town company. The court had jurisdiction of the subject-matter. The summons was served upon the president of the town company in another county, and, as he had power to receive notice for and on behalf of the corporation, the summons was actually served upon the town company, service upon the president being service upon the corporation. *Hoffield v. Board*, 33 Kan. 644, 7 Pac. Rep. 216. If Cross was not a proper and necessary party, it may be said that the summons was erroneously or improperly served upon the president of the town company in another county. Sections 34-37, 46-50, 55, 60, Civil Code. But a defendant may waive an irregular or erroneous service. We think if a civil action is brought against a defendant in the wrong county, but personal service of a summons is made upon him and a defendant in the county where the action is pending, and the court has general jurisdiction of the

subject-matter, and there is sufficient in the petition to challenge the attention and decision of the court as to the liability of both defendants, and the court holds that both defendants are liable, and renders judgment against both, the judgment rendered upon default against the defendant served in the wrong county is not void. The defendant in such a case ought to take advantage of the defective service by a motion, plea, or otherwise. If the service, or the jurisdiction of the court acquired by its process, is not challenged in any way before or after judgment in the court rendering the judgment, a defendant cannot avail himself of a review or correction of such judgment through some other court of the same jurisdiction, but having no appellate power. *Meixell v. Kirkpatrick*, 28 Kan. 316; *Rullman v. Hulse*, 32 Kan. 670, 7 Pac. Rep. 210. In *Commissioners v. Giffin*, (Ill. Sup.) 25 N. E. Rep. 995, the court said: "The statutes, as has frequently been held in this court, give the defendant a privilege merely of being sued in the county where he resides or may be found; and that to avail himself of such privilege he must do so in apt time, by plea to the jurisdiction, or he will be deemed to have waived it." *Drake v. Drake*, 83 Ill. 526; *Railway Co. v. Williams*, 77 Ill. 354; 1 Black. Judgm. §§ 86, 223, 224. In *Stark v. Ratcliff*, 111 Ill. 75, the syllabus contains the following: "The constitution of Texas expressly gives the district court of that state jurisdiction in all suits for the trial of title to land, but there is a statute of that state requiring suits for the recovery of land to be brought in the county where the land lies. An action of ejectment for land in such state was brought in the district court, but not in the county where the land was situate, and, no objection being made to the jurisdiction, the court rendered judgment for the plaintiff. Held, that as that court had a general jurisdiction over the subject-matter, its judgment could not be treated as void in a collateral action in this state, and that such judgment was admissible in evidence to show an eviction of the defendant in ejectment." In that case, *Mulkey, J.*, speaking for the court, said: "We understand the rule to be that, if a local action is brought against one in the wrong county, and the court in which the action is brought has a general jurisdiction in that class of cases, the defendant must plead to the jurisdiction, or otherwise take advantage of the irregularity, in the court where the action is brought. He will not be permitted, after having remained silent and permitted judgment to go against him, to call in question its validity for the first time in a mere collateral proceeding, as is sought to be done here. The rule as here stated we understand to be fully recognized by the courts of Texas, to whose laws we must look in determining the validity of this judgment." *Ryan v. Jackson*, 11 Tex. 391; *Morris v. Runnells*, 12 Tex. 177; *Stark v. Burr*, 56 Tex. 130. See, also, *Thornton v. Writing Mach. Co.*, (Ga.) 9 S. E. Rep. 679; *Atchison v. Morris*, 11 Fed. Rep. 582, and cases there cited; *Larned v. Griffin*, 12 Fed. Rep. 590, and cases cited;

*Pulmer v. Rowan*, 21 Neb. 452, 32 N. W. Rep. 210, and cases cited; 1 Tidd. Pr. par. 81; notes to *Prentis v. Com.*, 16 Amer. Dec. 784; *Matthews v. Puffer*, 10 Fed. Rep. 606; *Wilson v. Coolidge*, 42 Mich. 112, 3 N. W. Rep. 285. The judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

(51 Kan. 287)

**FT. SCOTT, W. & W. RY. CO. v. FORTNEY, et al.**

(Supreme Court of Kansas. April 8, 1898.)

**CONFLICTING EVIDENCE—REVIEW ON APPEAL—SPECIAL FINDINGS—INSTRUCTIONS.**

1. This court does not weigh conflicting testimony where there is enough in support of the verdict to fairly sustain it. And *held*, that in this case there is evidence showing that the defendant company was operating the railroad on which the engine ran from which the fire started, and that sufficient facts were shown to uphold the finding against the defendant, under section 1321 of the General Statutes.

2. It is not error for the trial court to refuse to require answers to questions which are either unsupported by the evidence, or not fairly within the issues being tried.

3. A party cannot take advantage of the use by the court of language which that party has asked the court to use in an instruction requested by it.

(Syllabus by the Court.)

Error from district court, Bourbon county; J. S. West, Judge.

Action by J. M. Fortney and another against the Ft. Scott, Wichita & Western Railway Company to recover for damages to plaintiffs' premises caused by fire from defendant's engine. There was judgment for plaintiffs, and defendant brings error. Affirmed.

J. H. Richards and C. E. Benton, for plaintiff in error. W. R. Biddle, for defendants in error.

ALLEN, J. 1. The defendants in error, as plaintiffs, brought this action to recover damages, which they allege they had sustained by reason of a fire which they allege the defendant company, in the operation of its railroad in Bourbon county, had negligently permitted to escape from its engine, and which they aver spread from a point near the right of way of the defendant's road to their lands, and damaged and destroyed their property, and claimed damages in the sum of \$5,150.57. The action is brought under section 1321 of the General Statutes. The jury returned a general verdict in favor of the plaintiffs for \$2,150.27 damages, and \$400 attorneys' fees. The railroad company brings the case here, and assigns various errors, which we will consider in their order. Before proceeding with this matter, however, the defendant in error objects to any consideration of the matters presented by the plaintiff in error, for the reason that the case does not affirmatively show that the pleadings upon which the case was tried are incorporated in the record. While there is some force in this objection, we are of the opinion that it fairly appears that the case was tried on the pleadings now before us. Elaborate

briefs are presented, and counsel for the plaintiff in error strenuously contend, first, that the wrong party was sued, that the record shows that, at the time of the destruction of plaintiffs' property, this line of railroad was operated by the Missouri Pacific Railway Company, and not by the defendant company; and that the operating line only is liable. We have no fault to find with the legal proposition stated by counsel that the operating company alone is liable, but various witnesses were examined upon this question. The leading counsel for plaintiff in error was introduced as a witness on behalf of the Fortneys. He testified that the original name of the company which owned the line of road was the St. Louis, Ft. Scott & Wichita; that this company operated the road up to the time of a foreclosure, sale, and reorganization, which took place in June, 1887, and thereafter it was called the Ft. Scott, Wichita & Western Railway Company; that the Missouri Pacific Railroad Company then purchased it, and became the owner of all its bonds and all its stock, and sometime after that the Missouri Pacific began to operate it. His testimony shows that the manner in which the Missouri Pacific purchased the road was by purchasing all its stock and bonds; that George Gould was the president of the company, and was also an officer of the Missouri Pacific; that the road is operated as a branch of the Missouri Pacific; that the Ft. Scott, Wichita & Western Railway Company is a corporation, and that the Missouri Pacific owns the road because it owns the stock and bonds of the company; that some of the officers of the Ft. Scott, Wichita & Western are the same as the officers of the Missouri Pacific, but not all of them. No lease or other contract between the Missouri Pacific and the Ft. Scott, Wichita & Western is shown in the evidence, and there seems to be no question as to the fact that the ownership of the road is in the corporation which was named as defendant in the court below. There was testimony on the one hand, though somewhat indefinite, to the effect that the name "Ft. S., Wichita & Western" was marked on the rolling stock used on the road, and that tickets bearing the same name were sold to passengers traveling over the line. On the other hand, employees of the company testified that they were employed by and received their pay from the Missouri Pacific Railway Company. We think that the question of fact as to which company operated the road was fairly left to the jury, and that there was evidence to uphold their verdict in that respect. As has often been decided by this court, we do not weigh conflicting testimony which has been fairly considered by a jury. If Mr. Richards' statement that the Missouri Pacific Railway Company owns all the stock and bonds of the Ft. Scott, Wichita & Western Railway Company is true, it is very difficult to perceive what substantial difference it makes as to the name under which the owner of the road is prosecuted, as the ultimate liability, if any, must fall on the same party in either event.

2. The second proposition contended for



is that the uncontroverted evidence shows affirmatively that the operating company was not guilty of any negligence; that the evidence clearly shows that the engine from which it is claimed the fire was communicated was properly constructed and managed; that plaintiffs, in their petition, stated certain facts which it is claimed constituted negligence; that the defendant met the case presented by the plaintiffs with conclusive opposing evidence; and that the plaintiffs then recovered on a different theory from that originally presented. We are unable to perceive that there was any substantial change in the plaintiffs' theory of the case. It is alleged in the petition that the company, by its employees, negligently permitted sparks and coals of fire to escape from said engine, which set fire to the grass on or near the right of way of said road, from which the fire was communicated that passed over the adjoining lands upon the lands of the plaintiffs, and caused the damage complained of. The particular mode of escape, and the particular negligence of the defendant through which it occurred, are not stated in the petition. We think the averments and the testimony were consistent.

3. The third error assigned—that the court ought to have sustained the demurrer to the evidence—is but a summing up of the first two errors claimed.

4. The fourth error claimed by the plaintiff in error is that the jury was governed by passion and prejudice, as evidenced by special verdict, untruthful answers to special questions, and refusal to answer others. There was testimony before the jury to the effect that the 873 best apple trees were worth \$10 apiece, and that the others were worth from \$4 to \$5 each, besides evidence as to the other items of damage claimed. There was also evidence showing that these trees were mostly killed; that there were in all 607 dead trees in the orchard. Taking the plaintiffs' evidence alone, and it would have supported a much larger verdict than the jury in fact rendered. We are not able to say that even in our own judgment the verdict was excessive, much less that it contains internal evidence of passion and prejudice on the part of the jury.

5. It is claimed that the court erred in refusing to require the jury to specifically and directly answer certain questions; these questions being answered, "We do not know," or in words to that effect. These questions were with reference to the employment and payment of the engineer and fireman by the Missouri Pacific Railway Company. The proof introduced on these points was somewhat vague and unsatisfactory, and we do not think that the jury could properly be required to make more specific answers under the testimony before them.

6. Complaint is also made of the instructions, and, among others, the following: "If you should find that the defendant's engine was at the time supplied with the best appliances known to railroad companies in this country to prevent the escape of coals or sparks; that such appliances were at the time in good repair and

condition for such appliances, in view of their use and all the other circumstances, —then the defendant would not be liable." The particular language complained of in this instruction is that it required the defendant's engine to be supplied with "the best appliances known to railroad companies in this country." It is contended that railroad companies are only bound to use the best appliances in use, not the best that may have been discovered, and known to other companies. The language used by the court is subject to criticism, but the objectionable words we find incorporated in an instruction asked by the defendant company itself; and it is a familiar rule that, where a party requests the court to give a certain charge which is erroneous or misleading, he cannot complain if the court accedes to his request. The sixth instruction asked by the plaintiff in error reads as follows: "A railroad company is chartered to use engines and cars to carry passengers and freight at a great rate of speed and in large quantities, and is authorized to use extraordinary means and power to accomplish these purposes; but, while so using them, it is the duty of said company to construct its machines and conduct its road by the use of the best known appliances, and so as not to damage the property of the people living along the line of its right of way by reason of its failure to do so." The court also gave the jury the following instruction, which is also complained of, viz.: "A railway company is chartered to use engines and cars to carry men and freight at great speed, and in large quantity, and is authorized to use extraordinary means and power to accomplish this purpose; but while so using them it is its duty to so construct their machines as not to damage the property of the people living upon the line of its right of way; and if you should find from the evidence that the fire which burned the plaintiffs' property was caused from coals or cinders dropped from defendant's engine, and you should find the engine used by the defendant was constructed upon such principle that if in perfect order, and properly operated, no coals or cinders would escape therefrom so as to cause such a fire, then the jury would be authorized to find that some defect existed in the engine." The use of the word "dropped" in connection with coals or cinders is criticised, as well as the general tenor of the instruction, but we are unable to detect any substantial error in it. While some other minor matters are discussed in the briefs, we fail to perceive any materiality in them, and on the whole record we are satisfied with the conclusions reached by the court below, and the judgment will be affirmed. All the justices concurring.

(50 Kan. 582)

FIRST NAT. BANK OF KINGMAN v. GERSON.  
(No. 6,538.)

(Supreme Court of Kansas. April 8, 1898.)

ATTACHMENT—PROPERTY IN CUSTODIA LEGIS—  
CHattel MORTGAGE—VALIDITY.

1. Where property has been attached in good faith, and subsequently taken from the officer op

an order of replevin, it is in custodia legis pending the result of the replevin suit, and not subject to a levy under further orders of attachment against the original judgment debtor; but where the attachment and replevin suits are collusively brought for the express purpose of placing the property beyond the reach of creditors, such property is not in the custody of the law, but is subject to claims of attaching creditors acting in good faith for the purpose of securing their just demands. In this case R., having notes against G. & Co. for \$712, and interest, attached property worth \$5,000 or more. J. G., claiming under a void chattel mortgage, replevied such goods from the sheriff, who held them under the attachment. *Held*, that this does not show a bona fide controversy between R. and the sheriff on the one hand and J. G. on the other over the title or right of possession to this property in view of all of the other facts found in the record and stated in the opinion. 32 Pac. Rep. 366, modified.

2. A chattel mortgage on a stock of drugs, etc., which includes a large quantity of intoxicating liquors, is void in toto.

(Syllabus by the Court.)

#### On rehearing.

ALLEN, J. This case was first heard before the commission, and at the February session an opinion was filed by Strang, C. On the argument for a rehearing our attention is directed to various matters which seem to have been overlooked, and for a clear understanding of the case it is necessary to state more fully and accurately the facts as they are shown by the record. This action was commenced in the district court of Kingman county on December 27, 1889, by the plaintiff against George Gerson & Co. for \$300 on a note dated October 22, 1889, due in 60 days. An affidavit and bond for attachment were filed, and an attachment issued and levied on a portion of the stock of merchandise of Gerson & Co. Thereafter Joseph Gerson filed a motion to discharge said goods from attachment, claiming the same as mortgagee from George Gerson & Co. Joseph Gerson also claimed that these goods were not subject to attachment, because of the following proceedings: That on December 17, 1889, an action was brought in the district court of Kingman county by George W. Rodgers vs. George Gerson & Co., on two promissory notes,—one dated July 29, 1889, due five months after date, for \$500, executed by George Gerson and Isaac Levy, payable to order of Joseph Gerson; and the other dated July 13, 1889, due three months after date, for \$212, signed by George Gerson & Co., also payable to the order of Joseph Gerson; both of these notes being indorsed by Joseph Gerson in blank. An affidavit for an attachment sworn to by George W. Rodgers was filed in that action, in which George Gerson & Co., it was alleged, were about to dispose of their property with intent to defraud, hinder, and delay their creditors. An order of attachment was issued in that action, and the whole stock of goods was levied on by the sheriff. On the same day Joseph Gerson commenced an action against the sheriff to recover the immediate possession of the goods. In his affidavit filed to obtain an order of replevin he alleges that the stock of merchandise was worth \$5,000. In his petition in that ac-

tion he alleges that he is entitled to the possession of said goods under a chattel mortgage executed by George Gerson and Isaac Levy to him, dated November 26, 1889, given to secure two promissory notes for \$1,600 each, both dated November 26, 1889, due, respectively, in three and six months from date, and bearing interest at the rate of 10 per cent. per annum, payable to the order of Joseph Gerson & Co. The chattel mortgage covers the entire stock of merchandise, consisting of rugs, patent medicines, toilet articles, paints, oils, liquors, cigars, glass, and stationery, perfumes, and all other goods, including fixtures, show cases, safes, etc.; also a soda fountain, generator, three copper founts, etc. A writ of replevin was issued, served by the coroner, and under that Joseph Gerson obtained possession of the entire stock, and he claims that by reason of these proceedings the property became in custodia legis, and therefore not subject to attachment. On the other hand, it is contended that these proceedings were collusive, and instituted and carried on by Rodgers on the one hand and Gerson on the other for the express purpose of withdrawing the entire property of George Gerson & Co. from the reach of their creditors. This claim is not considered or mentioned in the opinion heretofore filed. In order to fully understand the grounds of the plaintiff's claim in this respect, it is necessary to state some further facts. Joseph Gerson and George W. Rodgers both resided in the city of Newton, in Harvey county. The stock of goods in controversy in this action was kept in Kingman county. Joseph Gerson and George W. Rodgers both went from Newton to Kingman on the same train on December 17, 1889. The \$500 note sued on by Rodgers had been discounted by the Citizens' Bank of Newton, of which Rodgers was the cashier; and Rodgers, after it became due, and about the 27th of November, took the note up from the bank, as he testifies. Joseph Gerson, who indorsed both of these notes sued on by Rodgers, was, according to his own statement, worth from \$50,000 to \$75,000, and according to Rodgers' testimony was well off. Immediately on his arrival at Kingman, Rodgers went to the hotel, registered, left his overcoat, and from there went to the drug store of Gerson & Co., and demanded immediate payment of his note. He then went back to the hotel and got his dinner. After dinner he went to the store, and saw a paper on the window, stating that the store had been closed under a chattel mortgage given to Joseph Gerson, and found the door locked. He says that was the first information he had that Joseph Gerson had a chattel mortgage. He then went in search of a lawyer, and in that search found the office of Lydecker & Cooper, Joseph Gerson's attorneys. They informed him that they were busy, but that they could refer him to an attorney in a few minutes, who could serve him, and shortly thereafter John W. Cooper, a young attorney, who stayed in the same office, came in, and was introduced to Rodgers, and by Rodgers employed to commence the attachment suit. A replevin ac-

tion was commenced almost simultaneously on the same day, and was brought by Lydecker & Couper as attorneys for Joseph Gerson. On the 26th day of November, 1889, being the same date as that of the chattel mortgage, Isaac Levy conveyed to Abram Cole, who resided also in Newton, and who was a son-in-law of Joseph Gerson, all of the real estate owned by Levy, and being all of the real estate of any considerable value owned by any member of the firm of George Gerson & Co. Neither the deed nor the chattel mortgage was placed on record until the 17th of December, the date of these suits. Both of them were taken from Newton to Kingman by Joseph Gerson on that day, and filed for record. Charles Bucher, an attorney at Newton, testified that about the middle of July, 1889, Joseph Gerson called him into the store of A. Cole, in Newton, and said that times were a little close and he did not know just how business was going, and thought of taking in George's store at Kingman, and wanted to know the best way of standing the creditors of George off; that Joseph Gerson also asked him if an attachment were levied upon the stock, and then he should replevin, if any other judgments could be levied upon the goods after that; that he (Bucher) told Gerson that if that were what he wanted to do it was as good a way as any, and then added that he (Gerson) ought not to do such business with his own son. Bucher was not employed by Gerson, nor paid for his counsel. These statements of Bucher are not denied. It is true that Rodgers and Joseph Gerson deny having any conversation with each other while or before going on the train about the business they were going on, and Joseph Gerson gave Rodgers a false reason for his trip, viz. that he was going to look at a farm. It appears clearly from the evidence that in the stock of goods included in the mortgage there were intoxicating liquors of the value of \$500 or \$600. After the replevin suit Rodgers gave no redelivery bond, and, if mere change from his testimony in this case repudiates the claim made in his affidavit that Gerson & Co. were disposing of their property to defraud their creditors, he repudiated that claim. Rodgers' undertaking in attachment is signed by R. W. Hodgson, whose name also appears as a surety on Gerson's replevin bond. Rodgers testified as follows: "Question. On what facts did you act in procuring the attachment against Gerson & Co.? Answer. The fact that they owed me the money past due, and did not pay it, and considered it best on finding that the store had just been locked up under a chattel mortgage. It looked to me as though it were time I was looking out for myself. Q. You considered this chattel mortgage to Gerson as being a fraudulent business to defraud creditors? A. No, sir; I did not consider it any such thing. Q. Well how did you consider it, if you considered it at all? A. Well, as far as that was concerned, the only thing that I took into consideration was this: that is, I saw there,—I believe there was stock enough there, after paying Joseph Gerson's mort-

gage off, to pay me off. Q. How much was Joseph Gerson's mortgage? A. I did not know at that time. I have been told since it was, I believe, \$3,000. I believe I heard it was. Q. If you did not know at that time, how did you consider that there was enough for both of you? A. I knew that Joseph Gerson was slick enough not to loan money on goods unless he had good security. He always gets good security." There are 14 cases pending in this court, brought by various attaching creditors, all depending on the same state of facts.

It has already been held by this court that a chattel mortgage upon intoxicating liquors is void, and that, where other property besides intoxicating liquors is included in the mortgage, it is void in toto, both as to the liquors and as to the other property. *Flersheim v. Cary*, 39 Kan. 179, 17 Pac. Rep. 825. The foundation of Joseph Gerson's claim was therefore void.

It is contended that Joseph Gerson had obtained possession of the mortgaged property prior to the levy of the attachment, and that this cured the illegality in the mortgage; but in the replevin action Joseph Gerson claimed these goods, not because of a delivery to him as a pledge, but in his petition he bases his rights solely on this chattel mortgage. Probably an ill-founded claim prosecuted in good faith might be held sufficient to place the property in the custody of the law, but what did the undisputed facts in this case show? Gerson claims a stock of goods much in excess of the amount of his mortgage in value, under a mortgage void in law. George W. Rodgers, a friend of Gerson's, living at a considerable distance from the place where George Gerson & Co. live, takes up two notes, which had been originally given to Joseph Gerson, on which Joseph Gerson, a man of wealth, living in the same town, was indorser, and goes in company with Joseph Gerson to a town distant from his home, and there employs a lawyer from the same office occupied by Gerson's lawyers, to commence an attachment suit; procures the same person as surety on his bond that Gerson has on his replevin bond; then attaches not merely a sufficient amount of goods to satisfy his claim and costs, as a creditor acting in good faith would ordinarily do, but the entire stock of goods held by Gerson & Co., which the evidence shows to be worth somewhere from \$5,000 to \$6,500. This court ordinarily will not weigh conflicting testimony, but, where any evidence was before the trial court to sustain its findings, will uphold them. The undisputed facts in this case as they appear in the record presented for our consideration force us to the conclusion that this action was collusive. A bona fide controversy did not exist between Rodgers and Joseph Gerson, under which each party claimed this entire stock of goods in good faith. Rodgers' claim on the one hand was but for \$712, interest and costs, and Joseph Gerson's claim, even if legal and well founded, was but for \$3,200. Upon the facts here presented we must hold that these suits were collusive,

and therefore the property was not in the custody of the law. Gerson's chattel mortgage, being void for the reasons stated, of course affords no ground for discharging the attached property. It follows, therefore, that a rehearing should be granted, and that the order of the district court discharging the attached property must be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

(50 Kan. 589)

**FIRST NAT. BANK OF KINGMAN v. GERSON. WESTHEIMER et al. v. SAME. McPIKE et al. v. SAME. STICKNEY v. SAME. ROSENBERG et al. v. SAME. WESTHEIMER et al. v. SAME.** (Nos. 6,527, 6,535, 6,546, 6,547, 6,549, 6,551.)

(Supreme Court of Kansas. April 8, 1893.)

Attachments by First National Bank of Kingman and others against George Gerson & Co. Attachments dissolved. Plaintiffs appeal. Reversed.

**PER CURIAM.** In accordance with the stipulation on file in this court the decision in each and all the foregoing cases will be the same as in the case of *Bank v. Gerson*, (No. 6,538,) 32 Pac. Rep. 905.

(50 Kan. 589)

**FIRST NAT. BANK OF KINGMAN v. GERSON et al.** (No. 6,539.)

(Supreme Court of Kansas. April 8, 1893.)

**ATTACHMENT—FRAUDULENT DISPOSITION OF PROPERTY.**

Where a firm of druggists having a large quantity of intoxicating liquors executes to a creditor a chattel mortgage on the entire stock, including such liquors, and such mortgage is void for that reason, *held*, that the execution of such mortgage, and the delivery of the entire stock of merchandise of the mortgagor to the mortgagee thereunder, is sufficient ground to sustain an attachment issued on an affidavit alleging that the defendants had disposed of their property with intent to hinder, delay, and defraud their creditors.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Lealie, Judge.

Action of attachment by the First National Bank of Kingman, Kan., against George Gerson and others. A motion to dissolve the attachment was sustained, and plaintiff brings error. Order reversed.

Hay & Hay, for plaintiff in error. John E. Lydecker, for defendants in error.

**ALLEN, J.** The record in this case is substantially a duplicate of the record in the preceding case of *Bank v. Gerson*, (No. 6,538,) 32 Pac. Rep. 905, and all the questions herein presented might better have been embodied in one case. In this case George Gerson & Co. are made defendants in error, and the error complained of is that the district court dissolved the order of attachment issued in the action on the motion of George Gerson & Co. The proof in the case is identical with the one we have just decided, and a restatement of the facts is unnecessary. In order to dispose of this case it is only necessary for us to say whether or not the facts already considered in the other case are such that we must hold that the district court erred in discharging the attachment. We have held that the chattel mortgage given to Joseph Gerson was void. It is claimed by both the Gersons that Joseph Gerson took possession of the

entire stock of goods under that void chattel mortgage. He, (Joseph Gerson,) after having so obtained possession of the goods, could not lawfully sell them, because the chattel mortgage under which possession was given was a nullity. Joseph Gerson, not being a druggist, and having no permit to sell intoxicating liquor, could not lawfully dispose of the liquors contained in the stock, and apply the proceeds to the payment of his claim. Therefore the goods were disposed of in such manner as necessarily to hinder and delay creditors, if not for the purpose of intentionally defrauding them. This, of itself, is sufficient to sustain the attachment. It follows, therefore, that the district court erred in dissolving the attachment on the motion of the defendants, and its order must be reversed, and the case remanded for further proceedings. All the justices concurring.

(50 Kan. 591)

**WESTHEIMER et al. v. GERSON et al. VAN-NATTA LYND'S DRUG CO. v. SAME. FIRST NAT. BANK OF KINGMAN v. SAME. McPIKE et al. v. GERSON. STICKNEY v. SAME. ROSENBERG et al. v. SAME. WESTHEIMER et al. v. SAME.** (Nos. 6,536, 6,537, 6,540, 6,545, 6,548, 6,550, 6,552.)

(Supreme Court of Kansas. April 8, 1893.)

Attachments by Westheimer and others against George Gerson & Co. and Joseph Gerson. Attachments dissolved. Plaintiffs bring error. Reversed.

**PER CURIAM.** In accordance with the stipulation on file in this court, the decision in each and all the foregoing cases will be the same as in the case of *Bank v. Gerson*, (No. 6,539,) *ubi supra*.

(61 Kan. 134)

**CHICAGO LUMBER CO. v. FRETZ et al.**

(Supreme Court of Kansas. April 8, 1893.)

**MECHANIC'S LIEN—PRIORITY.**

1. A party in open, undisputed possession of real property, who afterwards receives a conveyance of the legal title thereto from the holder thereof, has such a title as will enable him to create a mechanic's lien thereon as against mortgagees and grantees of himself.

2. The cases of *Huff v. Jolly*, 21 Pac. Rep. 646, 41 Kan. 537, and *Lumber Co. v. Schweiter*, 26 Pac. Rep. 593, 45 Kan. 207, cited and distinguished.

(Syllabus by the Court.)

Error from district court, Harvey county; L. Houk, Judge.

Action by the Chicago Lumber Company against A. K. Frets and others to enforce a mechanic's lien. There was judgment in favor of defendants, and plaintiff brings error. Reversed.

Willard Kline, for plaintiff in error. Ady, Peters & Nicholson and Rossington, Smith & Dallas, for defendants in error.

**ALLEN, J.** Plaintiff in error, as plaintiff below, brought this action to foreclose a mechanic's lien on a lot and a half in the city of Newton, making A. R. Ainsworth, Emily K. Larned, W. W. Haas, and others defendants. Ainsworth claimed to hold the legal title to the lots. Emily K. Larned and W. W. Haas both claimed liens on the property as mortgagees from Frets, and each contested the right of plaintiff to any lien on the premises. The main question in the case is whether or not the special findings of the jury show that the

defendant Fretz was the owner of the lots, within the meaning of the statute, so that he might incur them with a mechanic's lien. The materials for which the plaintiff claimed a lien were furnished for the erection of a dwelling house and the appurtenances under contract with Fretz. The erection of the building was commenced on April 26, 1887, and the last of the material was furnished, and the last work done, on the 10th of June, 1887. At the time the work on the building was commenced, the legal title to the lots was in Shafer and Brown, who conveyed the property to Fretz on June 2, 1887. The mortgages under which defendants Larned and Haas claimed were executed by Fretz on June 1, 1887. Afterwards the legal title passed from Fretz, through one Canen, to the defendant Ainsworth. Special findings were made by the jury, among which are the following: "(9) What claim, right, title, or ownership did A. K. Fretz have in and about lot No. 15, and the east half of lot No. 17, in block No. 4, in the city of Newton, Kansas, at the time he contracted for the materials for which plaintiff claims a lien in this action? Answer. Claimed by undisputed possession." "(12) Did Fretz have any contract, either written or verbal, with the owner of the legal title to said premises, for the purchase of the same, at the time he contracted for the materials for which plaintiff asks a lien, or at any time prior to the date of the deed? A. We cannot tell." Upon these facts the court held that the plaintiff had no lien on the premises, and rendered judgment accordingly. It is contended that these facts do not show such title in Fretz as would enable him to create a lien prior to the execution of the deed from Shafer and Brown. It has already been held by this court that a mechanic's lien may attach to a leasehold estate. *Hathaway v. Davis*, 32 Kan. 693, 5 Pac. Rep. 29. In *Lumber Co. v. Osborn*, 40 Kan. 168, 19 Pac. Rep. 656, it was held that a person in the possession of real estate under a deed conveying the right of occupancy, and covenanting for the conveyance of the absolute title, will be deemed the owner, within the meaning of the mechanic's lien laws, and may subject his interests in the property to a mechanic's lien. In *Seitz v. Railroad Co.*, 16 Kan. 133, and *Trust Co. v. Sutton*, 46 Kan. 166, 26 Pac. Rep. 406, it is held that an equitable title is sufficient to support a mechanic's lien.

The main difficulty in this case is that the nature of Fretz's title is not shown. It only appears that he was in the undisputed possession of the property, and that he acquired the fee on the day after the mortgages under which the defendants Larned and Haas claim were executed. Possession, however,—undisputed possession,—is evidence of title. Full title itself is but the right to unlimited possession, and the fact that a person is in full possession of lands, unexplained, is evidence of ownership. In *Bricker v. Ledbetter*, 26 Kan. 269, it was held that where it appears that a husband and wife entered into the possession of vacant land, built a house thereupon, and occupied it, such possession is prima facie evidence of title,

and sufficient as against a mere trespasser and wrongdoer. So, in *Douglass v. Dickson*, 31 Kan. 310, 1 Pac. Rep. 541, possession under claim and color of title is sufficient evidence of title in an action to recover damages from a mere trespasser. See, also, *Giffin v. Linney*, 26 Kan. 717; *Drug Co. v. Brown*, 46 Kan. 543, 26 Pac. Rep. 1019. It is true that in this case it is shown that the legal title was in Shafer and Brown, and, if the controversy were between plaintiff and Shafer and Brown, it would be incumbent on the plaintiff to show what right Fretz had as against them, and the case of *Huff v. Jolly*, 41 Kan. 537, 21 Pac. Rep. 646, would be in point; or if it were shown, as in the case of *Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. Rep. 592, that it was expressly agreed that the purchaser should have no right to subject the property to any liens, the party claiming the lien would have no rights which he could enforce, as against the holder of the legal title, who had agreed to convey under the conditions stated in that case. In the last-mentioned case it was expressly agreed between Schweiter, who held the legal title, and Jones, who built the house, that a first mortgage might be placed on the property by Jones at the time the deed was executed to him, and that Jones should ever keep the lots clear of all liens, judgments, and taxes, of every kind and description; and the contract stipulated that the \$1,200 mortgage should be the first lien when the lots were conveyed to Jones. In that case it was held that the lien of the lumber company was subordinate to that of the mortgage upon the clear ground; that the lumber company was bound by the contract between Schweiter and Jones. In this case no such state of facts is shown, but it does appear that Fretz's possession was followed by the conveyance to him on June 2, 1887, of the full legal title. The mortgages also claimed under Fretz, and their claims are based on mortgages executed prior to the date of the deed from Shafer and Brown to Fretz. We are unable to perceive any good reason why Fretz should be held to have a better right to incur the lots with mortgage liens before he had a deed to the lots than with a mechanic's lien. At the time these mortgages were executed a dwelling house which certainly must have been plainly visible to any person seeing the lots, was in the course of construction, and that was sufficient to put the mortgagees on inquiry as to the existence of mechanics' liens. We see nothing inequitable in holding that those who have furnished material for the construction of the mortgaged property should be paid for it. We think, under the facts established in this case, it is fairly to be inferred that Fretz had a right to erect a dwelling house as he did, and, in the absence of any contrary showing, that the conveyance of the land to him was a recognition of the existence of a prior equitable title under which the improvements were made. It would, of course, be more satisfactory if the precise terms of the agreement under which Fretz obtained possession were shown, but we are not able to say that it was incumbent

on the plaintiff to do more than prove possession in Fretz. If the defendants were claiming directly under Shafer and Brown, then it would clearly have been necessary for the plaintiff to have gone further, and proved what rights Fretz had as against Shafer and Brown, the legal title being shown to be in them; but here all parties claim through Fretz, and we think their rights are to be determined just as though Fretz had the legal title at the time he commenced the erection of the dwelling house. It follows, therefore, that the judgment of the district court must be reversed; and, as the facts were specially found by the jury, we must direct that judgment be entered in favor of the plaintiffs for \$230.31, and 12 per cent. interest thereon from the 26th day of September, 1887; that the same be decreed a first lien on the property in question, and the other liens subordinated thereto. All the justices concurring.

(51 Kan. 248)

BEADLE v. KANSAS CITY, F. S. & M. R. CO.

(Supreme Court of Kansas. April 8, 1893.)

CARRIERS—RECOVERY OF OVERCHARGES—DAMAGES.

The act concerning railroads and other common carriers, of 1883, giving a full and ample remedy to the shipper for the recovery back for any excess of overcharges received by the common carrier, beyond reasonable compensation, is a substitute for the remedy provided in such case at common law. The statute not only permits the shipper to recover the excess of overcharges exacted by the common carrier, but allows three times the excess, or treble damages, with attorney's fee and costs. Sess. Laws 1883, c. 124; Gen. St. 1889, pars. 1333, 1334, 1342.

(Syllabus by the Court.)

On rehearing. For decision on appeal, see 29 Pac. Rep. 696.

HORTON, C. J. At the January term for 1892, this court held that the petition filed in this case stated statutory causes of action, and therefore affirmed the judgment of the trial court. Paragraphs 1332-1335, 1342, Gen. St. 1889; 48 Kan. 379, 29 Pac. Rep. 696. Our attention upon the rehearing has been called specially to the amendment filed to the petition, which reads as follows: "Now comes the plaintiff, and amends the prayer of his petition, as to each county thereof, as follows: Strike out the words 'three times' and 'to wit, \$ (figures) and (figures) cents, as provided by law,' and leave standing the words 'said sum,' so as to make it read, 'wherefore, plaintiff asks judgment for said sum, with interest,' etc. Plaintiff does this because he desires the action to be taken and considered as one upon implied contract to obtain the recovery of overcharges made."

At common law, a public or common carrier is bound to accept and carry for all, upon being paid a reasonable compensation. The common law condemns unjust and unreasonable charges, and it has always been the right of a shipper, at common law, to recover back any overcharge or excess beyond reasonable compensation. Therefore, the question raised in this case, upon the rehearing, is whether

the legislature, in passing the act concerning "Railroads and other common carriers," in 1883, intended that the provisions of the statute should be a substitute for the common law on this subject. The question is fairly presented in this case whether the plaintiff below has his remedy to recover back the overcharges alleged under the common law, or whether he must seek his remedy under the statute. Upon the part of the plaintiff the contention was, and is now, that the statute of 1883 is merely a cumulative remedy. The claim of the railroad company is that the statute affords a full and complete remedy to recover back any overcharge or excess of a carrier, and is a substitute for the remedy at common law; that the statute in this instance supersedes the common law, and gives the only remedy where unreasonable charges or prices are exacted by the carrier for the transportation of persons or property.

Paragraph 1333, Gen. St. 1889, reads: "No railroad company shall charge, demand, or receive from any person, company, or corporation, for the transportation of any property, or for any other service, a greater sum than it shall at the same time charge, demand, or receive from any other person, company, or corporation for a like service from the same place, or upon like condition and under similar circumstances; and all concessions of rates, drawbacks, and contracts for special rates shall be open to and allowed all persons, companies, and corporations alike. Nor shall it charge more for transporting freight from any point on its line than a fair and just proportion of the price it charges for the same kind of freight transported from any other point." Laws March 8, 1883, c. 124, § 10. Paragraph 1334 reads: "No railroad company shall charge, demand, or receive from any person, company, or corporation an unreasonable price for the transportation of persons or property, or for the hauling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad company; and upon complaint in writing, made to the board of railroad commissioners, that an unreasonable price has been charged, such board shall investigate said complaint, and, if sustained, shall make a certificate, under their seal, setting forth what is a reasonable charge for the service rendered, which shall be prima facie evidence of the matters therein stated." Id. § 11. Paragraph 1342 is as follows: "Any railroad company which shall violate any of the provisions of this act shall forfeit, for every such offense, to the person, company, or corporation aggrieved thereby, three times the actual damages sustained by the said party aggrieved, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court; and if an appeal be taken from the judgment, or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in appellate court or courts." Id. § 19.

The general rule is that a statute covering the whole subject-matter of a former

one, adding offenses and varying the procedure, operates, not cumulatively, but by way of substitution, and therefore impliedly repeals it. *U. S. v. Claffin*, 97 U. S. 546; *Young v. Railway Co.*, 38 Mo. App. 514; *Crosby v. Bennett*, 7 Metc. (Mass.) 19; *Smith v. State*, 14 Mo. 115; *Thurston v. Prentiss*, 1 Man. (Mich.) 201; *Com. v. Coolcy*, 10 Pick. 37. This court, in *Insurance Co. v. Swayze*, 30 Kan. 118, 1 Pac. Rep. 36, referring to the General Statutes of 1868, c. 119, § 8, which prescribes that "the common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force, in aid of the General Statutes of this state," decided that the rule of the common law permitting an administrator to settle or compromise claims against an estate in his hands was superseded by the statute concerning the duties of administrators and the power of probate courts. At common law the carrier could recover what was reasonable, notwithstanding the overcharge, and the shipper had to pay to the carrier all over the excess claimed, and he could recover only the overcharge or excess. But under the statute of 1883 the shipper aggrieved may recover, not only the overcharge or excess, but three times the actual damages sustained, together with the costs of the action and a reasonable attorney's fee. Therefore, if a shipper in this state is charged an unreasonable price for the transportation of his property, or for the storing of his freight, or for the use of cars, or for any privilege or service afforded by a railroad company in the transaction of its business, in an action brought to recover the overcharge or excess, the facts alleged, which would give the shipper a cause of action under the common law, to recover back merely the overcharge or excess, will, under the statute, authorize him to recover three times his actual damages or overcharge, with costs and attorney's fee. The legislature has not only enacted a statute which gives to the shipper all his remedy at the common law, but has conferred upon him further or additional rights. The statute gives a full and complete remedy to the shipper, who has been overcharged. It gives a better remedy than the common law, and therefore, in our opinion, it was intended by the legislature that this statute should supersede the common law concerning unreasonable prices or excessive charges. We do not think that a shipper may waive the statute, and avoid the limitation of one year, by an action at common law. The statute gives a full remedy, and when a full remedy is given thereby the parties are, and ought to be, confined to it. In a case very similar to this, (*Young v. Railway Co.*, supra,) the Missouri court of appeals decided that "a statute law and the common law may alike be repealed (1) by repealing clause; (2) by such repugnance that the two laws may not, in reason, both stand; (3) by a revision of the whole subject-matter of the former law, which is evidently intended as a substitute for it. The two latter, being repeals by implication, are not favored, yet the courts are steadily and unhesitatingly applying and

enforcing these rules whenever their terms cover the case in hand. Article 3, c. 21, Rev. St. 1879, concerning railroad classification and charges, repeals the common law, under the second—certainly, at least, under the third—reason set out above; and a common-law action cannot be maintained in this state to recover the excess of overcharges exacted by it." Opposing this, the rule is referred to upon the part of plaintiff, "that a statute fixing a penalty for an offense, does not, either expressly or by necessary implication, cut off the common-law prosecution or punishment for the same offense, and must be taken to intend merely as a cumulative remedy." This rule we fully recognize, but it is based upon the theory that a penalty may not give a sufficient or full remedy to the party aggrieved, and, therefore, that a statute providing a penalty should not supersede the rights of the aggrieved party at the common law. *People v. Turnpike Road*, 23 Wend. 221-243; *Turnpike Road v. State of Maryland*, 19 Md. 239. Under the statute of 1883 the shipper aggrieved may not only recover the overcharge or excess, but three times the amount of the overcharge or excess; that is, treble damages. Therefore, while the action is in the nature of a penalty, it gives a sufficient remedy. The purpose of the statute is not merely to punish an offense against the public justice of the state, but to afford a private remedy to the person injured by the wrongful act. *Huntington v. Atrill*, 13 Sup. Ct. Rep. 224. The party aggrieved may recover a greater amount under the statute than at the common law. Counsel for plaintiff cites the following cases in support of his contention. *Clark v. Transportation Co.*, (Mass.) 24 N. E. Rep. 49; *Cook v. Railway Co.*, (Iowa,) 46 N. W. Rep. 1080; *Heiserman v. Railroad Co.*, 63 Iowa, 732, 18 N. W. Rep. 903. In the *Clark Case*, supra, the statute is, in substance, the English employers' liability act. The Kansas statute of 1874, concerning the "Liability of railroads," is somewhat similar; but none of these statutes are a substitute for the common-law liability of the master, because these statutes merely give a new or additional right. They make the master liable for all damages to an employe by the negligence of a coemploye, if the party injured is in the exercise of due care and diligence. They do not attempt to regulate the full relations of master and servant. The common law, under those statutes, remains in force, in aid thereof, to supply a remedy not provided for in the statutes. In the *Cook Case*, supra, no question was raised in regard to any statute, or as to whether a statute abrogated the common law. In *Heiserman v. Railroad Co.*, 63 Iowa, 732, 18 N. W. Rep. 903, it does not appear that the point was made that the statute referred to was intended as a revision of the common law. The last case is referred to and commented upon in *Young v. Railway Co.*, supra.

Finally, it is claimed that the following provision of section 13 of the act of 1883 continues the common law in force as to overcharges: "No railroad company shall be permitted, except as otherwise provided



by regulation or order of the board, to change or limit its common-law liability as a common carrier." Paragraph 1336, Gen. St. 1889. The statute referred to does not change or limit the common-law liability of a railroad company as a common carrier, but enlarges that liability. The action for the recovery of overcharges, under the statute, must be brought under subdivision 4 of section 18 of the Code, within one year; not three years. The overcharges, however, may all be recovered under the statute, as at common law, with additional damages or penalty. No regulation or order of the board is necessary for the recovery of such overcharges, and no order or regulation of the board can prevent the operation of section 19, c. 124, Sess. Laws 1893, (par. 1342, Gen. St. 1889), concerning the recovery of such overcharges. What is said of the common-law remedy against common carriers in *Beadle v. Railroad Co.*, 48 Kan. 379, 29 Pac. Rep. 696, by Simpson, C., is wholly obiter. The motion for rehearing will be denied. All the justices concurring.

(50 Kan. 568)

STEWART et al. v. ADAMS et al.

(Supreme Court of Kansas. April 8, 1893.)

CITIES—EXTENSION OF BOUNDARIES.

Gen. St. 1889, par. 1018, provides for extending the limits of cities of the third class by proceedings before the board of county commissioners when the territory sought to be added is not subdivided into parcels of five acres or less, but where so subdivided the territory may be added by ordinance only. Paragraph 884 provides for extending the limits of cities of the second class by proceedings before the judge of the district court when the territory sought to be added is subdivided into lots and blocks; otherwise, territory may be added by ordinance only. *Held*, that an ordinance of a city of either second or third class, purporting to extend its limits by adding lands not properly subdivided, is void; and such ordinance cannot be construed to be valid so as to include lands properly subdivided, and exclude all other lands. Johnston, J., dissenting.

On motion for rehearing. Denied.

For former report, see 32 Pac. Rep. 122.

PER CURIAM. Ordinance No. 115 was passed by the city of Argentine on May 14, 1889, while the city was a city of the third class. Ordinance 217 was passed on July 29, 1890, and published July 31, 1890, after the city had become a city of the second class. No other action has been taken by the city, as a city of the third class, than the passage of ordinance No. 115, nor as a city of the second class, than the passage of ordinance No. 217, having for its object the extension of the original city limits so as to bring the property of plaintiffs below within its jurisdiction.

It is conceded that, if the property taxed has been added to the city, it was so added under and by virtue of the provisions of either ordinance No. 115 or No. 217.

Upon the motion for a rehearing it was earnestly and forcibly contended that all territory sought to be added by these ordinances to the city of Argentine, which was subdivided into lots or parcels of five

acres or less, was taken in and made a part of the city thereby, even if it were conceded that the tracts of land exceeding five acres in extent, not subdivided into lots or parcels, were not added to the city.

The title of ordinance No. 115 is as follows: "An ordinance extending the limits of the city of Argentine, Wyandotte county, Kansas, and declaring and defining the entire boundary thereof as changed by said extension." Section 1 of the ordinance reads: "That the boundary of the city of Argentine, Wyandotte county, Kansas, shall include the territory of the original city of Argentine, described as follows." (Here is set out the boundary of the original city of Argentine.) Section 2 reads: "That the limits of the city of Argentine are hereby extended so as to include all the territory, pieces, and parcels of land lying, being, and situated between the boundaries of the following described land." (Here is described a boundary line around a portion of the prior city limits and other undescribed territory; this, without regard to platted or unplatted tracts of land.) This section omits a tract of about 41 acres included within the original incorporated limits of the city of Argentine, by leaving it outside of the boundary line. The title of ordinance No. 217 is as follows: "An ordinance re-establishing and extending the city limits of Argentine, Kansas." There are three sections only in this ordinance. Section 1 reads: "That the limits of the city of Argentine are hereby re-established according to the following description." (Here follows a boundary line, but included therein are several unplatted tracts of land exceeding five acres in extent.) Section 2 repeals all ordinances in conflict therewith, and section 3 provides that the ordinance shall take effect upon its publication. The ordinance contains nothing more.

Under the provisions of the statute, when a town or village is incorporated as a city of the third class, the board of county commissioners of the county in which such town or village is situated declares, upon proper proceedings before it, that the town or village is incorporated by a certain name, designating in the order the metes and boundaries thereof; and "thenceforth the inhabitants within such bounds, and such further territory as from time to time may be lawfully added thereto, shall be a body politic and corporate by that name, and they and their successors (except such corporation be lawfully dissolved) shall have perpetual succession." Paragraph 923, Gen. St. 1889.

When cities of the second class are organized, the mayor and council of the city must make out and transmit to the governor an accurate description of the metes and boundaries of all lands in the city and additions thereto, and the boundary is thereby established. Paragraph 756, Id. Therefore the boundaries of cities of the second and third classes are not to be altered or changed by the mayor and city council, except authority is given by statute to add territory by ordinance, "when

the territory sought to be added is subdivided into lots or parcels of five acres or less." Additional territory may also be added to cities of the second and third classes upon proper proceedings had,—in the second class before a judge of the district court, and in the third class before the board of county commissioners.<sup>1</sup>

In ordinance No. 115 the boundary line left outside of the limits of the city a large tract of land formerly belonging to it, which the mayor and council had no authority to do. The claim that this court may construe these ordinances to add only the territory subdivided into lots or parcels of five acres or less, and omit undivided tracts or parcels, cannot be sustained on account of the provisions of the ordinances fixing the boundary of the city of Argentine. If either ordinance had merely added to the city of Argentine, as originally bounded, certain described lots or parcels of land, as is usual in such cases, there would be much force in the contention that the subdivided lots or parcels of five acres or less were added or taken in, while the tracts of land exceeding five acres, not subdivided, were not affected or included.

We are urged to declare, in the first instance, that the mayor and city council of Argentine did not intend to take into the city the tracts of unplatted land exceeding five acres in extent, although the ordinances, in establishing the boundary line of the city, embraced these tracts of unplatted land; and then we are further urged to declare, after the mayor and city council of Argentine have fixed the boundary line of the city by ordinances, that they intended thereby to establish another and wholly different boundary line than as stated in the ordinances. To give the construction desired we must give an interpretation to the ordinances different than they read, and we must change the boundary line of the city of Argentine, as established by the ordinances, and make a new boundary line for the city. We do not think, in the form that the ordinances were drawn and passed, that we can make the changes suggested, by establishing a new and different boundary line. *Cooley, Const. Lim. 230; Commissioners v. Carter, 2 Kan. 115; Hulbert v. Mason, 29 Ohio St. 562; City of Wyandotte v. Zeitz, 21 Kan. 660; F. S. v. Reese, 92 U. S. 214; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601; Suth. St. Const. 238; Allen v. Louisiana, 103 U. S. 80; People v. Porter, 90 N. Y. 68; Hinz v. People, 92 Ill. 406.*

If we were to construe the ordinances as suggested, we would wipe them out, and make a new one establishing a new bound-

ary line for the city, and by such boundary line leave out of the city large tracts of unplatted land included within the boundary line established by the ordinances. Instead of then having a regular boundary line, as fixed by the ordinances, this court would declare a zigzag boundary line, running in and out among various tracts of land, some platted and some unplatted, situated at different places within the boundary line originally fixed by the ordinances. This we cannot do. This would be legislation; not the exercise of judicial power.

The motion for rehearing will be denied.

HORTON, C. J., and ALLEN, J., concurring.

JOHNSTON, J., (dissenting.) I joined in the judgment of affirmance that was originally given, but the argument upon the rehearing convinced me that the last ordinance should be sustained, and the property sought to be annexed, and which has enjoyed special benefits, should be held to bear its just proportion of the public burdens. From the title of the ordinance, and its provisions, it seems to me to have been the manifest purpose of the mayor and council to annex territory, and not to define and establish the boundaries of the city. Presumably they were doing that which they had the legal power to do, and were not attempting to do that which the law does not permit. They had the power to add territory, and to do so an extension of the city limits was required. The title of the ordinance indicates that they were endeavoring to extend the limits so as to take in additional territory. In doing so they described a line which embraced both platted and unplatted territory. The unplatted territory could not be annexed, but they had authority to annex that which was platted, and, although the effort to annex was somewhat bungling, I think the ordinance is effectual to annex that which could be legally annexed. Ordinances to annex territory frequently embrace and describe several tracts, and the failure to properly describe one tract has never been held to defeat the annexation of those which were properly described. So, here, the fact that the new boundary line made by the council, in its effort to annex, embraced unplatted tracts of ground, should not defeat the annexation of that which was subject to be annexed, and which was included within the limits as extended. I therefore think the rehearing should be allowed.

(50 Kan. 573)

STEWART et al. v. SCHOONMAKER et al.

SAME v. BURT et al.

(Supreme Court of Kansas. April 8, 1893.)

Two cases. On motion for rehearing in each case. Denied.

For former report, see 32 Pac. Rep. 126, mem.

PER CURIAM. The questions involved in these cases are the same as those just decided in *Stewart v. Adams*, 32 Pac. Rep. 912, and the motions for rehearing in these cases will be overruled upon the

<sup>1</sup>Gen. St. 1889, par. 1018, provides for extending the limits of cities of the third class by proceedings before the board of county commissioners when the territory sought to be added is not subdivided into lots or parcels of five acres or less, but when so subdivided territory may be added by ordinance only. Paragraph 884 provides for extending the limits of cities of the second class by proceedings before the judge of the district court when the territory sought to be added is not subdivided into lots and blocks; otherwise, territory may be added by ordinance only.

authority of the opinion per curiam filed in that case.

JOHNSTON, J., dissents.

(51 Kan. 254)

**WATKINS v. NATIONAL BANK OF LAWRENCE et al.**

(Supreme Court of Kansas. April 8, 1893.)

REVIEW ON APPEAL—NATIONAL BANKS—LIQUIDATION—RIGHTS OF MINORITY STOCKHOLDERS—ESTOPPEL—APPOINTMENT OF RECEIVER.

1. Facts conceded by the pleadings, and accepted as true, in the district court, cannot be made subjects of controversy in the supreme court.

2. A national bank may go into liquidation, and be closed, by a vote of its shareholders owning two thirds of its stock; and this right may be exercised although it may be contrary to the wishes, and against the interests, of the owners of the minority of the stock.

3. A party who, with full knowledge of all the steps taken in placing a bank in liquidation, receives and retains a dividend paid by the officers in control of the liquidating bank, will not be heard to deny the validity of the liquidation.

4. The appointment of a receiver rests largely within the discretion of the court, and before it will take the property and business of a liquidating bank from the control of the directors, into its own hands, upon the application of a stockholder, it must appear that the danger of loss or injury to the rights of the plaintiff is clearly proved, and the necessity and right for the appointment of a receiver free from reasonable doubt.

5. The court found upon testimony, somewhat conflicting, that the directors of the liquidating bank were acting with reasonable diligence and economy in closing the business of the bank, and declined to appoint a receiver. *Held*, upon an examination of the testimony, that the finding and judgment will not be disturbed.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Proceedings by J. B. Watkins against the National Bank of Lawrence and others to appoint a receiver for the bank, and close up its affairs. There was judgment refusing to appoint a receiver, and plaintiff brings error. Affirmed.

T. A. Hurd, Riggs & Nevison, and W. J. Patterson, for plaintiff in error. S. O. Thacher, for defendants in error.

JOHNSTON, J. This proceeding brings up for review a ruling of the district court of Douglas county, refusing to appoint a receiver for the National Bank of Lawrence, which was in process of voluntary liquidation. The appointment of a receiver to wind up the business of the corporation seems to have been the sole purpose of the action. It was brought by J. B. Watkins, a stockholder of the bank, on November 15, 1889, against the board of directors, who were duly elected in May, 1889, and who had been in control of the bank since that time. In his petition he says that the bank was organized in 1886 with a capital stock of 1,000 shares, of the par value of \$100 each, and that, for several years prior to the commencement of the action, he was the owner of 261 shares of the stock. He further alleges that on June 17, 1889, at a meeting of the stockholders, a resolution was adopted, by the necessary two thirds of the capi-

tal stock, to place the bank in the process of voluntary liquidation, to take effect on the 29th day of June, 1889. He adds that the directors are not acting in good faith, nor endeavoring, with due diligence, to wind up the affairs of the bank for the benefit of the stockholders, and that his interest as a stockholder will suffer great loss and injury if the assets of the bank are left in the possession and under the control of the board of directors. In his petition are allegations that the directors were formerly interested in another bank, and that they had purchased the controlling interest in the defendant bank in order to obtain possession of its business and good will, and to deprive the plaintiff and other minor stockholders of the value of their stock in the defendant bank; that, while the purchase of the stock was in the names of individuals, it was really intended to be for the rival bank, and for its benefit and advantage; but that they were not the owners of the stock when the bank was placed in liquidation, and therefore it is argued that they had no lawful right or authority to act as the directors of the bank or otherwise. The defendants denied the charges of bad faith, and alleged that they were fairly and honestly administering the affairs of the bank, and were closing up its business with diligence, discretion, and honesty. A large volume of testimony was taken with reference to their conduct, in which there is considerable conflict, and upon which the court declined to take the property from the management of the directors, and place it in the hands of a receiver.

There is some testimony, and the arguments of counsel are largely directed to the claim, that the placing of the bank in liquidation was without authority, because the persons voting for the resolution were not the owners of the stocks voted; that the stocks so voted belonged to the rival bank, called the "Douglas County National Bank;" that the defendant directors, in whose name the stock was taken, really purchased the same in the interest of the Douglas County National Bank; and that as the stock was owned by the bank, and not by the directors, they were ineligible to the office of directors of the defendant bank; and that all their acts in relation to the defendant bank and its business were unlawful and void. These questions were not in issue in the court below, and are not open for consideration now. In his petition the plaintiff distinctly avers that the defendants were duly elected as directors, and "are still the duly-qualified and acting directors of said national bank." The truth of these averments is admitted in the answer, and hence the legality and qualification of these directors were not subjects for investigation in the district court, and cannot be inquired into here. Nor is the action of the stockholders, in voting to place the bank in liquidation, open to attack by the plaintiff. It is alleged in the petition and answer that the bank is in process of liquidation, and the plaintiff states that the resolution was adopted by the vote of persons "then holding in their names the nec-

essary two thirds of the capital stock of said bank." It appears that notice of this meeting had been given, and the plaintiff participated in the meeting, and his stock was voted in opposition to the resolution. It was the right of these stockholders to place the bank in voluntary liquidation. The act of congress provides that any state bank may become a national association when the necessary two thirds of the capital stock authorize the change to be made; and it further provides that "any association may go into liquidation, and be closed, by the vote of its shareholders owning two thirds of its stock." Rev. St. U. S. § 5220. Parties who purchase stock in a national bank take it knowing that two thirds of the stock of the bank may at any time vote it into liquidation. This right may be exercised although it may be contrary to the wishes, and against the interests, of the owners of the minority of the stock.

Besides this right of the majority to place the bank in liquidation, and the concession of the pleadings that it had been accomplished, there is another reason why plaintiff is precluded from questioning the right of the defendants in voting the bank into liquidation, or the validity of their action. It appears that since the liquidation began the directors in control have reduced some of the assets to money, and paid a dividend of 25 per cent. to each stockholder, upon the stock held by him, and that the plaintiff, with full knowledge of all the facts relating to the putting of the bank into liquidation, and to the acts of the defendants in its management and control since that time, accepted the dividend. By the receipt and the retention of the dividend, under these circumstances, the plaintiff recognized the validity of the liquidation, and the competency of the officers declaring it. He cannot be permitted to occupy the inconsistent position of repudiating the liquidation, and at the same time accepting the fruits of it.

The liquidation not being open to inquiry, there remains the inquiry whether the defendant directors were acting in good faith, and with reasonable care and diligence, in administering the assets and winding up the business of the bank. The court below, after a full inquiry, and upon some conflicting testimony, determined this question in the affirmative; and, upon an examination of the testimony, we see no good reason to disturb its findings and judgment. The appointment of a receiver rests largely within the discretion of the court, and in a case of this kind the mismanagement of the defendants, and the danger of loss or injury to the rights of the plaintiff, should be clearly proved, in order to warrant the appointment. It is a power which should never be doubtfully exercised, and the court should hesitate to take the property and business of a corporation from the control of the directors, into its own hands, unless the danger of loss or injury is clear, and the right and necessity for appointment free from reasonable doubt. Beach, Rec. § 5.

Testimony has been offered, tending to show that the defendants were conducting the business in such a way as to ob-

tain the business for the Douglas County National Bank which was formerly transacted by the defendant bank. The name of the Douglas County National Bank was changed to the Lawrence National Bank, and that bank removed its place of business to that which was formerly occupied by the defendant bank. On the other hand, it is shown that the change of name was made in April, long prior to the liquidation of the defendant bank, and, further, that they were paying the full rental value of the premises which they occupied. It is shown that the defendants offered plaintiff \$150 per share for the stock, which had cost him \$70 a share. The liquidation was begun on the 29th day of June, 1889, and it had only proceeded about four months when this and other actions were begun by plaintiff, which to some extent have interrupted the process, and delayed the completion of the adjustment. During the time that the directors have been administering the assets of the bank, they have declared a dividend of 25 per cent. on the capital stock. There is proof that they are acting with diligence and economy in winding up the affairs of the bank. Expenses of the management were reduced, unnecessary help was dispensed with, and, so far as appears, the full value of the assets disposed of, including the government bonds formerly owned by the bank, has been realized. There is nothing substantial with reference to the change of name. This was permitted by the comptroller, and can hardly be considered as a matter of consequence.

Much is said that the defendants permitted the other bank to appropriate the good will of the defendant bank without compensation, but there is little that is substantial in the good will of a liquidating bank. The plaintiff has a right to complain if, by any unlawful combination, the assets were not sold for their fair market value; but if the defendants were honestly administering the estate, and had obtained the fair value of the assets disposed of, including the rental of the building occupied by the defendant bank, the plaintiff has no reason to complain. After the bank is put into liquidation the duty of the officers in charge consists in the collection, and reduction to money, of the assets of the bank, and the equal and ratable payment of this money among the creditors and stockholders as their rights may appear. When it went into liquidation, it ceased to exist as a banking institution, and could no longer continue the ordinary banking business. It had no good will to transfer to another bank, beyond the benefits which might result from the leasing of the premises which it formerly occupied, and in which its business was being closed up. This might enhance the rental value of the building leased to the Lawrence National Bank, but manifestly the court below has found that \$100 per month, the rent received, was a fair charge for the use of the building. Bank v. Marshall, 26 Ill. App. 440. Plaintiff made an offer for the bank building, but it was coupled with a condition which made it unavailable. He proposed to give \$55,000 for the building, and com-

plaints that it was not accepted. His offer contemplated the giving of immediate possession, but existing contracts with parties who were occupying portions of the building precluded an acceptance. The defendants endeavored to sell the building to the plaintiff, and to arrange the terms of sales so as to protect the rights of parties under these contracts, but plaintiff declined to accede to the conditions proposed. The charge of mismanagement will hardly lie against the defendants for their action in respect to either the sale or the lease of the building, nor in their refusal to accept any of the propositions of the plaintiff. Neither can we say, after a review of all the evidence, that a case was made out which required the appointment of a receiver. The judgment of the court will therefore be affirmed. All the justices concurring.

(51 Kan. 178)

EMMONS et al. v. GILLE.

(Supreme Court of Kansas. April 8, 1898.)

MORTGAGES—FORECLOSURE—DEFENSES—TITLE IN THIRD PARTY.

It is no defense to a foreclosure action on a purchase-money mortgage that the mortgagor has commenced a civil action against a third person, claiming that such third person, for the purpose of clouding his title to the land mortgaged, has asserted an outstanding title thereto, and that such third person, by a cross answer, has alleged that he is the owner in fee simple of an undivided five sixteenths of the land, and praying the possession thereof, which action is pending at the time the foreclosure action was commenced and called for trial, if the grantee and mortgagor has taken actual possession, under his deed having covenants of warranty, and has remained in peaceable possession without eviction, and it is not charged that the vendor is insolvent, or acted fraudulently or deceitfully.

(Syllabus by the Court.)

Error from district court, Johnson county; J. P. Hindman, Judge.

Action by James M. Gille against D. R. Emmons and others to foreclose a mortgage. There was judgment for plaintiff, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

This action was commenced in the court below by James M. Gille against D. R. Emmons et al. to recover on two promissory notes made by D. R. Emmons,—one payable to plaintiff, and the other to Sarah J. Skelton, and by her indorsed, after maturity, but before the commencement of this action, to him,—and to foreclose a mortgage given by Emmons and wife to secure the notes, and to foreclose any interest that Carrie L. Emmons, George E. Hunter, and W. S. Beard might have in the land mortgaged. The defendants below admitted the making of the notes and the mortgage to secure the same. Carrie L. Emmons set up that the only interest she had or claimed in the property was such as she had by reason of being the wife of D. R. Emmons. George E. Hunter and W. S. Beard alleged that they were each the owners of an undivided one quarter of all of the land; that the notes were given in part payment of the pur-

chase price of the land described in the mortgage; and that the same was conveyed to D. R. Emmons by Sarah J. Skelton and her husband by a deed of warranty, in which they covenanted and agreed with Emmons that they were lawfully seised of the land, that the same was free and clear from all incumbrances, and they further agreed to warrant and defend the same in the quiet and peaceable possession of Emmons, his heirs and assigns, against all and every person lawfully claiming the same. They further alleged that one Lipman Myers, a resident of the state of Texas, claimed to own five undivided sixteenths of all of the land; that, at the time of the commencement of this action, there was pending and undetermined in the circuit court of the United States for the district of Kansas a suit in which Emmons, Beard, and Hunter were plaintiffs and Lipman Myers was defendant, in which Myers claimed to be the owner of an undivided five sixteenths part of the land, and was attempting in the action to oust Emmons, Hunter, and Beard from the possession thereof. They also claimed that they were pushing the suit so pending in that court to final determination as rapidly as possible; and they asked that the proceedings in this case be stayed, and that no judgment be rendered against them, either foreclosing their interest in the land, or personal judgment upon the notes, until such time as a final judgment should be had in the cause pending in the circuit court; and if the final judgment should be rendered in favor of Myers and against them, then that judgment be rendered herein against Emmons for an amount less than the amount purporting to be due on said notes, as the value of five sixteenths of the land bore to the whole amount thereof, and that they be further credited thereon for whatever amount they had expended in the Myers litigation. Gille replied to this defense by a denial of all matters inconsistent with the allegations of his petition. Upon the trial of the cause the defendants below read in evidence the pleadings in the case of Emmons, Hunter, and Beard vs. Lipman Myers, pending in the circuit court of the United States for the district of Kansas, and also the deed from James M. Gille and wife and Sarah J. Skelton and husband to David R. Emmons. It was admitted by the parties that the case of D. R. Emmons et al. vs. Lipman Myers was still pending in the circuit court of the United States, and that the land in controversy in that action was the same land upon which the mortgage in this action was sought to be foreclosed; and it was further admitted that the notes secured by the mortgage sought to be foreclosed in this action were given in payment of the balance of the purchase money for the land described in the mortgage. The court found for Gille, as prayed for in his petition, and overruled the motion for a new trial. To reverse this judgment, D. R. Emmons et al. filed their petition in error in this court.

Hale & Fife, for plaintiffs in error.  
Sheery & Hughes, for defendant in error.

HORTON, C. J., (after stating the facts.) This was an action on two promissory notes, and for the foreclosure of a mortgage given to secure the payment thereof, which notes were given for part of the purchase money of the land described in the mortgage. The defendants were in the peaceable possession of the mortgaged premises at the time of the commencement of the foreclosure proceedings, and sought, by answer, to enjoin or prevent any personal judgment or foreclosure proceedings, on the ground of an alleged defect in title, until final judgment should be rendered in a suit pending in the United States circuit court for the district of Kansas, between the defendants and Lipman Myers, who claims to be the owner of an undivided five sixteenths of the land described in the mortgage. There was no allegation in the answer of the insolvency of James M. Gille or Sarah J. Skelton, the vendors, or of any fraudulent or deceitful conduct on their part. D. R. Emmons, the purchaser of the land, took actual possession thereof under his deed having covenants of warranty, and continued in the actual possession thereof without eviction. After his purchase, D. R. Emmons filed his bill in the United States circuit court for the district of Kansas against Lipman Myers, of Texas, alleging therein that Myers, for the purpose of clouding his title to the land described in the mortgage, made and asserted a claim therein adverse to his estate and title, and asking that his title as against Myers be forever quieted and set at rest. Myers filed his answer, alleging that he was the owner in fee simple of an undivided five sixteenths of the land, and also filed a cross bill, claiming an undivided five sixteenths of the land, and asking possession thereof. Under the pleadings and proof presented we do not think that Emmons, or the other defendants below, were entitled, as a matter of absolute right, to any stay or injunction against the collection of the purchase money on account of the pendency of the actions in the United States circuit court. High, *Inf.* (3d Ed.) §§ 394-399; *Church v. Fisher*, 40 Ind. 145. In *Jones on Mortgages* (vol. 2, § 1500) it is said: "It is no defense to a foreclosure suit on a purchase-money mortgage that there is an outstanding paramount title or incumbrance, when there has been no actual eviction. The mortgagor is left to his remedy on the covenant." *Peters v. Bowman*, 98 U. S. 56; *Alden v. Pryal*, 60 Cal. 215; High, *Inf.* (3d Ed.) § 389; *Gayle v. Fattle*, 14 Md. 69; *Knapports v. Rawson*, 29 W. Va. 457, 2 S. E. Rep. 85. The courts may interfere to prevent a foreclosure on a purchase-money mortgage if an action has been commenced on an outstanding title against the grantee and mortgagor, and the vendor is insolvent, or has been guilty of fraud or deceit; but such a case is not presented. *Wilts. Mortg. Forec.* (Ed. 1889,) § 431, and cases cited; *Woodruff v. Bunce*, 9 Paige, 442; *Bumpus v. Platner*, 1 Johns. Ch. 213. The title to all of the mortgaged property is not contested in the action pending in the United States circuit court. It does not appear that the defendants

below paid, or offered to pay, the money due upon the mortgage for the land to which the title was not contested. Then, again, the outstanding title was brought, in the first instance, into court by the mortgagor himself. If the district court had postponed the hearing of the case, probably we would not have interfered. *Morris v. Barnwell*, 60 Ga. 147. A preliminary injunction is not a matter of strict right. Its issue rests with the sound discretion of the judge, and before one is issued there should be such a full showing of all the facts that the judge acts with a thorough understanding of the entire case. *Olmstead v. Koester*, 14 Kan. 403. The probable results of the final hearing, and the probable effects of a temporary restraining order upon the respective rights of the opposing parties, are proper considerations in determining the question of issuing an order. *Akin v. Davis*, *Id.* 143; *Conley v. Fleming*, *Id.* 387. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 150)

## PETERSON v. ALBACH.

(Supreme Court of Kansas. April 8, 1893.)

DEPOSITION—ADMISSION IN EVIDENCE—EJECTMENT—SUPPLEMENTAL ANSWER—RES JUDICATA.

1. The admission in evidence of a deposition taken at a time other than the one agreed upon, and without an appearance by the complaining party, in which is testimony of a material character, is material error.

2. In an action of ejectment, the defendant, to support the title and possession claimed by him, asked leave to file a supplemental answer, setting up a title acquired subsequent to the commencement of the action, and he offered in evidence proofs of such title, which were refused. *Held*, that permission to file a supplemental answer should have been granted on such terms as would have been just, and that then the proofs offered should have been received.

3. A general finding and judgment in such an action concludes a party on the question of title, and prevents him from thereafter asserting a claim of title, from whatever source it comes, which he had pending the action and prior to the judgment.

(Syllabus by the Court.)

Error from district court, Osage county; John Foster, Judge pro tem.

Action of ejectment by John Albach against John Peterson and others. There was judgment for plaintiff, and defendant Peterson brings error. Reversed.

Pleasant & Pleasant, for plaintiff in error. Ellis Lewis and W. P. Douthitt, for defendant in error.

JOHNSTON, J. This was an action in ejectment, brought by John Albach against John Peterson, N. D. Fairbanks, George W. Morris, and A. J. Utley, to recover about 155 acres of land situate in Osage county. Fairbanks, Morris, and Utley filed an answer, in which they disclaimed any title to or interest in the premises in controversy. Peterson's answer was a general denial, an admission of possession, and an assertion of rights against the plaintiff under several statutes of limitations. In the trial, which was with a jury, Albach appears to have relied upon a possession obtained under a lease

with a right to purchase the land, and that, while in possession, he was unlawfully and forcibly deprived of the same by Peterson. He also claimed under a tax deed issued in 1887, about a month before the commencement of the action, based on a sale held in 1874 for the taxes of 1873. On the other hand, Peterson claimed and offered testimony tending to show that a title to the land was conveyed to him more than five years prior to the commencement of the action; and, further, that Albach never obtained possession of the land, nor had any right to the same. The result of the trial was a verdict and judgment in favor of Albach, and Peterson brings the case up for review, and assigns numerous errors, some of which are not available on account of the confused and imperfect condition of the record. Complaint is made of the admission of the deposition of James Hagerman, upon the grounds that it was not taken at the time prescribed in the notice. It appears that there was an agreement between the parties that the deposition of this witness might be taken at Carbondale on November 3, 1888, whereas it appears to have been taken two days later. There is nothing to show a commencement of the deposition before November 5th, nor was there any continuance of the taking of the deposition from the stipulated time to that on which it was taken. The testimony therein related to the possession of Albach, and is of a material character, and the admission of the same was error. In addition to the title or interest acquired from Fairbanks and Morris, and his possession thereunder, Peterson undertook to show a direct title from the United States. He offered in evidence a duplicate copy of the patent for the land from the United States to Joseph A. Adams, issued in 1866, but the copy of the same was obtained by the plaintiff from the land office since the commencement of the action. He also offered a deed from Joseph A. Adams to himself, dated January 31, 1888, but the deed and duplicate patent were excluded upon the ground that they were executed and obtained after the commencement of the action. Peterson asked leave of the court to file a supplemental answer, setting up a subsequently acquired title, but his application was denied upon objection by Albach. Permission to file a supplemental answer upon just terms should have been granted. Under the issues formed a general finding and judgment will conclude Peterson on the question of title, and prevent him from thereafter asserting a claim of title, from whatever source it comes, which he had pending the action and prior to the judgment. Such a judgment would be res adjudicata not only as to the matters actually considered and decided, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided. "The law does not favor a multiplicity of suits, and, where all matters in controversy between parties as to the title or possession of real estate might be fairly ended in one action, the law requires that this should be done. Parties cannot try title to real estate by

piecemeal, in separate and independent actions upon separate deeds or chains of title, when they have in their possession during the trial separate and different deeds." *Hentig v. Redden*, 46 Kan. 236, 26 Pac. Rep. 701; *Austin v. Jones*, 47 Kan. 565, 28 Pac. Rep. 621.

It is contended that because the copies of the patent and deed offered to be produced are not included in the record the court cannot consider the error. The question may be fairly raised without copies of those instruments. It is enough if the case made shows the character of the instruments offered, and the objection upon which the ruling was based. The statement in the record with reference to these documents, and the objection upon which they were excluded, are sufficient to make the error available.

There are other rulings upon the admission of evidence which appear to be erroneous, and objections to instructions which appear to be faulty; but it is doubtful if the record is in such a condition that the court can consider them. We are clearly of opinion, however, that there should be a reversal, and another trial of this cause. Judgment accordingly. All the justices concurring.

(51 Kan. 165)

#### STEELE et al. v. BAUM.

(Supreme Court of Kansas. April 8, 1893.)

#### WRIT OF ERROR—DEFECT OF PARTIES—DISMISSAL.

Where the party chiefly interested adversely to the plaintiff in error is not made a party to the proceedings in this court, by summons or otherwise, and more than a year has expired after the rendition of the judgment complained of, the petition in error must be dismissed.

(Syllabus by the Court.)

Error from district court, Thomas county; Charles W. Smith, Judge.

Proceedings in attachment by Steele & Walker against J. D. Baum. A motion by Enoch Baum to discharge the attachment was sustained, and plaintiffs bring error. Petition dismissed.

J. R. Hamilton and J. E. Campbell, for plaintiffs in error. W. S. Willcoxon and E. A. McMath, for defendant in error.

HORTON, C. J. On the 17th day of August, 1889, Steele & Walker brought their action against J. D. Baum to recover \$235.60. At the time of commencing the action they procured an order of attachment against the property of the defendant. This order of attachment was levied upon certain real estate at Rexford, in Thomas county, as the property of J. D. Baum. On the 9th of November, 1889, J. D. Baum filed a motion to set aside the attachment. On November 14, 1889, one Enoch Baum also filed a motion to discharge the attachment, as to the real estate levied upon, on the ground that he was the owner thereof, and that J. D. Baum had no interest therein. On the 28th of March, 1890, the motion of J. D. Baum to set aside the attachment was overruled, but the motion of Enoch Baum to discharge the property attached was sustained. The petition in error was filed



in this court upon April 29, 1890. The order overruling the motion of J. D. Baum is not complained of. The error alleged concerns the motion of Enoch Baum. The title of the case in this court is Steele & Walker, Plaintiffs in Error, vs. J. D. Baum, Defendant in Error. The precise filed in this court for a summons is in the case of Steele & Walker vs. J. D. Baum. Although there is a reference to Enoch Baum in the petition in error, he is not a party in the title of the proceedings pending in this court. No summons has ever been directed to be served upon him or his attorneys. The only party interested adversely to Steele & Walker is Enoch Baum, and he has not been made a party to these proceedings, and has not been brought into this court in any way. The record shows that Enoch Baum is not united in interest with J. D. Baum, and notice to J. D. Baum is therefore no notice to him. It is now too late for him to be made a party to the proceedings, or brought into this court by summons. Much more than a year has expired since the date of the order and judgment complained of. *Ferguson v. Smith*, 10 Kan. 394; *Richardson v. McKim*, 20 Kan. 346; *Paving Co. v. Botsford*, (Kan.) 31 Pac. Rep. 1106. The motion to dismiss must be sustained. All the justices concurring.

(51 Kan. 139)

BOARD OF COM'RS OF ELK COUNTY v.  
SCOTT et al.

(Supreme Court of Kansas. April 8, 1893.)

## RECORD ON APPEAL—CERTIFICATE TO TRANSCRIPT.

To secure a review of the rulings and judgment of the district court upon a transcript, it is essential that the certificate of the clerk attached should show that it is full and complete.

(Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

Action by the board of commissioners of Elk county against L. Scott and others to recover money wrongfully allowed and paid to Scott for services as county attorney. There was judgment in favor of defendants, and plaintiff brings error. Petition dismissed.

R. H. Nichols, for plaintiff in error. J. M. White and L. Scott, for defendants in error.

JOHNSTON, J. In an action brought by the board of county commissioners of Elk county against L. Scott, formerly county attorney of that county, to recover \$75.37, alleged to have been wrongfully allowed and paid to him for services as county attorney, and also to recover a certain penalty and attorney's fee, judgment was given in favor of the defendant. To secure a review of the rulings and judgment of the district court the plaintiff brings to this court what purports to be a transcript of the record, but it is plainly insufficient. The certificate of the clerk fails to show that it is a complete transcript of the entire record, and this is essential. He certifies that it contains a true transcript of the petition, demurrer,

and journal entry, but there may have been other pleadings, orders, and entries than those contained in this record. Indeed, it appears from the allegations of the petition itself that important parts of that pleading are omitted from the record. The claims alleged to have been unlawfully allowed and paid are referred to as exhibits attached to and made a part of the petition, but an examination shows that they are not attached, nor can they be found in the record. To secure a review upon a transcript the certificate of the clerk attached to the record should show that it is full and complete, and, failing in this respect, the present proceeding must be dismissed. *Neiswender v. James*, 41 Kan. 463, 21 Pac. Rep. 573. All the justices concurring.

(51 Kan. 153)

## SIMONS v. McLAIN.

(Supreme Court of Kansas. April 8, 1893.)

## ESTATES IN JOINT TENANCY—WHAT CONSTITUTE.

1. Prior to the time that chapter 203, *Sess. Laws 1891*, went into force, "abolishing survivorship in joint tenancy," estates in joint tenancy, as recognized by the common law, existed in Kansas.

2. An estate in joint tenancy is an estate arising by purchase or grant to two or more persons. The grand incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action of ejectment by Lewis Simons against Hester McLain. There was judgment for defendant, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by HORTON, C. J.:

The facts on which are based the claims of Lewis Simons, the plaintiff, and Hester McLain, the defendant, are as follows: On the 17th day of May, 1872, and for more than one year prior thereto, Charles H. Hunter was the owner in fee simple of the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 28, township 27 S., of range 1 E. of the sixth P. M., in Sedgwick county. On the 17th day of May, 1872, while still seised in fee simple of said lands, Hunter, a single man, executed and delivered to Lewis Simons and E. G. Tewksbury his warranty deed, dated that day, for the above-described lands. The following is a copy of said deed, omitting the certificate of acknowledgment, which was in due form: "This deed, made this seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy two, between Charles H. Hunter, (a single man,) of Wichita, county of Sedgwick, and state of Kansas, of the first part, and Lewis Simons and E. G. Tewksbury, of Hillsborough, and state of New Hampshire, of the second part, witnesseseth. That the said party of the first part, for and in the consideration of the sum of \$1,200, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, re-

mise, release, alien, convey, and confirm unto the said party of the second part, and to their heirs and assigns, forever, all of the following described tract, piece, and parcel of land, lying and situate in the county of Sedgwick and state of Kansas, to wit, the northeast one quarter of the northeast one quarter of section No. 28, in township No. 27 south, of range 1 east, containing 40 acres, more or less. [Stamp \$1.50.] Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining. To have and to hold the same unto the said parties of the second part, their heirs and assigns, forever. And the said Charles H. Hunter, for himself and his heirs, does hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that he will warrant and forever defend the same lands and appurtenances, and every part and parcel thereof, unto the said parties of the second part, their heirs and assigns, against the said party of the first part and his heirs, and against all and every person or persons whomsoever lawfully claiming or to claim the same. In testimony whereof the said party of the first part has hereunto set his hand the day and year first above written. Executed and delivered in the presence of C. A. Phillip. Charles H. Hunter. [Seal.] The deed was filed for record and recorded in the office of the register of deeds of Sedgwick county, in this state.

On the 22d day of March, 1877, E. G. Tewksbury died without having alienated the land, or any part thereof, during his lifetime. On the 28th of March, 1877, letters testamentary with the will annexed were issued to Submit R. Tewksbury as executrix of the last will and testament of E. G. Tewksbury, deceased, by the probate court of Hillsborough county, N. H., a court having jurisdiction of the estate of E. G. Tewksbury, deceased. On the 21st day of February, 1882, Submit R. Tewksbury filed in the office of the probate court of Sedgwick county a properly authenticated copy of her appointment as executrix of said estate by the probate court of Hillsborough county, N. H. She also filed her petition in the probate court of Sedgwick county, praying for an order to sell real estate to pay debts of E. G. Tewksbury, deceased. All the proper steps necessary for the execution of a deed in proper form by an executrix with the will annexed were observed, and Submit R. Tewksbury, on May 8, 1882, as executrix of the estate and last will and testament of E. G. Tewksbury, deceased, executed a deed for the undivided one half of said lands to Henry Schweiter. On the 12th day of June, 1882, Lewis Simons and Mary Simons, his wife, executed and delivered to Henry Schweiter their warranty deed for an undivided one half of said premises. The deed made by Lewis Simons was executed and delivered after the death of E. G. Tewksbury. Lewis Simons has made no other conveyance of said land. All the interest that Henry Schweiter acquired in the land described in the petition by virtue of said deeds has passed by sundry meane conveyances from

Henry Schweiter to Hester McLain, who claims to own, not only the undivided half of the land as described in the petition, but also the other undivided one half, all of which is included in the tract conveyed by Charles H. Hunter to Lewis Simons and E. G. Tewksbury. The plaintiff claims to own the undivided one half of the premises as set forth in the petition, and not conveyed by him. Lewis Simons, the plaintiff commenced his action in the ordinary form of ejectment. Hester McLain, the defendant, answered by setting out in full the facts on which her title was based. The plaintiff demurred to this answer, as not alleging facts sufficient to constitute a defense. The court overruled the demurrer. The plaintiff elected to stand upon the demurrer, whereupon the court rendered judgment for the defendant. The plaintiff excepted, and brings the case here for review.

Thornton W. Sargent, for plaintiff in error. W. H. Criley, for defendant in error.

HORTON, C. J., (after stating the facts.) One question only is presented by the record, and that is whether, on the 22d day of March, 1877, the date of the death of E. G. Tewksbury, estates by joint tenancy existed in Kansas. By the common law, if an estate was conveyed to two or more persons without indicating how the same was to be held, it was understood to be in joint tenancy. A joint tenancy is defined to be "when several persons have any subject of property jointly between them in equal shares by purchase." "Each has the whole and every part with the benefit of survivorship, unless the tenancy be severed." In the quaint language of the law they hold, each per my et per tout, the effect of which, technically considered, is that, for purposes of tenure and survivorship, each is the holder of the whole. The grand incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor. 1 Washb. Real Prop. (5th Ed.) §§ 406, 408; Black, Law Dict. 651; And. Law Dict. 1018. By the policy of the American law, "joint tenancy, if not a subject of aversion, is rarely a matter of preference." Freem. Coten. (2d Ed.) § 35. In Connecticut, the judiciary, at an early day, entirely ignored what they styled "the odious and unjust doctrine of survivorship." Phelps v. Jepson, 1 Root, 48; Whittlesey v. Fuller, 11 Conn. 340. In Ohio the supreme court held that joint tenancy did not exist on account of the statute in that state of partition and distribution. Sergeant v. Steinberger, 2 Ohio, 305; Penn v. Cox, 16 Ohio, 30; Wilson v. Fleming, 13 Ohio, 68. But in most of the states the rule of the common law concerning estates in joint tenancy continued until abolished by statute. 1 Washb. Real Prop. (5th Ed.) 677, 678, notes, with statutes and statutes referred to. In this state the legislature, on March 10, 1891, passed an act "to abolish survivorship in joint tenancy." Sess. Laws 1891, c. 203, p. 349. A majority of this court in Baker v. Stewart, 40 Kan. 442, 19 Pac. Rep. 904, and Shinn v. Shinn,

42 Kan. 1, 21 Pac. Rep. 813, recognized "estates in entirety" where the deed is made to the husband and wife, and ruled that in such a case, the survivor of the two, at the death of the other, was entitled to the entire estate. This, of course, was a full adoption of the rule of "estates in entirety" as recognized by the common law. The writer of this dissented in that case. But, following the law thus declared by the majority of the court, and in view of the recognition of joint tenancy by the statutes of the state, and that "survivorship in joint tenancy" was not expressly abolished by statute until 1891, long after the execution of the deed of the 17th of May, 1872, and long after the death of E. G. Tewksbury on the 22d of March, 1877, we must hold that estates by joint tenancy existed in Kansas prior to March 10, 1891. The reasons are much stronger for recognizing estates by joint tenancy, as existing in Kansas prior to March 10, 1891, than that "estates in entirety" existed, in view of the statutes and decisions of this state, recognizing the separate existence of the wife from the husband. "The jus accrescendi is as much an incident of estates in joint tenancy as of estates in entirety." 2 Cooley, Bl. Comm. 181, and note 2; 1 Washb. Real Prop. 406; Dowling v. Salliotte, 83 Mich. 131, 47 N. W. Rep. 225. Paragraph 7281, c. 119, Gen. St. 1889, reads: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the General Statutes of this state; but the rule of the common law that statutes in derogation thereof shall be strictly construed shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed, to promote their object." See, also, the act in relation to landlords and tenants, concerning joint tenants, (paragraphs 3630, 3631, Gen. St. 1889.) Then, again, the legislature, in passing the act of March 10, 1891, abolishing joint tenancy, impliedly admitted the previous existence of such estates. That act closes as follows: "But nothing in this act shall be taken to affect any trust estate." Sess. Laws 1891, c. 203. The judgment of the district court will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed. All the justices concurring.

(51 Kan. 131)

#### BEARD v. MACKEY.

(Supreme Court of Kansas. April 8, 1893.)

##### CONTINUANCE—ABSENCE OF DEFENDANT.

A postponement of the trial of a cause on account of the absence of defendant, who, it was alleged, was unable to attend by reason of personal injuries which he had suffered, was asked for by his counsel. In the affidavit made to obtain the postponement the inability of the defendant to attend was shown. And it was further stated that no defense could be made without his personal attendance and assistance. The motion to postpone was overruled. There had been a previous trial of the cause, and it was not shown that he had a bona fide defense to make, nor that he was a witness to any material fact, or possessed of any knowledge which was not shared by his counsel.

Held, that there has not been such an abuse of discretion shown as to require a reversal of the ruling.

(Syllabus by the Court.)

Error from district court, Pratt county; S. W. Leslie, Judge.

Action by Henry Mackey against J. W. Beard to recover the possession of personal property. There was judgment for plaintiff before a justice of the peace. On appeal to the district court, there was judgment for plaintiff, and defendant brings error. Affirmed.

N. B. Carskadon, for plaintiff in error.  
J. C. Ellis, for defendant in error.

JOHNSTON, J. This was an action to recover the possession of personal property of the alleged value of \$100. It was first brought before a justice of the peace, where the plaintiff, Henry Mackey, was successful. The defendant, J. W. Beard, appealed to the district court; and, when the term arrived when the case was set for trial, his attorney asked for a postponement upon the ground that Beard was unable to be present at the trial. In an affidavit made by his attorney, it was stated "that it would prejudice his defense, and that in fact no defense could be made, without his personal attendance and assistance and suggestions; that said defendant, Beard, will not be able to attend this court for the reasons set up in certificate of physician, hereto attached." The certificate of the physician, which was dated about a week prior to the application for continuance, certifies that "J. W. Beard now lies at the residence of William Beard, in Hainesville township, Pratt county, Kansas, suffering from injuries received by a cyclone on the evening of May 6th, and on account of said injuries will not be able to attend this term of court." The court denied the application for a postponement, and proceeded with the trial, which resulted, as before, in a judgment for Mackey. The ruling denying the application for a postponement is the only one about which complaint is made.

Motions for continuance are addressed to the sound judicial discretion of the court, and, being largely within that discretion, the supreme court will not reverse the ruling of the trial court thereon unless there has been a plain abuse of such discretion. The personal attendance of a party to an action is generally important and necessary, and the cases are rare where a court would be justified in compelling counsel to proceed with a trial when it is shown that his client is unable to be present. We cannot say that an abuse of discretion has been shown in this case. While it was stated in counsel's affidavit that no defense could be made without his personal attendance, it was not stated that he had a bona fide defense to make, nor was it stated that he was a witness to any material fact, or possessed of any knowledge which was not shared by his counsel. The case had been tried in justice court, and counsel were thereby informed of the nature of the case, and of the testimony of the witnesses. It does

not appear that he was a witness in the justice court, or that he was expected to testify in the district court. Looking at the affidavit, and also at the nature of the case, as developed by the testimony, we cannot hold that there has been such an abuse of discretion as will require a reversal of the ruling of the district court. All the justices concurring.

(51 Kan. 127)

ST. LOUIS, K. & S. W. RY. CO. v. HAMMERS.

(Supreme Court of Kansas. April 8, 1893.)

EMINENT DOMAIN—SPECULATIVE DAMAGES.

In an appeal from an award made in a condemnation proceeding for the right of way for a railroad, the jury, in answer to a special question, stated that the greater part of the award made was for the frightening of stock by passing trains. Held, that such damages are speculative, and not a proper element in awarding compensation. *Railway Co. v. Lyon*, 24 Kan. 745.

(Syllabus by the Court.)

Error from district court, Harper county; C. W. Ellis, Judge.

Proceedings by the St. Louis, Kansas & Southwestern Railway Company against James A. Hammers to condemn a portion of defendant's land for right of way. On appeal to the district court there was judgment allowing defendant \$625 for the land taken, and plaintiff brings error. Reversed.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Shepard, Grove & Shepard, for defendant in error.

JOHNSTON, J. This was a condemnation proceeding which was tried upon an appeal in the district court of Harper county. The railroad of plaintiff in error was constructed across the corner of a 40-acre tract of land owned by James A. Hammers, and the land appropriated by the company was a part of that used by him as a place to feed and shelter his stock. It appears to have been naturally adapted to that purpose, and the building and operation of the railroad necessarily detracts from its value. Special questions were submitted to the jury, and the answers to these show that there was 54-100 of an acre of land taken for a right of way, for which the jury allowed \$25. By the general verdict the total damages were appraised at \$625. There is considerable confusion in the answers made to the special questions, but from them it appears that their allowance was based upon the land actually taken and the injury to the feed lot. In the eighth finding, in which they particularize and point out wherein the injury to the feed lot consists, they answer that they allow \$600 for the reason that passing trains may frighten his stock. The plaintiff in error challenges the rightfulness of this allowance, and insists that the verdict is excessive. Damages for the frightening of stock by the operation of the railroad is speculative and consequential in character, and not a proper element in determining the compensation to which the owner was entitled. This question was long since settled by the decision in *Railway Co. v. Lyon*, 24 Kan. 745. In that

case it was held that, "in assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams being frightened, or that additional care by the landowner may be necessary in the future as to such teams, by reason of the proximity of the railroad, does not of itself constitute any basis for special compensation. Such damages are speculative, and not the proper subject of inquiry and damages." The defendant in error argues that the testimony plainly shows that there was a depreciation in the value of the land not taken, to the extent of the allowance by the jury. There was undoubtedly a substantial diminution of the land not taken by the construction of the road, and, if the findings showed that it was made up of proper elements, the verdict would doubtless have been allowed to stand. The difficulty, however, is that the jury have definitely stated the elements considered by it in reaching its conclusion, and in doing so have placed their award upon an element for which damages cannot be allowed. The error is plain, and requires a reversal and a new trial. That will be the judgment of this court. All the justices concurring.

(51 Kas. 144)

STEVENS et ux. v. ALLEN.

(Supreme Court of Kansas. April 8, 1893.)

ACTION FOR FALSE REPRESENTATIONS—MATERIALITY—RELIANCE THEREON—KNOWLEDGE OF FALSITY.

1. Where a party fraudulently makes material representations, which he avers to be true, with the intention that they shall be acted upon, and these representations are actually relied upon by the other party in completing negotiations of a purchase or trade, and then they prove false, to the injury of the party accepting them, the party making such false and fraudulent representations is liable therefor.

2. A false representation as to the condition, quality, or other matters affecting the value of real estate of which the person to whom the representations are made, is contemplating a trade or purchase, is a false representation as to material facts.

3. When a party is exchanging or selling real estate situated in a distant county, so that an examination thereof cannot easily or readily be made, with a party away from the land, who accepts the land as described by the owner, the injured party can recover his damages for intentional false representations as to the condition, quality, or other matters affecting the value of the real estate. Under these circumstances the complaining party may rely upon the statements of the owner being true, without being guilty of such negligence as to preclude a recovery by him for the fraud practiced.

4. Where a wife, in the presence of her husband, makes representations concerning the condition, quality, and value of real estate which her husband owns, and is about to exchange or sell to another person, and at the same time informs such other person "that she has never seen the land; that she does not know the land, or have any personal knowledge thereof, but makes the statements from what her husband has told her about it," and the wife has no interest in the land, and is not benefited by the exchange or sale thereof, she is not liable for damages for such representations, even if false, in the absence of all proof that she knew such statements were false and untrue, as she did not make the same upon her own knowledge, but informed the party to whom she made

them, at the time, that she obtained her information from her husband.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by W. J. Allen against J. L. Stevens and R. C. Stevens to recover for damages sustained through the fraud and deceit of defendants in effecting a sale of land to plaintiff. There was judgment in favor of plaintiff against both defendants, and they bring error. Modified.

The other facts fully appear in the following statement by HORTON, C. J.:

Mrs. Wealthy J. Allen was the owner of a patent combined ironing board, step ladder, and bosom and sleeve board, for 16 states and territories, in which the patent was of the estimated value of \$1,000. In the year 1888, J. L. Stevens claimed to own certain real estate and farm property in Riley county, in this state, containing about 80 acres of unimproved land. In the fall of that year a trade and exchange were in process of negotiation between the parties, whereby Mrs. Allen, in consideration of the conveyance to her of the 80 acres of land in Riley county, was to sell and transfer to J. L. Stevens her interest in the patent in certain territory. That during the progress of the negotiations, and for the purpose of inducing Mrs. Allen to make an exchange, and to sell and transfer her patent for the land, both J. L. and R. C. Stevens, and each of them, represented to Mrs. Allen that the land was very valuable, of at least \$16 per acre; that the land was well watered, with good running creek and springs; that there was good bottom land on it; that 60 acres of the 80 acres were good, tillable plow land, and the remaining 20 good pasture; that there was plenty of good timber on the land, and that 15 acres of it had been plowed, and put in sod corn; and that J. L. Stevens had good title thereto. Mrs. Allen claims that during the negotiations for the trade and exchange, and at the time that such trade and exchange were made, she lived in Arkansas City, in this state, at a great distance from the land; that she had no opportunity to examine the same, but trusted entirely to the representations of the Stevenses; that she relied upon their representations, and was induced thereby to and did make an exchange and transfer to J. L. Stevens of the patent in the territory owned by her, and gave her promissory note in addition, for the sum of \$100, for the conveyance to her of the 80 acres. After the conveyance was made, Mrs. Allen claims she discovered that the representations of the Stevenses were wholly false; that there were not 60 tillable acres on the land; that it was rough, cut up by ravines running through it, stony, and wholly unfitted for farming; that it was not well watered; that it had little or no timber, and was worth only three to five dollars per acre; that J. L. Stevens had no good title to the same. Before commencing this action, Mrs. Allen offered to reconvey the land, but this was refused. She then brought her action for false representations and deceit. The

case was tried before the court with a jury, who assessed her damages at \$367.50. J. L. and R. C. Stevens excepted to the rulings and judgment, and bring the case here.

Eaton, Pollock & Love, for plaintiffs in error. Peckham & Peckham and T. S. Brown, for defendant in error.

HORTON, C. J., (after stating the facts.) This was an action in the court below for fraud and deceit in a land trade. It is contended that the trial court erred in overruling the demurrer of Mrs. R. C. Stevens to the evidence; also, that there is absolutely no evidence whatever upon which to base the verdict returned, and the judgment rendered against her. The land traded was the separate property of J. L. Stevens, the husband of Mrs. Stevens. She had no interest therein, excepting as his wife. The patent right owned by Mrs. Allen was transferred to J. L. Stevens, not to Mrs. Stevens. In signing the conveyance to the land to Mrs. Allen, Mrs. Stevens did so as the wife of J. L. Stevens, and for the purpose of transferring or relinquishing her inchoate interest. It appears from the evidence that Mrs. Stevens, in company with her husband, went to the house of Mrs. Allen before the deeds were exchanged, and made statements about the land. Mrs. Allen, however, testified that Mrs. Stevens informed her "she had never seen the land;" that "she made the statements from what her husband had told her about it;" that "she did not know the land herself." She did not pretend to have any personal knowledge thereof.

It is not necessary, in an action for false representation as to the condition, quality, or other matters affecting the value of property, that the person making the representation should derive any benefit from the deceit. But in this case it does not appear that Mrs. Stevens had any knowledge of the falsity of the representation she made, and it further appears that she informed Mrs. Allen that all she said about the land was obtained from her husband, who was present at the interview. For aught that appears, the statements of Mrs. Stevens may have been made innocently, honestly, and in good faith. *De Lee v. Blackburn*, 11 Kan. 190; 2 Warr. Vend. p. 965, and cases there cited; 5 Amer. & Eng. Enc. Law, p. 318; *Edgington v. Fitzmaurice*, 22 Cent. Law J. 81. Therefore, we think that her demurrer to the evidence should have been sustained, and we also think that there was no competent evidence upon which to rest the judgment against her. Although Mrs. Stevens derived no benefit from the trade, if she had made the statements as of her own knowledge, or if it had been shown that she knew that the statements were false, or had any reason to consider them false, a liability might have attached to her.

The other errors assigned concern J. L. Stevens, the owner of the land, who made the trade with Mrs. Allen, but none of these alleged errors are sufficient to cause any reversal of the judgment of the

trial court against him. Stevens had seen the land; knew its condition, quality, and value. The representations he made were of material facts. Mrs. Allen was induced to trade for the land, and pay much more than its value, by reason of these false and fraudulent representations. They were evidently made for the purpose of deception, and with full knowledge of their falsity. *De Lee v. Blackburn*, supra; *Nowlan v. Cain*, 3 Allen, 263; *Brown v. Rice's Adm'r*, 26 Grat. 467; *Hull v. Fields*, 76 Va. 607; *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. Rep. 360; *Grinnell*, Deceit, 41-64; *Medbury v. Watson*, 6 Mete. (Mass.) 246. Under the circumstances of this case, Mrs. Allen was excusable for not verifying the accuracy of the statements made by J. L. Stevens by actual inspection of the land, which was many miles distant from where she resided. *Endsley v. Johns*, 120 Ill. 469, 12 N. E. Rep. 247; *Miner v. Medbury*, 6 Wis. 295; *Kerr*, *Fraud & M.* 80; *Hale v. Philbrick*, 42 Iowa, 81; *Carmichael v. Vaudebur*, 50 Iowa, 651; *State v. McConkey*, 49 Iowa, 499. "If a vendor of land makes express representations of title, which are fraudulent, and even so appear by the record, he is responsible for the misrepresentations to the vendee." *Claggett v. Crall*, 12 Kan. 393; *Bailey v. Smock*, 61 Mo. 213; *Klefer v. Rogers*, 19 Minn. 32, (Gil. 14.) The judgment of the district court against J. L. Stevens will be affirmed, but the judgment against Mrs. Stevens will be reversed, and the case remanded, with direction that the trial court sustain her demurrer to the evidence, and render judgment in her favor, for the want of any evidence to sustain the judgment. All the justices concurring.

(51 Kan. 241)

**STATE ex rel. COUNTY ATTORNEY OF BARBER COUNTY v. PIERCE.**

(Supreme Court of Kansas. April 8, 1898.)

**IRREGULARITIES IN INJUNCTION—VIOLATION—CONTEMPT—PUNISHMENT—CONSTITUTIONAL LAW.**

1. Mere errors in the proceedings under which an order of injunction is granted by a district judge, and irregularities in the form of the order itself, are not a justification of the party against whom the injunction is granted in disobeying the same; and where a defendant knowingly violates an injunction, irregular in form, and based on erroneous, though not void, proceedings, he is liable to punishment for contempt.

2. The proper mode of obtaining relief from the consequences of such errors or irregularities is to apply to the court or judge to correct them, and not by disobedience of the order.

3. Section 9, c. 107, Laws 1889, in so far as it purports to repeal sections 243, 244, 246, 247, c. 80, Gen. St. 1888, is void, being in contravention of section 16, art. 2, of the constitution.

(Syllabus by the Court.)

Appeal from district court, Barber county; George W. McKay, Judge.

Action by the state on the relation of the county attorney of Barber county against the board of county commissioners to enjoin defendant from issuing county scrip in payment of certain bridges. D. L. Pierce, chairman of the board, was found guilty of contempt of court in issuing the scrip in violation of the injunction proceedings, and appeals. Order affirmed.

R. A. Cameron, E. Sample, and T. S. Brown, for appellant. J. N. Ives, Atty. Gen., C. W. Ellis, and Lyman W. De Geer, for appellee.

**ALLEN, J.** This is an appeal from an order of the district judge of Barber county finding the defendant guilty of contempt of court in having violated an order of injunction issued against him by said district judge, imposing a fine of \$25, and requiring defendant to make restitution of certain county scrip issued in violation of said order of injunction. It appears from the record that an action was commenced in the name of the state by De Geer, county attorney of Barber county, against the board of county commissioners, of whom Pierce was chairman, to enjoin said board from purchasing certain bridges in Barber county, and issuing bonds or scrip of said county in payment therefor. At the time of the commencement of this action a temporary injunction was granted by the district judge. The order granting the injunction was served by the sheriff on Pierce, chairman of the board. A summons was also issued in due form by the clerk, on which the words "Injunction Allowed" were indorsed. It appears that after the service of the summons and copy of this order the defendant, Pierce, signed what is denominated "a piece of scrip for \$1,738.68," payable to R. Lake, for what was claimed to be his interest in the Lake City bridge; that Pierce himself took the scrip, after its having been signed by himself and the county clerk, away from the clerk's office, and receipted for it on the clerk's register.

Various objections are raised by counsel for Pierce to the validity of the order punishing him for contempt. It is said, in the first place, that the judge of the district court of Barber county had not jurisdiction of the subject-matter of the injunction proceedings, for which reason the proceedings were without authority and void, and disobedience of the order was not ground for contempt. It is claimed that chapter 61 of the Session Laws of 1891 gave the board of county commissioners power to do what they were attempting to do in the way of purchasing bridges, and that there was no power to restrain them resting in the district judge; and it is urged that the validity of this statute has already been upheld in this court in the case of *Pierce v. Smith*, (Kan.) 29 Pac. Rep. 565. By section 1, c. 28, Gen. St. 1889, it is provided: "There shall be in each county organized for judicial purposes a district court, which shall be a court of record, and shall have general jurisdiction of all matters, both civil and criminal, (not otherwise provided by law,) and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general supervision and control of all such inferior court and tribunals, to prevent and correct errors and abuses." Section 239 of the act provides: "The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, by the district court, or the judge thereof, or, in his absence from the county, by the probate

judge, by its appearing satisfactorily to the court or judge, by affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." There can be no question as to the power of the district court, or the judge thereof, in a proper case to restrain and control the board of county commissioners of any county within the judicial district of such judge from doing any illegal act, and, if the position taken by counsel for the appellant in this case were sound, the board of county commissioners would have the right to determine whether their proposed action was legal or illegal, and thus reverse and set aside a decision of the district court. This position is utterly untenable. It appears from the record that the original order signed by the judge was served on the defendant. It is contended that such service is void; that the order should have been issued by the clerk. But it appears that a summons was duly issued before the commencement of the action, upon which the words "Injunction Allowed" were indorsed by the clerk. It is contended that, inasmuch as this indorsement was not signed by the clerk, the defendant might disregard it. The statute does not require the indorsement to be signed by the clerk. It might be well for the clerk to do so, but where an indorsement of the kind is authorized by the statute, and where a writ is duly signed by the clerk, and attested with his seal, the party on whom service is made is bound to take notice of all indorsements that the law authorizes to be made thereon; and as the statute provides that it shall be sufficient notice of the granting of the injunction where such indorsement is made, the service in this case must be held sufficient, without reference to the question as to the sufficiency of the service of the original order signed by the district judge himself.

The order of injunction itself is attacked as a nullity. The order starts out by reciting that an application was presented to the probate judge of Barber county, and that it was shown that the district judge was absent from the county. Then follows an order of injunction restraining the defendant and other members of the board of county commissioners from doing certain acts to prevent the doing of which said injunction case was commenced, and this order was signed, "G. W. McKay, District Judge of Barber County, Kansas." The recitals contained in the order are, to say the least, very awkward. The order appears to have been prepared to be issued by the probate judge, but it was in fact made by the district judge. We think, however, these recitals are not an essential part of the order. The command restraining the defendant from doing the acts mentioned in the order is explicit. We cannot say that the defendant might obey or disregard it, as he saw fit. If the proceedings in the injunction case were erroneous, the defendant's remedy was to have applied to the district court of Barber county, or the judge thereof, to dissolve the injunction, and, if errors were still committed by that court or judge, the defendant had ample remedy by proceedings here.

It is claimed that the affidavit to the petition for injunction was not signed by the plaintiff or his agent, but by a stranger to the record. It is true that it was not signed by the county attorney, but by one Charles W. Pease, whose relation to the case does not appear. We do not deem it necessary to decide whether this was a sufficient verification of the petition for the purposes of granting an injunction, but we do hold that the order of injunction was not void because of a defective affidavit. It was, at most, erroneous for the district judge to issue the injunction, and the error, if any, could only be corrected by a proper proceeding in that action. The defendant could not treat the order of injunction as absolutely void for that reason. It is contended that no contempt was committed, because an order had been made by the board of commissioners, before the summons was served, for the purchase of the bridges, and that the action of Pierce was merely carrying out the order already made by the board. There is no substance in this claim. The order enjoined the defendant from paying for any such bridge with county scrip or warrants, and this is exactly what the defendant proceeded to do. We think it clearly appears that the defendant knowingly violated the order. While there are great irregularities in the proceedings of the district judge, it was still the duty of the defendant to obey, and we are unable to find any defect in the proceedings so great that we can hold the injunction order void. The order of the court directing the defendant to make restitution of the scrip issued in violation of the order, or to pay the amount thereof into the treasury of Barber county, and assessing a fine of \$25 against the defendant, is criticised by the defendant as unauthorized. We are unable to see anything wrong in the order. It appears to be what the statute requires.

Lastly, it is claimed that the sections of the statute authorizing injunctions to be granted, and providing punishment for the violation thereof, were repealed by section 9, c. 107, Laws 1889. It is true that this section purports to repeal sections 243, 244, 246, 247, of the Code. The title of the act, however, and the sections which are amended in the body of the act, show clearly that this was a mistake, and that sections 643, 644, 646, and 647 are the ones mentioned in the title, and in fact amended and intended to be repealed by section 9. If it had really been the intention of the legislature to repeal these sections, section 9, in so far as it refers to them, would be in violation of section 16, art. 2, of the constitution. On the whole record we feel constrained to affirm the order of the district judge. All the justices concurring.

(51 Kan. 175)

#### STATE v. BURKET.

(Supreme Court of Kansas. April 8, 1893.)

#### INTOXICATING LIQUORS—ILLEGAL SALE—INFORMATION.

1. Where an information charges the defendant simply with an unlawful sale of intoxicating liquors, and does not state either that the defendant had no permit to sell, or that, having a



permit, he sold in a manner prohibited by law, and where such information is attacked at the proper time by a motion to quash, *held*, that such information is insufficient, and that such motion should have been sustained.

2. The statute prohibiting the unlawful sale of intoxicating liquors defines several different offenses, and a defendant who is charged with an unlawful sale is entitled to have the information state the particular kind of offense for which he is to be tried, when he challenges the attention of the court to the defect in the information at the proper time.

(Syllabus by the Court.)

Appeal from district court, Kingman county; W. O. Bashore, Judge.

Prosecution against P. J. M. Burket for violation of the prohibitory liquor law. Verdict of guilty, and judgment thereon. Defendant appeals. Reversed.

Gillett Bros. & Co., for appellant. John T. Little, Atty. Gen., and Emmett Tiffany, for the State.

ALLEN, J. The defendant appeals from a judgment sentencing him to fine and imprisonment for a violation of the prohibitory law. The jury found him guilty as charged in the third count of the information. This count charges that the defendant "did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors, contrary to the statute in such cases made and provided." The sufficiency of the information was challenged by a motion to quash, refusal to plead, and objection to the introduction of any testimony, as well as by a motion in arrest of judgment. It will be observed that no words are used in that count of the information under which the conviction was had negating the exception clause in the statute, but that the defendant is charged simply with having unlawfully sold intoxicating liquors. In what particular the sale was unlawful is not pointed out by the information. Under our statute, an offense may be committed through the sale of intoxicating liquors in various ways. If a person sell without having a permit to sell intoxicating liquors, he is guilty, no matter what the purpose be for which the liquor is sold, under the first clause of section 386 of the crimes act; or any person not lawfully and in good faith engaged in the business of a druggist, who shall sell, is guilty under the second clause of that section. A druggist, having a permit to sell intoxicating liquor, who shall sell otherwise than in the manner and for the purposes mentioned in the act, may be convicted under section 388. While many of the strict rules which formerly obtained in criminal pleadings have been done away with, section 103 of the Code of Criminal Procedure still requires that the indictment or information must contain "a statement of the facts constituting the offense in plain and concise language, without repetition." Does this information contain such a statement? We are cited by counsel for the state to the cases of *State v. Whisner*, 35 Kan. 273;<sup>1</sup> *State v. Nickerson*, 30 Kan. 546, 2 Pac. Rep. 654; *State v. Schmidt*, 34 Kan.

399, 8 Pac. Rep. 867,—as authorities in favor of the sufficiency of this information. In each of these cases, however, we find that the information charged the defendant with selling without a permit. In the case of *State v. Ratner*, 44 Kan. 429, 24 Pac. Rep. 953, the defendant was charged as in this case, simply with an unlawful sale of intoxicating liquors, but no objection was raised to the form of the information till after the verdict, when it was challenged on a motion in arrest of judgment. Mr. Justice Johnston, in speaking for the court, said: "If the attention of the court had been called to the indefiniteness of the charge it probably and properly would have required the state to describe the offense with greater particularity. The fact that a charge in an information is stated in general terms, will not be held bad after verdict and judgment, although it might have been held insufficient on a demurrer or motion to quash; and the information in the present case cannot be held fatally defective after objection made after the verdict." In the case of *State v. Tanner*, (Kan.) 31 Pac. Rep. 1096, recently decided, the defendant was charged with an unlawful sale, being not lawfully and in good faith engaged in the business of a druggist. It was held by this court, Chief Justice Horton delivering the opinion, "that in such a case it is the duty of the prosecution to show that the defendant, although having a permit, is not a person lawfully and in good faith engaged in the business of a druggist;" that a defendant could only be convicted of the particular offense with which he stood charged, and that the proof should be limited to the matters charged in the information. While we have no disposition to destroy the force of the statute by nice technicalities, and while this court has upheld and enforced the law in full compliance with its spirit, we are constrained to declare that the defendant who challenges the sufficiency of an information filed against him in due time is entitled to know the precise charge that is made against him, and to know in what particular it is claimed a sale of intoxicating liquors made by him is illegal. We do not care to nicely discuss the question stated by counsel as to the necessity of negating exception clauses contained in statutes. What we do hold is that the information must show in what particular it is charged the defendant violated the law. We deem it unnecessary to consider the other matters brought to our attention. Because of the insufficiency of the information the judgment will be reversed. All the justices concurring.

(51 Kan. 124)

#### STATE v. LUND.

(Supreme Court of Kansas. April 8, 1893.)

#### INTOXICATING LIQUORS — COMMON NUISANCE — ILLEGAL SALE — EVIDENCE.

Where a defendant is charged, under section 392 of the crimes act, (paragraph 2533, Gen. St. 1889,) with keeping and maintaining a common nuisance, contrary to the prohibitory liquor law, the trial court commits no material error in in-

<sup>1</sup>10 Pac. Rep. 852.

structing the jury, upon the evidence presented, to find the defendant guilty for selling intoxicating liquors upon the premises described in the information at the time therein alleged, if it further appears from the uncontradicted evidence that the defendant had the key of the premises, opening and closing doors, and the general charge thereof. (Syllabus by the Court.)

Appeal from district court, Harper county; George W. McKay, Judge.

Prosecution against Walter Lund for keeping a place as a common nuisance where liquors were kept for sale, and for selling liquors in violation of law. He was found guilty of keeping a nuisance, and judgment was rendered thereon. Defendant appeals. Affirmed.

Sam S. Sisson and George W. Finch, for appellant. John T. Little, Atty. Gen., and T. J. Beebe, for the State.

HORTON, C. J. At the July term of this court for 1892 this cause was reversed, and remanded for a new trial. *State v. Lund*, 30 Pac. Rep. 518. When the case was called again for trial in the district court, Lund presented a motion asking that the state be required to charge in separate counts the two different offenses alleged in the first count. This motion was sustained by the state's being permitted to amend by inserting a second and further count, charging Lund with selling and bartering intoxicating liquors in violation of law. After the second count was filed, at the instance of the prosecuting attorney the court tried the case upon the theory that the first count charged Lund with the offense of keeping and maintaining a common nuisance only, in violation of section 392 of the crimes act, (Gen. St. 1889, par. 2533.) Lund was sentenced for keeping a common nuisance. The jury found him not guilty upon the charge of selling intoxicating liquors, as alleged in the second count. He appeals, and complains of various rulings.

Upon the first trial this case was erroneously tried upon the theory that two offenses might be charged in one count, that the jury might find the defendant guilty of one or both, and that the court might sentence for either. Upon the second trial, however, Lund was not misled in any way by the information. Upon the first count, he was tried for keeping a place as a common nuisance where intoxicating liquors were kept for sale or sold. Upon the second count he was charged and tried for selling intoxicating liquors in violation of law. There was no confusion on the second trial of two offenses in the same count, as when Lund was first convicted. We do not think there was any error, at least any error prejudicial to Lund, upon the second trial concerning the way the offenses were charged and tried. As the defendant was discharged from the second count, it is unnecessary to refer to the instructions thereon, but it appears from the record that the court properly instructed the jury that the state could not convict upon the second count unless the sale was established which the state elected to rely upon for a conviction. It is also urged that the trial court committed error in instructing the jury to find

Lund guilty of keeping a common nuisance, if at the time alleged he sold and bartered intoxicating liquors upon the premises described in the first count. In some cases, perhaps, this instruction might be misleading, or not sufficiently explicit; but in this case there was no evidence tending to show that Lund was acting as clerk or agent for the owner or keeper of the premises, or any other person. The intoxicating liquors were sold upon the premises by a wheel, generally known as "blind tiger," the person furnishing the intoxicating liquors on the wheel and receiving the money being concealed at the time of the transactions. The evidence clearly showed that Lund was in charge of the premises, had the key for opening and closing the same, and if he sold and bartered the intoxicating liquors at the time and place, as found by the jury, he was clearly guilty of the offense of which he was convicted. *State v. Schweiter*, 27 Kan. 499; *State v. Teis-sedre*, 30 Kan. 476, 2 Pac. Rep. 650; *State v. Nickerson*, 30 Kan. 548, 2 Pac. Rep. 654. Upon the record the trial court committed no error in refusing to sustain the motion for a new trial. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 120)

#### STATE v. SMITH.

(Supreme Court of Kansas. April 8, 1893.)

##### SALE OF INTOXICATING LIQUORS—EVIDENCE.

Where a defendant, upon being accosted by another person, who asked him if he could get some whisky, replied, if he would give him his money, he thought he could, and such person then asked him how much it would be, and the defendant answered, "a dollar a pint," and upon being given this amount of money the defendant went away, and returned in about 15 minutes with a pint of whisky, which he put down in an outhouse for the person paying the money, and then immediately left, and such person went into such outhouse, and obtained the liquor, held, that upon instructions to the effect that if the defendant acted for himself in selling the whisky, or if he acted as the agent of the owner of the whisky, in furnishing the same to the party paying therefor, the jury might properly find the transaction a sale, and the defendant, having no permit to sell intoxicating liquors, guilty under the statute.

(Syllabus by the Court.)

Appeal from district court, Pratt county; W. O. Bashore, Judge.

Prosecution against A. B. Smith for selling liquors in violation of the prohibitory liquor law. Verdict of guilty, and judgment thereon. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 14th day of September, 1892, an information was filed against A. B. Smith, charging him with a violation of the prohibitory liquor law, in selling certain liquors without a permit. Trial had on the 25th of November, 1892. The jury returned a verdict of guilty, and the district court sentenced the defendant to pay a fine of \$100, and to be imprisoned in the jail of Pratt county for the period of 90 days. The costs of prosecution were also adjudged against the defendant, and he

was required to stand committed until the fine and costs were paid. The facts in the case, as developed on the trial, are substantially as follows: A. B. Smith, while back of Stewart's store, in Iuka, in Pratt county, on the 13th of August, 1892, was accosted by the witness James Nash, who asked him if he could get some whisky for himself and the friend who was with him, and Smith replied that, if he would give him his money, he thought he could. Nash asked him how much it would be, and Smith replied that it was a dollar a pint, and they each gave him a dollar. He (Smith) went with the money to his house, where he had just left Bob Durant, who had previously told him if he knew of any one wanting something to drink, to let him know, and from whom he had on several previous occasions procured whisky; and he obtained two pints of whisky from Durant, and took it, in about 15 minutes, to an outhouse within a short distance of where Nash and his friend were waiting for him, and in plain view of them, and left it in the outhouse for them, and they immediately went into the outhouse and got the whisky. It was admitted that Smith had no permit to sell intoxicating liquors. The court instructed the jury as follows: "(1) That the law presumes every person innocent of crime until proven guilty beyond a reasonable doubt. (2) By a 'reasonable doubt' is not meant a mere conjecture or imaginary impression, but is a doubt founded upon reason, and arising either from the evidence adduced in the trial, or from the want of evidence. (3) You are further instructed that the liquors generally or publicly known as 'whisky, beer, and ale' are presumed by law to be intoxicating, without proof of their intoxicating character on the part of the state, and such liquors can be legally sold only by druggists who have a permit to sell the same for medicinal or scientific purposes. (4) If you find from the evidence, beyond a reasonable doubt, that the defendant sold intoxicating liquors, as charged in the information of the county attorney, at any time within two years next on or before the 14th day of September, 1892, then you shall find the defendant guilty. (5) The law does not tolerate or countenance any deceit or subterfuge for the violation of its mandates, and that the giving away of intoxicating liquors, or any shift or device to evade the provisions of the law, is deemed an unlawful selling of intoxicating liquors. (6) Any person who acts as an agent for another for selling intoxicating liquors contrary to law may be convicted, the same as his principal, and it is immaterial whether the name of the principal is known or not. (7) In this class of cases the law does not recognize an agency, and even though the defendant may have only acted as the agent of the owner of the whisky, and had no title himself, yet if he sold it to Mr. Nash, even as an agent for another, he violated the law, and you should find him guilty. (8) A sale, in law, is the transmutation of personal property from one person to another for a price. If, therefore, you shall find from the evidence that

the defendant bought or received whisky in any quantity, and then sold, transferred, and delivered it, or any part thereof, to the witness Nash, as charged in the information, for a certain consideration paid by said Nash, you should find the defendant guilty, even though you may believe that the defendant bought or procured the same for the purpose of selling it to Nash. (9) In considering the question as to whether the defendant sold to the witness Nash whisky, as charged in the information, you are to consider all the facts and circumstances detailed in evidence; and if you shall find and believe from the evidence, beyond a reasonable doubt, that defendant furnished or procured the said liquor himself, and that he afterwards sold and delivered the same, or a part thereof, to the witness Nash, you should find the defendant guilty as charged, notwithstanding the defendant may have purchased the said whisky solely for the purpose of reselling and delivering the same to the witness Nash, and that the defendant had received from Nash the price in payment thereof before he bought the same. (10) You are the exclusive judges of the facts in this case, and what the evidence proves; also, are judges of the credibility of the witnesses. In determining the credibility of the witnesses, you may take into consideration their deportment upon the witness stand, their interest in the event of this action, and their friendly or hostile feeling towards the defendant. Trusting that you will give the able counsel who shall address you a patient and considerate hearing, that you will not confound the arguments with the law and the facts, and believing that you will discharge your duty in the premises conscientiously and justly, the case is now submitted to your consideration." Smith, the defendant, excepted to the rulings, instructions, and sentence of the court, and brings the case here.

Ellis & Barrett, for appellant. John T. Little, Atty. Gen., and J. M. Dumenil, for the State.

HORTON, C. J., (after stating the facts.) The errors alleged in this case concern the giving and refusing instructions to the jury. The instructions given are criticised, and the statement of the trial court "that a sale, in law, is the transmutation of personal property from one person to another for a price," is urged as being inapplicable and unintelligible. The court evidently used the word "transmutation" as "change" or "exchange." The word "transmutation" is sometimes defined as "the change of one species into another; the change from one nature, form, or substance into another." Taking all the instructions together, we perceive no good reason why the word "transmutation," as used, should have misled the jury.

The most serious matter urged is that the trial court refused to give the following instruction: "You are instructed that if you find from the evidence that the defendant took money from another person for the purpose of purchasing intoxicating liquors from some third person, who had

the same for sale, and in whose sales defendant had no other interest than as a purchaser, and that the defendant did purchase the intoxicating liquors from such third person with the money received by him for that purpose, and did deliver it to the person from whom he received the money, or placed it where it could be and was found by the person or persons for whom it was purchased, such a transaction does not constitute a sale by the defendant." The theory of the prosecution was that Smith, in furnishing intoxicating liquor to Nash and his friend, acted for himself, only, or for Durant, from whom he procured the liquor. The instructions of the court fully informed the jury that they could not find Smith guilty, as charged, unless he sold on his own account to Nash and his friend intoxicating liquor, or unless he acted as the agent of the owner of the liquor in selling the same. Smith was not found guilty by the jury upon the theory that he was simply the purchaser of intoxicating liquor from Durant, or that he acted merely as the agent of Nash and his friend in obtaining the liquor. We think, under all the circumstances of the case, the instructions given were sufficient, and not misleading, and that no material error was committed in refusing the instructions requested. *State v. Morton*, 42 Mo. App. 64. See, also, section 410, Crimes Act, Gen. St. 1889, p. 773. The judgment will be affirmed. All the justices concurring.

(21 Nev. 433.)

**EGAN v. JONES. (No. 1,380.)**

(Supreme Court of Nevada. May 5, 1893.)

**ELECTION CONTEST—SUFFICIENCY OF COMPLAINT—BRIBERY—"CONVICTED."**

Const. art. 4, § 10, declares that any person "who may be convicted of having given or offered a bribe to procure his election or appointment to office" shall be disqualified to hold any office of profit or trust in the state. Gen. St. § 1560, authorizes a contest of election "when the person whose right to the office is contested was not, at the time of election, eligible to such office." *Held*, that a complaint to contest the election of a district attorney, which alleged that contestee offered before election to make a bond conditioned that, if elected, he would return to the county treasury each month a portion of his salary, but does not allege that contestee had been "convicted" of offering such bribe, does not show that contestee was disqualified to hold the office, and is bad on demurrer.

Appeal from district court, Lander county; A. L. Fitzgerald, Judge.

Complaint by James B. Egan against William D. Jones to contest the election of respondent to the office of district attorney. A demurrer to the complaint was sustained, and contestant appeals. Affirmed.

James B. Egan, in pro. per. James F. Dennis, for respondent.

**MURPHY, C. J.** This is what purports to be an election contest, brought under section 1560, Gen. St. Nev., which reads: "Any elector of the proper county may contest the right of any person declared

duly elected to an office exercised in and for such county, and also any elector of a township may contest the right of any person declared duly elected to any office in and for such township, for any of the following causes: First, for malconduct on the part of the board of inspectors, or any member thereof; second, when the person whose right to the office is contested was not, at the time of election, eligible to such office." It appears from the complaint that at the general election held in the month of November, 1892, the contestant, Egan, and the contestee, Jones, were opposing candidates for the office of district attorney in and for Lander county, Nev.; that Egan received 253 votes, and Jones 269 votes; and thereafter the board of county commissioners met and canvassed the vote, finding the result as above stated, declared Jones elected, and ordered a certificate of election to issue to him. The contestant filed his complaint, and assigns as the grounds of Jones' ineligibility that, at divers and sundry times during the political campaign of 1892, Jones, in his public speeches, declared that the sum of \$1,800 per annum, which is the salary fixed by law to be paid the district attorney of Lander county, was more than the services required of that officer were worth, and that, if the people would elect him (Jones) to the office, he would return to the county treasury \$50 per month out of said salary; and the said Jones offered to give a bond as a guaranty of good faith and return of the money as aforesaid. A demurrer was interposed to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action against the defendant. The demurrer was sustained. The contestant failing to amend, judgment was entered in favor of contestee for his costs.

This ruling of the court is assigned as error, and appellant argues that he was not required to allege in his complaint that the contestee had been tried and convicted of the crime of bribery; and he relies on section 10, art. 4, of the constitution to support his position. Said section reads as follows: "Any person who shall be convicted of the embezzlement or defalcation of the public funds of this state, or who may be convicted of having given or offered a bribe to procure his election or appointment to office, or received a bribe to aid in the procurement of office for any other person, shall be disqualified from holding any office of profit or trust in this state; and the legislature shall, as soon as practicable, provide by law for the punishment of such defalcation, bribery, or embezzlement as a felony." Contestant argues that, under the words "or who may be convicted of having given or offered a bribe to procure his election or appointment to office," it was not necessary for him to allege in his complaint that the contestee had been convicted of the crime of bribery, in order to sustain his action. We think differently. The conviction is the foundation upon which the cause of action must be based on a charge of bribery, and without such a conviction no ouster can be adjudged. The word "convicted" has a well-defined meaning, and he who

reads ought not to be misled thereby. Webster Dict. defines the word as "the past participle of the verb 'to convict.' To prove or find guilty of an offense or crime charged; to pronounce guilty, as by legal decision." Black, Law Dict.: "Convicted. This term has a definite signification in law, and means that a judgment of final condemnation has been pronounced against the accused." And Law Dict.: "Convicted. Found guilty of the crime whereof one stands indicted." Rap. & L. Law Dict.: "The finding a person guilty of an offense." Bouv. Law Dict. "Conviction. A condemnation. In its most extensive sense this word signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense it means the judgment given against the criminal." See, also, *Blaufrees v. People*, 69 N. Y. 109; *Faunce v. People*, 51 Ill. 312; *Ritter v. Press Co.*, 68 Mo. 460. Under our system of government, and the statute of this state and the constitutional provision referred to, "convicted" means when a person has been indicted by a grand jury, tried by a court and jury, and found guilty of the offense charged in the indictment; and it was the intention of the framers of the constitution that no person should be ousted from an office, when charged with the crime of bribery, until after such trial and conviction upon a verdict of guilty. By the section of the constitution referred to, bribery is made a felony under article 1, § 8. "No person shall be tried for a capital or other infamous crime \* \* \* except on presentment or indictment of a grand jury." Section 1, Crim. Proc., reads: "A crime or public offense is an act or omission forbidden by law, and to which is annexed, on conviction: \* \* \* Fourth, removal from office; fifth, disqualification to hold or enjoy any office of honor, trust, or profit under this territory." "Sec. 5. No person can be punished for a public offense except upon legal conviction in a court having jurisdiction. Sec. 6. Every public offense must be prosecuted by indictment, except—First, where proceedings are had for the removal of a civil officer of the territory." The exception merely refers to proceedings by impeachment. This is seen by reading section 3952: "If the offense for which the defendant is impeached be the subject of an indictment, the indictment shall not be barred by the impeachment." The court did not err in sustaining the demurrer, and the judgment is affirmed.

BIGELOW, J., concurs.

(21 Nev. 419)

STATE v. TROLSON. (No. 1,382.)

(Supreme Court of Nevada. May 3, 1893.)

EMBEZZLEMENT—INDICTMENT—EVIDENCE—STATUTES—AMENDMENT OF.

1. Under St. 1887, p. 81, providing that any person to whom any money, property, or effects shall have been intrusted, who shall appropriate the same, or any part thereof, in any manner, or for any other purpose than that for which the same was intrusted, shall be guilty of embezzlement, an indictment need

not allege that defendant appropriated the property willfully, feloniously, or with intent to steal, as the offense is complete when the appropriation is made, though he intended to afterwards replace the property taken.

2. St. 1887, p. 81, is entitled "An act to further define and punish embezzlement." Section 1 defines embezzlement, and section 2 fixes the punishment for a violation of section 1. *Held* that, as the act is complete within itself, and does not conflict with Gen. St. §§ 4634, 4635, also relating to embezzlement and its punishments, it does not amend the former statute, and hence does not violate Const. art. 4, § 17, requiring each law to embrace but one subject, which shall be expressed in the title, and that no law shall be revived or amended by reference to its title only.

3. On the trial of an indictment charging defendant with the embezzlement of certain money received as agent of an express company for transmission, the fact that the money so received was in the safe constitutes no defense, where defendant was short in his accounts with the company in an amount larger than that alleged to have been embezzled.

Appeal from district court, Storey county; Richard Rising, Judge.

John Trolson was convicted of embezzlement, and appeals. Affirmed.

P. Reddy, for appellant. J. D. Torreyson, Atty. Gen., and William Woodburn, for the State.

MURPHY, C. J. The defendant was indicted and charged with having embezzled the sum of \$1,877.55, money he had received as agent of Wells, Fargo & Co. at Virginia City, Storey county, Nev., from one John McGrath, to be by the said John Trolson, as such agent of Wells, Fargo & Co., forwarded to Richard Mercer, at Los Angeles, state of California; that instead of forwarding the same, as was his duty so to do, by the nature of his employment, he appropriated the said sum of money to his own use. He was tried, convicted, and sentenced to imprisonment in the state's prison for five years.

Errors are alleged in this court, for the first time, on motion in arrest of judgment. It is contended that the indictment is deficient in matters of substance, in not charging that the defendant appropriated the money, "willfully, feloniously, and with intent to steal the same." Neither one of these words is used in the indictment. It is not disputed but what the agency is sufficiently alleged, and that he received the money as such agent of Wells, Fargo & Co., and in the regular course of his employment, and that it had never been sent by Trolson to the party for whom it was intended. The charging portion of the indictment complained of reads as follows: "That on or about the said first day of December, A. D. 1892, and before the finding of this indictment, the said John Trolson, having said money and coins, and each of them, in his possession as such agent of said corporation as aforesaid, and being then and there intrusted therewith as aforesaid, for the purpose aforesaid, and for no other purpose, did appropriate the said sum of money, and the said coins, and each of them, to his own use, for his own benefit, and did appropriate the same, and the whole thereof, in a manner and for pur-

poses other than that for which the same were intrusted; and then and there did use the said sum of money, and the said coins, and the whole thereof, and each of said coins, for his own benefit, and did use the same, and the whole thereof, in a manner and for purposes other than that for which the same were intrusted as aforesaid; and thereby did embezzle said sum of money, and said coins, and each of them,"—all of which is contrary to the form of the statute. The indictment shows who placed the money in the defendant's hands, the purposes for which it was intrusted to him, and that, instead of carrying out said trust, he did embezzle the same.

Embezzlement is not an offense at common law, but was created by statute; therefore, in deciding the question submitted, we must be governed by the statute of our own state. The statute under consideration reads as follows: "Any person, or any agent, manager, or clerk of any person, corporation, association, or partnership, with whom any money, property, or effects shall have been deposited or intrusted, who shall use or appropriate such money, property, or effects, or any part thereof, in any manner, or for any other purpose, than that for which the same was deposited or intrusted, shall be guilty of embezzlement." In setting out a statutory offense it is sufficient to describe it in the words of the statute, with a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to show that the statutory offense has been committed by the party therein named, and to inform him as to what is intended. *State v. Logan*, 1 Nev. 510; *U. S. v. Gooding*, 12 Wheat. 472; *People v. Gray*, 66 Cal. 271, 5 Pac. Rep. 240; *People v. Tomlinson*, 66 Cal. 345; *Com. v. Bennett*, 118 Mass. 451; *Golden v. State*, 22 Tex. App. 2, 2 S. W. Rep. 531; *Crump v. State*, 23 Tex. App. 616, 5 S. W. Rep. 182; *Wood v. State*, 47 Ark. 492, 1 S. W. Rep. 709; *Lowenthal v. State*, 32 Ala. 589; *State v. Wolff*, 84 La. Ann. 1153; *Huffman v. State*, (Ala.) 9 South. Rep. 28; *People v. Hennessey*, 15 Wend. 150; 1 Whart. Crim. Law, 1061. "The cases are few and exceptional," said Foster, J., in *Com. v. Raymond*, 97 Mass. 569, "in which an indictment which follows the words of the statute will be held to be insufficient." The word "embezzle" has a well-defined meaning. In the Century Dictionary, "embezzle" is defined as the act "to steal slyly; purloin; fitch; make off with; to appropriate fraudulently to one's own use, as what is intrusted to one's care; apply to one's private use by a breach of trust, as a clerk or servant who misapplies his master's money or valuables." Webster: "To appropriate fraudulently to one's own use, as property intrusted to one's care; to apply to one's private use by a breach of trust, as to embezzle public money." Whart. Law Dict.: "Larceny by clerk or servant or agent; the act of appropriating to himself that which he receives in trust for another." And. Law Dict.: "Appropriation to one's own use

of anything belonging to another, whether rightfully or wrongfully in the possession of the taker; theft." "Embezzlement is a sort of a statutory larceny committed by servants and other like persons where there is a trust reposed, and therefore no trespass, so that the act would not be larceny at the common law." 1 Bish. Crim. Law, § 567.

As hereinbefore stated, embezzlement is a crime defined by statute, and it will not be disputed but what it is within the power of the legislature to declare what acts would constitute the crime, and fix the punishment thereof. One of the elements that enters into the statutory definition of embezzlement is the fiduciary or confidential relation existing between the employer and the employee; and this is especially true with regard to agents of such corporations as Wells, Fargo & Co., which was organized for the purpose of and is doing a large express business, in transmitting money and other valuables to different parts of the country, and the work connected therewith must necessarily be done by and through confidential clerks and agents, who are intrusted with the duties of receiving, forwarding, and the care and custody of large sums of money, valuables, and property so deposited and intrusted to said corporation, through its clerks and agents, for shipment, and in which said corporation has a special ownership, and is held responsible for the loss or miscarriage thereof after it is once received and receipted for by its authorized agents. The legislature of 1887 had in view the nature of the business transacted by corporations organized for banking and express companies, milling and mining companies, companies and individuals engaged in stock brokerage. All, or nearly all, of the business had to be done by and through agents, clerks, and employees, who necessarily, from the nature of their employment, were intrusted with large sums of money, valuable shares of stock, and bullion. The legislature was also aware that large sums of money and valuable shares of stock, that had been intrusted to agents for certain purposes, were appropriated and used by such agents, not with the intention of stealing the same, and depriving the owner of the use thereof for all times, but with the hope and expectation of being able to save themselves from financial ruin. If prices in the stock board turned their way, they were all right, and the money and stocks were replaced, and the owners thereof knew nothing of the matter; but, if the reverse should happen, they were bankrupt and defaulters. Take the case under consideration for an example. The defendant testified that he had been in the employment of Wells, Fargo & Co. some 16 years. That after he became a married man, on account of sickness in his family, the wages he received were not sufficient to meet his expenses. That he commenced to use money intrusted to him in small sums; that he speculated in stocks. That he borrowed money at different times to replace the amounts he had taken. That his employer knew nothing of these appro-

<sup>1</sup>5 Pac. Rep. 509.

priations. Finally, on the 1st day of December, 1892, he was some \$2,000 short in his accounts. When he received the commission mentioned in the indictment he failed to enter it on the book of the office, or to forward the same to the party for whom it was intended, and the company knew nothing of the matter until it was called upon to pay, and did pay, the sum charged in the indictment. He also testified that he never intended to steal the money, but always intended to repay the same, and would have done so if he had been given time. *State v. Pratt*, (Mo. Sup.) 11 S. W. Rep. 978. It was to cover cases of this kind that the legislature left out the words "willfully, unlawfully, and with intent to steal," and the word embezzled contains within itself the charge that the defendant appropriated the money to his own use, and sufficiently designates the crime intended to be charged. *State v. Wolff*, 34 La. Ann. 1153. The counsel for appellant contends that "in every crime or public offense there must be a joint operation of act and intent, or criminal negligence;" and that the words "with intent to steal" should have been set forth in the indictment. The statute under consideration does not make the criminal intent an element of the offense further than is necessarily included in the words "who shall use or appropriate such money, property, or effects, or any part thereof, in any manner, or for any other purpose than that for which the same was deposited or intrusted, shall be guilty of embezzlement." The language of the statute, which is copied into the indictment, is clear, and plainly imports that the defendant did appropriate the money to his own use with the intention of depriving the owner of the use thereof; and it is also clear to our minds that neither the defendant nor his counsel could have been misled as to the offense charged. The intent which is mentioned in the text-books on criminal law as essential to constitute a crime is not necessarily an evil or wrongful intent, beyond that which is involved in the prohibited act. Whatever one voluntarily does he of course intends; and, whenever the statute has made that act criminal, the party voluntarily doing the prohibited act is chargeable with the criminal intent, and the statute of 1887 "does not make it necessary to allege that the act was knowingly done, as a constituent part of the crime." *Com. v. Elwell*, 2 Metc. (Mass.) 190; *Bish. St. Crimes*, § 250. Bishop on Criminal Procedure (volume 1, § 523) says: "It is perhaps safe to say that in all cases where a statute creates an offense, and mentions some intent as an element therein, the indictment must follow these statutes in this particular, and specify the intent. On the other hand, as a general proposition, if the statute is silent concerning the intent, there need be no intent alleged in the indictment." "So, in regard to frequent attempts which have been made to exonerate individuals charged with disobedience to penal laws, on the ground of good faith or error of judgment; it has been held that no excuse of this kind will avail against the peremp-

tory words of a statute imposing a penalty. If the prohibited act has been done, the penalty must be paid." The offense consists in the violation of the law, not in the intent or motive by which the party was actuated. *Sedg. St. Const.* 80, and authorities there cited.

In the case of *State v. Combs*, (Kan.) 27 Pac. Rep. 818, it is said: "The second objection—that the information contains no allegation of intent—cannot be sustained. The charge, as stated, includes the evil intent of wrongfully appropriating money, intrusted to him by Fearn for a special purpose, to his own use, and sufficiently characterizes the intent with which the offense was committed." In *State v. Noland*, (Mo. Sup.) 19 S. W. Rep. 717, the court said: "It is next objected that the indictment is insufficient for failure to aver the intent with which the defendant converted the money to his own use. \* \* \* It has generally been ruled, under similar statutes, that an indictment substantially charging the crime in the terms of the statute is sufficient." In the case of *Leonard v. State*, 7 Tex. App. 435, it is said: "It is no part of the description of the offense of embezzlement, as in theft, that it was taken with the intent to deprive the owners of the property or its value, or to appropriate it to the benefit of the taker. The indictment alleges the property to have been in the possession of the defendant, which would to some extent excuse the pleader from a more minute description. Still, we are of the opinion it was sufficiently described, for the purpose of this prosecution, to apprise the defendant as to what he was charged with." In *Halsted v. State*, 41 N. J. Law, 589, *Beasley, C. J.*, speaking for the court, said: "Nothing in law is more incontestable than that, with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not universally apply. The cases are almost without number that vouch for this." The case of *State v. Hopkins*, 58 Vt. 200, was an indictment for embezzlement, and in passing upon the question of intent the court said: "The remaining question in respect to the charge is the one relating to the intent of the respondent in doing the alleged act. Was it necessary that he should have acted fraudulently and feloniously, that he should have the intent to steal, that he should have a heart void of social duty, and been fatally bent on mischief? We think not."

Without the citation of further authorities, which are numerous, we are of the opinion that there is no defect in the indictment. It is drawn in such a manner as to bring the defendant within the provisions of the statute. The nature of his employment is set out in ordinary and concise language. That he received the money in the course of his employment; the ownership of the money, together with his duty in relation thereto; and that he appropriated the same to his own use, and embezzled the same,—is fully, directly, and expressly alleged, without uncertainty or ambiguity. And courts will not interpolate into a statute a corrupt motive as an ingredient of the offense of



embezzlement, for, when an act is prohibited in express terms by the statute, such prohibition cannot be contracted so as to embrace only such persons as do such act with intent to steal the money or property. Nor is it in the province of the court to say whether this law is too rigorous or not. That is for the legislative department to determine. Courts must declare the law as they find it.

The intent with which the party appropriates the money or property to his own use is a question of fact, to be determined from the evidence in the particular case. *People v. De Lay*, (Cal.) 22 Pac. Rep. 90; *People v. Galland*, 55 Mich. 628, 22 N. W. Rep. 81. In the case under consideration the question of intent was submitted to the jury in the instructions of the court, which read as follows: "The next question is that it must appear from the evidence that the defendant appropriated this money, or some portion of it, to his own purpose, with the intent to deprive Wells, Fargo & Co. of it; and that fact must be shown beyond a reasonable doubt. Therefore, if you believe from the evidence that the defendant, John Trolson, received this sum of money, and that he received it as the agent of Wells, Fargo & Co., for the purpose of transmission to Richard Mercer at Los Angeles, and that instead of transmitting it as he should have done, that he diverted it and appropriated it to his own use, and did use, and did so with the purpose and intent of using it, that fact would constitute the crime of embezzlement as defined by the statute, and you should convict the defendant. If, on the other hand, you should believe the statement made by the defendant, that when he received this money he deposited it in the safe, and although the facts be that he did not transmit it, as was his duty to do, but that he left it in the safe, and did not use it, he cannot be held guilty. The offense of embezzlement consists of two things,—the act of taking the money, and the intention with which it is taken. If you believe his statement that he received this money, and did not take or use it for his own purpose, or for any other purpose whatever, or any part of it, he must be acquitted." From the foregoing it is seen that the question of intent with which the defendant appropriated the money to his own use was submitted to the jury with the evidence in the case, and the law has been complied with.

Counsel for appellant contends that the statute of 1887, under which the defendant was indicted, is unconstitutional, by reason of its nonconformity to section 17, art. 4, of the constitution, which reads: "Each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only, but in such case the act as revised, or section as amended, shall be re-enacted and published at length." The law embraces but one subject, and matter properly connected therewith, to wit, defining the acts which shall constitute the crime of embezzlement, and fixing the punishment.

He further argues that it cannot be determined from the reading of the title whether it was intended as an amendment to sections 4634 and 4635, Gen. St., or a supplemental act; that there is no repealing clause. We agree with the counsel that, if the act of 1887 was an attempted amendment of the above sections, as such it is an absolute failure; and we are confident it was not intended as a supplemental act. Nor is it repugnant to, or in conflict with, either one of the above-mentioned sections, and does not repeal, directly or by implication, the former statute defining the crime of embezzlement, but is an independent statute complete within itself. The legislature has, in section 1, in clear and unmistakable language set forth fully what acts shall constitute the crime. Section 2 fixes the punishment for violation of the provisions of section 1. It is a familiar doctrine that repeals of statutes by implication are not favored. *People v. Gustin*, 57 Mich. 408, 24 N. W. Rep. 156, and authorities therein cited. The court said "that the question of repeal is largely one of intent; and if the two statutes can stand, and both have effect, they must be allowed to do so." Cooley on Constitutional Limitations (page 182) says: "But repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court in holding that the latter in time repeals the other, when it does not in terms purport to do so." Sedgwick on Construction of Statutory and Constitutional Law (page 354) says: "But it is only in case of irreconcilable repugnancy that this rule applies. It gives way to the fundamental principle that the intention of the legislature is to govern. \* \* \* The general rule is conceded to be that, where the two statutes contain repugnant provisions, the one last signed by the governor is a repeal of one previously signed; but this is so merely because it is presumed to be so intended by the lawmaking power. Where the intention is otherwise, and that intention is manifest upon the face of either enactment, the plain meaning of the legislative power thus manifested is the paramount rule of construction. It is no part of the duty of the judiciary to resort to technical subtleties to defeat the obvious purposes of the legislative power in a matter over which that power has a constitutional right to control." Where there are two acts on the same subject, the rule is to give effect to both, if possible. *State v. Archibald*, (Minn.) 45 N. W. Rep. 607; *Bish. St. Crimes*, §§ 155, 156. The act of 1887 is in no wise repugnant to, nor conflicts with, the former laws in relation to embezzlement. In our opinion the prosecuting officer may draw the indictment under the act of 1887 or 1879, as the facts in the case might seem to require, and was so intended by the legislature. The title of the act of 1887 reads: "An act to further define and punish embezzlement." We think the title is sufficient, and not misleading. The word "further" can be omitted, and yet the act will have a good title. It is a well-established rule of construction that, if the act is broader

than the title, that part of the act indicated by the title will stand, while that portion of the act not indicated by the title must be rejected. Such being the case, the reverse must follow, and, where the title is broader than the act, that portion of the title which has no legitimate connection with the body of the act must be held to be surplusage and disregarded.

It is argued that the instructions given by the court were inconsistent with one another, and misleading. The whole charge to a jury must be taken together, and considered as an entirety, and all that is required is that the law be clearly stated in accordance with the facts in the case, that the jury may not be misled; and when the instructions state the law they must be sustained. We have carefully examined the instructions in the case, and, considered together, they are a full, clear, and correct exposition of the law applicable to the facts in the case, and the defendant was not prejudiced thereby.

The verdict of the jury is supported by the evidence. True it is that the defendant testified that he put the money in the safe, and that amount and more was found therein. He admitted that he had taken and used money for speculative purposes which had been intrusted to him as agent of Wells, Fargo & Co.; that it had been going on for three years; that on the date the money was paid by McGrath to him to be forwarded to Mercer he was in the neighborhood of \$2,000 short in his accounts with Wells, Fargo & Co. It was shown at the trial that he failed to make an entry on the books of the company of the receipt of the money, and it was conceded that it had never been sent to Mercer by Trolson. Therefore, when the defendant received that money, and failed to enter an account thereof in the books of the company, and placed the money in the safe to make up his deficits in other accounts, he diverted the said sum of money from the uses and purposes for which it was intended, and converted the same to his own use, and by so doing he violated the law. The mere fact that there was a large amount of money in the safe, and that the money the defendant received from McGrath was a part of the larger amount, constituted no defense when it was shown that he was \$2,000 short in his accounts. That he made no entry in the books, and failed to send the money to Mercer, as was his duty to do, were all facts and circumstances to be submitted to the jury, from which they could determine the intent of the defendant in appropriating the money in the manner in which he did.

We cannot close this opinion in more apt language than that used by the supreme court of Missouri in the case of *State v. Manley*, 17 S. W. Rep. 801, wherein it is said: "The object and purpose of the statute was to prohibit by severe punishment the conversion of money received by virtue of official positions and certain fiduciary relations named therein. It was enacted with a view to prevent the growing tendency of those intrusted with public moneys and trust funds to speculate for their own

personal aggrandizement. To accomplish this purpose it was deemed best to say to officers and trustees: 'You shall not convert to your own use, in any manner whatever, the moneys you have received by virtue of your public trust. Your good intentions will not restore these moneys after your investment has proved disastrous. It matters not that in many cases you honestly think you can safely invest the public funds, and will be able to restore them when called for. They were not placed in your hands for such a purpose. To save you from dishonor, your sureties from bankruptcy and loss, we will deter you from attempting such a proceeding.' Experience justified the legislature in coming to this conclusion. Observation had taught that many well-meaning men had been lured to their own disgrace and ruin by converting the trust funds in their hands to their own private ends, and, having lost, attempted to cover up their property, and make good the trust funds by false charges and vouchers."

How aptly the above covers the case under consideration may be summoned up in a very few words. The defendant was compelled to pay the sum of \$175 by reason of his having delivered a package of books to a party who was not entitled to receive them. He says: "I was unable to make this payment out of my salary and meet my other expenses. I used money coming into my hands to speculate on in hopes to make my loss good." He took the money that had been given to him by Peter for a certain purpose, to pay the amount he had heretofore used for his own benefit, out of the money he had received from Paul. The long looked for profits on his investments did not come to hand. On or about the 1st day of December, 1892, he had appropriated to his own use the sum of \$2,000; he says, "taken at different times and in small amounts." About this time he received the Mercer money from McGrath, and instead of sending it to Mercer, as was his duty so to do, he placed it in the safe to cover his former speculations, and with the hope that he might be able to raise money from some source to meet the Mercer demand before he would be called upon for the money. But such was not to be the case. Mercer, not receiving his money, made a demand on the home office, and the amount was paid, and the defendant exposed. The offense committed by the defendant comes within the words of the statute; also within its reason and spirit, and the mischief it was intended to remedy. The judgment and order appealed from are affirmed.

BIGELOW, J., (concurring.) To what has been said by the Chief Justice, I desire to add:

1. The objection to the indictment that it does not state facts sufficient to constitute a public offense is not waived by a failure to make the point in the district court either by demurrer or upon motion in arrest of judgment. Such an objection may be taken for the first time in the appellate court. *State v. Mack*, 20 Or. 234,

25 Pac. Rep. 639; *Lemons v. State*, 4 W. Va. 755; *State v. Sims*, 43 Tex. 521.

2. The indictment follows the language of the statute of 1887, p. 81, and under that statute is certainly sufficient, as is abundantly shown by the preceding opinion. The only question, then, is whether that is a valid and constitutional law. It is objected that it is not, because it is virtually an amendment of sections 4634, 4635, Gen. St., which, under the constitution, can only be amended by re-enacting them in full; and a number of Nebraska cases (*Smalls v. White*, 4 Neb. 357; *Sovereign v. State*, 7 Neb. 410; *Stricklett v. State*, 48 N. W. Rep. 820; and *Smith v. State*, 52 N. W. Rep. 572) are cited as supporting that view. It seems, however, that the courts of that state stand alone upon that question; and while their position may be the more correct, viewed from a theoretical and philosophical standpoint, in my judgment the weight of authority and the more practical reason is with those that hold the general rule that the clause of the constitution under consideration does not apply unless the subsequent statute is, in terms as well as in effect, an amendment of the preceding statute. Speaking of the constitutional provision that an amended section of a statute must be re-enacted and published at length, Judge Cooley says: "It should be observed that statutes which amend others by implication are not within this provision, and it is not essential that they even refer to the acts or sections which by implication they amend." Const. Lim. 182. This statement is well supported by the adjudged cases of many states. A statute is frequently so interwoven with others, and either directly or indirectly modifies or amends so many others, and the rule contended for is itself so uncertain and indefinite, and in its nature incapable of reasonably fixed limits of application, that, as it seems to me, its adoption would lead to more uncertainty and confusion in the law than it would eliminate. Therefore, if we admit the position of counsel that the act of 1887 is an amendment of the previous statutes concerning embezzlement, it does not follow that the act is unconstitutional. I concur in the affirmance of the judgment, and of the order refusing a new trial.

(18 Colo. 354)

HARVEY et al. v. TRAVELERS' INS. CO. et al.  
(Supreme Court of Colorado. April 19, 1898.)

APPEAL—WHEN LIES—STARE DECISIS—OVERRULING DECISIONS—CONSTRUCTION OF STATUTE.

1. Under the statute governing appeals to this court, an appeal does not lie on the ground that the judgment relates to a freehold, unless the right or title to the freehold is the direct subject of the action, nor unless the judgment is conclusive of such right or title until reversed. The statute does not allow a party to appeal from a judgment in his own favor, but he may have a judgment in his favor reviewed by writ of error. If a cause is not appealable by the terms of the statute, the court is without jurisdiction to review the judgment, and joinder in error does not cure such want of jurisdiction.

2. Wherever the construction of a statute has been repeatedly given in the same way, or where a construction has been given and acquiesced in for

a number of years, it would be manifestly improper for a court to disturb questions thus settled.

3. When judicial decisions are wrong in principle, and subversive of substantial rights, it may be necessary to review and overrule them; but such necessity can seldom arise where only some question of practice or mode of procedure is involved.

4. When the legislature re-enacts a statute which has theretofore received a settled judicial construction, the legislative intent undoubtedly is that such former construction will be adhered to.

(Syllabus by the Court.)

Appeal from district court, Arapahoe county.

Suit by J. K. Harvey and others against the Travelers' Insurance Company and others to cancel certain conveyances and judgments, and for other relief. From the decree entered, plaintiffs appealed. Defendants now move to dismiss the appeal. Motion granted.

The other facts fully appear in the following statement by ELLIOTT, J.:

Motion of appellees to dismiss appeal. Appellants were plaintiffs below. The relief sought in the district court, was, in substance, as follows: (1) To impeach, set aside, and hold for naught certain judgments and decrees rendered by another court of record; (2) to vacate, set aside, and declare null and void certain sales and conveyances of real property; (3) to obtain a decree for the foreclosure of a certain mortgage, and for the sale of certain real property therein described, for the purpose of paying to plaintiffs certain bonds secured by said mortgage; (4) for a judgment against certain of the defendants for any balance remaining due and unpaid to plaintiffs, in case the proceeds of the mortgaged property should not be sufficient to pay them in full, and for other and further relief, and for costs.

J. P. Brockway, for appellants. Charles H. Toll, Wolcott & Valle, W. M. Maguire, and H. C. Charplot, for appellees.

ELLIOTT, J., (after stating the facts.) In the district court, plaintiff obtained judgment substantially as sought by their complaint. Upon a rehearing, however, that court modified its decree, denying the money judgment asked by plaintiffs in case the proceeds of the mortgaged property should not be sufficient to pay their claims in full. In other respects the judgment was altogether favorable to plaintiffs. This is apparent from the nisi prius record, as well as from the fact that, in assigning error upon this appeal, appellants only complain of the action of the court refusing to allow any money judgment in their favor. The statute governing appeals to this court, except as to amount, is substantially the same now as it was in territorial times, and as it has been ever since, with brief interruptions. It reads as follows: "Appeals to the supreme court from the district, county, and superior courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of one hundred dollars, or relate to a franchise or freehold." See Rev. St. 1868, p. 513; Laws 1879, p. 226; Code 1887, § 388; Court of Ap-

peals Act 1891, p. 118. See, also, Code 1877, c. 36, and Sess. Laws 1885, p. 350.

1. The statute above quoted was borrowed from Illinois. Before its adoption in Colorado it had received a judicial construction in Illinois, to the effect that an appeal does not lie on the ground that the judgment relates to a freehold, unless the right or title to the freehold is the direct subject of the action, or unless the judgment is conclusive of such right or title until reversed; and also that the statute does not allow a party to appeal from a judgment in his own favor. *Rose v. Choteau*, 11 Ill. 170; *Addix v. Fahnestock*, 15 Ill. 448; *Carr v. Miner*, 40 Ill. 33. This court has followed the Illinois decisions, as above stated, and has also held that the right of appeal is governed by the statute; that, if a cause is not appealable by the terms of the statute, the court is without jurisdiction to review the judgment; and that joinder in error does not cure such want of jurisdiction. *Molandin v. Railroad Co.*, 3 Colo. 173; *Peabody v. Thatcher*, 3 Colo. 275; *Bartels v. Hoey*, 3 Colo. 279; *Bernard v. Boggs*, 4 Colo. 73; *Board v. Sloan*, 4 Colo. 128; *Thorne v. Ornauer*, 6 Colo. 39; *Hall v. Mining Co.*, 6 Colo. 81; *Vallette v. Smelting Co.*, 11 Colo. 204, 17 Pac. Rep. 509; *Crane v. Farmer*, 14 Colo. 294, 23 Pac. Rep. 455; *Meyer v. Brophy*, 15 Colo. 572, 25 Pac. Rep. 1090; *Sons of America, etc., Ass'n v. City of Denver*, 15 Colo. 592, 25 Pac. Rep. 1091; *People v. Richmond*, 16 Colo. 274, 26 Pac. Rep. 929.

2. Appellants' counsel virtually admits that the decisions in the foregoing cases, if adhered to, will prevent his clients from maintaining this appeal; nevertheless, he earnestly and forcibly insists that such decisions are wrong, and that they should be overruled. In this connection the following from an opinion of the supreme court of Illinois, delivered by Mr. Justice Lockwood, is peculiarly appropriate: "The maxim 'stare decisis' is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude courts from investigating former decisions, when the question has not undergone repeated examination, and become well settled. Wherever the construction of a statute has been repeatedly given in the same way, or where a construction has been given and acquiesced in for a number of years, it would be manifestly improper for a court to disturb questions thus settled." See *Bowers v. Green*, 1 Scam. 42. This language was used more than half a century ago. It is a clear expression of a familiar doctrine.

3. When judicial decisions are wrong in principle, and subversive of substantial rights, it may be necessary to review and overrule them; but such necessity can seldom arise where only some question of practice or mode of procedure is involved. For example, in the *Bowers-Green Case*, supra, a single former decision of the supreme court of Illinois, denying the right of parties to a writ of error in case an appeal did not lie, was overruled. The reasons given for overruling the former decision were that much injustice must

necessarily result if such decision were adhered to, since it denied all right of review in certain cases, and that the writ of error ought not to be considered abolished by implication, particularly where it was evident that the legislature could not have contemplated such abolition. Such reasons have no bearing upon the decisions which we are now asked to review and overrule. The right to a writ of error in civil cases has always been upheld by this court, except during the brief period when the first Code took away such right by substituting the right of appeal in all civil actions. *Willoughby v. George*, 4 Colo. 22; *People v. Richmond*, 16 Colo. 282, 26 Pac. Rep. 929. Appellants' right to have this cause reviewed by the proper appellate tribunal is not affected by this decision.

4. In reviewing judicial decisions construing a statute, the course of legislation during the period covered by the decisions is sometimes important to be considered. The Code of Civil Procedure adopted by our first state legislature went into effect October 1, 1877. By it the grounds and mode of appeal to this court were radically changed; but the Code in this respect, being unsatisfactory, was repealed in less than 18 months, and the old grounds and mode of appeal were restored, by the second legislative assembly. Again, in 1885, the grounds and mode of appeal to this court were greatly changed; but the appeals act of 1885 was only suffered to remain until the next meeting of the general assembly, when it was superseded by the Code of 1887; and thus the old grounds and mode of appeal were again re-enacted, as they still remain, save as modified by the court of appeals act of 1891. See statutes above cited. When the legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent. It must be considered that the statute is re-enacted with the understanding that the former construction will be adhered to. The decisions of this court construing the statute of appeals of 1868, 1879, and 1887, supra, do not interfere with the substantial rights of litigants. They do not prevent the review of judgments of inferior courts by writ of error where an appeal does not lie. Favorable, as well as adverse, judgments may be thus reviewed. A construction which has received such repeated legislative, as well as judicial, approval should not be disturbed. The motion to dismiss this appeal must be sustained. The appeal will be dismissed without prejudice, with leave to appellants to withdraw the record and printed abstract.

(98 Cal. 139)

STOCKTON SAV. BANK v. STAPLES et ux.  
(No. 18,019.)

(Supreme Court of California. April 25, 1893.)

ESTOPPEL—DEED OF MARRIED WOMAN—RIGHT OF CORPORATION TO HOLD LAND—ADVERSE POSSESSION—EVIDENCE.

1. Where there is a substantial conflict of evidence, a finding on the issue to which it relates will not be set aside.

2. A husband who witnesses a deed of the wife purporting to convey the wife's separate estate, and who, although he must be presumed to know its contents, does not dispute or object thereto, is estopped to deny the validity of the deed.

3. A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land.

4. Declarations of one in actual possession of land, showing that he claims to be sole owner, is admissible on an issue of adverse possession, as tending to show the character of the possession.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by the Stockton Savings Bank against D. J. Staples and Mary P. Staples, his wife. Judgment for plaintiff, from which, and an order denying a new trial, defendants appeal. Affirmed.

Arthur Rodgers and John E. Budd, for appellants. Louttit, Woods & Levinsky, for respondent.

VANCLIEF, C. Action to quiet title to an undivided half of a quarter section of land situate in the county of San Joaquin. The judgment was in favor of the plaintiff, and defendants have appealed therefrom, and from an order denying their motion for a new trial. Robert Coffee, who is admitted to have been the source of title, conveyed an undivided half of the quarter section to the defendant Mary P. Staples in March, 1870; and it is not disputed that she remained a tenant in common with him until the 2d day of June, 1875, at which time it is claimed by plaintiff that he ousted her, and thence maintained a continuous adverse possession of her interest until September 11, 1888, when he conveyed the whole quarter section to Alice L. Hudson, who continued the adverse possession until September 20, 1890, when she conveyed the entire quarter section to the plaintiff. This action was commenced October 15, 1890. The court found all the essential elements of a continuous adverse possession by Robert Coffee, Alice L. Hudson, and plaintiff, except notice to Mary P. Staples of its hostile character, from June 2, 1875, until the commencement of this action; and further found, substantially, that Mary P. Staples had actual notice of the adverse and hostile character of such possession from 1884 until the commencement of this action. Thus it appears that the title upon which plaintiff recovered was found to have been acquired by prescription.

1. Counsel for appellants contend, with considerable force and plausibility, that the findings as to adverse possession are not justified by the evidence; and, if it were merely a question of preponderance of the evidence, I should be inclined to agree with them; but after a careful examination I think there is sufficient evidence, positive and circumstantial, substantially tending to support those findings, to bring the case within the rule that, where there is a substantial conflict of evidence, a finding upon the issue to which it relates should not be set aside.

2. It appears that at the date of the deed from Coffee to Mrs. Hudson she was

a married woman, and that the consideration for that deed was her promise to support Coffee during the remainder of his life. It does not appear, however, that this consideration was expressed in the deed from Coffee to Mrs. Hudson, as no copy of any part of that deed appears in the record. The consideration was proved on the trial by the testimony of Mrs. Hudson, who testified that an oral agreement for the deed and the consideration therefor had been made about the time of her marriage. Upon this showing it is claimed for appellants that the land must be presumed to have been community property, which could not have been conveyed to the plaintiff by the wife, and therefore that her deed to plaintiff conveyed no title. But it further appears that the deed from Mrs. Hudson to plaintiff was signed by her husband as a witness to her execution of it, and that the deed contained the following recitals: "The right, title, and interest hereby conveyed, being the separate property and estate of the said party of the first part, [the wife,] the same having been by her acquired by deed dated September 11, 1888, made, executed, acknowledged, and delivered by Robert Coffee to said party of the first part, the consideration paid for the said deed \* \* \* being then and there the separate property and estate of the said party of the first part." The facts thus recited in the deed, if true, show that the land was the separate property of the wife; and if the husband, when he signed the deed as a witness, knew its contents, and did not then dispute nor object to those recitals, he would be estopped from denying their truth to the prejudice of plaintiff's title, (Bigelow, Estop. p. 553;) and as against the defendants, for all purposes of this case, it must be presumed, in the absence of evidence to the contrary, that he did know the contents of the deed when he signed it, and that he has ever since acquiesced in the conveyance. *Prima facie*, therefore, whatever title the husband had passed to plaintiff by the estoppel. The plaintiff was in possession of the land before and at the time of the commencement of this action. The possibility that this *prima facie* case may be overcome by facts not disclosed by the record in this case can be of no avail to the defendants in any event, since it appears that they have lost their title, whether the plaintiff has acquired it or not; the term of five years' adverse possession having expired before the date of Mrs. Hudson's deed to plaintiff.

3. Appellants contend that the court erred in overruling their objections to the introduction in evidence of the deed from Mrs. Hudson to plaintiff. The ground of the objection was that the plaintiff "was not shown to have the power to purchase, hold, or receive said land, nor that said land was conveyed to it for any of the purposes of the corporation." There was no evidence to show for what purpose the corporation had been organized, or what business it was conducting. The court found according to the allegation of the complaint, not denied in the answer, that at all the times stated the plaintiff "was a corporation duly organized and incor-

porated under and by virtue of the laws of the state of California, and having its office and principal place of business in the city of Stockton, county of San Joaquin, state of California." Under these circumstances I think it must be presumed (as against the defendants, at least) that the corporation had power to purchase and hold the land. *Mining Co. v. Clarkin*, 14 Cal. 545; *Evans v. Bailey*, 66 Cal. 112, 4 Pac. Rep. 1089; *Hagar v. Board*, 47 Cal. 222; *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 84; *Spel. Priv. Corp.* §§ 203, 206. It does not appear under what statute, or for what purpose, the plaintiff was incorporated, nor what business it was engaged in, nor for what purpose the property was purchased or used. In answer to a similar objection in *People v. La Rue*, supra, it was said: "If there was anything in its charter, or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record; hence we deem the objection untenable."

4. It is contended that the court erred in admitting evidence of the declarations of Coffee, while in possession, that he claimed to be the sole owner of the land. That Coffee was in the actual possession and the sole occupant of the land during the whole term of his alleged adverse possession was admitted by the defendants at the trial, and the questions contested related only to the character of his possession, namely, did he intend and claim it to be adverse, and did the defendants have notice that it was so intended and claimed? I think the declarations admitted tended in some degree to show the character of his possession, and for that purpose were admissible. *Cannon v. Stockman*, 36 Cal. 536; *Lick v. Diaz*, 44 Cal. 479. I think the order and judgment should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(3 Cal. Unrep. 855)

**BENICIA AGRICULTURAL WORKS v. ESTES et al.** (No. 18,006.)

(Supreme Court of California. April 17, 1893.)

**MORTGAGE FORECLOSURE—DEFENSE—UNLAWFUL CONSIDERATION—EVIDENCE.**

1. On a mortgage foreclosure the evidence showed that, at the time the note and mortgage were given, there was pending, in insolvency proceedings against defendants' father, the latter's petition for discharge and plaintiff's opposition thereto; that the consideration of the note, though not expressed therein, was an assignment to defendants by plaintiff of his claim against the insolvent, which was of the same amount as the note, and that the estimated value of the claim was one-sixth of its face; that by agreement plaintiff's claim against the insolvent assigned to defendant was to be held by plaintiff's attorney, and, when paid, to be applied on the note; that, after the giving of the note and mortgage, plaintiff's opposition to the discharge of the insolvent was withdrawn. *Held*, that the mortgage and note were void as against public policy.

2. The fact that a mortgage was given as security for the performance of an unlawful contract may be shown by oral testimony in an action for foreclosure, though no infirmity appears on the face of the mortgage. *Buffen-deau v. Brooks*, 28 Cal. 642, followed.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the Benicia Agricultural Works, a corporation, against Lyman W. Estes and M. Estes, for the foreclosure of a mortgage. Plaintiff had judgment, from which, and an order denying a new trial, defendants appeal. Reversed.

R. P. Davidson, for appellants. R. B. Terry and G. B. Graham, for respondent.

VANCLIEF, C. Action to foreclose a mortgage executed by Lyman W. Estes to the plaintiff, to secure a joint and several promissory note for \$1,200 made by both defendants. The only defense to the action is that the consideration for the note and mortgage was unlawful, as being contrary to the policy of express law. Judgment was rendered in favor of the plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial.

The facts of the alleged defense are substantially as follows: That, at the time of the execution of the note and mortgage, there was pending in the superior court a proceeding, under the insolvent act of 1880, against one Albert Estes, the father of the defendants, instituted by his creditors, in which he had been adjudged an involuntary insolvent, and had filed his petition for a final discharge from all his debts and liabilities; that the plaintiff, as one of the creditors of the insolvent whose claim had been proved, opposed the final discharge of the insolvent, and had filed in the court in which the proceeding was pending written specifications of the grounds of its opposition; that said petition of the insolvent for discharge, and the opposition thereto by the plaintiff, were pending and undecided at the time of the making and execution of the note and mortgage; and that the only consideration for the making of said note, and the execution of said mortgage, was the withdrawal by plaintiff of its opposition to the final discharge of the insolvent. The cause was tried by the court, and the only findings upon the issues tendered by the answer are, in substance, that the plaintiff did not promise the defendants that, if they would make and execute the note and mortgage, the plaintiff would withdraw all opposition to the discharge of said insolvent; and that defendants did not make and execute the note and mortgage in consideration of any agreement or promise of the plaintiff to withdraw its opposition to the discharge of said insolvent. The appellants contend that these findings are not justified by the evidence; and this is the only ground upon which a reversal of the judgment and order is asked.

On the trial, the allegations of the answer in respect to the pending of the insolvency proceeding against Albert Estes, and the opposition to the discharge of the

insolvent, were admitted by the plaintiff. The only oral testimony at the trial was that of the defendants on their own behalf, and that of G. B. Graham, Esq., who had been the attorney for the plaintiff in the matter of its opposition to the discharge of the insolvent, on behalf of the plaintiff. Besides this, there was some documentary evidence, which will be noticed hereafter. It appears without dispute that the trial of the matter of the opposition to the discharge of the insolvent had been set for trial on the 22d day of March, 1890, and that one of the defendants had been subpoenaed as a witness on that trial; that during the morning of that day, before the hour appointed for the trial, the defendants called upon Mr. Graham, when negotiations were commenced between him and them for a compromise or settlement of the matter of the opposition to their father's discharge. The defendants testified, in substance, that Mr. Graham, on behalf of plaintiff, first proposed the compromise, and offered to withdraw plaintiff's opposition to their father's discharge if they would pay, or secure the payment of, \$1,200; that they said they had no money, but would accept the proposal if they could give satisfactory security, but they wanted a few days to consider the matter. Thereupon it was agreed that Mr. Graham should have the trial postponed until March 29th, to give time to complete the settlement, which he did. On March 24th the defendants returned, and on that day a compromise was effected, according to the terms of which they signed the note and mortgage in suit, and placed them in Mr. Graham's hands, with the understanding that they should be considered delivered, and take effect, when he should withdraw the plaintiff's opposition to their father's discharge, provided no other creditor should have filed opposition to such discharge; but if plaintiff's opposition should not be withdrawn, or if any other creditor should file opposition before the discharge, the note and mortgage were to be returned to defendants. That it was also agreed that defendants should be credited on their note the amount of dividends which should be paid by the assignee on the plaintiff's claim against the insolvent, which, it was then understood, would not exceed \$200. Defendants further testified that there was no other consideration for the note and mortgage than above stated.

The minutes of the court in which the insolvency proceeding was pending show that on March 22d the trial of the matter of opposition to the discharge of the insolvent was postponed, at request of Mr. Graham, by stipulation with opposing counsel, until March 29th, and that on March 29th the opposition of plaintiff to the discharge of the insolvent was withdrawn by Mr. Graham as attorney for plaintiff, the minute of the withdrawal being as follows: "Insolvency of Albert Estes. Now comes G. B. Graham, attorney for Benicia Agricultural Works, and in open court withdraws his opposition to the discharge of the insolvent heretofore filed." Plaintiff's counsel objected

and excepted to all oral testimony as to the transaction, on the ground that the only agreement made had been reduced to writing, and signed by defendants, and they contend here that the written instrument so signed is the only competent evidence of the transaction; and there is no question that the following instrument was drawn by Mr. Graham, and signed by the defendants: "March 24, 1890. Whereas, L. W. Estes and M. Estes have this day given their notes to Benicia Agricultural Works for the sum of \$1,200, payable in seven months from this date, and the said L. W. Estes executed a mortgage on certain real estate to secure said note, which said note was given to secure the amount by them agreed to be paid to the Benicia Agricultural Works for the transfer to them of a certain claim by the said Benicia Agricultural Works against the estate of Albert Estes, an insolvent, which proceedings in insolvency were begun and are pending in the superior court of Fresno county, state of California; and it is hereby agreed by the undersigned that said claim so transferred to them by the said Benicia Agricultural Works shall be held by Geo. B. Graham, its attorney, as collateral security to said note and mortgage, and he shall have the right to collect and receipt to the assignee of said insolvent estate for any dividends that may be payable on account of said claim, and credit the same on said note. Said mortgage is not to be recorded until March 29, 1890; and, in case any creditor shall, of his own motion, file opposition to the discharge of said insolvent before or at that time, said note and mortgage to be surrendered back to them, and they to retransfer said claim. L. W. Estes. M. Estes." This instrument was put in evidence by plaintiff, and is admitted to have been drawn by Mr. Graham, and signed by defendants, at the time the note and mortgage were signed.

Mr. Graham testified that this instrument, as written, is the agreement that was entered into, and contains all its terms; that he never agreed to withdraw plaintiff's opposition to the discharge of the insolvent, except at the request of defendants; that he told defendants the opposition to the discharge would be within their control. "They told me they wanted to dismiss it. Then I said, 'I will go up to court, and dismiss it on Saturday (March 29th) on your request;' and I did dismiss it for them, and not for anybody else. \* \* \* There was not a word said about my signing the agreement; never intended to sign it. \* \* \* I notified the Benicia Agricultural Works of the mortgage, and they ratified everything I did with it." He further testified that defendants first proposed the settlement or compromise, and that he immediately said to them: "You can't settle it or compromise anything with me. The only way you can do in the matter is to buy the claim. \* \* \* I don't think I told them it would be illegal to do so. I knew it myself, and just shut it all off by telling them they need not say anything except about the purchase of the claim. I told them if they purchased the claim



they could dismiss the opposition,—control it; the right to control it would pass to them. \* \* \* I told them I would do whatever they directed me to do; it would be under their control. Did not tell them I would have them substituted in the proceeding, and appear as their attorney. I did not have them substituted in the proceeding. I appeared as their attorney in the way I did. They told me to dismiss, and I did it. Did not make any intimation to the court of any change in the relationship. I simply dismissed it. I was in the case as attorney for the Benicia Agricultural Works." Being asked to explain the last part of the written agreement the witness said: "I think I can state that so you can understand it. They said they didn't want to buy the claim if there was going to be other opposition filed, \* \* \* and this agreement was written up in accordance with what was then understood and agreed between us,—that in case other opposition should be filed, that then I was to surrender it, and there was to be no sale; if there was no other opposition filed, then it was to be an absolute sale. Question. Then, unless the withdrawal of the opposition you had filed, could be made effective, there was to be no sale. That was the understanding, was it? Answer. You can draw your own conclusions about that. I have stated to you what was said. They directed me to dismiss the opposition after I had turned it over to them. Q. Then you have no other explanation than that you have given of that last clause of the agreement? A. The clause explains itself. It is according to the terms of the agreement between us. There is no explanation to be given growing out of the contract or agreement between the parties. I have an opinion about it, but my opinion, the court has said, was not proper to be given. No, sir; I have no explanation to make." The testimony of the defendants that it was estimated and understood that the dividends to be paid by the assignee on plaintiff's claim against the insolvent would not exceed \$200 was not disputed.

Conceding the truth of Mr. Graham's testimony as to facts, exclusive of his opinion as to their legal effect, and considering only such parts of the testimony of the defendants as are undisputed, it seems too clear to admit of debate that the entire substance of the consideration for the note and mortgage consisted of the withdrawal of plaintiff's opposition to the discharge of the insolvent, Albert Estes. Mr. Graham must have known that the defendants had in view, and sought to accomplish, only that object; and it is clearly apparent that they received, and were to receive, nothing else beneficial to themselves or detrimental to the plaintiff. It was not disputed that the parties understood that the dividends on plaintiff's claim against the insolvent would not exceed \$200, nor is it pretended that such understanding was incorrect. Therefore, the formal assignment of that claim, on the condition that plaintiff should continue to hold it as collateral security, and receive and credit the divi-

dends on the note, did not operate as a consideration, or even as a partial consideration, for the note. The note and the conditional assignment of the claim, having been parts of the same transaction, are to be construed together, and in the light of the circumstances of the case; especially the circumstances that the parties understood that the dividends on plaintiff's claim against the insolvent would not exceed \$200, and that the sole object of the defendants was to secure the discharge of their father. By so construing the note and written agreement, any attempted disguise is made transparent, the alleged transfer of plaintiff's claim against the insolvent is discovered to be mere form without substance,—a mere subterfuge,—and the real nature of the transaction is clearly revealed. The provision that the claim, said to have been assigned, was to be held and the dividends thereon collected by plaintiff, and credited on the note, becomes merely a qualification or contingent limitation of the liability of defendants on their note, the only effect of which is that, instead of being unconditionally obligated to pay \$1,200, as expressed in the note, the defendants are only bound to pay \$1,200, less the amount of the dividends paid plaintiff on its claim against the insolvent. It is the same as if the contingent qualification or limitation had been expressed in the note.

If the views above expressed as to the effect of the evidence are correct, it follows that the consideration for the note and mortgage was illegal, because "contrary to the policy of express law," in the sense of the second subdivision of section 1667 of the Civil Code, and consequently the note and mortgage are void. The authorities to this effect are numerous, only a few of which, specifically applicable to this case, need be cited. The facts of the case of *Bell v. Leggett*, 7 N. Y. 176, are almost entirely similar to the facts of this case. The bankrupt proceedings in question in that case were under the United States bankrupt act of 1841, the policy of which in respect to withdrawing opposition to the discharge of the bankrupt cannot be distinguished from that of our insolvent act of 1880. Indeed, that case was cited by our code commissioners as an example falling under the second subdivision of section 1667 of the Civil Code. See note 2 under that section in *Deering's Code*. It is also cited as authority, on a point similar to the principal point in this case, in *Estudillo v. Meyerstein*, 72 Cal. 317, 13 Pac. Rep. 869. The case of *Rice v. Maxwell*, 53 Amer. Dec. 85, is also specifically applicable to this case. As having a general bearing upon the main question in this case the following cases may be consulted: *Valentine v. Stewart*, 15 Cal. 403; *Beard v. Beard*, 65 Cal. 354, 4 Pac. Rep. 229; *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. Rep. 391; *Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. Rep. 36; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. Rep. 735. The point made by counsel for respondent to the effect that the oral testimony was incompetent is not tenable. *Buffandeau v. Brooks*, 28 Cal. 642, and cases above cited. For the reason that the finding excepted to is not justified by

the evidence, I think the order and judgment should be reversed, and a new trial granted.

We concur: TEMPLE, C.; BELCHER, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the order and judgment are reversed, and a new trial granted.

(98 Cal. 143)

**KENNEDY v. GLOSTER et al.** (No. 18,020.)  
(Supreme Court of California. April 17, 1893.)

**HOMESTEAD—SELECTION OF—ABANDONMENT.**

1. Where portions of a tract of land selected as a homestead are situated in different counties, a declaration of the homestead, executed in duplicate, and one recorded in each county, has the same effect as one declaration recorded in both counties.

2. The fact that the owner of a farm selected as a homestead took cattle to pasture for hire, when he had more pasturage than was necessary for his own animals, and sometimes sold hay therefrom, does not vitiate the selection as a homestead, as being within the rule that property used for business purposes solely cannot be selected as a homestead.

3. Under Civil Code, § 1243, providing that "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged," a conveyance of land as security only does not operate as such abandonment after a reconveyance.

4. Under Civil Code, § 1262, providing for the selection of a homestead by a declaration, which must be acknowledged in the same manner as grants of real property, and section 1186, providing that the acknowledgment of a married woman shall not be taken unless she is made acquainted with the contents of the instrument by the officer, on an examination without the hearing of her husband the selection of a homestead by a married woman is void, when the certificate does not recite that she was examined by the certifying officer apart from her husband.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county; John Caldwell, Judge.

Action by John J. Kennedy against D. M. Gloster, Catherine Gloster, and others, for the foreclosure of a mortgage. Plaintiff had judgment against all of the defendants except Catherine Gloster, and as to her the action was dismissed, from which judgment, and from an order denying a new trial, plaintiff appeals. Reversed.

P. Reddy, Chas. F. Hanlon, and Frank R. Wehe, for appellant. T. L. Ford and Goodwin & Goodwin, for respondents.

**BELCHER, C.** In 1874, and for several years prior thereto, the defendant D. M. Gloster was the owner of a tract of land situated partly in Plumas county and partly in Sierra county, in this state, the part in Sierra county being described as the N. W.  $\frac{1}{4}$  of a certain section 5. He was a married man, and the land was all community property. There was a dwelling house on the quarter section in Sierra county, in which he, with his wife and children, then lived, and has ever since lived. The whole tract was inclosed by a

fence, but was subdivided into separate fields, a portion of the land being used for pasturing stock, and a portion for raising hay; and around his house was also a fence, which inclosed about two acres. On September 1, 1874, Mrs. Gloster, the defendant Catherine, for the joint benefit of herself and husband, executed, in duplicate, a declaration of homestead upon the whole tract. Each copy of the declaration was separately acknowledged by her in proper form, and one of them was filed for record in Sierra county on the 5th, and the other in Plumas county on the 9th, of the same month. On December 21, 1875, Mr. and Mrs. Gloster executed to Michael Coffey and Margaret Gloster a deed, absolute in form, of all that part of the land situate in Plumas county. The deed was given to secure the payment of an indebtedness from Mr. Gloster to the grantees, and on its payment, in July, 1879, they reconveyed the property to him. Meantime he remained in possession of the land, using it as before. On November 17, 1886, Mrs. Gloster, for the joint benefit of herself and husband, executed, in duplicate, a new declaration of homestead upon all the land described in the declaration of 1874, and two other quarter sections, — one situate in Plumas county, and the other in Sierra county. Each copy of this declaration was in fact properly acknowledged by her, but the certificates of acknowledgment were defective in form, in that they failed to state, as required by statute, that, upon an examination without the hearing of her husband, she was made acquainted with the contents of the instrument. One of the copies was filed for record in Plumas county, and the other in Sierra county, on the 22d day of the same month. On January 23, 1888, the defendant D. M. Gloster executed a mortgage to the plaintiff's assignor upon all the land in Plumas county described in the homestead declaration of 1874, and upon the two quarter sections in Sierra county described in the declaration of 1886. The plaintiff commenced this action to foreclose that mortgage, making Mr. and Mrs. Gloster and certain other parties defendants. All of the defendants, except Mrs. Gloster, suffered their defaults to be entered. She answered and set up in defense of the action the two declarations of homestead, executed and filed for record by her, as before stated. The court below found all the facts alleged in the complaint to be true as against D. M. Gloster, and also found that, at the time the mortgage was executed, there was a valid homestead, covering all the land described in the declaration of 1886, and hence that the mortgage was void. Judgment was accordingly entered in favor of the plaintiff, and against D. M. Gloster, for the amount found due, and in favor of Mrs. Gloster, dismissing the action as against her, with costs. From this judgment in favor of Mrs. Gloster, and from an order denying his motion for a new trial, the plaintiff appeals.

1. It is claimed for appellant that, when a copy of the homestead declaration of 1874 was filed for record in Sierra county, the land described therein and situated in

that county immediately became and constituted the homestead of the declarant, and that the filing of the other copy in Plumas county a few days later was, in effect, an attempt to select a second homestead while the first was in force; and it is argued that, as one cannot have two homesteads at the same time, the land in Plumas county did not become impressed with the character of homestead. It is admitted, however, that a valid homestead may be declared upon land situated partly in two counties; but it is said that to effect that end the same declaration or paper should be filed in each county. We do not think this claim should be sustained. When an instrument is executed in duplicate, it is, in effect, but one instrument. Here the declaration was evidently executed in that way that it might more conveniently and promptly be sent to the two county seats for record; and, if it had not been executed in duplicate, it clearly could not have been recorded in both counties at the same time, and yet in that event the objection interposed would seem to be equally tenable.

2. It is also claimed that the homestead must be limited to the dwelling house in which the claimant resided, and the separately inclosed two acres of land on which it was situated. This claim is rested upon the theory that the balance of the land was used for purposes of business, and hence was not subject to selection as a homestead. But it is well settled in this state that a farm may be selected as a homestead. In *Gregg v. Bostwick*, 33 Cal. 227, it is said: "Both in the constitution and in the statute the word 'homestead' is used in its ordinary or popular sense; or, in other words, its legal sense is also its popular sense. It represents the dwelling house at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks." Here it was proved that the whole tract was used as a farm by its owners, principally for pasturing and feeding their own cows and other domestic animals, though sometimes, when there was more pasturage than was necessary for their animals, they took in other cattle to pasture; and, when they had more hay than their animals would consume in the winter, they sold some of it. But these facts did not, in our opinion, make the farm such a place of business as to bring it within the cases holding that property used for business purposes solely cannot be selected as a homestead. The declaration was in proper form, and, when filed for record, we think it had the effect to impress upon the whole farm a valid homestead claim.

3. It is further claimed that when Mr. and Mrs. Gloster executed their deed in December, 1875, they abandoned their homestead upon that part of the land covered by the deed. The answer to this claim is that "a homestead can be abandoned only by a declaration of abandonment, or

a grant thereof, executed and acknowledged." Section 1243, Civil Code. Here the proof is clear that the deed was given only as a mortgage, and therefore it did not pass the title, and could not operate as a grant.

4. It is claimed that the declaration of 1886 did not create any new homestead rights, for the reasons, among others, (1) that it was an attempt to select a second homestead, while that of 1874, if valid, was still in force; and (2) that the certificates of acknowledgment attached to the declaration were not in the form prescribed and made necessary by the statute, and hence it was not entitled to be recorded. It is admitted by respondent that the certificates of acknowledgment were not in proper form, but contended that, notwithstanding the defects, the declaration might still be filed for record, and that, when so filed, it constituted a valid homestead. The Civil Code has the following provisions: "Sec. 1262. In order to select a homestead, the husband or other head of a family, or, in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record. Sec. 1263. The declaration of homestead must contain certain specified statements. "Sec. 1264. The declaration must be recorded in the office of the recorder of the county in which the land is situated. Sec. 1265. From and after the time the declaration is filed for record, the premises therein described constitute a homestead," etc. As we read these sections, the requirement is imperative that a married woman's acknowledgment of a declaration of homestead must be taken and certified in the manner prescribed by section 1186 of the Civil Code<sup>1</sup> and it was, in effect, so held in *Beck v. Soward*, 76 Cal. 527, 18 Pac. Rep. 650. The certificate must be attached to the declaration, and the paper may then be filed for record, and constitute a homestead; but, if the certificate is not made in substantial conformity to the requirements of the statute, the paper is not entitled to record, and, if filed and recorded, it will not constitute a homestead. Looking at the whole record, we conclude that Mrs. Gloster had a valid homestead upon all the land described in her declaration of 1874, and as to that land that the mortgage was void, but that the plaintiff was entitled to have his mortgage foreclosed upon the quarter section in Sierra county, which was covered by it, and not included in the homestead. The judgment and order should therefore be reversed, and the cause remanded, with directions to the court below to modify its judgment in accordance with the views above expressed.

<sup>1</sup>The section provides: "The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument, on an examination without the hearing of her husband; nor certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution."

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded, with directions to the court below to modify its judgment in accordance with the views herein expressed.

(98 Cal. 193)

WEILL v. LIGHT, Justice of the Peace.  
(No. 18,065.)

(Supreme Court of California. April 25, 1893.)

WRIT OF REVIEW.

A writ of review will not be granted until after the time has expired for taking an appeal.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Proceedings by R. Weill for writ to review a judgment rendered by Charles Light, a justice of the peace. From a judgment annulling the said judgment, defendant appeals. Reversed.

J. B. Webster and L. W. Elliott, for appellant. Loutitt, Woods & Levinsky, for respondent.

VANCLIEF, C. This is an appeal from a judgment of the superior court of San Joaquin county, annulling a judgment of a justice of the peace upon a writ of review. The action in which the judgment of the justice of the peace was rendered was brought by the History Company, a corporation, against R. Weill, to recover from the defendant therein the sum of \$86.70 for certain books alleged to have been sold to the defendant by the plaintiff, and a judgment by default was rendered by the justice of the peace for the sum demanded on the 29th day of January, 1892. The writ of review was issued by the superior court, and served on the justice of the peace, on the 16th day of February, 1892. It is claimed by counsel for respondent here that the justice's court exceeded its jurisdiction, because there was no valid service of summons on the defendant, Weill. On the other hand, appellant's counsel contend (1) that service of summons was waived by an appearance of the defendant; and (2) that defendant might have appealed from the judgment of the justice's court, as the time within which such appeal might have been taken had not expired when the writ of review was issued and served. I think this second point of appellant must be sustained, and that it is finally decisive of the case in favor of the appellant. It is too well settled to admit of doubt that the writ of review will not be granted on the petition of a party who is entitled to appeal from the order or judgment of which he complains. *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 Pac. Rep. 270, and cases there cited. See, also, *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. Rep. 366. I think the judgment should be reversed, and the superior court directed to dismiss the proceeding.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the superior court is directed to dismiss the proceeding.

(98 Cal. 179)

CITY OF FRESNO v. FRESNO CANAL & IRRIGATION CO. et al. (No. 18,034.)

(Supreme Court of California. April 24, 1893.)

IRRIGATION—CANAL THROUGH CITY—NUISANCE—ACTION TO ABATE—INCONSISTENT FINDINGS—DECREE DESTROYING PROPERTY.

1. In an action by a city against an irrigating canal company to enjoin the operation of its canal along one of plaintiff's streets, and abate it as a nuisance, the court found, *inter alia*, that said canal can be constructed below the surface of the street, and covered up so that it will not be an obstruction to the street. *Held*, that such finding is inconsistent with a finding, or conclusion of law, that "said canal, where it traverses the streets of said city, is a nuisance per se," and a judgment granting an injunction, and ordering the nuisance abated, must be reversed.

2. It appeared that the canal was constructed at great expense, more than five years before the incorporation of plaintiff, and eleven years before the suit was brought, and had ever since been used by the canal company adversely to all the world; that the proprietors of the land where the city is located induced such company to run its canal through the town, and located the latter on the assurance that the company would do so; that the supervisors were consulted at the time, and made no objections; that taxes on the canal were paid to the city, and its trustees, by ordinances and official acts, recognized its existence; that a mill of the company was erected at an expense of nearly \$100,000; that there are other expensive mills on the canal operated by its waters; that, after leaving the city, the canal distributes water for the irrigation of many farms; and that it can be constructed below the street and covered so that the surface can be restored to its former condition. *Held*, that a decree ordering the canal to be abated as a nuisance by filling it up was erroneous.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by the city of Fresno against the Fresno Canal & Irrigation Company and the Fresno Milling Company to enjoin and abate as a nuisance such irrigation company's canal, which runs along certain streets of such city, and on the banks of which such milling company has erected a mill. From a decree granting the relief prayed, and ordering the nuisance abated by filling the canal, defendants appeal. Reversed.

T. P. Ryan, for appellants. Reel B. Terry, C. C. Merriam, and Church & Cory, for respondent.

McFARLAND, J. This action was brought by the city of Fresno, in its corporate capacity, to obtain a decree abating as a nuisance a certain ditch or canal owned by the Fresno Canal & Irrigation Company, and which runs through parts of certain streets of said city. The Fresno Milling Company, which had purchased water from the ditch of the other defendant, and had built a large flouring mill on the banks of the canal, was also made a party defendant. The court declared the

canal a nuisance per se, and ordered it to be entirely abated; that is, filled up and entirely destroyed. From the judgment, and from an order denying a new trial, said defendant the Fresno Milling Company appeals.

The said canal was constructed at great expense more than five years before the incorporation of said city; the mill of the milling company was erected at an expense of nearly \$100,000; other expensive and costly mills have been erected upon the banks of the canal, and are operated by its waters; and the canal, after leaving the city, distributes water for the irrigation of many farms. There are therefore many equitable considerations in favor of defendants; and such large properties should not be thus utterly destroyed, unless such result necessarily follows from an application of the rules of law. It appears that in 1874 the land now composing the city of Fresno, and a very large body of land, consisting of many thousands of acres, adjoining it, was the property of the Contract & Finance Company, and that in said year the agents of said company visited that locality for the purpose of selecting a site for a new town or city. They consulted Mr. M. J. Church, who was the president and superintendent of the said defendant the Fresno Canal & Irrigation Company, as to a proper town site. They wanted a place to which water could be brought, saying that "a town without a stream of water was no town at all." Church informed them that the place where the city of Fresno was afterwards located could be more readily supplied with water than any other part of the territory designated, and that he would pledge himself that his company would put a stream of water through that place if they located the town there. Upon that assurance the town was shortly afterwards located at that place. Afterwards the projectors of the town, fearing that Church might fail to bring in the water, offered him inducements in the way of both money and land to bring it in. The ditch was commenced by Church's company about 1874, and was completed about 1879 or 1880, the water being brought into the town through the ditch in 1880. The board of supervisors of the county were consulted about the matter, and made no objection to the building of the ditch, although no formal action was taken by the board upon the subject. The company defendant has continuously used the ditch from 1880 to the present time. The corporation plaintiff, the city of Fresno, was not incorporated until October, 1885. This action was not commenced until December, 1891. At the time the ditch was in course of construction, the defendant was urged to build it by the persons who then owned all the property in what is now the city of Fresno; but in 1876 the owner of the property made a deed to Fresno county, "granting a perpetual right of way to public streets and alleys" of said proposed town or city. After the plaintiff was incorporated, its trustees, by ordinances and official acts regularly done, recognized the existence of said canal. The canal was assessed in

1888, and the city tax paid thereon. The court finds that "about the year 1880, before the incorporation of the city of Fresno, a canal or a ditch was built through certain streets of said city by the defendant the Fresno Canal & Irrigation Company, and has been maintained and used by said company ever since, uninterruptedly, continuously, and adversely to all the world, but without color of title." The words "without color of title" are of no significance here, because the defendant had actual, and not merely constructive, possession of the canal; and, of course, as against private persons, the said defendant would have acquired a perfect title by prescription.

It is contended, however, by respondent, that, as the streets were dedicated to the public in 1876, the appellant could acquire no right to any part thereof by adverse user; and this, of course, is the general rule. If, however, it were necessary to discuss the proposition here, it is not clear under the law that in this case an estoppel in pais cannot be invoked by appellants as against the respondent. In 2 Dillon's Municipal Corporations the author, after reviewing the subject at great length, and referring to many authorities, uses this language, which seems to be the result of such authorities: "The author cannot consent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but, upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." Section 875. And many cases are cited by the author, mainly from Illinois, Indiana, Iowa, and Ohio,—all exceptional cases,—in which the doctrine of estoppel in pais was successfully invoked as against the public; and the case at bar seems to be as safely within the rule as are many of the cases there cited. But we do not deem it necessary to determine absolutely whether or not that rule would apply to the case at bar, for we think that in this case another principle comes into play.

The court finds "that said canal is an irrigating ditch; that it flows out west of the city, and is there distributed, and supplies water for the irrigation of many farms; that within the city extensive and costly mills for the purpose of crushing grain and manufacturing flour have been erected on its banks, to be operated by its waters; that these industries would be injured should the canal be prevented from running within the city." The court also, in finding 14, finds "that said canal can be constructed below the surface of said street, and covered up in such a manner that the surface of said street can be restored to its former condition, so that it will not be an obstruction to the free use and enjoyment and travel of said street." The constitution of the state (section 1, art. 14) declares that "the use of all water now appropriated,

or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use." See, also, *People v. Stephens*, 62 Cal. 209; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264; *Fresno Co. v. Fowler Switch Canal Co.*, 68 Cal. 359, 9 Pac. Rep. 309. And the statutes of the state recognize ditches and canals as of public use, and regulate such use. For instance, section 551 of the Civil Code provides that, where they cross or are on the lines of public highways, their works "must be so laid and constructed as not to obstruct public highways." The canal of the defendants was constructed in the face of, and without objection by, the supervisors of the county or the public, and the city of Fresno, when it was incorporated, found said canal occupying parts of certain streets in the city which it then took control of. Under these circumstances, if the nuisance consists merely in the manner in which the canal is conducted and managed, it is a nuisance which can be remedied without a total destruction of the property, and the rule stated in *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. Rep. 795, should be applied; that is, the appellant should be enjoined from conducting the canal in such a manner as to make it a nuisance, but a total destruction of the property should not be decreed. This rule has been applied as against a public corporation. In *Shepard v. People*, 40 Mich. 487, the appellant was indicted for causing a public nuisance within the city of Pontiac by maintaining a milldam therein, and the trial court, in its judgment, ordered that the dam should be removed; but the appellate court reversed that part of the judgment, saying: "Property is not to be destroyed until its destruction is lawfully ascertained to be necessary in order to stop the nuisance, and then no other, and no more, is to be destroyed than is thus determined to be needful to effect that object." Many cases are cited. See, also, *People v. Albany*, 11 Wend. 539. But in the case at bar the findings do not clearly set forth what the real facts are. Finding 14, above quoted, is inconsistent with other findings, and particularly with the statement (whether considered as a finding of fact or a conclusion of law) that "said canal, where it traverses the streets of said city, is a nuisance per se;" and for this reason the judgment and order must be reversed. Judgment and order reversed, and new trial ordered.

We concur: DE HAVEN, J.; FITZGERALD, J.

(98 Cal. 184)

MAWHINNEY v. SOUTHERN INS. CO.  
(No. 14,763.)

(Supreme Court of California. April 24, 1893.)

FIRE INSURANCE POLICY—ACTION FOR LOSS OF HARVESTING MACHINE—LOCATION OF PROPERTY—EVIDENCE.

In an action on a fire insurance policy on a harvesting machine while "operating in the grain fields, and in transit from place to place in connection with harvesting, in" a cer-

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tain county, it appeared that the machine was moved, the day after the policy was issued, from the place where it had been stored since the previous harvesting season, to a blacksmith shop, to be repaired in order to fill contracts for cutting grain. While near such shop, eight days after being taken thereto, and about the day the harvesting season commenced, the machine was burned. Held, that it was not "operating in grain fields," or "in transit from place to place in connection with harvesting," at the time it was destroyed. Paterson, Garoutte, and McFarland, JJ., dissenting.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Mawhinney against the Southern Insurance Company on a fire insurance policy. From a judgment for plaintiff, defendant appeals. Reversed.

T. C. Van Ness and J. P. Meux, for appellant. Church & Cory, for respondent.

HARRISON, J. The defendant made this policy of insurance in favor of the plaintiff's assignor, by which it insured him, to an amount not exceeding \$800, for the term of three months from June 2, 1890, against loss or damage by fire to the following described property, "while located and contained as described herein, and not elsewhere, to wit: Threshing outfit in the field. \$800 on one combined harvester, complete, all while owned by assured, and known as 'Barrett's harvesting machine and outfit,' and operating in the grain fields, and in transit from place to place in connection with harvesting, in Fresno county, Cal." The harvester was destroyed by fire June 10, 1890, and in an action upon the policy the complaint alleged that its destruction occurred "while in transit from L street, in Fresno, the place where the same was at the time of said insurance, to the grain fields, for use in connection with the harvest in said Fresno county." This allegation was denied by the defendant, and was the issue upon which the cause was tried. At the close of the plaintiff's case the defendant moved for a nonsuit upon the ground that the evidence failed to sustain this allegation of the complaint. The court denied the motion, and, the defendant declining to offer any evidence, judgment was rendered in favor of the plaintiff, from which, and an order denying a new trial, the defendant has appealed.

At the date of the policy the harvester was in a building on L street, in the city of Fresno, where it had been stored since the previous season, and on the next day after the policy was issued it was taken to a blacksmith shop in the city of Fresno, about a quarter of a mile distant, for general repairs, where it remained until it was destroyed, on the night of June 10th. The plaintiff testified: "The machine had never got to the grain fields when it was burned, but was left at this shop for the purpose of repairs. I helped to take it there. It had never been taken from the shop after being carried there." Barrett, the plaintiff's assignor, to whom the policy was issued, testified that "it required about \$175 worth of repairs upon the harvester to put it in a condition to be used, and took about two weeks to repair it.

I took the machine straight from Mr. Mawhinney's place to the shop, on the other side of the railroad track, about a mile from Mr. Mawhinney's place. It had not been used at all prior to that, when carried to the shop for repairs, and there it stood until it burned. It stood about sixty or one hundred feet away from the shop, with several machines between it and the shop. None were burned, except this one. Neither was the shop burned. I had never carried it into the field, nor put it to any use, after the insurance was procured, nor used it in any way, except to take it to the shop for repairs, and had not taken it from any place with a view of harvesting at that time, and nothing had been done in the way of harvesting that season; only the repairs I have stated. I mean I had taken it to the shop for the purpose of repairs, and with a view of going into the field for harvesting as soon as it was ready, and used it for no other purpose during that season." Upon this testimony the nonsuit should have been granted. The harvester was not "operating in the grain fields," or "in transit from place to place in connection with harvesting," at the time it was destroyed. It had not been used at all in connection with harvesting during that season, and the testimony of Barrett that it required about two weeks to make such repairs as would put it in a condition to be used shows that it could not have been, at the time of the loss, in transit from place to place "in connection with harvesting." The policy purported to be on a "threshing outfit in the field," and its terms did not cover the harvester while it was at a blacksmith shop for repairs, and it cannot be said that while it was at the shop in Fresno, to which it had been taken for the purpose of putting it in repairs for the season, it was in transit "from place to place, in connection with harvesting," any more than if it had been sent to San Francisco for repairs, and had been there destroyed. An insurer is not liable except upon proof that the loss has occurred within the terms of the policy, and when making the policy he is at liberty to select the character of the risk he will assume. If the terms of this risk are distinct, and without ambiguity, the assured cannot complain if the risk assumed does not cover the loss. The locality of the property, as well as its custody, and the incidental care that, by reason of such locality and custody, the property will naturally receive, are elements which enter into a consideration of the risk to be assumed; and, if they are made a part of the conditions of the policy they must be observed by the assured, as fully as any other conditions, before the insurer can be made liable for a loss. In the present case the insurer would reasonably assume that the harvester would be under greater care and watchfulness while it was actually operating in the fields, or in transit from place to place for such purpose, than if left standing, unhoused and uncared for, in open grounds near a blacksmith shop. But, whatever may have been the motives for limiting the extent of his risk, he cannot be made lia-

ble for a loss that was not covered by the risk assumed in the policy.

The judgment and order are reversed.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.

PATERSON, J. I dissent. The plaintiff testified that the harvesting season in Fresno county commenced about the 10th of June; that the machine was sent to the blacksmith for repairs, which were nearly completed when it was burned. I. N. Barrett testified that the object of taking the machine to the blacksmith shop was to repair it for work in the field; that a contract had been made for cutting grain, and that he had made arrangements to take the machine out to the field on the 11th day of June, or as soon as the necessary repairs were completed; that one contract had been made for harvesting before the machine left plaintiff's place, and another contract after it reached the shop, but no work had been done with it that season. Upon this showing I think the motion for a nonsuit was properly denied. The taking of the machine from the place where it was housed to the shop, and the work done upon it there, were acts done "in connection with harvesting,"—as much so as if the machine had already been in operation, and had been returned to the shop for repairs. The plaintiff, when he took it out for repairs, intended, not to return it to the place where it had been stored, but to continue on to the field of operations as soon as the necessary repairs were completed. If the plaintiff had actually entered the field he was to harvest, although he knew that the machine needed repair, and had returned to the blacksmith shop, there would be no question whatever of his right to recover herein. The law did not require of him such a vain thing. Contracts had been made for the harvesting of crops, and the machine was "in transit from place to place, in connection with harvesting," within the meaning of that language, as used in the policy, when it was destroyed by fire. It is evident that by the terms of the provision of the policy quoted the parties intended that, so long as the machine remained in the house or shed on plaintiff's place where it had been stored for the winter, the company should not be liable, but that as soon as it was removed therefrom, and started out to operate in the grain fields, the company should become liable. A machine is not so likely to be burned when in the hands of a crew of threshers as when stored in a hay barn, nor it is so likely to be burned when on the road, or when standing in front of a blacksmith shop for repairs. When plaintiff took the machine from its storehouse, his intention was to commence operations in the grain fields he had promised to harvest. The stop made at the shop for repairs was merely incidental to the main object, viz. actual work in the harvest field towards which they were headed.

We concur: GAROUTTE, J.; McFARLAND, J.



## TURNER v. COFFMAN. (No. 19,258.)

(Supreme Court of California. April 7, 1898.)

In bank.

From a judgment in favor of Turner, Coffman appeals. Motion to dismiss appeal. Denied.

Blackstock &amp; Ewing, for respondent.

PER CURIAM. Motion to dismiss appeal for failure to file transcript of the record within the time prescribed by section 1, of rule 2.

The clerk's certificate shows that a statement of the case was settled and filed on February 10th. This gave the appellant all of March 22d to file the record in compliance with the rule. The notice of this motion was prematurely served on March 21st, which is also the date of the clerk's certificate. Motion denied.

(50 Kan. 591)

## RILEY et al. v. STEIN et al.

(Supreme Court of Kansas. Feb. 11, 1893.)

## EASEMENT—HOW CREATED.

The owners of certain town lots agreed to so arrange and divide the same as that they would face on Fourth instead of Quincy street, in the city of Topeka, as originally platted, and for the accommodation of purchasers set apart a strip of ground 12 feet wide on the north side of one of the lots, to be at some future time used as an alley. They afterwards conveyed to a purchaser, with the usual appurtenances, 25 feet off of the west end of said lots, reserving a strip of ground 12 feet wide across the north end of the tract reserved for use as a private alley for all of said lots, and also a right of way over and across said 12-foot strip; and also deeded to other parties portions of said lots, describing the tracts so conveyed as running to an alley or along an alley. Held that, while the grantors reserved the ownership in the strip designated as a private alley, the several grantees acquired an easement over the strip of land referred to as against the grantors.

(Syllabus by Green, C.)

Commissioners' decision. Error from district court, Shawnee county; John Guthrie, Judge.

Action by Elsie R. Riley and others against Anna Stein and another to enjoin defendants from obstructing a private alley. There was judgment for defendants, and plaintiffs bring error. Reversed.

J. C. Clark and Eugene Wolfe, for plaintiffs in error. S. B. Isenhardt and H. C. Root, for defendants in error.

GREEN, C. This was an action brought by the plaintiffs in error to perpetually enjoin Anna and William C. Stein from closing up or obstructing a certain tract of land which was claimed to be a private alley. On the 9th day of June, 1882, Anna Stein owned the fee in lots 107, 105, and the south half of 103, and Anna and William C. Stein, her husband, were the owners of the north half of lot 103, and all of lots 101 and 99; all situated on Quincy street, in the city of Topeka, in Shawnee county. It seems that the owners of said lots arranged to divide them so they should face on Fourth street instead of Quincy, as originally surveyed and platted, and that for the accommodation of the purchasers who might purchase parcels of this land with frontage on Fourth street there should be set apart a strip of ground 12 feet wide on the north side of lot 99,

on Quincy street, to be at some future time used by the owners of the several lots or parcels of land to be conveyed by them on Fourth street for a private alley; and Stein and wife, it seems, intended and designed to so reserve the 12 feet of land for this purpose before they sold any of the land. On June 9, 1882, Anna and William C. Stein, through an agent of theirs, sold and deeded to James H. Johnson the following described parcel of land, together with all of the appurtenances, to wit: "The west 25 feet of lots numbered 99, 101, 103, 105, and 107, on Quincy street, in the city of Topeka, except a strip twelve feet wide across the north end of said tract, reserved for use as a private alley for all of said lots; also a right of way over and across said twelve-foot strip." These five lots, being located on the northwest corner of Quincy and Fourth streets, extended 125 feet on Quincy street and 150 feet back on Fourth street, to an alley running north and south in the block. On March 1, 1884, Stein and wife deeded to George F. Riley, the deceased husband of the plaintiff in error, the following described parcel of said lots fronting on Fourth street, to wit: "Beginning at a point forty-five feet west of the southeast corner of lot No. 107 on Quincy street, in the city of Topeka, Kansas, and running thence west along Fourth avenue in said city forty feet; thence north, parallel to said Quincy street, 113 feet, to an alley; thence east forty feet; thence south 113 feet, to the place of beginning;" the said Steins then and there were reserving a strip of ground 12 feet wide off the north side of lot 99 for a private alley. On September 6, 1884, the Steins conveyed of said lots to W. H. Riley, by warranty deed, the following described parcel, fronting on Fourth street, with all of the appurtenances, to wit: "Commencing at a point in the south line and west of the southeast corner of lot 107, Quincy street, city of Topeka, eighty-five feet; thence northerly and parallel to Quincy street 113 feet, across lots 107, 105, 103, 101, and 99, to an alley; thence westerly twenty-five feet along south side of said alley; thence southerly 113 feet parallel to Quincy street; thence easterly twenty feet, to the place of beginning." On the same day they conveyed to Hannah C. Riley the following described tract: "Commencing at a point in the south line and west of the southeast corner of lot 107, Quincy street, city of Topeka, 105 feet; thence northerly and parallel to Quincy street, across lots 107, 105, 103, 101, and 99, Quincy street, 113 feet, to an alley; thence westerly along the south side of said alley twenty feet; thence southerly and parallel to Quincy street 113 feet, to Fourth street; thence easterly along Fourth street twenty feet, to the place of beginning." The court found that Stein and wife, "at the time of the conveyances to W. H. Riley and Hannah C. Riley, represented to them that the twelve-foot strip on the north side of lot 99 on Quincy street was a private alley from Quincy street west 150 feet to the alley on the west side of said lots, to be used by the purchasers of said lots." By these several conveyances the Steins deed-

ed all of lots 99, 101, 103, 105, and 107, except 45 feet off the east end thereof, which they reserved to themselves, and except the 12-foot strip off the north side of lot 99, which has been referred to in all of the conveyances as an alley. Upon the above state of facts the court below found for the defendants. The plaintiffs in error and one of the defendants below, James H. Johnson, ask that the judgment of the district court be reversed.

It is contended that by these several conveyances and the recitals therein the grantors, while they retained the ownership of the strip of land designated as a private alley, conveyed to the several purchasers the easement or service of said strip as a way to and from the lots sold. The question to be determined in this case is, have William C. Stein and wife, by the execution of these several deeds and other acts, given to the grantees an easement over the ground now claimed as a private alley? The exception and reservation in the Johnson deed are in the following language: "Except a strip twelve feet wide across the north end of said tract, reserved for use as private alley for all of said lots; also a right of way over and across said twelve-foot strip." The other deeds contained recitals as to the alley. Did the grantors convey a right to an alley way to the grantees by these several deeds? In the case of *Lewis v. Beattie*, 105 Mass. 411, which was an action for the obstruction of the plaintiff's easement in a way leading from a highway, and the deed to the plaintiff described the land as running to and bounded on a way 40 feet wide, the grantors were the owners of the fee covered by the way mentioned in the conveyance. The court said: "Standing by itself, this deed would carry the title to the middle of the strip described as a way, with an easement reserved to the grantors over the half conveyed, as well as to whatever rights of way existed in others at the time." *Fisher v. Smith*, 9 Gray, 441; *Winslow v. King*, 14 Gray, 321. The rule has been stated "that when a grantor conveys land bounded on a street or way over his other land, he and those claiming under him are estopped to deny the existence of such street or way." *Insurance Co. v. Cousens*, 127 Mass. 261; *Tobey v. Taunton*, 119 Mass. 404; *Lewis v. Beattie*, supra; *Howe v. Alger*, 86 Mass. 211. In *O'Linda v. Lothrop*, 21 Pick. 292, "where the owner of a narrow strip of land, and also of land adjoining it on the north and on the south, conveyed to the same grantee two parcels of land, one of which was described as bounded south on a 'street,' and the other as bounded north on an 'intended street,' the strip of land first mentioned being referred to by these words, it was held that the fee in such strip did not pass by the deed, but that the grantee acquired a right of way thereon by implication, or on the principle of estoppel." In the above case there was nothing in the deed of a right of way over the street; but the court held that the grantor was estopped to deny that it was a street or way to the extent of the land referred to, holding that it was an implied covenant on his part that there

was such a street. In *Parker v. Smith*, 17 Mass. 413, the principal question was the construction of a deed in which a piece of land was described as being bounded southwardly and westwardly on a way or street. The court, through Chief Justice Parker, held that by this description the grantee and his heirs were estopped from denying that there was a street or way to the extent of the land on those two sides. It was said: "We consider this to be not merely a description, but an implied covenant that there are such streets. It probably entered much into the consideration of the purchase that the lot fronted upon two ways which would always be kept open, and, indeed, could never be shut without a right to damages in the grantee or his assigns." As sustaining this doctrine, see, also, *Sutherland v. Jackson*, 32 Me. 80; *Lindsay v. Jones*, (Nev.) 25 Pac. Rep. 297; *Story v. Railroad Co.*, 90 N. Y. 163; *Washb. Easem.* p. 266; *Bigelow, Estop.* 370. It will be observed by a reference to the clause in the deed to Johnson that the clause as to the reservation of the private alley is more favorable to the grantees than in most, if not all, of the cited cases. It is recommended that the judgment of the district court be reversed, and that this cause be remanded to the court below, with the instruction to enter judgment upon the findings of fact in favor of the plaintiff and against the defendants for a perpetual injunction enjoining defendants from obstructing the alley or strip of ground in controversy.

PER CURIAM. It is so ordered; all the justices concurring.

(50 Kan. 155)

In re GUNN.

(Supreme Court of Kansas. April 8, 1893.)

For majority opinion, see 32 Pac. Rep. 470.

ALLEN, J. (dissenting.) At the time the decision in this case was announced I expressed orally my dissent from the conclusions reached by the majority of the court, and stated some of the reasons which then occurred to me why I could not concur in the conclusions reached by my brethren. I now proceed in a more deliberate manner to consider the very grave questions involved herein.

There is no difference of opinion among us as to the power of the court to release from restraint any person unlawfully restrained of his liberty, no matter what the pretense of authority may be. The principal divergence of opinion is as to the lawful scope of our inquiry, and as to the rules by which this court must be governed in inquiries affecting the integrity of the legislative department of the state government. It is conceded that if George L. Douglass was the speaker of the house of representatives at the time the warrant under which the petitioner was arrested was issued, and in issuing such warrant acted under the authority of the house of representatives of this state, the petitioner

is lawfully in the custody of Clevinger, and should not be discharged under the proceedings in this case. That the court has authority to inquire into the legality of the arrest, and therefore to declare whether or not George L. Douglass is speaker of the house of representatives, there is no question; but the main controversy centers on the question whether this court is bound to follow the action of the political departments of the state government, or whether it may institute an inquiry of its own, and may decide for itself whether George L. Douglass or J. M. Dunsmore is speaker of the house of representatives. I do not regard it as accurate to say that this is a question arising between two contending bodies, each claiming to be the house of representatives, because each of these two bodies concedes the right of most of the individual members of the other body to seats in the legislature, and each of them retains on its own roll of members of the house most of the names of those composing the other body. The question presented is as to which of these two men is speaker of the house. It is conceded that but one man can hold the office of speaker at a given time. Two men claim to be both de jure and de facto speaker. While this court is lawfully called upon to decide whether George L. Douglass is in fact the speaker, the limits of its inquiry and the rules by which it must be governed in determining that question are the principal subjects of contention. It was conceded on the argument that a direct proceeding could not be maintained either by one of these two contending bodies against the other to determine its right to exercise the functions of the house of representatives, or by one of these men, who each claim to be the speaker of the house, for the purpose of determining their respective rights to the office of speaker, although this court has undoubted original jurisdiction in action of quo warranto. Why does this distinction exist? This court, at its present session, has been called on to determine the rights of two persons, each of whom claims to be the county commissioner of a remote county, and has heard the evidence and arguments in the case. Why may it not entertain a similar action for the purpose of determining the respective rights of these two men who claim to be the speaker of the house of representatives? Can any other answer be given than that the rights of Douglass and Dunsmore are determined elsewhere, and that the questions involved in the inquiry into their respective rights are questions which the constitution and laws have for good and sufficient reasons withdrawn from the consideration of this court? It is an anomaly in jurisprudence to hold that in an action where the right of a party is collaterally drawn in question the court may enter on a line of inquiry which it would be prohibited from pursuing in a direct proceeding in which the parties interested were participants, and were afforded ample opportunity to present their claims and protect their rights.

In order to arrive at the reasons which have influenced the framers of our consti-

tution to withdraw inquiries of this kind from the consideration of this court, and to place the determination of questions similar to these in other hands, it becomes necessary to examine the fundamental law, the general framework of our state government, and also briefly to recur to the leading points in the development of free government in English-speaking countries, and the division of powers among the several co-ordinate departments which have been found so essential to the preservation of the rights and liberties of the people. Though the constitution of the United States and the constitutions of the several states of the Union are the works of the people of this country, they are yet modeled largely after the institutions of England, the common law of which country is still the law of this and most other states of the Union, except so far as it has been modified by our constitution, statutes, and the peculiar conditions and wants of the people of the state. Paragraph 7281 of the General Statutes provides: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the General Statutes of this state." In an autocratic government, the executive, legislative, and judicial powers are all vested in the same person. In England the king originally decided cases in person, and for many centuries the court records were made to recite the presence of the king himself in person, long after the king had ceased to have anything to do with proceedings in the courts, and to this day the judges are theoretically appointed by the crown, though the recommendations of the ministry are now accepted by the queen. The legislative branch of the government in England has been for many centuries made up of a house of lords, who were hereditary legislators, and the house of commons, who were chosen by the people under a more or less restricted right of suffrage. The judges all derived their appointments and their powers from and as representatives of the crown; but parliament gradually forced upon the king a recognition of its rights, and has gradually extended its powers to such an extent that it is now the ruling power in England. At an early period the sovereign insisted on the right to determine who should be summoned to parliament, but the house resisted such interference, and succeeded in asserting and maintaining its right to be the sole and exclusive judge of the election and qualification of its own members. It would neither submit to any interference by the crown nor by the judges, who were the creatures of the crown. Though the reasons for this rule may not appear to be as strong in a state where all branches of our government are elective, still the framers of the constitution have seen fit to embody in the fundamental law a provision which it required long years of conflict for the British parliament to establish as its right. Section 1, art. 2, of the constitution, provides: "The legislative power of this state shall be vested in a house of representatives and senate." Section 3 reads: "A majority of each

house shall constitute a quorum. Each house shall establish its own rules, and shall be judge of the elections, returns, and qualifications of its own members." The legislatures in the several states of the Union have powers corresponding generally to the powers of the British parliament. They are the instruments through which the people express their supreme will in making the laws, subject, however, to the veto power vested in the executive, and the limitations of the constitution. Section 1, art. 1, provides: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction, who shall be chosen by the electors of the state at the time and place of voting for members of the legislature, and shall hold their offices for the term of two years from the second Monday of January next after their election, and until their successors are elected and qualified." Section 3 provides: "The supreme executive power of the state shall be vested in a governor, who shall see that the laws are faithfully executed." The executive and legislative constitute what are commonly denominated the "political departments" of the state governments. It is they, and they alone, who, as representatives of the people, have the power to enact, change, and amend the laws in any manner they may see fit, provided they do not transcend the limits of their powers as fixed by the constitution. They may create and abolish courts; they may prescribe rules and regulations by which courts shall be governed, as well as establish the laws fixing the rights of private individuals, and prescribe punishment for infractions of the Code which they establish. What, then, is the proper place of the judiciary, and what are the limits of their functions? They are defined by article 3, from which we quote. Section 1: "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law; and all courts of record shall have a seal, to be used in the authentication of all process." Section 2: "The supreme court shall consist of one chief justice and two associate justices, a majority of whom shall constitute a quorum, who shall be elected by a majority of the electors, and whose term of office after the first shall be six years. At the first election the chief justice shall be chosen for six years, one associate justice for four years, and one for two years." Section 3: "The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus, and such appellate jurisdiction as may be provided by law. It shall hold one term each year at the seat of government, and such other terms at such places as may be provided by law; and its jurisdiction shall be coextensive with the state." It will be observed that the constitution gives to the supreme court original jurisdiction in only three classes of cases, and for all other jurisdiction it must look to the lawmaking power. It may have much or little, ac-

cording as the legislature shall determine. It has jurisdiction in this case by virtue of the section of the constitution last quoted. The district courts are by statute given general jurisdiction of all matters civil and criminal, with some slight exceptions. By section 8, art. 3, of the constitution, it is provided that "the probate court in each county shall have jurisdiction in cases of habeas corpus." We thus see that this court has precisely the same jurisdiction in an action of habeas corpus arising in this county that the district and probate courts of this county have. This court and the probate court, however, derive jurisdiction from the constitution, while the district court receives its power at the hands of the legislature. No provision of the constitution or the laws made thereunder prescribes any other or different rules for the government of this court in an action of this kind than are prescribed for the government of a probate court. The only difference in the powers of each is that the probate court is limited to one county, while the supreme court has jurisdiction coextensive with the state.

This court has seen fit to take testimony as to what transpired on the 10th day of January, when the legislature convened. It has taken testimony as to what persons were elected representatives. It has received in evidence a list from the office of the secretary of state, for the purpose of showing what persons were elected to seats in the house. It has received and considered the oaths of office of various persons claiming the right to be members of the house. It has heard witnesses testify as to what transpired in representative hall at the time George L. Douglass and J. M. Dunsmore claim respectively to have been elected speaker. It has also received, not from the office of the secretary of state, but from the hands of Frank L. Brown, who claims to be clerk of the house of representatives, certain printed documents, which he claims are the journals of the house, though not printed by the state printer; and upon these as evidence this court proceeds to determine who is the speaker of the house. If this court may do so, then the district court or probate judge of this county may also sit in judgment in the same manner in a similar case, and may proceed with the same inquiry, and along the same lines. More than this, if the question as to what constitutes the house of representatives, and as to who is the presiding officer thereof, is the subject of judicial inquiry in collateral proceedings, the humblest judicial officer in the state would seem to have the right, whenever any act of the legislature is challenged as invalid because such legislature is not composed of persons duly authorized to act as legislators, to proceed with just such an inquiry as has been carried on in this case. To sanction such practices is to overturn our system of government, and to place the law-making power, which has the right, and has from time immemorial exercised the right, to prescribe rules and regulations for the government of the judiciary, under the control and dominion of the courts; and in this case this court undertakes to

prescribe for one branch of the legislature a rule which shall govern its action, in direct and pointed contravention of that provision of the constitution which says "each house shall establish its own rules." Whence does this court get the right or the authority to say what rules shall govern the house of representatives in its organization? No such power was ever possessed by the courts of England; no such power has ever been exercised by the courts of any English-speaking country. Even the supreme lawmaking power itself—both branches of the legislature—and the executive combined would be powerless in the face of the provisions of the constitution to prescribe any rule which would be binding on any future house of representatives or senate with reference to its own modes of organization or procedure.

It is not the province of this court to decide every question. Only judicial questions are proper subjects of its cognizance. Every department of the government, and every officer in every department of the government, in the transaction of his duties, must decide questions. Questions of expediency, of public policy, of changes and modifications of the criminal law, of rules governing private rights, of the power and jurisdiction of the courts, of their modes of procedure, are questions to be decided by the lawmaking power. Questions of expediency in the execution of the laws and in the performance of the functions of the executive department are to be determined by the governor and the other executive officers charged with those duties. Generally speaking, it is the province of the court to declare what the law is, and to apply it to the determination of questions of private right. Generally speaking, the courts have nothing to do with matters of policy, or with the determination of questions as to the expression of the popular will. In order to determine what are judicial questions and what are political questions, it is necessary to review the practices of the departments of the government and the decisions of the courts.

The early case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, was an action brought on articles of agreement which had been entered into between William Penn and Lord Baltimore in reference to establishing the boundaries to their respective provinces in America. The bill was for the specific performance and execution of the articles. It was objected that the court had no jurisdiction, because the suit related to the boundaries of political provinces, and that the jurisdiction was in the king and council, and not in the court. Lord Chancellor Hardwicke, while he entertained jurisdiction, and decided the case, did so upon the ground that the action arose on a contract between the parties as individuals, and in the opinion uses this language: "It is certain that the original jurisdiction in cases of this kind relating to boundaries between provinces and dominion and proprietary government is in the king and council. \* \* \* This court therefore has no original jurisdiction on the direct question of the

original right of the boundaries, but this bill does not stand in need of that; it is founded on articles in England under seal for mutual consideration, which gives jurisdiction to the king's courts, both law and equity, of the subject-matter." The case of *Nabob of Carnatic v. East India Co.*, 1 Ves. Jr. 370, and 2 Ves. Jr. 56, was an action brought for a discovery and accounting by the company for certain revenues derived from provinces over which the nabob had held sway, but from which, under a treaty with the company, they had collected the revenue. It was objected that the nabob was a sovereign prince of a foreign country, and that under the authority of the act of parliament the company had been given power to make peace or war with the natives of India, not Christians, as should be most for their advantage; that the transactions between them were between sovereign powers, and were of a political nature, which the court had no jurisdiction to determine. After elaborate argument the court sustained this objection, and dismissed the bill; Lord Commissioner Eyre saying "It is a case of mutual treaty between persons acting in that instance as states, independent of each other; and the circumstance that the East India Company are mere subjects with relation to this country has nothing to do with that." The case upon which the court proceeds is introduced by the answer, which has had added a great number of particulars to the case by introducing the other treaty, which explains the first, and it was not merchantable in its nature, but political. In the case of *Foster v. Nelson*, 2 Pet. 306, the question as to the boundaries of a tract of land ceded by Spain to France by the treaty of St. Ildefonso was in question. In delivering the opinion of the court, Chief Justice Marshall used the following language: "In a controversy between two nations concerning national boundaries it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself its own rights, and, if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, but its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established." In *Williams v. Insurance Co.*, 13 Pet. 420, Mr. Justice McLean, delivering the opinion of the court, says: "And can there be any doubt that when the executive branch of the government which is charged with her foreign relations shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional

functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the nation."

The leading case in this country on the main point in controversy is that of *Luther v. Borden*, reported in 7 How. 1. That case grew out of the Dorr rebellion in Rhode Island. It was a suit brought by Martin Luther, a citizen of Massachusetts, against the defendants, for damages occasioned by trespasses alleged to have been committed by the defendants in Rhode Island. The defendants justified their acts, claiming that they were done under the lawful orders of an officer of the militia, in whose company they were enrolled. The state of Rhode Island did not adopt a constitution after the Revolutionary War, as most of the colonies did, but continued under the old charter government. In 1841 an attempt was made to hold an election, and form a new government. A convention was called, constitution framed, and election held for its ratification; state officers were elected, and an attempt was made to install the new government. The old charter government refused to recognize these proceedings, and refused to recognize the new officers. The militia were called out, and a period of great excitement followed. On the trial of this action the defendants sought to prove the establishment of the new government, with Dorr at its head. Testimony tending to prove these facts was rejected by the court, and the principal matter considered by the supreme court of the United States was as to whether the court could take testimony on that question. Two governments, two legislatures, and two governors were claiming the right to act at the same time. The president of the United States, however, recognized the old charter government. The opinion in the case, delivered by Chief Justice Taney, is directly in point in this case as bearing on the right of the court to enter into the consideration of a political question on which the executive department has acted. I quote from his language: "Certainly the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the state courts. In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the state, and the judicial power has followed its decision. In Rhode Island the question has been directly decided. Prosecutions were there instituted against some of the persons who have been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defense similar to the testimony offered in the circuit court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had,

therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it. But the courts uniformly held that the inquiry proposed to be made belonged to the political power, and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made the judicial department would be bound to take notice of it as the paramount law of the state, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the state during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. This doctrine is clearly and forcibly stated in the opinion of the supreme court of the state in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority. Indeed, we do not see how the question could be tried and judicially decided in a state court." "The fourth section of the fourth article of the constitution of the United States provides that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion, and, on the application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence. Under this article of the constitution it rests with congress to decide what government is the established one in a state; for, as the United States guaranties to each state a republican government, congress must necessarily decide what government is established in the state before it can determine whether it is republican or not; and, when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed as well as its republican character, is recognized by the proper constitutional authority, and its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and, as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

In this case Mr. Justice Woodbury dissented, but not on the ground of any disagreement with the majority of the court on this particular question. On the contrary, he takes occasion to expressly concur in that particular. He says: "I concur with the rest of the court in the opinion that the other leading question—the validity of the old charter at that time—is not within our constitutional jurisdic-

tion. These two inquiries seem to cover the whole debatable ground, and I refrain to give an opinion on the last question, which is merely political, under a conviction that, as a judge, I possess no right to do it, and not to avoid or conceal any views entertained by me concerning them; as mine, before sitting on this bench, and as a citizen, were frequently and publicly avowed. It must be very obvious, on a little reflection, that the last is a mere political question. Indeed, large portions of the points subordinate to it, on this record, which have been so ably discussed at the bar, are of a like character, rather than being judicial in their nature and cognizance; for they extend to the power of the people, independent of the legislature to make constitutions to the right of suffrage among different classes of them in doing this, to the authority of naked majorities, and other kindred questions, of such high political interest as during a few years to have agitated much of the Union no less than Rhode Island. But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these things belong to the people and their political representatives, either in the state or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination, or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right; there being so different tastes as well as opinions in politics, and especially in forming constitutions some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws given to them by others, and not provided by themselves. And those are no more Locke than an Abbe Sleyes, but the people. Judges, for constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation. Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges, would be that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the people to make constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when constitutions and laws are made and put in force by others, then the courts, as empowered by the state or the Union, commence their functions, and may decide on the rights which conflicting parties can legally set up under them, rather than

about their formation itself. Our power begins after their ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them. We speak what is the law,—*jus dicere*; we speak or construe what is the constitution, after both are made; but we make or revise or control neither. The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules. They are, *per se*, questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights,—not what is *meum* and *tuum*,—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russell for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and, if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by, nor frequently amenable to, them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves, and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible, and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times. \* \* \* The subordinate questions which also arise here in connection with the others,—such as whether all shall vote in forming or amending those constitutions who are capable and accustomed to transact business in social and civil life, and not others; and whether, in great exigencies of oppression by the legislature itself, and refusal by it to give relief, the people may not take the subject into their own hands, independent of the legislature; and whether a simple plurality in number on such an occasion, or a majority of all, or a larger proportion, like two thirds or three fourths, shall be deemed necessary and proper for a change; and whether, if peacefully completed, violence can afterwards be legally used against them by the old government, if that is still in possession of the public property and public records; whether what are published and acted on as the laws and constitution of a state were made by persons duly chosen or not, were enrolled and read according to certain parliamen-



tary rules or not, were in truth voted for by a majority or two thirds,—these and several other questions equally debatable and difficult in their solution are in some aspects a shade less political. But they are still political. They are too near all the great fundamental principles in government, and are too momentous, ever to have been intrusted by our jealous fathers to a body of men like judges, holding office for life, independent in salary, and not elected by the people themselves."

In the case of *Georgia v. Stanton*, 6 Wall. 50, the supreme court of the United States again affirmed the same doctrine as laid down in the *Borden Case*, the syllabus in which case reads as follows: "(1) A bill in equity, filed by one of the United States to enjoin the secretary of war and other officers who represent the executive authority of the United States from carrying into execution certain acts of congress, on the ground that such execution would annul and totally abolish the existing state government of the state, and establish another and different one in its place,—in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would, be maintained,—calls for a judgment upon a political question, and will therefore not be entertained by this court. (2) This character of the bill is not changed by the fact that, in setting forth the political rights sought to be protected, the bill avers that the state has real and personal property, (as, for example, the public buildings, etc.,) of the enjoyment of which, by the destruction of its corporate existence, the state will be deprived; such averment not being the substantive ground of the relief sought." In this case Mr. Justice Nelson, in delivering the opinion of the court, said: "The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country that we need do no more than refer to some of the authorities on the subject. They are all in one direction." And again: "That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character, will hardly be denied; for the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill in a judicial form for the judgment of the court." And again: "Having arrived at the conclusion that this court, for reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants."

In the case of *Jones v. U. S.*, 137 U. S. 212, 11 Sup. Ct. Rep. 80, Mr. Justice Gray, speaking for the supreme court, said:

"Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively blinds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Gelston v. Hoyt*, 3 Wheat. 246, 324; *U. S. v. Palmer*, Id. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Keene v. McDonough*, 8 Pet. 308; *Garcia v. Lee*, 12 Pet. 511, 520; *Williams v. Insurance Co.*, 13 Pet. 415; *U. S. v. Yorba*, 1 Wall. 412, 423; *U. S. v. Lynde*, 11 Wall. 632, 638. It is equally well settled in England. *The Pelican*, Edw. Adm. Append. 'D'; *Taylor v. Barclay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, 221, 223; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. Div. 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. Div. 348, 356, 359."

So late as October, 1891, the same high court, in *Re Cooper*, 12 Sup. Ct. Rep. 453, which grew out of the controversy between the United States and Great Britain over their respective rights to the waters of Behring sea, reaffirms the doctrine laid down in the cases cited. The case grew out of the capture of a British sealer in Behring sea, 59 miles from land. The attorney general of Canada, with the knowledge and approval of the imperial government of Great Britain, requested the aid of the court for the claimant, a British subject, and sought to submit the controversy to the supreme court of the United States; but it appeared that the vessel had been taken under the orders of the executive department, and the court declined to take jurisdiction, and refused to interfere with the action of the political department. Chief Justice Fuller, after commenting on the treaty under which Alaska was acquired, and the act of congress of March 2, 1889, says: "If this be so, the application calls upon the court, while negotiations are pending, to decide whether the government is right or wrong, and to review the actions of the political departments upon the question, contrary to the settled law in that regard;" and cites *Foster v. Neilson*, 2 Pet. 253; *Williams v. Insurance Co.*, 3 Sum. 270, 13 Pet. 415; *Luther v. Borden*, 7 How. 1; *Georgia v. Stanton*, 6 Wall. 50; *Jones v. U. S.*, 137 U. S. 202, 11 Sup. Ct. Rep. 80; *Nahob of Carnatic v. East India Co.*, 1 Ves. Jr. 371, 2 Ves. Jr. 56; *Barclay v. Russell*, 3 Ves. 424; *Penn v. Lord Baltimore*, 1 Ves. Sr. 444,—and proceeds in this case: "Her Britannic majesty's attorney general of Canada has presented, with the knowledge and approval of the imperial government of Great Britain, a suggestion on behalf of the claimant. \* \* \* We are not insensible of the courtesy implied in the willingness thus manifested that this court should proceed to the decision on the main question argued for the petitioner, nor do we permit ourselves to doubt that under such circumstances the decision would receive all the consideration that the utmost good faith would require, but it is very clear that, presented as a political question

merely, it would not fall within our province to determine it."

In *Griffin's Case*, Chase, 412, Chief Justice Chase said: "When the functionaries of the state government existing in Virginia at the commencement of the late Civil War took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a state government for the state of Virginia which could be recognized as such by the national government. Their example of hostility to the Union, however, was not followed throughout the state. In many counties the local authorities and majority of the people adhered to the national government, and representatives from these counties soon after assembled in convention at Wheeling, and organized a government for the state. This government was recognized as the lawful government of Virginia by the executive and legislative departments of the national government, and this recognition was conclusive upon the judicial department."

The case of *U. S. v. Ballin*, 144 U. S. 1, 12 Sup. Ct. Rep. 507, which holds the Reed rule, adopted by the national house of representatives, to be valid, is entirely in harmony with the cases cited, so far as it affects this particular question.

Let us now consider the views of the great text writers who have expounded the provisions of the constitution, and the decisions of the courts of last resort of the several states; and in doing so let us steadily keep in mind the fact that a controversy exists as to the organization of one of the political departments of the state, and that the question that we are to determine now is, upon whom rests the responsibility of deciding which is the legal organization? and whether that question is a judicial one, or a political one, is to be determined by the other political departments. Judge Story, in his work on the Constitution, in section 374, says: "In order to clear the question of all minor points which might embarrass us in the discussion, it is necessary to suggest a few preliminary remarks. The constitution contemplating the grant of limited powers, and distributing them among various functionaries, and the state governments, with their functionaries, being clothed with limited powers, subordinate to those granted to the general government, whenever any question arises as to the exercise of any power by any of these functionaries under the state or federal government it is of necessity that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such power. It may arise in the course of the discharge of the functions of any one or of all of the great departments of government,—the executive, the legislative, and the judicial. The officers of each of these departments are equally bound by their oaths of office to support the constitution of the United States, and are therefore conscientiously bound to abstain from all acts which are inconsistent with it. Whenever, therefore, they are required to act in a case not hitherto settled by any proper authority, these functionaries must, in the first

instance, decide, each for himself, whether, consistently with the constitution, the act can be done. If, for instance, the president is required to do any act, he is not only authorized, but required, to decide for himself whether, consistently with his constitutional duties, he can do the act. So, if a proposition be before congress, every member of the legislative body is bound to examine and decide for himself whether the bill or resolution is within the constitutional reach of the legislative powers confided to congress. And in many cases the decisions of the executive and legislative departments, thus made, become final and conclusive, being from their very nature and character incapable of revision. Thus, in measures exclusively of a political, legislative, or executive character, it is plain that, as the supreme authority as to these questions belongs to the legislative and executive departments, they cannot be re-examined elsewhere." In a note to this section Mr. Jefferson is quoted as saying: "My construction is that each department of the government is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the laws submitted to its action, and especially when it is to act ultimately and without appeal."

President Lincoln, in his inaugural address, said: "I do not forget the position assumed by some, that constitutional questions are to be decided by the supreme court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the supreme court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

President Jackson, in 1832, in his veto message on the act for a recharter of the Bank of the United States, said: "If the opinion of the supreme court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government. The congress, the executive, and the court must, each for itself, be guided by its own opinion of the constitution. Each public officer who takes an oath to support the constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the house of representatives, of the senate, and of the president, to decide upon the constitutionality

of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over congress than the opinion of congress has over the judges; and on that point the president is independent of both. The authority of the supreme court must not, therefore, be permitted to control the congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

With the rulings of the supreme court of the United States on this question all of the state courts that have been called on to decide similar questions concur. The supreme court of the state of Pennsylvania, in the case of *Kerr v. Trego*, 47 Pa. St. 292, which was brought to determine which of two contending bodies of men constituted the common council of the city of Philadelphia, while entertaining jurisdiction of that case, takes occasion to say: "In all cases of this kind—at least in all bodies that are under law—the law is that, where there has been an authorized election for the office in controversy, the certificate of election which is sanctioned by law or usage is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law. This is not now disputed. No doubt this gives great power to dishonest election officers, but we know no remedy for this but the choice of honest men. When party fealty is a higher qualification than honesty or competency, we must expect fraud and force to rule; and a man must be an Ajax or a Ulysses to be qualified for office. On the division of a body that ought to be a unit, the test of which represents the legitimate, social succession is, which of them has maintained the regular forms of organization according to the laws and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them? This is the uniform rule in such cases. It is always applied in the case of church divisions, and was so applied by us three times last year in the church cases already alluded to. The courts can never apply it to divisions in the supreme legislature, because that body is subject to no judicial authority, and cannot be."

Judge Cooley, in his work on Constitutional Limitations, beginning on page 50, says: "We have already seen that we are to expect in every constitution an apportionment of the powers of government. We shall also find certain duties imposed upon the several departments, as well as upon specified officers in each, and we shall likewise discover that the constitution has sought to hedge about their action in various ways, with a view to the protection of individual rights and the proper separation of duties. And whenever any one is called upon to perform any constitutional duty, or to do any act in respect to which it can be supposed that the constitution has spoken, it is obvious that a question of construction may at

once arise, upon which some one must decide before the duty is performed or the act done. From the very nature of the case, this decision must commonly be made by the person, body, or department upon whom the duty is imposed, or from whom the act is required." Then, again, on page 51: "In these and the like cases our constitutions have provided no tribunal for the specific duty of solving in advance the questions which arise. In a few of the states, indeed, the legislative department has been empowered by the constitution to call upon the courts for their opinion of the constitutional validity of a proposed law, in order that, if it be adjudged without warrant, the legislature may abstain from enacting it. But those provisions are not often to be met with, and judicial decisions, especially upon delicate and difficult questions of constitutional law, can seldom be entirely satisfactory when made, as they commonly will be under such calls, without the benefit of argument at the bar, and of that light upon the question involved which might be afforded by counsel learned in the law, and interested in giving them a thorough investigation. It follows, therefore, that every department of the government, and every official of every department, may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction. Sometimes the case will be such that the decision, when made, must, from the nature of things, be conclusive, and subject to no appeal or review, however erroneous it may be in the opinion of other departments or other officers; but in other cases the same question may be required to be passed upon again before the duty is completely performed. The first of these classes is where, by the constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the constitution has confided the decision, would be impertinent and intrusive. Under every constitution, cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final."

Chancellor Kent opens his eleventh lecture, found in volume 1 of his Commentaries, p. 221, with these words: "The power of making laws is the supreme power in a state, and the department in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly, and with the most careful precision." And again, on page 235 of the same volume, he says: "Each house is made the sole judge of the election return and qualifications of its members. The same power is vested in the British house

of commons, and in the legislatures of the several states, and there is no other body known to the constitution to which such a power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and, as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to, for the sake of uniformity and certainty."

In the case of *Gormley v. Taylor*, 44 Ga. 76, the supreme court of Georgia uses the following language: "No evil could be more offensively aggressive on the rights of the people than the assumption by the judiciary of powers not delegated to their rightful jurisdiction. To lodge in the opinions of a few men, no matter how far removed from the passions of the hour, the rights of the people in the creation of government and decision of affairs of state, was not the intention of the people. Constitutions and laws precede the judiciary, and we decide questions arising out of them after they are made, not before. We restrain the legislature within the limitations set to its powers. But we may not set up our opinions as to the decision of the legislature upon questions not purely legal. The constitution prescribes the manner of passing laws, and the legislature must pursue the mode prescribed. The constitution divides powers, and the co-ordinate branches must stay within the prescribed limits. If this were not so, the judiciary might declare an act void, and the legislature might impeach the judiciary—as happened in Illinois—for the decision. The intention of the constitution is to divide the powers, and let each move independently in its orbit, all revolving round the constitution in their appropriate sphere, like the planetary systems round the sun, and each kept in place by the central power which moves the whole in harmony." "I find involved in this decision of the court a reversal of the judgment of the legislature as to the status of the state under reconstruction. This embraces a political, as well as legal, question, and it would be an ostentatious parade of learning to go through the decisions of the courts excluding political questions involving the principles of government from judicial jurisdiction. The very question made by Governor Jenkins before the supreme court at Washington on the constitutionality of the reconstruction acts admonishes me of the fact that these matters were, while regarded by the profession of Georgia plainly and palpably unconstitutional at the time, nevertheless political in their character, and refused a hearing at the bar of that tribunal."

In the case of *Railroad Co. v. Little*, 45 Ga. 372, the same court said: "It is not only the right, but the solemn duty, of the courts to pass upon the constitutionality of laws. But the constitutionality of a law, and the legality of a legislature which passed it, are wholly different things. Over the former the judiciary has jurisdiction; over the latter, in my judgment, it has not. Very serious question has been

made whether courts, in their inquiries into the constitutionality of laws, are not confined to an examination of the law itself as it appears on the statute books. It has been contended by learned judges that, while courts may inquire if the provisions of a law are contrary to the constitution, and (still keeping to the act as it appears upon its face) whether the body of it conforms to the title, and whether there be more than one subject-matter, etc., that this exhausts their authority. They cannot go behind the act itself, examine the journals of the two houses, or learn from other sources whether the legislature conformed, in its passage, to the constitutional requirements as to the mode and manner in which bills shall be introduced, read, and voted upon. And this limitation upon the power of the judiciary would seem entirely consistent with section 32 of our bill of rights, which provides 'that legislative acts, in violation of this constitution, are void, and the judiciary shall so declare them.' There is an obvious distinction between a 'legislative act' and the mode in which that act has been introduced, read, and voted upon. But though, as I have said, this distinction has been drawn, I am inclined to think the weight of authority is in favor of the right of the courts to go at least to the journals, and inquire if they show the proper and constitutional proceedings to have been had on the passage of the law. But the cases are uniform that the journals are conclusive, however untrue in fact, and nothing will be heard in contradiction of them; and this upon principles of public policy, and respect of one branch of the government for the other, as well as upon the further principle that even courts, in the search after truth, recognize finalities behind which they will refuse to look. But, as I have said, the question made in this case is not really upon the constitutionality of the law as to its provisions, or its title, or even as to the mode in which it was introduced, read, and voted upon, but upon the constitutionality of the legislature itself,—upon its authority to pass any acts. Being, as it is claimed, in session contrary to the constitution, it was not at the time a legislative body at all, but a mere mob, incapable of making laws of any kind. Is it competent for the courts to decide upon the legality of a session of the legislature? I think not." And again: "Necessarily the courts must decide what is the law,—what is the legal will of the lawmaking power. But if they have the right to go behind this, and to inquire whether the lawmaking power is itself legal, they become, in effect, the supreme power in the state. A case may be supposed of a body—a mere public meeting—undertaking to pass laws, and it is asked if the courts, when the acts of such a body are pleaded as law, must not inquire into the rightfulness of the claim of the body to be a lawmaking power. In such a case the inquiry by the courts would be, not the rightfulness of the authority, nor its conformity to any written code of constitutional law, but whether it was in fact the legislative department of the government, recognized

as such by the people, or by whatever final arbiter has power to enforce its edicts. In other words, courts do not make governments, or decide upon their validity. If they cannot recognize as rightful the lawmaking power, which is, in fact, supreme, they must get out of the way, and not attempt, by their feeble arm, to stay the tide of revolution. *Luther v. Borden*, 7 How. 1. But there is another ground, which, though it assumes the right of the courts to pass upon the legality of the legislature directly, is fatal to the position taken against this law. It is a settled rule that, even where courts have power to inquire into the right of an officer to perform official acts, they will not do so collaterally. They will freely investigate the legality of any particular act, but they will never, in so doing, inquire into the right of the officer to act, as such, at all. The rule is uniform that the acts of an officer, otherwise legal, cannot be attacked on the ground of any illegality in his appointment, or on the ground that, though he is an officer in fact, he is not so according to law. Is not the general assembly, actually in session, entitled from the courts to at least the same measure of consideration as they grant to a constable or a justice of the peace?"

In New Hampshire the justices of the supreme court of judicature were requested by the house of representatives to give their opinion whether the governor had the constitutional authority to issue to any one a summons to appear as a senator elect. The court, answering, (see 58 N. H. 577,) said: "If a mistake, or even an intentional wrong, should be committed by the executive, the remedies under our form of government are ample and prompt; the wrong to be suffered temporary. If, on the other hand, a precedent of interference by one department with the discharge of its duties by another should be established by the form of a judicial decision, a dangerous blow would, in our judgment, be struck at one of the most vital principles of our system of government, the consequences of which no one could foretell, and which no intelligent and candid citizen could fail to see must be lasting and pernicious."

The Opinion of the Justices contained in 70 Me. 585, and also the case of *Prince v. Skillin*, 71 Me. 361, are referred to by the chief justice. The constitution of Maine, (article 6, § 3,) defining the judicial power of the supreme court, reads as follows: "They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate, or house of representatives." No similar provision is found in the constitution of this state, and such provisions are not common. Under this provision of the constitution there would seem to be no question as to the duty of the court to answer questions of this kind when requested so to do by a political department of the state, and it will be noted that there is a marked difference between answering questions of this character at the solicitation of a political department and answering them at the request of parties to ordinary litigation.

In that case, however, there were not only two bodies of men, each claiming to be the house of representatives, but also two bodies respectively claiming to be the state senate. These cases, however, are authorities squarely against the position taken by this court that parties holding certificates of election, whether elected or not in fact, and whether in fact qualified under the constitution to sit as members of the house, are entitled to organize without reference to the very right of the matter. In Maine the returns of the elections of members of the legislature are made to the governor and council, who thereupon examine them, and issue to the members who appear to be "elected," as it is there denominated, a summons to attend the legislature. In this state a canvassing board, consisting also of the governor and certain state officers, issue what is denominated a "certificate of election." The two documents are intended to serve precisely the same purpose, viz. to furnish evidence that the person receiving it is entitled to a seat in the legislature. No one disputes the proposition, so far as I am aware, that the certificate or summons, as the case may be, furnishes prima facie evidence of right to the seat; but prima facie evidence must always give way to stronger and better evidence when it exists. We quote from *Opinions of the Justices*, 70 Me. 585: "Holders of summonses which are void for the reason that the governor and council have failed to correctly perform the constitutional obligation resting upon them have no right to take a part in the organization or in any subsequent proceedings of the house to which they are wrongfully certificated. They are not in fact members. But the members rightfully elected, as shown by the official returns, and the opinion of court upon the propositions heretofore by the governor presented to the court, are entitled to appear and act in the organization of the houses to which they belong, unless the house and senate, in judging of the election and qualification of members, shall determine to the contrary. A member without a summons, who appears to claim his seat, is prima facie entitled to equal consideration with a member who has a summons issued in violation of law. He is not to be deprived of the position belonging to him on account of the dereliction of those whose duty it was to have given him the usual summons. The absence of that evidence may be supplied by other evidence of membership. The house and senate have the same right to consider and determine whether, in the first instance, such persons appear to have been elected, and, finally, whether they were in fact elected, as they have of any and all the persons who appear for the purpose of composing their respective bodies." And again: "In neither case did the senate or house itself act upon the question of their membership. Both the senate and house [meaning the bodies assembled to be organized as such] were debarred from any action thereon by the conduct of the presiding secretary and clerk. The assumption of such officers

that no questions should be entertained relative to the rights of persons whose names are not upon the rolls furnished by the secretary of state, but who were claimants of seats, was unwarrantable. The statute of 1869, embodied in Rev. St. c. 2, § 25, cannot preclude either the senate or house from amending and completing the rolls of membership, according to the facts. Each house has the constitutional right to organize itself. The form provided for aid and convenience in effecting the organization does not confer upon a temporary presiding officer such conclusive power. We have not failed to carefully consider the act of 1869, c. 67, incorporated in Rev. St. c. 2, § 25; and, so far as it declares that 'no person shall be allowed to vote or take part in the organization of either branch of the legislature as a member unless his name appears upon the certified roll of that branch of the legislature in which he claims to act,' we think it clearly repugnant to the constitution, which declares that each house shall be the judge of the election and qualification of its own members. It aims to control the action of each within its constitutional power till after a full organization, with a majority determined and fixed by the governor and council. By their action in granting certificates to men not appearing to be elected, or refusing to grant certificates to men clearly elected, they may constitute each house with a majority to suit their own purposes, thus strangling and overthrowing the popular will as honestly expressed by the ballot. The doctrine of that act gives to the executive department the power to rob the people of the legislature they have chosen, and force upon them one to serve its own purposes. It poisons the very foundation of legislation, and tends to corrupt the legislative department of the government. It strikes a death blow at the heart of popular government, and renders its foundation and great bulwarks—the will of the people as expressed by the ballot—a farce. Each house has the same power, and is charged with the same duty, to declare the election of its own members, and organize in any legitimate way, as before the passage of that act." And again: "Question 9. To make up the legal quorum required on any vote in either house, can the votes of any persons be counted who, though summoned, do not appear to be elected by the official returns under the constitution, and the decision of the court? Answer. Not if the attention of the house is called to the fact that such persons are illegally summoned, and objection is seasonably made to the counting of such persons for the purpose of making up a quorum, and the house does not act upon the question of their admissibility."

In the case of *Prince v. Skillin*, 71 Me. 369, we find the following language: "It is claimed that the decision of the governor and council acted as a final canvassing board, and that their final action constitutes an estoppel upon all other branches of the government except the houses of the legislature in regard to the membership of those bodies. This is not so. The

object of all investigations is to arrive at true results." Again: "In accordance with these views, it has been uniformly held by this and all other courts where the question has arisen that the decision of the canvassing board is only *prima facie* evidence that the real title to the office depends upon the votes cast, and that the tribunal before which the question arises will investigate the facts of the election, the votes cast, and the legality of the action of the canvassing board. *People v. Cook*, 8 N. Y. 67; *People v. Vall*, 20 Wend. 12; *State v. Governor*, 25 N. J. Law, 348; *People v. Thacher*, 55 N. Y. 525." And again: "The underlying principle is that the election, and not the return, is the foundation of the right to an elective office, and hence it has been held competent to go behind the ballot box, and purge the returns by proof that votes were received and counted which were cast by persons not qualified to vote." *People v. Pease*, 27 N. Y. 45. "Freedom of inquiry in investigating the title to office," observes *Andrews, J.*, in *People v. Thacher*, 55 N. Y. 531, "tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of returning officers, and it weakens the motive to fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed."

In the case of *Hughes v. Felton*, 11 Colo. 489, 19 Pac. Rep. 444, the validity of an act establishing the superior court of Denver was attacked. The objection made was not to the mode of its passage, nor to the subject-matter apparent on the face of the act, but because it was claimed that the legislature which enacted it was not a legal or constitutional body. The supreme court of Colorado, following the unbroken current of authorities on this question, uses the following language: "From what has already been said it is plain to be seen that a determination of the main proposition contended for involves a decision of questions which this court has no authority to decide, and which it is prohibited from deciding by an express provision of the constitution lodging such power elsewhere. The members of the legislature thus assailed met at the time and place provided therefor by law, and then and there organized the two houses in the manner required by law. In doing this each house necessarily judged of the election and qualifications of its members. The two houses thus organized recognized each other as a component part of the legislature of the state, and they received full recognition as such by the executive branch of the government. They chose two persons to represent the state of Colorado in the senate of the United States, who were afterwards admitted to seats as members of that distinguished body; and in all other respects the said assembly acted and was recognized as the legislature of the state. It is a general, if not universal, rule, that courts, in determining the validity or invalidity of a legislative act, do not, for the purpose of impeaching such act, permit of or consider evidence outside of

the act itself, the enrolled bill, and the journals of the two houses. Division of Howard Co., 15 Kan. 195, and cases there cited. For these reasons the proposition advanced is not tenable."

In the case of *Robertson v. State*, 109 Ind. 79, 10 N. E. Rep. 582, 643, this question was most exhaustively considered. The question at issue was the title to the office of lieutenant governor of Indiana. The plaintiff, Smith, claimed that in January, 1887, he was elected president of the senate; that one Manson was elected lieutenant governor in November, 1884, and held the office until July, 1886, when he vacated it by accepting a federal office; that on the 2d of November, 1886, the respondent was voted for and claimed to be elected lieutenant governor; that he thereupon took the oath of office, and intruded into the office of lieutenant governor, and it was alleged in the complaint that the speaker of the house of representatives recognized Robertson as lieutenant governor. Suit was brought by injunction in the circuit court of Marion county, in which the state capitol is located, to restrain Robertson from exercising the duties of the office of lieutenant governor, and an appeal taken from the decision of that court to the supreme court. Separate opinions were filed by the various members of the court on the original hearing, and also by the chief justice and Judge Niblack on the petition for a rehearing. Chief Justice Elliott, after having delivered the opinion of the court, in his individual opinion says: "I fully concur in the opinion of my Brother Niblack that the courts have no jurisdiction of the subject-matter of this action, and, as the subject has been by him so fully and so ably discussed, little can be added. I began the investigation of this question with the impression that the courts had jurisdiction of the subject-matter, but I leave it with the firm conviction that they have not. This impression arose from a belief that it is better and safer that such controversies as this should be settled by some other tribunal than the legislature; but, while still impressed with that belief, I am compelled to yield to the settled rules of the law and the clear words of the constitution. Whatever may be the views of a court or judge upon a question of constitutional policy, the expressed will of the people, as written in their constitution, must be obeyed and enforced. I am convinced that the framers of the constitution have conferred upon the general assembly exclusive authority over such controversies as this, although, regarded as a question of policy, I am persuaded that it would have been wiser to have intrusted the authority to some other tribunal. The makers of the constitution had power to vest the authority in the legislature, and they have done it. To their judgment all must yield. The grant of power to the legislature cannot be defeated upon the presumption that it will not be justly exercised. On the contrary, it is the duty of the judiciary to assume that legislators will faithfully and impartially perform the duty imposed upon them by the constitution they have solemnly sworn to support.

Courts must accord to the legislature the same solemn sense of duty, and the same conscientious resolution to perform it, unmoved by improper motives, that they can claim for themselves. In *Brown v. Buzan*, 24 Ind. 194, it was said: 'The judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the constitution; and also a high capacity to judge of its meaning.' Again: "Our own court has recognized the general principle that it is often best to intrust higher power to officers whose terms are short. In *Brown v. Buzan*, supra, it was said: 'Thus, to whatever extent this court might err in denying the rightful authority of the lawmaking department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes.' This reasoning supplies grounds for sustaining the policy of distributing the power of settling contests for office; for, if that power is lodged in the legislature, the people can, at short and often-recurring intervals, rebuke where rebuke is needed, and approve where approval is merited." And again: "In many instances powers of a judicial nature are conferred upon the legislature, and it has always been held that, where such a power is conferred, it is exclusive and supreme. No other tribunal can share in its exercise, nor can any court control it. *People v. Mahaney*, 13 Mich. 481, 492; *State v. Gilmore*, 20 Kan. 551; *State v. Tomlinson*, Id. 692; *Dalton v. State*, 43 Ohio St. 652, 3 N. E. Rep. 685; *Smith v. Myers*, (Ind. Sup.) 9 N. E. Rep. 692, and cases cited." And again: "A high tribunal has been designated by the people to determine all contests for the office of lieutenant governor. There the people have placed that great power, and there it must rest until the people in their sovereign capacity shall change their constitution." And in the same case, on a petition for a rehearing, Judge Niblack, on page 158, 109 Ind., and page 346, 10 N. E. Rep., says: "If an act of the present general assembly, whether passed at the regular or some special session, shall come before us, signed by the appellant on behalf of the senate, and otherwise duly certified and approved, it will be our duty to assume that the appellant was, at the time he affixed his signature, the acting and qualified lieutenant governor of the state, and that he has been so recognized by the two houses of the general assembly. On the other hand, when an act of the current general assembly shall come before us, signed by the relator, Smith, or some other person, as president pro tempore of the senate, we will be required to assume that the person so signing was elected to preside over the senate at a time, and under circumstances, which authorized his election. So that the senate set-



ties for us, and not we for it, who, for any occasion, is its proper presiding officer."

The supreme court of Texas, in the case of *Wright v. Fawcett*, 42 Tex. 206, says: "To decide the result of an election is a question of a different character," part of the process of political organization, and "not a question of private right." *Hulseman v. Rems*, 41 Pa. St. 396. And see *Arberry v. Benvers*, 6 Tex. 469; *Baker v. Chisholm*, 3 Tex. 157; *Walker v. Tarrant Co.*, 20 Tex. 16. Where the law has provided a mode of deciding cases of contested elections, designed to be final, the courts have no authority to adjudicate such cases other than that the law may give to them. *Batman v. Megowan*, 1 Metc. (Ky.) 533; *Grier v. Shackelford*, 3 Brev. 490; *Skerrett's Case*, 2 Pars. Eq. Cas. 509, as reported in *Brightly, Elect. p. 820*; *Ewing v. Filley*, 43 Pa. St. 389."

All are familiar with what took place when the result of the presidential election of 1876 was in dispute. The question as to what tribunal had power to decide the result of that election was widely discussed, and the view was generally entertained by members of all political parties that not only had the supreme court no power to decide the controversy, but that it was beyond the power of congress to abdicate its sole and exclusive right to count the vote and declare the result. The electoral commission was established with the vain hope that a nonpartisan decision of the grave questions involved might be obtained by having certain judges of the supreme court of the United States pass their opinions on the questions involved. The result of the commission was a sad disappointment to those who believed the judiciary to be free from partisan bias. While the conclusions of the commission were received and abided by in congress, it was merely acquiesced in as the most practical means of solving the great complication, and the whole proceeding was a clear recognition of the main point before us now for our consideration, viz. that political questions are to be decided by the political departments of the government alone, and that the judiciary in all such cases must follow, and not lead. It is not every question, even of a judicial nature, that under our constitution is to be decided by the courts. Section 27, art. 2, of the constitution: "The house of representatives shall have the sole power to impeach. All impeachments shall be tried by the senate, and when sitting for that purpose the senators shall take an oath to do justice according to the law and the evidence. No person shall be convicted without the concurrence of two thirds of the senators elected." By paragraphs 2735, 2736, Gen. St. 1889, it is provided that all contests over the election of state officers, justices of the supreme or district courts, shall be tried by the senate. Doubtless the reason which actuated the legislature in making the senate the court to try contests of this kind was that such contests are political in their nature, and, though they involve the rights of individuals to the possession and emoluments of public offices, yet the public have such a deep interest in the result of such contests, and they become so

generally the subject of political agitation and discussion, that it is better that a political branch of the government should be responsible for the decision than that a court should run the risk of being charged with partisanship in the decision of such controversies. The framers of our own, and, so far as I am aware, not only the national, but all state constitutions, have clearly foreseen that impeachments will frequently, if not usually, precipitate political agitation, excitement, and strife, and the power to present articles has therefore wisely been lodged in one branch of the lawmaking department and the trial in the other. Can it be that the framers of our constitution, having given to each branch of the legislature the exclusive power to judge of the election and qualifications of its own members, intended that the judiciary should have power indirectly to judge of the very existence of the house itself? It seems to me clearly not. Section 5, art. 1, of the constitution, provides that "he [the governor] may, on extraordinary occasions, convene the legislature by proclamation, and shall, at the commencement of every session, communicate, in writing, such information as he may possess in reference to the condition of the state, and recommend such measures as he may deem expedient." Section 6 provides that "in case of disagreement between the two houses in respect to the time of adjournment he may adjourn the legislature to such time as he may think proper, not beyond its regular meeting." In section 14, art. 2, of the constitution it is provided that "every bill and joint resolution passed by the house of representatives and senate shall, within two days thereafter, be signed by the presiding officers, and presented to the governor. If he approve it, he shall sign it; but, if not, he shall return it to the house of representatives, which shall enter the objections at large upon its journal, and proceed to reconsider the same." The governor is thus required to communicate with the senate and house, and of necessity must promptly decide what body of men is the house.

The rule of our government is that each of the three great co-ordinate departments are independent of each other, and that each matter which is intrusted to one of those departments shall be determined by that department alone, without interference from another; and, as the decision of this court is in its nature final, the judiciary ought to be most careful of all to nicely observe the boundaries of its own authority. It is presumed that those who administer each department of the government will act honestly and from equally pure and lofty motives. It is needless to multiply authorities on this question. The supreme court of Pennsylvania, in the case of *Railroad Co. v. Cooper*, 33 Pa. St. 284, said: "Here again, and under another aspect, the sincerity and honesty of the legislature in the performance of their duties is attempted to be made a question of judicial cognizance; and again we say that we have no jurisdiction of such a question, and can have no right to express any official opinion in relation to it."

Official morality in us requires that we shall not assume authority to judge of the official morality of the legislature. For the faithfulness and honesty of their public acts, we repeat, they are responsible to the public alone, and not by means of a trial before the courts." The supreme court of Ohio, in the case of *Dalton v. State*, 43 Ohio St. 680, 3 N. E. Rep. 685, says: "The jurisdiction of each house to decide upon the election, returns, and qualifications of its own members is supreme and exclusive;" citing *Cooley*, Const. Linn. 133; *State v. Jarrett*, 17 Md. 309; *People v. Mahaney*, 13 Mich. 481. No court of the state has, nor is it possible under our present constitution to clothe any court of the state with, the power to decide as to the election of any candidate to either house. See *Slack v. Jacobs*, 8 W. Va. 612, where the authorities are extensively collated and reviewed. Also, *Humboldt Co. v. County Com'rs*, 6 Nev. 30; *State v. Harmon*, 31 Ohio St. 250.

Recurring now to the exclusive control by each house of the legislature over the election and qualification of its members, we will consider some cases decided by this court. In the case of *State v. Gilmore*, 20 Kan. 551, it appears that Gilmore was chosen a member of the lower house of the legislature in 1876. W. L. Martin, as relator, commenced an action in the name of the state against Gilmore in August, 1877, while Gilmore was a member of the state legislature, holding the office of representative of the fifty-fourth representative district, alleging that he was guilty of being in a state of intoxication, produced by strong drink, voluntarily taken, and asked that he be removed from his office under the provisions of chapter 122 of the Laws of 1875. The opinion was delivered by Justice Brewer, and from it I quote: "The constitution declares (article 2, § 8) that 'each house shall be judge of the elections, returns, and qualifications of its own members.' This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses, acting conjointly, do not decide. Each house acts for itself and by itself; and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time and at all times during the term of office each house is empowered to pass upon the present qualifications of its own members. By section 5 of the same article acceptance of a federal office vacates a member's seat. He ceases to be qualified, and of this the house is the judge. If it ousts a member on the claim that he has accepted a federal office, no other court or tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature, (and so as to any other disqualification,) exclusive; and it is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal or officer. It may appoint

a committee to examine and report, but the decision must be by the house itself. It, and it alone, can remove. Perhaps, also, it might delegate to a judge or other officer outside its own body power to examine and report upon the qualifications of one of its members. But neither it nor the two houses together can abridge the power vested in each house separately of a final decision as to the qualifications of one of its members, or transfer that power to any other tribunal or officer. And an act which purported to grant to the district court power to remove from office must be construed as not embracing members of the legislature; or, if its language specifically names or necessarily includes them, then, as to them, the act is unconstitutional."

In the case of *State v. Tomlinson*, 20 Kan. 692, Chief Justice Horton, delivering the opinion of the court, says: "The attempt to determine the title of the defendant as a member of the legislature in this manner must necessarily fail, for the simple reason that we cannot and ought not to take jurisdiction of the case. We are powerless to enforce any judgment of ouster against a member of the legislature. While the constitution has conferred the general judicial power of the state upon the courts and certain officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers, and among them is the power to judge of the elections, returns, and qualifications of members of the legislature. This power is exclusively vested in each house, and cannot by its own consent or by legislative action be vested in any other tribunal or officer. This power continues during the entire term of office. Section 8, art. 2, State Const.; *State v. Gilmore*, supra. Within certain constitutional restrictions, the executive, legislative, and judicial powers of the state are independent and supreme; and neither has the right to enter upon the exclusive domain of the other. We should be passing beyond the limits of our power to judge of the election or qualifications of a member of the legislature, and, as the constitution has expressly confided this power to another body, we must leave it where it has been deposited by the fundamental law. If we are at liberty to interfere in this case, or if, with consent of the legislature, we assume jurisdiction, we may review all similar decisions of that body, and in the end bring the legislative power of the state in conflict with the judiciary. The objections to such a course are so strong and obvious that all must acknowledge them." And again: "It is insisted, upon the authority of *Prouty v. Stovers*, 11 Kan. 235, that this court has expressed the right to make inquiry into the fact whether the district from which a member of the legislature is admitted exists or not, and if it does not exist the member may be ousted by the courts. In that case it was only decided that, where the legislature was sitting as an electoral body in a contest concerning the validity of an election by such body, the courts were not precluded by the action of the house in admitting

members from inquiry into the legality of certain representative districts, and the right of the members admitted to seats from these districts to vote at such election. That decision is not in conflict with the view here stated, viz. that we have no jurisdiction, in a proceeding like this, to oust a person from his seat as a representative after he has been declared and adjudged to be a member of the house by the power and tribunal having the exclusive authority to hear and determine that question. *O'Ferrall v. Colby*, 2 Minn. 180, (Gil. 148;); *McCrary*, Elect. § 515; *Hiss v. Bartlett*, 3 Gray, 468; *People v. Mahaney*, 13 Mich. 481."

Before proceeding to a consideration of the particular facts in this case, let us first determine the proper limits of judicial inquiry. The testimony of the principal actors in the struggle to obtain control of the organization of the house on the 10th of January was taken before the court, subject to objection, and with the understanding that the question as to its admissibility was reserved to be passed on at the time of the decision of this case. That this procedure was wholly unwarranted, and that no such testimony should have been received by the court, is entirely clear from the authorities. I shall not attempt a complete review of the cases, which are very numerous upon the point, but shall content myself with referring to a few of them. In the case of *State v. Smith*, 44 Ohio St. 348, 7 N. E. Rep. 447, and 12 N. E. Rep. 829, it was contended that an act of the legislature was invalid because the senate was composed of less than a quorum of duly-elected members. It was claimed that 17 members of the senate, being less than a quorum, had 4 other persons, who were not elected, sworn in, and that the 21 persons acting together, in the absence of 19 duly elected senators, passed the act in question. The court says: "Counsel have exhibited unusual industry in looking up the various cases upon this question, and out of a multitude of citations not one is found in which any court has assumed to go beyond the proceedings of the legislature as recorded in the journals required to be kept in each of its branches, on the question whether a law had been adopted; and, if reasons for this limitation upon judicial inquiry in such matters have not generally been stated, it doubtless arises from the fact that they are apparent. Imperative reasons of public policy require that the authenticity of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired to-day upon the faith of what has been declared to be the law shall not be destroyed to-morrow, or at some remote period of time, by facts resting only in the memory of individuals. One of the earliest cases on the subject was that of *Rex v. Arundel*, Hob. 109. It involved the question whether a private statute had been enacted. The court there held that the act could only be tried by itself,—its enrollment in the chancery; the chancery being then, as the office of

the secretary of state is with us, the depository of the laws. The court said, 'When the act is passed, the journal is expired.' Many cases follow this decision, adopting the attested enrollment of the law as conclusive on the question of its passage. *State v. Young*, 32 N. J. Law, 29, is an instructive case on the reason and policy of the rule. See, also, *People v. Devlin*, 33 N. Y. 269; *People v. Commissioners*, 54 N. Y. 276; *Eld v. Gorham*, 20 Conn. 8; *Sherman v. Story*, 30 Cal. 258; *Lottery Co. v. Richoux*, 23 La. Ann. 743; *State v. Swift*, 10 Nev. 176; *Speer v. Road Co.*, 22 Pa. St. 377." And again: "There are numerous cases in the decisions of the different states to the effect that the journals of the legislature may be noticed by courts on the question whether the bill became a statute or not. Opinion of the Justices, 52 N. H. 622; Judicial Opinion, 35 N. H. 579; *People v. Mahaney*, 13 Mich. 481; *Moody v. State*, 48 Ala. 115; *Grob v. Cushman*, 45 Ill. 119; *Board v. Heenan*, 2 Minn. 380, (Gil. 281); *In re Roberts*, 5 Colo. 528. The latter presents an extensive collection of the cases. But, as before stated, none have been found in which the courts have, for any purpose affecting the validity of a statute, gone beyond such permanent memorials of its enactment. The case of *State v. Francis*, 26 Kan. 724, is cited and relied on by counsel for relators. But it does not sustain them. There the house of representatives of Kansas had, by law, at that time, but 125 members. It had in fact 129. Four of these had by law no seats in the house, and could in no event be entitled to participate in its proceedings; they were simply supernumeraries. The journal showed that the concurrence of three, at least, of these supernumerary members was requisite to the passage of the law in question, and that all of them voted for it. The court took notice of these facts appearing upon the journal, and of the further fact that, as a matter of law, the house then consisted of 125 members only, and held that the bill did not become a statute. In no case, however, is the rule that limits judicial inquiry in questions of this kind to the journals of the legislature, and excludes all parol testimony, more strongly stated. The language used is as follows: 'In our opinion, the enrolled statute is very strong presumptive evidence of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. \* \* \* If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid; but in this state, where each house is required by the constitution to keep and publish a journal of its proceedings, we cannot wholly ignore such journals as evidence.' That the invalidating facts must clearly and beyond reasonable doubt appear from the

Journal is sustained by *Osburn v. Staley*, 5 W. Va. 85." And again: "As to the averment that the passage of the act was part of a conspiracy, entered into between the president of the senate and seventeen of the members, carried into effect in the absence from the state of a majority of the members of the senate, it is sufficient to say that such suggestions have frequently been made for the purpose of inducing judicial inquiry into the conduct of legislative bodies, but the inquiry has as frequently been declined by the courts as not only indecorous, but as subversive of the independence of the legislature as a co-ordinate branch of the government. There is no authority for it in the constitution and laws of this state, and it is opposed to the practice and policy of our system of government. *Slack v. Jacob*, 8 W. Va. 613; *McCulloch v. State*, 11 Ind. 431; *Wright v. Defrees*, 8 Ind. 298; *Evans v. Browne*, 30 Ind. 514; *Railroad Co. v. Cooper*, 33 Pa. St. 278; *Harpending v. Haight*, 39 Cal. 202. In *Miller v. State*, 3 Ohio St. 484, it is said by Thurman, J.: 'A disposition to disregard it [the constitution] is no more to be imputed to the legislature than to the judicial department of the government, and ought not to be imputed to either.' And it is said by Cooley: 'Although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.' Cooley Const. Lim. 187. See, also, *State v. Moffitt*, 5 Ohio, 363; *Kuehler v. Hill*, 60 Iowa, 545, 14 N. W. Rep. 738, and 15 N. W. Rep. 609. In the case of *Division of Howard Co.*, 15 Kan. 194, this question was considered by this court, and I quote from the syllabus: "(1) Legislature — Records, Journals, and Enrolled Bills. The legislative journals and the enrolled bills are the only records required by the constitution and laws to be kept for the purpose of showing any of the legislative proceedings, and hence they must import absolute verity, and be conclusive proof as to whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. The engrossed bills of the two houses are not required to be made records, nor portions of any record. Therefore, where the legislative journals and the enrolled bill of a particular act of the legislature apparently show that the bill was regularly passed by the legislature, signed by the proper officers of each house, signed and approved by the governor, and filed in the office of the secretary of state as an enrolled law, it will be held that such enrolled bill is valid and conclusive evidence of the law as contained in said bill, notwithstanding it may appear from an engrossed bill of the house (not contained in the journal of either house) and other extrinsic evidence that a mistake was made in enrolling said bill, and that the enrolled bill omitted one important section, which was contained in the

bill as it passed the two houses. (2) Evidence—Judicial Notice—Published Laws—Enrolled Bills—Journals. The courts will take judicial notice, without proof, of all the laws of the state, and in doing so will take judicial notice of what the books of published laws contain, of what the enrolled bills contain, of what the legislative journals contain, and, indeed, of everything that is allowed to affect the validity or meaning of any law in any respect whatever. *Topeka v. Gillett*, 32 Kan. 437, 4 Pac. Rep. 800." There is much conflict in the authorities as to whether the courts may go behind the enrolled bill for the purpose of determining the validity of an act of the legislature, but, as our constitution (section 10, art. 2) requires each house to keep and publish a journal of its proceedings, I concur in the opinion heretofore expressed by this court, that this court may examine the journal for the purpose of informing itself as to what the action of each house was in fact. I also fully concur with the opinion expressed in the case of the *Division of Howard County*,—that it is unnecessary to introduce the journal in evidence, as the court will take judicial notice of its contents. From reason and authority I then conclude that all testimony offered in this case with reference to the doings of the legislature was incompetent, and improperly received.

The question then arises, of what journal shall this court take judicial notice? The law requires the journal to be printed by the state printer, and delivered to the secretary of state. In this case the publication was presented by Frank L. Brown, who, it is claimed, was clerk of the house of representatives, not published by the state printer, nor otherwise authenticated than by oral testimony. How shall the court be enlightened as to whether or not this is the journal of the house? This court takes judicial notice of who is governor of this state, and of the fact that the senate is in session. It seems to me clearly that it must take judicial notice of the fact that the governor and the senate are in communication with the house of representatives. It must take judicial notice as to what organization has been recognized by them. It is clearly shown in this case that J. M. Dunsmore has been recognized as speaker of the house of representatives by the governor, the senate, secretary of state, state printer, official state paper, auditor, and treasurer; and, if the position taken by the majority of the court is correct, that this is substantially a contention between two bodies of men, each claiming to be the house of representatives, that the body presided over by J. M. Dunsmore has received full recognition from the senate and each and all of the officials named. There was, then, a complete state government, with no question as to the right of those persons who filed the various officers in the executive branches or in the senate. The only question raised was as to the rights of the officers of the house of representatives and as to the right of certain persons whose seats were contested to sit as members of the house. Unless it follows the decision of the governor and senate, the

only way this court can possibly determine who is speaker of the house of representatives is by determining—First, who were members of the house on the 10th day of January; and, second, what those members did in perfecting the organization of the house. Whence does this court derive its power to determine what, it must be apparent to all, is purely a political question? Let it be conceded for the purposes of this case that the house, which, under the constitution, alone has power to decide who are its members, refuses to so decide, does that confer the power on this court? Certainly not. Yet in no other manner can this court possibly determine, nor has the majority of this court attempted to determine, who is speaker of the house, in any other manner than by going directly into the question who were elected members of the body. The chief justice cites from the work of McCrary on Elections, and also from Cushing's Law and Practice of Legislative Assemblies. Were we members speaking on the floor of the house with reference to the rights of other members, I concede the propriety of citing there these authorities, or any other authorities bearing on the question of the rights of persons to sit in that house; but the right of a person to a seat in the house of representatives is not, and never can be, the subject of trial here, and it seems to me that the reasons why such right cannot be tried indirectly are still more forcible than the reasons why it cannot be tried directly. The majority of this court holds that a certificate of election entitles the holder to participate in the organization of the house, yet the very body of men in whose favor this court so holds, before the attempted election of Mr. Douglass as speaker, declared that Joseph Rosenthal, who did not hold a certificate of election, whom the records of the office of the secretary of state showed was not elected a member of that house, was a member of that house, and admitted him to a seat therein. Thus, if this body is the house of representatives, being the tribunal which has authority under the constitution to determine who are entitled to sit as its members, it has established and declared a rule directly the reverse of the rule laid down by this court. Why did this so-called "Douglass House" admit Rosenthal to his seat? It was because he was in fact elected by the people of his district as such member. Does this court hold that that action was wrong? If that action was right, why should not the list furnished from the secretary of state's office be purged of all its errors, as well as this one error in Rosenthal's case? If Rosenthal, who has no certificate, and no record in the secretary of state's office to back him, may sit merely because it is the will of the people that he shall sit, why may not Rice, Gleason, White, Helstrom, Goodvin, Brown, and Morrison also take part in the election of a speaker, if they were in fact elected by the people of their districts? Who shall determine this question,—the house itself, or this court? If Campbell, of Doniphan, Sherman, of Shawnee, Elting, of Ness, Bowers, of Grant, and Chrisman, of Chautauqua,

were, under the constitution of this state, disqualified from sitting in that body, how can this court say, merely because they have certificates, merely because the figures in the office of the secretary of state show that they received a majority of the votes cast in their respective districts, that they shall participate in the proceedings of the house, in direct violation of the fundamental law of the state? If this court has not power to decide according to the very right of the matter, and has not power to go behind certificates erroneously issued, records falsely made, and infractions of the fundamental law of the land, of what value is it as a tribunal to determine any such question? The governor and senate, in determining which of these bodies they should co-operate with, were not bound down by any such narrow, inequitable rule as that declared by this court, but were free to investigate for themselves, and it was their duty, as the political representatives of the people of the state of Kansas, to see that their will—the will of the people—was carried out in this matter, to see that it was not defeated by any jugglery of returns, or by any disregard of the fundamental law of the land as declared in the constitution and the numerous authorities above cited. The presumptions in favor of their integrity, of their patriotism, are just as great as the presumptions in favor of this court; and as an added security to the people that their wishes shall be respected the governor is accountable to them at the next regular election, and the senate two years later. The members of this court, however, are exempt, after their election, from being subjected to popular censure for a period of six years. It may be noticed that the tenure of office of the judiciary is generally much longer elsewhere than in this state, and the judges of the courts of the United States hold for life. We have seen that the courts both of England and of this country, by an unbroken line of decisions from the early case of *Penn v. Lord Baltimore* to the very latest utterances in the United States, have steadily maintained the doctrine that the courts have no jurisdiction to decide political questions. Can there be any doubt that the question which this court has undertaken to decide is a political question? We are not here considering even the private rights of Douglass and Dunsmore to enjoy the privileges and emoluments of the office of speaker, for neither one of them is before the court, but we are determining the question which of two contending political organizations is entitled to the control of the house of representatives of this state. This is the very pith and marrow of this controversy. Were it not a struggle for political supremacy, but merely a contest over private rights, can it be imagined for a moment that we should have witnessed scenes of violence, and been on the verge of civil war? It is patent to every one that the control of the house of representatives of this state was one of the leading subjects of political agitation in this state, not only prior to and during the election last fall, but has been a con-

stant source of public agitation and discussion ever since the election. The question as it has been presented to us by the oral testimony in the case shows that Mr. Douglass claims to be speaker as the representative of one political organization, and Mr. Dunsmore as representative of the other; that each of these gentlemen was nominated by a caucus of his political adherents in the house, and that each one claims his election as having resulted from the carrying into effect of such caucus nomination. The mind of man cannot conceive a question more clearly political in its nature than this is.

The case of *Martin v. Ingham*, 38 Kan. 641, 17 Pac. Rep. 162, is cited. Instead of that case being an authority in support of the position maintained in this case, it seems to me to be rather the reverse. I quote from the opinion: "The only acts of public functionaries which the courts ever attempted to control by either injunction or mandamus are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." Again: "Now, it is true, with some exceptions, that the legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other, or independent of each other, or that one of them may not in some instances control one of the others. The most of the jurisdiction possessed by the court depends entirely upon the acts of the legislature, and the entire procedure of the courts, civil and criminal, is prescribed by the legislature." And again: "Now, while many of the duties imposed upon the governor in the organization of new counties, and possibly all of them, except certain ones prescribed by the new provision above quoted, are still ministerial, yet some of these duties prescribed by these new provisions are certainly not ministerial. Some of them relate to the investigation of supposed frauds, and precisely that kind of frauds which we are now asked to investigate in the injunction case; and clearly such duties are not ministerial. Hence, as some of the duties imposed upon the governor in the organization of new counties are ministerial and some of them are not, and as the courts will not by mandamus or injunction control any of the acts of officers except such as are purely ministerial, and will not control even them when any other plain and adequate remedy exists, it follows that it must be shown clearly and conclusively in the particular case that the acts of the governor sought to be controlled are not purely ministerial acts, but also that no other plain and adequate remedy exists. Also, as we have already stated, all presumptions are in favor of the good faith and honesty of the governor. It will not only be presumed that

he has in the past performed honestly and faithfully all his duties, but it will also be presumed that he will in the future honestly and faithfully perform the same; and these presumptions will continue until it is clearly, conclusively, and affirmatively shown otherwise. And in favor of the chief executive officer of the state these presumptions should be considered as of the strongest character; indeed, much stronger than any kindred presumptions in favor of inferior officers."

It is said in the opinion filed by the chief justice that the Georgia and Pennsylvania cases were cited in that case. It is true that *Low v. Towns*, 8 Ga. 373, was cited in that case. The cases we have cited in 44 and 45 Ga. were not referred to by the court. So the case of *Hartrant's Appeal*, 85 Pa. St. 433, was cited, but the Pennsylvania case above quoted was not mentioned; but it will be noticed that in this very case of *Martin v. Ingham* this court refused to grant a mandamus against the governor, and reversed the decision of the district court granting an injunction, on the expressed ground that some of the duties which it was sought to control the governor in the discharge of were not purely ministerial, but were discretionary; and, however the reasoning in that case in certain portions of the opinion may appear favorable to the position taken in this, the judgment rendered by this court was against the exercise or attempted exercise of any control over the actions of the governor. In the case of the *State v. Francis*, 26 Kan. 724, also cited, this court said: "In many of the states of this Union it is held that the enrolled statutes are conclusive evidence of the due passage and validity of the acts purporting to be embodied in them. See authorities cited in the case of *Division of Howard Co.*, 15 Kan. 211, and *State v. Swift*, 10 Nev. 176, cited in the case of *Commissioners v. Higginbotham*, 17 Kan. 78." Again: "In our opinion, the enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and that it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally."

The distinction between the power of this court to keep the legislative and the executive within the limits fixed by the constitution, to declare void any unconstitutional act, and the power to declare the legislature itself void, seems to have been lost sight of. The right of this court to declare unconstitutional acts void is not questioned, nor is the right of this court to declare any unwarranted assumption of power on the part of the legislature, or either house thereof, void, doubted. The distinction is clearly indicated in the opinion delivered by Mr. Justice Brewer in the case of *Prouty v. Stover*, 11 Kan. 235, from which I quote: "Defendants claim that this court cannot look beyond the action of the house to inquire whether persons admitted as members were legally entitled to seats. Article 2, § 8, declares that each house 'shall be judge of the elections, returns, and qualifications of its own

members.' Its determination is not the subject of appeal or review. It is final, and concludes everyone. But what is included in this power? Does the power to judge of the qualifications of its members include the power to increase such membership? Can it enlarge its members without limit? Is it, like an academy of science, or a lodge of Odd Fellows, capable of indefinite expansion? If the law fixed the number of senators at twenty-five, could those twenty-five admit twenty-five more on pretense of judging 'of the elections and qualifications of its own members,' and thus create a senate of fifty members? If this power exists, how easily could a partisan majority secure to itself a two-thirds vote by simply admitting new members. To create a representative or senatorial district requires a law,—the consent of both houses. Neither house by itself can create a district and then admit some one to represent it. The district must exist before it can be represented, otherwise one house could usurp the functions of both. And if one house can admit members above the limit prescribed by law, why may it not above the constitutional limit? But when the district exists, then the decision of the house as to who shall represent that district is conclusive and final. It determines who were elected, whether the returns are sufficient, and also whether the party elected has the proper qualifications. Over all these matters its jurisdiction is ample, its determination final." The case of *Burnham v. Morrissey*, 14 Gray, 226, is cited. This case merely upholds the right of the court to decide on habeas corpus as to the legality of a commitment by the speaker of the house for a contempt. This power has not been questioned in this case. The case of *State v. Cunningham*, (Wis.) 51 N. W. Rep. 725, and 53 N. W. Rep. 35, merely hold that an action to enjoin the secretary of state from publishing notices of election of members for the senate and assembly under a claim that an act of the legislature under which the notices were about to be published was unconstitutional, was not a political, but a judicial, question. The court, on page 53 of 53 N. W. Rep., cites *Marbury v. Madison*, 1 Cranch, 137, and quotes approvingly the language of Mr. Justice Orton as follows: "Mr. Justice Orton, in the same case, speaking for the whole court, said: 'But it is sufficient that these questions are judicial and not legislative. The legislature that passed the act is not assailed by this proceeding, nor is the constitutional province of that equal and coordinate department of the government invaded. The law itself is the only object of judicial inquiry, and its constitutionality is the only question to be decided.'"

The various passages cited from *McCrary on Elections* do not reach the contention in this case. The question as to what shall be decided by the political departments of the government and what by the judicial is not the subject being treated of by the author. The case cited from 53 N. W. Rep. 944, seems to be a mistake, as it has no application whatever in this case. The Montana case of *State v. Kenney*, 23 Pac. Rep. 733, merely holds that a person holding a certificate

of election to the legislature, against whom a contest had been filed, but whose rights had not been determined by the legislature, was entitled to his pay after the legislature adjourned. None of the cases cited by the chief justice, none of the cases to which our attention was called on the hearing, assert the doctrine that the judiciary may, under any circumstances, unless it be where the constitution expressly requires them to give their opinions when asked, decide political questions. It is said that Douglass was elected speaker because he received the votes. In *Rosenthal's Case*, decided by this court only in January last, (32 Pac. Rep. 129,) it was held that this court had no power to require the canvassing board, after it had performed its duties and adjourned, to reconvene, and correct a manifest error; and Chief Justice Horton, in delivering the opinion in that case, said: "If it be said that this leaves Rosenthal without any remedy, and that the law in some way ought to furnish him a remedy for the wrong committed against him, we answer that, if this be true, it is the fault of the legislature, not the fault of the state board of canvassers, nor the courts; but it is not wholly true, while Rosenthal may not obtain from the state board his certificate, yet he has a remedy before the house of representatives, even if not a complete one. The jurisdiction of each house to decide upon the election returns and qualifications of its own members is clearly given by the constitution and the statutes. That body, with the general consent of its members, can admit him to his seat at once, or, if it so determines, it can delay his admission until full investigation is had of his claims. It may, it is true, act arbitrarily, and refuse him rights, but this is hardly probable. This proceeding, if successful, would have only given a certificate. The proceeding in this court is not a contest between Rosenthal and Stubbs, nor can we try the title to the office. The house of representatives has the exclusive power to decide who have been elected members to its body."

This court has now proceeded to decide, and has decided, that a quorum of legally elected members of the house elected George L. Douglass speaker. How does it reach that conclusion? By holding that those persons who held certificates of election were members of the legislature, entitled to elect a speaker, without reference to the question whether they were duly elected or not, and without reference to the question whether they were qualified or not. In other words, this court has said that if they were returned they were entitled to sit, without reference to the question of election or qualification; but the constitution says that the house itself shall judge of the elections, returns, and qualifications of its members. Before the alleged election of Mr. Douglass the evidence before us shows that there was no determination of the rights of any of the contestants in any manner, except Rosenthal's alone. It shows that no opportunity was afforded of presenting objections, even, for the consideration of the house. There was nothing like order



or regularity on either side in the proceedings from which it is claimed on the one hand that Mr. Douglass was elected, and on the other that Mr. Dunsmore was chosen. In the Maine case referred to the judges argue with great force that it is those who were elected who shall sit, rather than those holding certificates. I shall not attempt to express an opinion here as to the rights of contesting members to seats in the house, but shall merely call attention to the questions properly before the house to be determined. It was alleged that 4 of the 64 who are said to have voted for Mr. Douglass were postmasters, and therefore disqualified to sit; and the journal of the Douglass house shows that 2 of those men, at least, were postmasters up to the 31st day of December last. Section 5, art. 2, of the constitution reads: "No member of congress, or officer of the United States, shall be eligible to a seat in the legislature. If any person, after his election to the legislature, be elected to congress, or elected or appointed to any office under the United States, his acceptance thereof shall vacate his seat." The case of *Privett v. Bickford*, 28 Kan. 52, is cited as an authority sustaining the proposition that if a disability be removed between the date of the election and the commencement of the term the person chosen is still entitled to his seat. The constitutional provision then before the court is very different in its terms from the one above quoted, and reads as follows: "And no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the 1st day of April, A. D. 1861, provided that they have served one year or more thereto, shall be qualified to vote or hold office in this state until such disability shall be removed by a law passed by a vote of two thirds of all the members of both branches of the legislature." It will be apparent at a glance that this provision applies to the status of the individual at the time he is to hold office, and not at the time he is to be elected, while the provision with reference to members of the legislature applies to his capacity to be chosen, and of course must refer to the time the choice is made. This view is fully sustained by authorities. *Searcy v. Grow*, 15 Cal. 118; *State v. Clarke*, 8 Nev. 566; *Carson v. McPhetridge*, 15 Ind. 327.

Section 4, art. 2, of the constitution reads: "No person shall be a member of the legislature who is not at the time of his election a qualified voter of and a resident in the county or district for which he is elected." It is claimed that one of the 64 members by whose votes Mr. Douglass claims to be speaker was not a resident of the state, but had taken a claim in Oklahoma, and was, both at the time of his election and at the time of the session of the legislature, a resident of that territory. It is also claimed that six other of the persons who voted for Mr. Douglass, although holding certificates of election in

due form, were not in fact elected by the electors of their respective districts. It is manifestly improper for me, entertaining the views I do on this question, to express an opinion as to the rights of these individuals to seats in the legislature. I may, however, call attention to the fact that the question as to the eligibility of the candidate for an office is one which the canvassing board can never pass upon, as, under all of the rulings of this court, their sole duty is to compile the returns and declare the result from the statements returned to them. It is manifest that the canvassing board, in the performance of its duty, will issue certificates to ineligible or disqualified persons, as well as to those who are eligible and qualified to hold office. Now, suppose the people of certain districts, because of their great admiration for the distinguished persons whom I will name, and because of their desire to be represented by men of great ability, should by a majority of the votes in their respective districts elect William E. Gladstone and Prince Bismarck to represent them in the legislature, and certificates should be regularly issued to them, would any person contend that they might participate in the organization of the house because they held certificates? Will any one claim that a citizen of Missouri who holds a certificate of election, even though he were in fact elected, has a right to participate in any proceeding of the legislature of this state? Now, if these four members who are claimed to have been postmasters at the time of the election, and this one person who is alleged to have been a citizen of Oklahoma, were in law, for these reasons, ineligible to be chosen as members of the legislature, whence comes the quorum of 63 or more legal votes by which Mr. Douglass was elected speaker? And if these six persons whose election is denied were not in fact elected, though they held certificates, how many votes which should be counted were cast for Mr. Douglass? It may be said, and it is assumed, that all of these persons had a right to vote, and were legal members of the legislature, but where is the power vested to decide this question? Before this court can hold that Mr. Douglass is speaker of the house of representatives it must hold that the five persons objected to as disqualified were qualified, and thereby assume the power conferred by the constitution on the house alone to judge of the qualifications of its own members. If it holds that the six persons whom it is claimed were not in fact elected were elected, it must assume the power given by the constitution to the house itself to judge of the election of its members, and when this court assumes to say that a certificate, or a certificate and the record in the secretary of state's office, are the ultimate and final proofs as to the right of an individual to participate in the organization of the house, it assumes the power given by the constitution to that house to judge of the returns of its members. It seems to me that the rule as declared is in its nature arbitrary and unjust, and tends to consequences far more mischievous than the rule established by the constitution.

Much has been said with reference to the constitutional house of representatives. The constitution makes no provision whatever with reference to certificates of election. The mode of ascertaining and declaring the result of an election is purely a statutory matter. Certificates are issued, not in pursuance of a provision of the constitution, but in pursuance of a statute; and were the statute to establish any rule by which the articles of the constitution above quoted were contravened, that statute would be void. Only 54 members, whose rights to seats were not contested at the time, voted for Mr. Douglass. It is unnecessary to inquire how many voted for Mr. Dunsmore. It may be that all of the 58 who are said in the opinion to have been duly-qualified members were in fact such or not. A member of the senate or house is, in my judgment, always a political representative of the people, and the question as to his election, return, and qualifications is always a political question, to be determined by the political departments of the state government.

Was Mr. Douglass at the time this writ was issued in possession of the office of the speaker of the house of representatives? In other words, was he an officer de facto? The term "de facto" is defined by Burrill: "Of fact; from, arising out of, or founded on, fact; in fact; in deed; in point of fact; actually; really." The proposition is stated with much force that there cannot be two de facto officers holding the same office at the same time. This proposition seems almost axiomatic. A de facto officer is one who is in possession of the office in such manner that he can discharge the duties thereof. The speaker of the house of representatives has various duties to discharge. He is the presiding officer of the house, and as such presiding officer discharges such duties as ordinarily devolve on the presiding officer of any deliberative body; but, in order to give any effect to the deliberations of the body over which he presides as a branch of the law-making department of the state, he must be able to communicate in his official capacity with the senate and with the governor. Neither he nor the body over which he presides can possibly be in full possession of the powers respectively of speaker and house until their rights are recognized by the governor and the senate. It is shown in this case that neither the senate nor governor, nor any executive department of the state, would recognize Mr. Douglass as such speaker. On the other hand, it is clearly shown that the senate, the governor, lieutenant governor, secretary of state, auditor, treasurer, and state printer have recognized J. M. Dunsmore as the speaker of the house, and have gone on transacting public business with him as though he were in fact and of right the speaker, and have recognized the body over which he presides as the duly and legally constituted house of representatives. It is well known, not only to the legal profession, but to the general public, that when the legislature is in session this course of recognition and intercommunication between the governor and the two co-ordinate departments of the legislature

must go on daily, and it has gone on from the 12th day of January to the time of this trial without cessation. And when we consider the fact that these are the co-ordinate political departments of the government, and that under the authorities hereinbefore cited it is they, and they alone, who must decide political questions, can there be a doubt that, as a legal proposition, J. M. Dunsmore is de facto speaker of the house? In the history of American politics, many of the most critical crises have developed in contests over the election of a speaker of the house of representatives of the United States and over the presiding officers of the houses of the various state legislatures. Wherever political parties are nearly equal in strength, the contest for mastery centers on the organization of the legislative departments, and this it is that makes the election of a speaker of the house of representatives so peculiarly a political question, and for this reason, most of all, should controversies of this kind be withdrawn from the consideration of the courts, whose procedure should always be calm and deliberate, in accordance with fixed and settled principles, and entirely freed from those influences which have been found by experience to often, if not usually, bias the judgment of the strongest minds. In the case of *State v. Williams*, 5 Wis. 308, it was held that courts take notice of the accession to office of officers under the constitution, and while they remain in office, and exercise the duties thereof, regard them as officers de facto. Generally, as respects third persons, the acts of an officer de facto are to be recognized as valid. Where a governor continued to hold over after the expiration of his term and after taking the oath of office by his rightful successor on the assumption of his election, and under the certificate of the state canvassers, and so continued the acting governor, his approval of an act of the legislature was held valid as the act of an officer de facto. The supreme court of Connecticut, in *State v. Carroll*, 38 Conn. 449, lays down the rule with reference to de facto officers as follows, (19 Amer. Dec. 66:): "An officer de facto is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid, so far as they involve the interests of the public and third persons, where the duties of the officer are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of

an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such." And this definition is substantially recognized and adopted by nearly all the adjudications in the American courts of the present day. *Brady v. Theritt*, 17 Kan. 468; *Ellis v. Institution*, 68 N. C. 423; *Threadgill v. Railroad Co.*, 73 N. C. 178; *People v. Staton*, Id. 546; *Burke v. Elliott*, 4 Ired. 355; *Brown v. Lunt*, 37 Me. 423; *People v. Lieb*, 85 Ill. 484; *Peirce v. Wear*, 41 Iowa, 378; *McLean v. State*, 8 Heisk. 22; *Fowler v. Bebee*, 9 Mass. 231; *Sheehan's Case*, 122 Mass. 445; *Mallett v. Mining Co.*, 1 Nev. 188; *Ex parte Norris*, 8 S. C. 408, decided in 1876, (where the validity of a pardon issued by Wade Hampton, while acting as de facto governor of South Carolina, was before the supreme court of that state for determination;) *Carleton v. People*, 10 Mich. 250; *Clark v. Com.*, 29 Pa. St. 129; *Com. v. McCombs*, 56 Pa. St. 436; *State v. Williams*, 5 Wis. 308. But I do not deem it necessary to multiply authorities on the question as to when a person becomes an officer de facto. There can be no doubt under any rule that has been declared by any court that J. M. Dunsmore was at the time this case was heard the de facto speaker of the house of representatives, unless the body over which he presided was not composed of a sufficient number of lawfully chosen representatives to constitute the house, and the only way in which his status as such officer de facto has been attacked is by attacking the right of persons to sit in that house. In other words, we have had on trial not the right of one member individually to participate in the organization, but the rights of large numbers of persons acting collectively; and the court has decided the right of 64 persons in a lump to sit and vote in the house on its organization, while refusing to inquire into the right of any one of the 64 individuals to his seat.

I conclude, then:

1. That all inquiries in a court of justice as to the validity of any act of the legislature, or of either house thereof, is confined to the act itself, the journals of the house, and to such other records and permanent memorials as are provided by law; and that in no case can any court of justice, from the highest to the lowest, take the oral testimony of witnesses as to what transpired in the hall of the house of representatives in its organization or in the transaction of its business.

2. That the constitution vests in the house of representatives the sole and exclusive power to judge of the elections, returns, and qualifications of its own members, and that the house cannot be divested of that power by anything less than an amendment to the state constitution.

3. That a certificate of election is but prima facie evidence of the election of the holder, and is neither conclusive on that fact, nor on the question as to the eligibility or qualifications of the holder, but that all these questions are to be determined by the house under its own rules, at such time and in such manner as it sees fit. That any declaration of this court as to the rules which must control a legislative

body at its organization, or as to the force of such certificates, is an unwarranted expression on a subject over which courts have no jurisdiction.

4. That the question as to what body of men is the house of representatives at any given time is a political question, and can never be a proper subject of judicial inquiry.

5. The speaker of the house of representatives derives his authority solely from the house, and his title to that office cannot be drawn in question, nor determined by any court or tribunal other than the house itself.

6. Where two different organizations are effected, each claiming to be the house of representatives, each having a person chosen as its speaker, each including within its numbers many persons whose rights to sit as members of the house are unquestioned, together with other persons whose rights are questioned, a political question is presented as to which of those two contending bodies and officers is in fact and in law the house and the speaker thereof.

7. Political controversies can only be determined by the political departments of the government, and, while the constitution of the state does not contemplate such a condition of things, nor provide in express terms a tribunal before which their respective claims can be heard and determined, yet, under an unbroken chain of authorities in all countries where the common law prevails, the recognition of one of those bodies by the other political departments of the government, viz. the governor and the senate, is conclusive on the judiciary.

8. The decision of the governor and the senate is just as binding and conclusive where they refrain from enforcing their decisions by force, as though they resorted to violence and bloodshed. In a country where laws are supreme, a premium should never be offered to induce violence, but a decision made by the lawfully constituted authorities should always be acquiesced in by all good citizens.

For these reasons I conclude that this court must take judicial notice that George L. Douglass was neither in fact nor in law speaker of the house of representatives, and had no authority to issue the warrant under which the petitioner is held.

(98 Cal. 203)

In re WHETTON'S ESTATE. (No. 15,005.) (Supreme Court of California. April 29, 1893.)

WILLS—CONTEST—RIGHT OF EXECUTOR TO DEFEND.

Under Code Civil Proc. § 1327, which makes an executor, where a will is attacked after probate, a necessary party to the proceeding, and requires the issue of a citation to him personally to show cause why the probate should not be revoked, the executor has the right to support and defend the will.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings by James Whetton to have the will of Catarina R. Whetton declared null and void, and letters testamentary

granted to one Navarro revoked. Decree granting the relief, from which this appeal is taken. Reversed.

Dunne & McPike, for appellants. Henry I. Kowalsky, for respondent.

GAROUTTE, J. The record in this case is in a condition of hopeless entanglement, but sufficient appears to require a reversal of the judgment. One Navarro was named as executor and made a devisee by the last will and testament of Catarina R. Whetton, deceased. He qualified as such executor, and entered upon the discharge of his duties. James Whetton, husband of deceased, filed a contest asking for revocation of his letters testamentary, and that the will be declared null and void. A citation was issued to Navarro to show cause upon a certain day why his letters should not be revoked, and the will set aside as void. Navarro appeared as executor, and filed a general demurrer to the petition. What occurred subsequently to the foregoing events is not made plain by the record, but sufficient appears therefrom, aided by the light furnished from the briefs of respective counsel, to indicate that the court was of the opinion that the executor, as such, had no right to support and defend the will, and he was thereupon denied such right. This position is not well founded. When a will is attacked after probate, section 1327, Code Civil Proc., makes the executor a necessary party to the proceeding, and requires that a citation issue to him personally to show cause why the probate should not be revoked. It would be an absurdity to cite him to show cause, and, when he appears in court in obedience to the citation, to refuse to consider the reasons which he is prepared to advance why the will should not be set aside and annulled. It is not only his privilege to make such showing, but it is his duty under his trust. While it has been held in many cases that an administrator cannot appeal from a decree of distribution, because he has no interest in the final judgment, whatever it may be, yet that principle is in no sense analogous to the right of an executor to support a will, especially so when it has once been probated. For the foregoing reasons, let the judgment and decree setting aside the will, revoking the probate thereof, and distributing the estate be reversed, and the cause remanded for further proceedings.

We concur: PATERSON, J.; HARRISON, J.

(98 Cal. 195)

RICHARD v. WOLFLING. (No. 18,035.)  
(Supreme Court of California. April 27, 1893.)

MINES—LOCATION ON AGRICULTURAL LANDS.

A location of a mine is not invalid, as against a subsequent location, because a portion thereof was made on agricultural land, which was afterwards patented, where the agricultural land could be profitably worked only by commencing on the other portion of the location, and the money expended on such other portion was sufficient to make a valid location

of the whole, the subsequent locator not connecting his claim with the holders of the agricultural patent.

Department 2. Appeal from superior court, Tuolumne county; John M. Corcoran, Judge.

Action by E. J. Richard against M. J. Wolfling. From a judgment for plaintiff, defendant appeals. Affirmed.

F. W. Street and F. P. Otis, for appellant. Reddick & Solinsky, for respondent.

McFARLAND, J. The defendant filed an application in the United States land office for a patent to a quartz mining claim 1500 feet in length and 600 feet wide, called the "Scorpion." The plaintiff filed in said land office an adverse claim, averring that he was the owner of a quartz mine called the "Hope Mine," and that a portion of the Scorpion mine, claimed by defendant, conflicted with a portion of said Hope mine. The contest was referred to the superior court, where the plaintiff brought this action, and the court found in favor of plaintiff for the portion of the mining ground in conflict. Defendant appeals from the judgment, and from an order denying a motion for a new trial.

Plaintiff introduced evidence tending to show ownership of the mining ground in contest, first, under a location made by Alexander Araya and others in June, 1872, and also under a relocation made by said Araya and one Samuel Ralston on the 7th of April, 1880. Many of the exceptions relied on by appellant refer to said location of June, 1872, and to evidence tending to show the continued ownership of plaintiff's grantors under that location down to the second location of April, 1880. We think that plaintiff showed a good location made in June, 1872, a conveyance by the other locators to said Araya, and a full possession by Araya, under mining laws and customs, down to April, 1880, and that if plaintiff could have shown those facts under the complaint the said exceptions would not be tenable. But as the complaint seems to be based expressly upon the second location of April 7, 1880, the testimony as to the location of June, 1872, perhaps, should not be regarded at all, and therefore the exceptions as to that testimony need not be here examined.

On the 7th of April, 1880, the said Araya and said Samuel Ralston relocated the said Hope mine,—the description being the same as in the location of 1872, except that the width was made only 450 feet instead of 600,—and their notice of location contained this clause: "This claim was recorded in 1872, and has been worked and held up to date." It is not disputed that this location of April, 1880, was made in accordance with the laws of congress and the customs of the district, or that it was held by a proper mining possession, unless the whole location was invalid and void because a portion of the claim was afterwards patented as agricultural land to one St. Cyr, as hereinafter mentioned. The Hope mine runs generally in a northerly and southerly direction, and the northerly half of the claim (that is,

about one half) was on section 30 of a certain township, and the southerly half was in lot 1 of section 31, which lies immediately south of said section 30. At the time of the location it does not appear that lot 1 of section 31 had been patented, but it does appear that about three months afterwards a patent issued from the United States government to said St. Cyr for said lot 1. The northerly part of the mine in section 30 still is public land of the United States. Nearly all the work that has been done by plaintiff and his grantors on said mine is on the southerly portion of it, and upon the ground which lies within said section 31, afterwards patented to St. Cyr; and, as before said, there is no doubt that more than sufficient work was done on the said southerly portion to hold the whole mining claim. Indeed, it appears that about \$25,000 has been spent on the mine by plaintiff and his grantors. Under these circumstances, appellant contends that the whole location of the Hope mine made by Araya and Ralston in April, 1880, is void, because the southerly portion of it was upon land not open to location, and that, therefore, the work done upon the southerly part of the mine was of no value, in point of giving possession to the upper portion. It appears, however, that, within a couple of months after the location of the Hope mine, Araya and Ralston procured from the claimants of said lot 1, in section 31, a conveyance to them of the right to mine said Hope mine, on the said lot 1; and, under these circumstances, we do not think that appellant's position is tenable. If, after the second location, in 1880, plaintiff's grantors allowed St. Cyr, without opposition, to procure a patent to lot 1, as agricultural land, of course they could not have made any successful contention for the mine, as against the holders of the agricultural patent. It does not appear whether or not, at the time of the location of the mine, they knew that there was any claim of any kind for the land, as agricultural land. It was quite a common thing for miners, in locating mining claims, to be ignorant of government legal subdivisions, and of the inchoate rights of other persons to agricultural titles. In the present case the locators of the mine acquired from the agricultural owners the right to work the mine; and under these circumstances we do not think that a third person, not connecting himself with the St. Cyr right, is in a position to dispute the validity of the mining location. Appellant claims under a location made several years afterwards, to wit, in 1887; and his successful contest of respondent's right must rest upon the very narrow and technical point that a portion of the location of respondent was not on public land. But the real prior right, in justice, and in accordance with the generally received notion of valid mining locations, is with the respondent; and we know of no absolute rule of law which makes such a location as that of respondent invalid, as against the subsequent comer, who evidently relies wholly upon this supposed defect in respondent's location. There is no question that the

land in contest between the parties in this action is unoccupied public land, and the contention that respondent cannot hold it because a portion of the ground located at the time was not public land cannot be maintained. Moreover, it appears from the evidence that the northerly portion of the Hope mine could be profitably worked only by commencing on the southerly portion, and working northerly; and it has been frequently held that work done for the purpose of developing a mine is deemed to have been done on the mine, although actually done at a distance therefrom. Neither is the position tenable that there could not have been a valid relocation of the mine by plaintiff's grantors. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. Rep. 182.

Appellant cites *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110. In that case, plaintiff claimed that his grantor, Thomas, had discovered a vein, and sunk a discovery shaft at a certain point, and thereupon made a valid location. But it appeared that he had not made such discovery; that one Fallon had previously made the discovery, and had previously made a valid prior location of the claim, and had made application for a patent; that Thomas did not contest Fallon's application; and that Fallon obtained a patent for his location, which included the discovery shaft of Thomas. And the court held that "a location on account of the discovery of a vein or lode can only be made by a discoverer, or one who holds under him," and that, "if the title to the discovery falls, so must the location which rests on it." The court further said that "the issue of the patent to Fallon was equivalent to a determination by the United States in an adversary proceeding, to which Thomas was in law a party, that Fallon had title to the discovery superior to that of Thomas, and that consequently Thomas' location was invalid." It is apparent, therefore, that the facts in that case were different from those in the case at bar. There nothing was involved but mining locations and rights; and the decision went upon the theory that the whole claim of Thomas rested upon an alleged "discovery," which he had not made, but which had previously been made by Fallon. And Thomas obtained no rights from Fallon, and did not connect himself with Fallon in any way. But in the case at bar the mining location of plaintiff's grantors was long prior to that of defendant, and was in every way a perfect location, except so far as it might be embarrassed by the rights of the subsequent agricultural patentee, with whom defendant does not connect himself in any way; and therefore we think that, as against the appellant, the title of respondent to that part of the Hope mine which is in conflict with the Scorpion mine is complete. To hold otherwise would be to commit an injustice which the law applicable to mining locations and rights does not demand.

There were numerous exceptions taken at the trial which we do not deem it necessary to notice. It is sufficient to say that we do not think that the court erred

in excluding the judgment roll in the case of *Wolfig v. McCormick*, and that there was no error committed in rulings concerning the testimony of the witnesses Tanzey and Araya. The other exceptions were either not well taken, or concern immaterial matters. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(98 Cal. 27)

BULL et al. v. STRONG. (No. 19,108.)

(Supreme Court of California. March 28, 1893.)

HUSBAND AND WIFE—MORTGAGE ON SEPARATE ESTATE.

In an action to foreclose a mortgage on a wife's separate estate, plaintiff alleged that defendant and her husband executed and delivered a deed conveying land to him "in trust, the conditions of which are stated in a separate instrument in the hands of the parties of the first part;" that the deed was intended as a mortgage for moneys advanced to defendant's husband, and that at the time of its delivery plaintiff executed and delivered to defendant and her husband a defeasance. The court found that no such contract was made with defendant's husband, that the defeasance was never delivered, and that defendant knew nothing of it until after her husband's death. *Held*, that a judgment for defendant was proper.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Alpheus Bull, Jr., and others, executors of Alpheus Bull, deceased, against Hattie Strong. From a judgment for defendant, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Wells, Monroe & Lee, for appellants. S. M. White, John D. Bicknell, and Chapman & Hendrick, for respondent.

McFARLAND, J. This action was originally commenced by Alpheus Bull, now deceased, against John T. Coe, administrator of Charles L. Strong, deceased, and his widow, Hattie W. Strong, to foreclose a mortgage executed to said Bull by said Charles and Hattie Strong upon land admitted to have been the separate property of said Hattie. Judgment was first rendered in favor of the defendants; and upon appeal to this court the judgment was reversed, and a new trial ordered. See *Bull v. Coe*, 77 Cal. 54, 18 Pac. Rep. 808. After the return of the remittitur the pleadings were amended several times; and the action was prosecuted by the administrators of Alpheus Bull against Hattie W. Strong, alone, it having been dismissed by the plaintiffs as to the administrator of said Charles L. Strong. Judgment was again rendered in favor of the defendant Hattie W. Strong, and plaintiff appeals from the judgment and from an order denying a new trial. It is averred in the complaint that on October 31, 1882, the said Charles L. Strong, since deceased, and his wife, the said Hattie W. Strong, duly executed to said Bull, deceased, a deed which conveyed to said Bull the land in contest, which provided, however, that the said land "is herein made over to the

party of the second part in trust, the conditions of which are stated in a separate instrument in the hands of the parties of the first part." It is averred in the complaint that this deed was given and intended as a mortgage to secure certain moneys advanced or to be advanced by said Bull to said Charles L. Strong; that this deed was delivered the next day, November 1st, by said Charles to said Bull; and that at the time of its delivery the said Bull executed and delivered to said Charles and Hattie Strong an agreement in writing dated November 1, 1882, and which is called generally the "defeasance." This defeasance refers to said deed of October 31st, and declares that it was given in trust to secure the payment, with interest at 9 per cent., of all moneys advanced or to be advanced by Bull in payment of said Charles L. Strong's one-third interest in the Belmont mine, as well as for the expense of working said mine, the amount not to exceed \$11,000. It also provided that the profits of said mine should be applied in payment of the money thus advanced; and that, if such profits should not be sufficient to pay said advances, then said Bull should have the right to sell such portion of the land as should be necessary to meet the deficiency. There is a rather obscure provision about "twelve months from the date of this instrument," and there are some other provisions not necessary to be here stated. The answer denies that said defeasance was delivered either to said Charles or to said Hattie Strong at the time alleged in the complaint, or at any time. Said defendant Hattie Strong also denies in her answer that said deed was delivered to said Bull for any such purpose as that stated in the defeasance; and she avers that the deed was given only for the purpose of raising some money, if it should become necessary, not exceeding \$3,000, to pay her expenses for a trip east to be treated for her ill health, and for certain family expenses. She also denies that any money was advanced by Bull on said deed; and furthermore that the profits, sale, etc., of said mine, all of which were received and controlled by said Bull, more than repaid him for any advances which he may have made for her said husband in the business of said mine. Many other issues were made by the pleadings, but they are not necessary to be here noticed. Evidence was introduced at the trial as to a great many matters, and the findings are very full and quite lengthy. But the court finds, among other things, that the said defeasance "was never delivered to the said C. L. Strong in his lifetime, nor was it drawn up in the presence of said Strong, nor was any such contract as set forth in said defeasance ever made between said Alpheus Bull and the said C. L. Strong;" and that said defendant Hattie Strong knew nothing of said alleged defeasance until long after the death of her husband. We have carefully examined the long transcript and the exhaustive briefs of counsel, and we are satisfied that the court was warranted in making said findings. This being so, the judgment must be affirmed without reference to the many other points which

arose in the case. We may say, however, that we see no material error in the rulings of the court upon the admissibility of evidence. As the appellants rely in their complaint upon the terms of the written defeasance, they could hardly recover upon any other theory; but as to the said statement of respondent that the deed was given to secure advances, if such should be found necessary, not to exceed \$3,000, for her trip east, family expenses, etc., the court finds that if any moneys were advanced by Bull for such purpose they had been fully paid, and we cannot say that such finding was not warranted by the evidence.

The judgment and order are affirmed.

We concur: DE HAVEN, J.; FITZGERALD, J.

(98 Cal. 149)

SPINNEY v. GRIFFITH et al. (No. 18,014.)  
(Supreme Court of California. April 18, 1893.)

CONSTITUTIONAL LAW—MECHANICS' LIENS—WHO MAY CLAIM—RECORDING CONTRACT.

1. Const. art. 20, § 15, providing that mechanics, material men, etc., shall have a lien upon the property upon which they have bestowed labor or furnished material, etc., and the legislature shall provide by law for the speedy and efficient enforcement of such liens, is not self-executing, but requires legislation to give a lien.

2. Code Civil Proc. § 1183, provides that mechanics, material men, contractors, subcontractors, etc., shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value thereof. The section then provides that "in case of a contract for the work between the owner and his contractor, the lien shall extend to the whole contract price. \* \* \* All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000," and shall be recorded; "otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien" therefor. Held, that a contractor who fails to record his contract, where the agreed sum to be paid is over \$1,000, can have no lien.

3. In such case the contractor cannot claim a lien under the first part of the section, on the ground that, his contract being void, he may recover on an implied contract for the services and materials furnished; since, though, under the common law, he may be entitled to recover on an implied contract, he cannot have a lien, as the lien is created by statute solely, and the statute must be complied with.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by John Spinney against Annie T. Griffith and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Sayle & Coldwell, for appellants. Church & Cory, for respondent.

SEARLS, C. This is an action to cancel a contract for the construction of a brick building in the city of Fresno, and to foreclose a mechanic's lien. Plaintiff had

judgment, from which, and from an order denying a motion for a new trial, defendants, Annie T. Griffith and S. N. Griffith, appeal. Defendant Annie T. Griffith is the wife of her codefendant, S. N. Griffith. She owned lots 8 and 9, in block 70, of the city of Fresno, and her husband owned, or had recently owned, lots 161 and 162, of the Central California Colony, near Fresno. On the 20th of February, 1890, the plaintiff, Joseph Spinney, entered into a written contract with the husband, S. N. Griffith, by which Spinney agreed to furnish the materials and build a brick building on said lots 8 and 9, in the city of Fresno, for the sum of \$3,940, and to accept in full payment therefor a mortgage executed by one W. D. Crichton, for \$4,000, on lots 161 and 162, in Central California Colony aforesaid. Crichton executed the mortgage to plaintiff in accordance with the contract, and the latter built the house, completing the same on or about June 1, 1890. About the time of the completion of the building, plaintiff discovered that he had been victimized in the matter of the mortgage which he had received in satisfaction of his building contract. S. N. Griffith had represented to him that he had sold the land in the Central California Colony to Crichton for \$5,500, had received \$1,500 of the purchase price in cash, and was to receive the mortgage of \$4,000 as security for the residue of the consideration; whereas, in fact, the sale was a sham, no money had been paid, and the mortgage was only given to be palmed off upon plaintiff, the mortgaged property not being worth \$2,500, etc.

In the view taken of the case, it is not deemed necessary to state at length the facts constituting the alleged fraud. Upon discovering the facts, plaintiff tendered the mortgage and notes, which it was given to secure, to Griffith, and demanded a rescission of the contract, which being refused, he proceeded and in due time filed a contractor's lien under the law for the "liens of mechanics and others" for \$3,940 upon the building which he had constructed. It is alleged in the complaint, and found as true by the court, that, in making the contract, S. N. Griffith was the duly-authorized agent of his wife, Annie T. Griffith, although that fact does not appear from the contract. The court below rendered a judgment annulling the contract between plaintiff and S. N. Griffith, and awarding the former a judgment for \$3,940, with interest and attorneys' fees, amounting in the aggregate to \$4,478.50 against the defendant Annie T. Griffith, and upholding the validity of plaintiff's lien upon her premises aforesaid.

Can so much of the judgment as holds the mechanic's lien of the plaintiff to be a valid and subsisting lien on the premises of the defendant be sustained? The lien of mechanics and others on buildings and the land upon which they are erected, as security for the amount due them for labor performed and the materials furnished, is the creation of statute, and was unknown either at common law or in equity. We must therefore look to the source of its being—the statute—alike for the right to such a lien and the mode by



which it can be secured. The terms "statute" and "statute law" are here used in that broad and comprehensive sense which includes alike the organic law and the statute enacted under it. By section 15 of article 20 of our constitution it is provided that "mechanics, material men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor, or furnished material, for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens." This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action. So far as substantial benefits are concerned, the naked right, without the interposition of the legislature, is like the earth before the creation, "without form and void;" or, to put it in the usual form, the constitution in this respect is not self-executing. Chapter 2, tit. 4, pt. 3, Code Civil Proc., contains the statutory provisions applicable to the case at bar. That chapter (Id. § 1183) provides that mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, etc., performing labor, or furnishing materials, to be used, etc., shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished. The same section provides further: "In case of a contract for the work between the owner and his contractor, the lien shall extend to the whole contract price. \* \* \* All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, \* \* \* and shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; \* \* \* otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." It will be seen from this quotation that, when the amount agreed to be paid thereunder exceeds \$1,000, the contract must be in writing, and shall be subscribed by the parties thereto, and must be filed and recorded before the work is commenced; otherwise it shall be wholly void. If the contract is wholly void, it cannot be made the basis of a substantial claim for a lien. A void contract is no contract; it is as though it had never existed. The statute, in addition to declaring the contract void, which would seem to be quite sufficient for practical purposes, goes a step further, and declares that "no recovery can be had thereon by either party thereto." If no recovery can be had thereon, manifestly no lien thereunder would be of avail.

It has been contended that, while the contractor cannot take a lien and recover under the contract, still, the contract be-

ing void, and a lien being given by the earlier part of the section to contractors as well as to others, he is, upon well-established rules, entitled to recover upon an implied contract for the services and materials furnished, and, being so entitled to recover, and the lien being assured to contractors, he may have and enforce it. The contention may seem plausible, but is the position tenable? First, the right to recover upon a quantum meruit for services, and upon a quantum valebat for goods, wares, and merchandise sold and delivered, in case no value or price has been agreed upon by the parties, and in some cases where an attempted contract is void, is a creation of the common law, founded upon the equitable theory that he who has received and been benefited by the services or goods should pay a reasonable compensation therefor. The rule is not one created or dependent upon any statute, but exists independent thereof. The "lien law," as it is frequently termed, is with us pre-eminently a creature of the statute. It derives its existence only from positive enactment, and "not arising out of, or of the essence of, the contract for labor, or dependent on the motives which suggest its being enforced, \* \* \* a remedy given by law, which secures the preference provided for, but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all its essential requirements." Phil. Mech. Liens, § 9. This being so, the right to a lien is not a corollary of the right to recover, but, while dependent upon such right for its efficacy, is an independent creation of the statute. Looking, then, to the text of the statute, it may be said the contractor whose contract is for more than \$1,000, and whose contract is not in writing, and is not filed for record, cannot enforce his lien under the contract, because it is declared void. He cannot have a lien independent of the contract, because the statute by implication forbids it. "In such case the labor done and material furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

All persons except the contractor shall have a lien. If it was intended that the contractor, too, was in such a case to have a lien, why was he excepted? To hold that he may under such circumstances have a lien is to hold the exception nugatory. The statute must be construed so as to give effect to all its provisions, and, when so construed, the contractor whose remuneration is in excess of \$1,000, and who has failed to comply with the provisions as to execution and recording his contract, is without the pale of the class to which liens are given by such statute. The reason of the exception is apparent. It is in the interest of laborers, subcontractors, and material men. In contracts of magnitude they are afforded a medium by which to judge as to the security afforded them under the contract. The penalty upon the owner

failing to record is found in his liability to pay for all the labor performed and materials furnished; while the contractor, for like negligence, is shut out of the class of persons to whom a mechanic's lien is given, and relegated to the personal liability of the owner given him, not by the statute, but independent of it. These views of the law preclude the right of plaintiff to a mechanic's lien. He was an original contractor, and, as such, entered into a written contract with defendant, by which he agreed to construct for the latter a building, the consideration for which was in excess of \$1,000. The contract was not at any time filed for record, or recorded, as required by section 1183, Code Civil Proc. It was therefore void, and plaintiff was not entitled to a lien. Under the circumstances of this case, we may regret the conclusion to which we are forced, but we have no duty except to declare the law as we find it. The judgment and order appealed from should be reversed, and the court below directed to take such action as may be proper, and in consonance with the views expressed herein.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order should be reversed, and the court below is directed to take such action as may be proper and in consonance with the views expressed herein.

(98 Cal. 157)

GRAY v. McWILLIAMS. (No. 18,098.)

(Supreme Court of California. April 20, 1893.)

SURFACE WATER—EASEMENT OF FLOWAGE—OVERFLOW FROM RIVERS.

1. The owner of the lower or servient land must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land. *Ogburn v. Connor*, 46 Cal. 346, followed.

2. The rule that the owner of the lower or servient land must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land does not apply to the overflow of water from the large rivers of the state, and the owners of land along such streams have the right to construct levees or embankments to protect their land from such overflows, though the effect thereof may be to prevent the free discharge of such water, or may tend to increase the flow of such water on the land of their neighbor, not so protected. *Lamb v. Reclamation Dist.*, 14 Pac. Rep. 625, 73 Cal. 125, followed.

3. If the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods, his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee on his own land, though the effect may be to increase the flood waters on the higher land of the neighbor, who has not so protected himself. *McDaniel v. Cummings*, 23 Pac. Rep. 795, 83 Cal. 515, followed.

4. Water seeping from a river through an embankment or levee constructed by the owner of the higher land near the river is not over flow from which the owner of neighboring lower land may protect himself by an embankment, thus accumulating it upon the higher land, but is like surface water, and he is bound to permit it to flow off over his lower land.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county; W. H. Grant, Judge.

Action by Mary Gray against A. S. McWilliams. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

U. W. Brown, for appellant. H. M. Albery and K. Albery, for respondent.

SEARLS, C. Action to remove and abate as a nuisance an embankment or levee, erected by defendant upon his own land, but which held back and caused water to flow upon the land of plaintiff, and to recover damages for injury caused thereby. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals. The plaintiff, Mary Gray, has been since 1888 the owner in fee in her own right, and in possession, of a tract of land consisting of over 40 acres, situate in the county of Colusa. The defendant, A. S. McWilliams, is, and since September, 1887, has been, the owner of and in possession of a tract of land of over 200 acres, lying south of and adjoining plaintiff's land for a distance of 80 rods. Upon the dividing line, between the land of plaintiff and defendant, is a roadway or avenue 50 feet wide, known as "Fruitvale Avenue." Upon the center of this avenue is an embankment, constructed in 1884, by the grantors of plaintiff and defendant, for the double purpose of a roadway, and as a check to hold water for irrigation purposes. This embankment, which runs east and west, if maintained intact throughout its length, prevents the water accumulating on the north side from flowing in a southerly or southwesterly direction to and upon the land of defendant, and, as a consequence, causes or tends to cause the same to accumulate upon the land of plaintiff. In the winter of 1889 and 1890, defendant closed up a water way through this embankment, in consequence of which plaintiff's land was flooded, her orchard thereon injured, etc. The land north and east of that of plaintiff is slightly higher than plaintiff's land, there being a slight slope over the lands of plaintiff and defendant towards the southwest. These lands are all on the west side of the Sacramento river, and east of them and on the west side of said river is a large levee, to protect the country from overflow in times of flood. West of this large levee, and east of the lands of the plaintiff and defendant, is a raised wagon road leading from Colusa to Princeton, the general course of which is northwest and southeast. Through the embankment of this road there are several openings or water ways. The court finds that commencing at the Princeton road there is a trough, water course, or washout, running thence in a southwesterly direction across the lands of plaintiff and defendant, crossing Fruitvale avenue in its course. This "trough, water course, or washout," across plaintiff's land, and for 100 feet on the land of defendant, has abrupt banks, is about 3 feet deep, and from 12 to 14 feet wide. From a point on defendant's land, say 100 feet from his north line, this trough

subsides into a depression or swale, which extends for a couple of miles in a southwesterly direction to Hopkins slough, which in turn connects with a large natural water course, called the "trough," etc. The court finds that this trough, water course, or washout was formed naturally by the action of the water, has existed certainly since 1881, and serves in time of rainy weather or high water to drain and carry off the surface and surplus water from plaintiff's land, and from lands of others naturally draining upon and over hers. The court finds, as to the sources from which the waters thus accumulating upon plaintiff's land came, as follows: "(9) That the water thus thrown back upon the plaintiff's land was surface water, and was composed partly of seepage water escaping from the Sacramento river by percolation through the river levee, and partly of rainfall; but what portion of said water was seepage or percolating water, and how much thereof was rain water, cannot be found or determined from the evidence; but there was no rush or great flow or volume of water spreading over the surface of the soil as in case of flood or overflow from the river, and at no time did it appear in such quantities but that it would have naturally passed off in the said water way or trough on plaintiff's and defendant's lands, had there been no obstruction in said water way or trough. There is a branch ditch on the west side of the Princeton road, which defendant claims by his answer served to concentrate the surface waters and seepage water coming from the Sacramento river, and pour them upon plaintiff's land at a fixed point, etc., but, as the finding of the court is against this view, the facts connected therewith need not be mentioned at length. Like considerations apply to matters of estoppel and prescription. To say that the evidence is sharply contradictory scarcely conveys an adequate idea of the antagonisms it presents. There is hardly an issue made in the case but that might have been decided differently, and the conclusion would have found support in the evidence. After the findings in the cause were filed, counsel for defendant asked the court, in addition to its findings, to pass upon 18 additional propositions, which were offered in writing, which request was refused. Some of these propositions involved facts and issues already passed upon; others may be regarded as involving evidentiary, rather than ultimate, facts, and, while it would have been of interest here to have had an exposition of a few of them, we cannot say, in the face of the somewhat full and explicit findings, that any error was committed by the court in its refusal.

Among the conclusions of law deduced by the court were: "(1) That plaintiff's land is the dominant tenement, and defendant's land the servient tenement; that the water which was obstructed, and caused the injury to plaintiff, was surface water, and that the plaintiff had an easement, and defendant owed plaintiff a servitude for the flowage of such water from plaintiff's land onto and across de-

fendant's land. (2) That the embankment of earth or obstruction complained of was a nuisance, and should be abated as such," etc.

Had plaintiff an easement in the land of defendant for the flow of the water in question over it? "An easement is a privilege without profit, which the owner of one tenement has a right to enjoy, in respect of that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." *Godd. Easem.* p. 2; *Stevenson v. Wallace*, 27 *Grat.* 87; *Ritger v. Parker*, 8 *Cush.* 147. "A charge or burden upon one estate, (the servient,) for the benefit of another, (the dominant.)" *Morrison v. Marquardt*, 24 *Iowa*, 35. Easements are of two kinds, similar to one another in many respects, but differing in many particulars. To the first class belong those easements created by act of man, and to the second those which are given by the law to every owner of land. This latter class is given by law, because without them there would be no security in the enjoyment of land by its owner. Without them a neighbor might deprive a landowner of the benefits derivable from things which in the course of nature have been provided for the common good of all, and which the law wisely provides shall not be wrested from one by the act of another. These easements are said to be inherent in the land *ex jure nature*, and are often termed "natural rights." A careful review of the adjudicated cases will, it is believed, show that a good deal of obscurity has been thrown around many questions connected with the subject under consideration, by a failure to observe the line of demarcation between these two classes of easements. As it is with the latter class that we have exclusively to do in the present case, we must eliminate from consideration such rules of construction as apply exclusively to easements founded upon grant or prescription.

What then is the "natural right" of the plaintiff in the premises? It is claimed that at common law it was held that no natural easement or servitude existed in favor of the owner of the superior or higher land, as to mere surface water, or such as falls or accumulates by rains or the melting of snow; and that the proprietor of the inferior or lower tenement or estate might at his option lawfully obstruct or hinder the flow of such water thereon; and in so doing might turn back or off of his own lands, and onto and over the lands of other proprietors, such water, without liability by reason of such obstruction or diversion. It is also claimed that the doctrine of the civil law is almost directly the reverse of that of the common law, and that under it the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating on his land which is higher, upon or over the land of the servient owner as in a state of nature; and that such natural flow or passage of the waters cannot be interrupted or prevented by the servient

owner, to the detriment or injury of the estate of the dominant proprietor. And as that conclusion is in unison with the doctrine on the same subject of the courts of fully one half of the states of our Union, all professing to be controlled as we are by the common law, we are justified in saying that with us the rule established has become and is a part of our common law. The case of *Ogburn v. Connor*, 46 Cal. 346, in which this court, in a well-considered opinion, held in substance that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude. In *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. Rep. 795, the court was urged to overrule *Ogburn v. Connor*, but refused to do so, placing such refusal upon the ground of stare decisis. The case was, however, distinguished from *Ogburn v. Connor*, and passed off upon the principle laid down in *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. Rep. 625. In view of the reasoning and conclusions in *McDaniel v. Cummings*, and *Lamb v. Reclamation Dist.*, it may be fairly assumed, as the consensus of opinion on the part of the court: (1) That the owner of the lower or servient tenement must permit the surface water from the higher land of his neighbor to flow unobstructed over his lower land, as held in *Ogburn v. Connor*, supra. (2) That the rule of *Ogburn v. Connor* does not apply to the overflow of water from the large rivers of the state, and that the owners of land along such streams have a right to construct levees or embankments for the protection of their lands from the ravages of flood waters, although the effect thereof may be to prevent the free discharge of such flood waters in as large and ample a manner as they would otherwise do, or may tend to increase the flow of water upon lands not similarly protected, as was held in *Lamb v. Reclamation Dist.*, supra. (3) That if the owner of higher land upon a river subject to overflow fails to erect levees or embankments to protect his land from the effect of floods, his neighbor owning lower land in his rear may protect himself from such floods by erecting a levee upon his own land, although the effect thereof may be to increase the flood waters on the higher land of the neighbor, who has not resorted to like means of protection, as was held in *McDaniel v. Cummings*, supra. If there is an essential difference in the conclusions reached in these several cases, the reasons for such difference are to be found in the elementary facts forming their basis.

In the case of flood waters escaping from natural streams, we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but after all, this declaration is used in view of the means of defense resorted to, rather than in the abstract. We build the banks of the river

higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to its ultimate destination, and he who, to protect himself from a flood, should erect a barrier across the channel of one of our important rivers, would probably be met with the declaration that it was not the proper mode of warfare, even against a "common enemy." In the case of surface waters having no defined channels of escape, and the owner of the land upon which they are found being impotent to rid himself of their presence, the law wisely provides that the laws of nature shall be left untrammelled in their disposition.

Was the water held back by defendant's embankment surface water, in the sense that defendant was legally inhibited from retarding its passage over his land? Surface water is usually defined to be such as falls from the clouds in the form of rain or snow, or rises to the surface in springs. The reason why the owner of the higher land has an easement in the lowerland for their escape is to be found not so much in the source from which they are derived, as in the fact that nature has adopted this method of ridding the land of their presence in surplus quantity. I can see no good reason why the water which accumulated upon the land of plaintiff should not be subject to the rules in regard to surface water, as defined in *Ogburn v. Connor*, supra. A portion of such water (how much the court cannot determine) came from the seepage through the levee built to protect, or which at least does protect, all these lands from overflow. The evidence showed that this river levee was a large and high one; that the winter of 1889-90 was one of heavy floods; that for some months the water was several feet above the general level of the country, and that gradually the levee became saturated until the water seeped or percolated through and under it; that it came to the surface much as springs do, and gradually sought a lower level, not in a defined channel, but as surface water is wont to do, by percolation and by the force of gravity. It came without any act or agency of the plaintiff, and as she was, so far as appears, powerless to direct its course, it would seem rational to say that, like other surface water coming without volition, it should be permitted to pass off by the method devised by nature. It must be within the observation of many of us that these large levees, in time of protracted flood, however well constructed, are not so impervious to water under pressure but that percolation or seepage to some extent is liable to occur. Constructed as they are in this state, under the encouragement of law, for the general benefit, and effecting as they usually do great good to individuals and communities, it would seem natural that the minor inconveniences inevitable and inseparable from their existence should be borne by those upon whom they naturally fall, and that to concentrate the whole effect upon a single individual is not in consonance with our views of justice under such circumstances. Had the defendant left the water way through Fruitvale avenue open, as

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he was in duty bound to do, to allow the escape of what, beyond all cavil, was the surface water upon the land of plaintiff, this seepage water, according to the finding of the court, would have passed off without injury to plaintiff, and, so far as appears, without detriment to any one. If the presence of this seepage water enhanced the servitude imposed upon defendant's land, it was without the action of plaintiff, and was and is a condition not dependent upon the acts of the parties, the result of which all the landowners subject to its effect must bear in their turn.

The only theory suggesting itself under which a different conclusion could be reached is to be found in the doctrine of *McDaniel v. Cummings*, supra, holding that, upon the failure of the landowner next the river to construct a levee, the owner of lower land in the rear of him can do so, even though the higher land near the river is surcharged with flood water as a consequence. If this may be done, it may be asked in case a levee is built by the landowner next the river, as in this case, which restrains the major portion of the flood water, why may not the owner of lower land in the rear, as in case of this defendant, protect himself from the minor portion or seepage water by a sublevee, even though it increases the quantity of water upon the owner of higher land, as in case of plaintiff here? The answer must be that the rule enunciated in *McDaniel v. Cummings* was in consonance with a sound public policy favoring a cherished object, viz. the reclamation and improvement of valuable lands subject to overflow, and was well calculated to meet and do justice in cases where the owners of higher lands along the rivers refuse or neglect to construct levees, or to join with their neighbors in doing so. It does not apply here, because a main levee has been built upon the higher land contiguous to the river, which appears to effect, in the main, the object of its construction. To permit each owner of lower lands in the rear to construct sublevees to hold back the seepage water escaping from the main levee would be to permit them to flood the protected higher land in front, and thus practically to frustrate the beneficial results of the main levee. Such a rule, when thus extended, would tend to retard rather than promote improvement and consequent prosperity. As a conclusion, after a careful examination of the case in all its different aspects, it is held that the court below was correct in its conclusions that plaintiff, as the owner of the higher land, had an easement or right to have all the water in question, including what was termed "seepage water," flow from her land to, upon, and over the land of defendant, and to that extent the land of defendant was the servient, and that of the plaintiff the dominant, tenement. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

# WHITE et al. v. FRESNO NAT. BANK.

(No. 14,758.)

(Supreme Court of California. April 21, 1893.)

CONTRACTS—PERFORMANCE—JURISDICTION—RES  
• JUDICATA—APPEAL.

1. In an action by a contractor for constructing a building, defendant cannot set off damages for plaintiff's failure to complete the building within the time prescribed by the contract, where such failure was due solely to its own negligence.

2. Where the supreme court denies an application by a defendant corporation for a writ of prohibition, to prohibit the trial court from proceeding in the action, based on the ground that it has acquired no jurisdiction, the question of jurisdiction is *res judicata* on appeal by defendant from a subsequent judgment in the action.

3. In an action by a building contractor, defendant cannot for the first time on appeal complain that the plans and specifications referred to in the contract set out in the complaint, and introduced in evidence, were not attached to or made a part thereof, and hence that the contract was not in its entirety filed for record as required by statute.

In bank. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Action by W. C. White and F. R. Thomas, partners, etc., against the Fresno National Bank. From a judgment for plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Nourse & Short, for appellant. Baldwin & Campbell, for respondents.

GAROUTTE, J. This action was brought to recover a balance alleged to be due from defendant to plaintiffs for the construction of its bank building in the city of Fresno. Plaintiffs are assignees of the contractor, and his contract was confined to the woodwork of the building. The contractor completed his work to the satisfaction of the architect, but the bank claims that it was not done within the time fixed by the terms of the contract, and by reason thereof it suffered damage in loss of rents, etc., and asks a set-off to that extent. Judgment went for the plaintiff, a motion for a new trial was denied, and the appeal is prosecuted from the judgment and order.

The principal point upon which appellant relies for a reversal of the judgment is that by virtue of section 16, art. 12, of the constitution, defendant, being a corporation, could not be sued in San Joaquin county, and therefore no jurisdiction was ever obtained over it. When this action was originally brought, the bank objected to the jurisdiction of the superior court of San Joaquin county to proceed in the matter, and applied to this court for a writ of prohibition based upon such alleged want of jurisdiction, asking for an order directing that court to refrain from further proceedings in the case. The application for the writ was heard in bank, and denied, and a petition for a rehearing was also denied. 83 Cal. 491, 24 Pac. Rep. 157. While such decision may not, technically speaking, be the law of the case, yet it is *res adjudicata* as to that

subject; and, notwithstanding the industry and learning disclosed in the present discussion of the question by appellant's counsel, we shall treat the matter as settled and foreclosed by the former decision.

Appellant's affirmative defense is based upon the failure of the contractor to complete the building within the time agreed upon, and in this respect the court found that such failure was not due to any fault or neglect of the contractor, but was attributable entirely to the negligence of the defendant. The contractor's evidence supports this finding, and we cannot disturb it. The mere fact that the brick and iron work was finished in December, and the contractor did not complete the building until some four months after that time, is not of itself sufficient to overthrow the finding of the court that the delay was not occasioned by his fault or neglect. There was also some evidence tending to show that the contract was filed in the recorder's office prior to the commencement of the work, and no evidence to the contrary.

It is insisted that the contract set out in the complaint, and introduced in evidence, is incomplete, in this: that the plans and specifications therein referred to are not attached and made a part thereof, and consequently the contract in its entirety was not filed for record, as required by the statute. No demurrer was offered to the complaint upon this ground. The answer admitted the contract as set out in the complaint, and the contract itself was introduced in evidence without objection. It is too late to raise the question for the first time in this court. The authorities cited do not support appellant's contention in this regard. In *Holland v. Wilson*, 76 Cal. 434, 18 Pac. Rep. 412, the question arose upon a special demurrer. In *Yancy v. Morton*, 94 Cal. 558, 29 Pac. Rep. 1111, it came before the court upon an objection to the evidence. *Rebman v. Water Co.*, 95 Cal. 394, 30 Pac. Rep. 564, does not appear to be in point. The errors of law are not well taken. Let the judgment and order be affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; PATERSON, J.; McFARLAND, J.; DE HAVEN, J.

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BURKE v. BOURS et al. (No. 18,087.)

(Supreme Court of California. April 22, 1893.)

EJECTMENT—FINDINGS OF FACT—REVIEW ON APPEAL—PURCHASE OF LAND BY FORMER AGENT—EQUITABLE TITLE—EVIDENCE.

1. Where, in ejectment, there is evidence supporting the findings of the trial court, its decision, either on the weight of the testimony or the credibility of the witnesses, will not be reviewed on appeal.

2. In ejectment it appeared that the owner's agents employed defendant to sell the land in dispute; that he informed such agents that he had a purchaser, and sent them a deed in which neither the name of the grantee nor the consideration was inserted; that such agents forwarded the deed to the owner, who inserted the consideration, and returned it executed to such agents, who sent it to defendant. Afterwards the latter informed such agents that the

supposed purchaser refused to take the land; that he had caused his own name to be inserted in the deed as grantee, and, if satisfactory to the owner, he would take the land. The owner consented, and defendant sent the price to such agents, and took possession. *Held*, that defendant was not acting as the owner's agent in making the sale to himself, but was a purchaser dealing directly with the owner, and obtained a good title to the land, in the absence of any fraud on his part.

In bank. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action in ejectment by W. G. Burke, administrator of the estate of Jose R. Arguello, deceased, against B. W. Bours and F. A. Ruhl, Bours' tenant. From a judgment for defendants, plaintiff appeals. Affirmed.

For reports of decisions on prior appeals, see 28 Pac. Rep. 57, and *Arguello v. Bours*, 8 Pac. Rep. 49.

George D. Collins, for appellant. Jas. H. Budd, John E. Budd, and Nicoll & Orr, for respondents.

HARRISON, J. When this action was here upon the last appeal (92 Cal. 108, 28 Pac. Rep. 57) the facts before the court were that Bours had been employed by Faulkner, Bell & Co., who were agents of Arguello, to make a sale of the land, and had reported to them a sale thereof for the sum of \$4,500, sending at the same time a form of a deed to be executed by Arguello, without, however, inserting the amount of the consideration or the name of the grantee; that Arguello filled in the amount of the consideration, and executed the deed without inserting the name of any grantee; that when Bours received the deed he caused his own name to be inserted therein as grantee, and sent his check for the amount of the purchase money to Faulkner, Bell & Co., who accounted for the same to Arguello. The judgment of the court below was reversed upon the grounds that Bours was to be regarded as the agent of Arguello for making a sale of the land, and could not, as such agent, make a sale to himself. After the cause went down, another trial was had, and, in addition to the facts found upon the preceding trial, the court found that, when Bours sent the deed to Faulkner, Bell & Co. for execution, he had negotiated a sale of the property to one Ahumaja for the sum of \$4,500, but that when he received the deed, after it had been signed by Arguello, Ahumaja refused to consummate the purchase; that thereupon Bours had his own name inserted as the grantee in the deed, and wrote to Faulkner, Bell & Co., informing them of his failure to complete the sale, and "that he had had his own name inserted in said deed as grantee, and that, if this was agreeable to Mr. Arguello, he would take said property, and pay the said sum of \$4,500 therefor, and that, if it was not agreeable to Mr. Arguello, he would return the said deed to him;" that a few days thereafter he received a letter from Faulkner, Bell & Co., inclosing one from Arguello, in which Arguello stated "that he was satisfied with Mr. Bours as the purchaser of said property, and that he

was glad he had purchased it, and all that he (Arguello) wanted was to receive his money;" that upon the receipt of this letter Bours caused the deed, which he had in the mean time kept in his possession, to be placed of record, and immediately remitted the \$4,500 to Faulkner, Bell & Co., and entered into possession of the property, and has since remained in possession of the whole thereof; that upon the receipt of the money by Faulkner, Bell & Co. they informed Arguello that they had received from Bours the sum of \$4,500 as the proceeds of said property, and had placed the same to his credit; and that Arguello immediately acknowledged the receipt of such information. The court also finds "that the said Jose R. Arguello, prior to the payment of the said purchase money by the said Bours, had full knowledge and notice that said B. W. Bours' name had been inserted in said deed as the grantee therein named after the signing thereof; and at the time of the receipt of said purchase price said Arguello had full knowledge and notice that said Bours was the grantee named in said deed, and had full knowledge and notice of all the facts and circumstances surrounding the said transaction." Judgment was thereupon rendered in favor of the defendants, and the plaintiff has appealed therefrom, bringing up the evidence in a bill of exceptions, and specifying therein that it is insufficient to sustain certain of the findings. There was, however, testimony before the court below supporting the above findings, and the decision of that court, both upon the weight of this testimony as well as upon the credibility of the witnesses, cannot be reviewed here.

The decision of this court upon the former appeal was based upon the fact that it then appeared that Bours was the agent of Arguello for the purpose of making a sale of the land, and that the purchase by him was made without the knowledge of Arguello that he was such purchaser, and upon the well-established principle of law that when these facts were brought to the knowledge of the principal he had the right to have the sale set aside at his option, irrespective of any question of fraud or unfairness or advantage. It was said in the opinion at that hearing, "while a trustee may purchase the trust property where he deals openly with his beneficiary in the sale, and the transaction is in all respects fair and just, and the consideration full and adequate, yet that is not this case. Neither does the evidence disclose that Arguello ratified and confirmed the sale to Bours after a full knowledge of all the facts. Aside from the fact that Bours sent his personal check to Faulkner, Bell & Co. for the amount of the purchase price, there is nothing in the record to indicate that Arguello had any knowledge whatever that Bours was the purchaser."

\* \* \* Having decided that defendant occupied such relations towards Arguello that he would not be allowed to become a purchaser of this real estate unless the sale was made with the full knowledge and consent of Arguello, or ratified and confirmed by him after a full knowledge of all the facts, neither of which conditions

existed in this case, it necessarily follows that he is not the vendee under an executed contract of sale, and possesses no equity sufficient to defeat plaintiff's rights to a recovery of the possession of this tract of land." The conditions under which the judgment of this court was then rendered do not now exist. It now appears not only that Bours dealt openly with Arguello in the sale, and that the transaction was fair and just, and the consideration full and adequate, but it also appears that "the sale was made with the full knowledge and consent of Arguello." These circumstances take the case out of the principles announced at the former hearing, and show a complete defense to a recovery by the plaintiffs. There is no inhibition upon a purchase by an agent from his principal, "where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation. The principal may, if he sees fit, deal with the agent as with any other person." *Mecham, Ag. § 466; Rochester v. Levering*, 104 Ind. 562, 4 N. E. Rep. 203. The agent has the same right to deal directly with his principal as has a stranger. The rule which prevents the agent from purchasing the property which he is authorized to sell for his principal is based upon the maxim that no man can serve two masters, and that an agent shall not unite in his own person his individual with his representative character, or place himself in a position where his personal interest will be in conflict with his duty to his principal. When, however, the agent deals with his principal "at arm's length, and after a full disclosure of all that he knows with respect to the property," (*Murphy v. O'Shea*, 2 Jones & La. T. 425,) or when the principal ratifies the purchase from himself with full knowledge of the circumstances connected with the transaction, he can thereafter avoid the sale only upon the same grounds as if the purchase had been made by a stranger. The powers of an agent in dealing with the property of his principal are limited in the same manner as those of a trustee. A trustee is not forbidden to deal with the trust property when the beneficiary, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. (Civil Code, § 2230.)

The present case does not fall within the rule which is applicable when an agent with a power of sale makes a sale to himself. Bours did not have any power of sale from Arguello, and did not in fact make any sale to himself. His relation to Arguello, resulting from his original employment by Faulkner, Bell & Co., was rather that of a broker than an agent for sale, and his subsequent proposition to them that he would himself purchase the land from Arguello at the price of \$4,500 placed him in the position of a purchaser dealing directly with the owner. Faulkner, Bell & Co. were the agents of Arguello for the sale of the property, and the persons to whom Bours, if he desired to purchase the same, would naturally make



application. He had had no direct correspondence with Arguello, and his offer and information to Faulkner, Bell & Co. must be regarded the same as if made to Arguello. Although his previous relation to Arguello, by virtue of having been employed to make a sale of the property, still left him charged with the duty of disclosing any facts or circumstances affecting the property which might have come to his knowledge while holding such fiduciary relation, yet the record does not show that there was any concealment or silence on his part which would make him guilty of constructive fraud. When Bours wrote to Faulkner, Bell & Co., making the proposition to purchase the property himself from Arguello for the sum of \$4,500, he was not acting as the agent of Arguello in making a sale of the premises to himself, but was making a direct proposition to Arguello through Faulkner, Bell & Co., who were his agents for the sale of the property. Arguello had been previously informed of all that Bours had done in attempting to effect the sale, and it is not disputed that \$4,500 was the full value of the property. The court finds that, when Bours was first employed in behalf of Arguello, he wrote to Faulkner, Bell & Co., "fully advising them of the condition of the said property;" and that, after the receipt of that letter, Arguello stated "that he agreed with Mr. Bours' opinion of the property;" and that, after Bours had endeavored to make a sale of the property, he again wrote to Faulkner, Bell & Co., "advising them therein of what he had done;" and that, as soon as he had found a purchaser, he informed Faulkner, Bell & Co. thereof. These findings are not excepted to, and, as it is not claimed that there were any facts or circumstances within the knowledge of Bours that he failed to disclose, must be construed as equivalent to a finding that he made a full disclosure of all the information he had respecting the value or condition of the property. As the sale from Arguello to Bours is to be regarded as made upon a direct dealing between them for the purchase and sale of the property, the rules governing the ratification and confirmation by a principal of the act of his agent have no application. The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.; MCFARLAND, J.

(98 Cal. 189)

YOSEMITE COMMISSIONERS v. BARNARD. (No. 18,093.)

(Supreme Court of California. April 27, 1893.)  
LANDLORD AND TENANT—MISTAKE IN LEASE—  
HOLDING OVER—UNLAWFUL DETAINER—PLEADING  
AND PROOF.

1. On an issue as to mistake in a lease, testimony of the lessee that he understood that the lease was to run for 10 years from the expiration of a previous lease does not warrant the court in disregarding the terms of the lease that it should run 10 years from a named date.

2. In unlawful detainer the defense of an outstanding title against plaintiff, if available at all, cannot be taken advantage of unless

pleaded, notwithstanding what the court finds on the subject.

3. In unlawful detainer against a tenant holding over, an outstanding lease by the landlord to a third person, under whom the tenant does not claim, is no defense.

In bank. Appeal from superior court, Mariposa county; John M. Corcoran, Judge.

Action by Yosemite Commissioners against Barnard. From judgment for plaintiffs, defendant appeals. Affirmed.

James H. Budd and Gould & McCabe, for appellant. W. H. Hart, Atty. Gen., and Oregon Sanders, (T. C. Coogan, of counsel,) for respondents.

HARRISON, J. Action of unlawful detainer. The complaint contains the ordinary allegations in an action of unlawful detainer brought by a landlord against his tenant, who continues in possession, against the will the landlord, after the expiration of the term. The defendant made no denial of these allegations, except that he denied that the term for which the premises were demised had expired, or that he held over contrary to the terms of the lease. He pleaded, however, as a separate defense to the action, that he signed the lease set forth in the complaint, but that that portion thereof fixing the term was intended to read "from the 1st day of January, 1885, for and during the full term of ten years then next ensuing," instead of 10 years from the 1st day of January, 1882, and that the insertion in the lease of words purporting to make the term commence on the 1st of January, 1882, was made "by inadvertence and mistake." The court found "that no mistake was made in the execution of said lease."

1. It is unnecessary to determine whether such a defense can be pleaded to an action of unlawful detainer, or whether the facts alleged in the present case would entitle the defendant to any remedy whatever. The defense was an affirmative one, and, unless sustained by evidence offered in its support, necessitated a finding against its existence. The defendant, however, failed to offer any competent evidence that the plaintiffs ever intended to make him a lease of the premises for any term other than that expressed in the instrument which was executed between them, and his testimony that he understood that the lease was to run for 10 years from the expiration of a previous lease did not require the court to disregard his written agreement in the lease itself that it was to run for only 10 years from the 1st of January, 1882. The finding of the trial court upon this conflict of evidence cannot be reviewed in this court.

2. The court found "that on August 1, 1891, plaintiffs executed a written lease for the property described in the complaint to one Glasscock for a period of one year from January 1, 1892, at a nominal rent." It is contended by appellant that by reason of this finding the plaintiffs were not entitled to the possession of the premises, and that judgment should therefore have been rendered in his favor. The defendant

did not, however, allege any defense of this nature in his answer, and there was no issue before the court which authorized it to make the finding; and, consequently, being a finding outside of the issues in the case, it could not form an element in determining the judgment to be rendered. See *McCreary v. Marston*, 56 Cal. 403. But, if the pleadings had properly presented an issue upon which this finding could have been made, the finding itself falls short of constituting a defense to the plaintiffs' right of recovery, for the reason that the defendant does not connect himself with Glasscock, or show that he has succeeded to Glasscock's right to the possession of the premises. Such a defense is in the nature of a plea of outstanding title, and even in those actions of ejectment that do not proceed upon strict title, but where only the right of possession is involved, the defense of outstanding title is not available to the defendant unless he connects himself with such title. Title, however, is never involved in an action of unlawful detainer. *Felton v. Millard*, 81 Cal. 540, 21 Pac. Rep. 533, and 22 Pac. Rep. 750. The tenant, having received the possession by the permission of his landlord, cannot compel the landlord to litigate the right of some other to that possession for which the tenant has no claim. As between him and his landlord, his contract as lessee obligates him to surrender the possession at the expiration of his term, and he cannot set up an outstanding title, or show any title in himself which has not been mediately or immediately derived from his landlord.

The judgment is affirmed.

We concur: GAROUTTE, J.; PATERSON, J.; McFARLAND, J.; DE HAVEN, J.; FITZGERALD, J.

(98 Cal. 168)

SCOTT v. GLENN. (No. 18,088.)

(Supreme Court of California. April 22, 1893.)

ORDER DENYING NEW TRIAL — APPEAL — FAILURE TO FILE UNDERTAKING — DISMISSAL — TIME OF TAKING — SALE OF REAL ESTATE — FAILURE OF VENDEE TO SIGN CONTRACT — TENDER OF DEED — DEFAULT.

1. Where no undertaking is filed on appeal from an order denying a motion for a new trial, such appeal will be dismissed.

2. Where an appeal from a judgment is not taken within 60 days, the evidence will not be considered.

3. Where a contract for the sale of land is signed by the vendors and delivered to the vendees, and a partial payment is made thereunder, it is valid, though not signed by the vendees.

4. A vendor of real estate is not in default because he fails to tender a deed at the time the last payment falls due, though time is expressly made of the essence of the contract.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by A. E. D. Scott against G. R. G. Glenn on a contract for the sale of certain real estate. From a judgment for defendant, and from an order denying his

motion for a new trial, plaintiff appeals. Affirmed.

Geo. B. Graham, for appellant. J. P. Meux, for respondent.

GAROUTTE, J. This action arises from a contract of sale of real estate, and was commenced to recover the sum of \$600, paid to respondent and one Meux as a partial payment under the terms of the contract, and is based upon an alleged default upon the part of said respondent and Meux to carry out the terms of said contract. Glenn answered the complaint, denying the allegations thereof, and set out a cross complaint alleging tender of the deed, demand and refusal of the payment of the balance due, and asked judgment against Scott and his covenidees under the contract for the balance due, and that the realty be held to satisfy such judgment. The cross complaint was denied. Meux, as a covendor, assigned his interest to Glenn, and judgment went in favor of defendant upon the main case, and also in his favor upon the cross complaint, and plaintiff appeals.

His appeal from the order denying his motion for a new trial must be dismissed, as no undertaking was filed thereon; and, the appeal from the judgment not being taken within 60 days from the rendition thereof, we cannot look into the evidence, but must confine our examination to the pleadings, findings, and judgment.

1. It is insisted that the contract is void, as a contract for the sale of real estate, because not signed by the vendees. The vendor is the party to be charged, and his signature to the contract, taken in connection with a delivery thereof to the vendee, and a partial payment thereunder, binds both parties. *Vassault v. Edwards*, 43 Cal. 458; *Dennis v. Strassburger*, 89 Cal. 583, 26 Pac. Rep. 1070; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. Rep. 249; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. Rep. 515.

2. The signature of Meux, the covendor, was attached to the contract by Glenn, and appellant claims this was done without authority. The court finds the act of Glenn in this regard was fully ratified in writing by Meux. The evidence is not before us, and the finding concludes the matter against appellant's contention.

3. It is insisted that the vendor is in default because he did not tender the deed at the time the last payment fell due; time being expressly made of the essence of the contract. Except as to the single case of *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280, which has since been overruled in this respect, the authorities are all opposed to this doctrine upon which appellant now relies. *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. Rep. 696; *Newton v. Hull*, 90 Cal. 493, 27 Pac. Rep. 429; *Banbury v. Arnold*, 91 Cal. 609, 27 Pac. Rep. 934; *Townsend v. Tufts*, 95 Cal. 257, 30 Pac. Rep. 528; *Joyce v. Shafer*, (Cal.) 32 Pac. Rep. 320.

The findings of the court are full upon all the issues raised by the pleadings. They are favorable to defendant, and support the judgment rendered by the trial court. For the foregoing reasons let the

judgment be affirmed, and the appeal from the order denying a new trial dismissed.

We concur: McFARLAND, J.; DE HAVEN, J.

(3 Colo. App. 239)

**In re LEONARD'S ESTATE.<sup>1</sup>**

(Court of Appeals of Colorado. March 27, 1893.)

**DISTRIBUTION OF ESTATE — LIABILITY FOR COSTS.**

1. In proceedings to obtain a share in the estate of a decedent, it is error to tax costs against the administrators personally, when there is nothing to show that they precipitated the contest, or were responsible for it, or exceeded their official duties; and the fact that they were nephews of decedent should be disregarded.

2. When certain of the heirs were in no way responsible for the contest, costs should not be taxed against the estate as a whole; and, when the claimants have been successful in establishing their rights, they should not be assessed with costs.

Error to district court, Boulder county.

Petition by Nellie Eggleston and George H. Leonard for a distributive share of the estate of John Leonard, deceased. A decree was entered in favor of petitioners, and the administrators appeal. Affirmed, except as to costs.

The other facts fully appear in the following statement by REED, J.:

In January, 1887, John Leonard died, a bachelor and intestate, in the county of Boulder, at an advanced age,—probably born in 1812; consequently, was at the time of his death about 75 years old. He left property estimated at from \$125,000 to \$150,000. There resided in the immediate vicinity of his place of death two nephews, John and Henry Church, sons of his sister, Mary Church, who took out letters of administration on his estate. John Leonard was the son of Edward and Elizabeth Leonard, who were married in Ireland, and had born to them, before immigrating to America, William, probably born about 1804; Mary, afterwards Mrs. Church, and mother of administrators, born about 1809; and John Leonard, born about 1812. In 1814 the family came to America, and settled at Prescott, Can. In the same year a daughter, Ann, was born, but whether in Ireland or America does not appear. She died at an early age, leaving no children. There was also born to the mother at some subsequent time, indefinitely determined, another son, Thomas Jefferson Leonard. At the time the testimony was taken in this case. (1888-89,) Mrs. Church was the only living child, and she gave her age as 79. William Leonard left one child, Mary, who became the wife of Orlando Bond. Thomas J. Leonard died at Washington, D. C., in 1869, leaving two children,—George H. Leonard and Mrs. Nellie Eggleston,—petitioners in this proceeding. Mrs. Mary Church, sister of John Leonard, was an heir, and it was conceded that the family of Orlando Bond, whose wife was the daughter of William Leonard, were entitled to share in the estate. This controversy arose as to the children of Thomas

J. Leonard,—the petitioners. Shortly after the death of John Leonard, Mrs. Mary Church asserted that Thomas J. was not her brother, and the brother of John Leonard, but was the illegitimate son of her mother, Elizabeth, by an Irish tailor named Patrick Nolan, with whom her mother lived without marriage; that he (Thomas J.) was born at some indefinite time, and at some indefinite place, some years after the death of her husband, Edward Leonard. In the settlement of the estate by John and Henry Church, as administrators, the claims of the petitioners as distributees were disregarded. A petition was filed in the county court setting up the relationship, and praying the recognition of the parties as heirs. The administrators, John and George Henry Church, answered, averring, on information and belief, that Mary Church, Amanda Wells, Anna Smith, and Earl C. Bond, the three latter grandchildren of William Leonard, were the only heirs. A citation issued to the respective claimants. Service was had by publication. Mary Church filed an answer identical with that filed by her sons, the administrators, except that it was not on information and belief, averring that she and the three grandchildren of William Leonard were the only heirs; that Thomas Leonard was not a brother of John Leonard; and that his children, the petitioners, were not heirs. Earl C. Bond, Mrs. Amanda Wells, and Anna Smith answered, admitting that Thomas Leonard and John Leonard were brothers, and that the petitioners were heirs of John Leonard. The issues were tried to a jury, resulting in the following verdict: "We, your jury, in answer to the question, 'Was Thomas J. Leonard the son of Edward Leonard by his wife, Elizabeth Leonard?' say, yes." From such finding an appeal was taken to the district court, where it was tried to Hon. John Campbell, judge, without a jury, resulting in the same finding as in the county court, from which error was prosecuted to this court.

Rogers, Shafroth & Walling, for appellants. R. D. Thompson and T. M. Patterson, for appellees.

REED, J., (after stating the facts.) No error of law is urged as ground of reversal; the sole contention is that the judgment of the district court is not warranted by the evidence. But one question of fact was to be determined,—whether Thomas Jefferson Leonard was the son of Edward and Elizabeth Leonard, and brother of John Leonard, deceased; George H. Leonard and Mrs. Eggleston, the petitioners, being son and daughter of Thomas. Thomas was alleged by respondents to have been born to Elizabeth, out of wedlock, long subsequent to the death of her husband, Edward. This claim was so ably urged, as being established by the evidence, that, contrary to the usual practice, this court has not only carefully examined the record, but the immense mass of evidence—mostly depositions—used upon the trial. The case was first ably and carefully tried to a jury in the county court, and a verdict found for the peti-

<sup>1</sup> Rehearing denied May 8, 1893.

tioners. The administrators took an appeal to the district court, where the case was again ably tried, resulting in the affirmation of the verdict of the jury. The learned judge of the district court, in an able opinion, reviews, analyzes, and examines the entire evidence, and finds that the petitioners (descendants of Thomas Leonard) were entitled to one third of the estate of John Leonard; that the Bonds (descendants of William Leonard) were entitled to one third, and Mrs. Mary Church to one third. We think the finding and decree were warranted by the evidence. The evidence is conflicting, to a certain extent, but the evidence in support of the contention of the illegitimacy of Thomas Leonard is vague, undeterminate, and inconclusive; based upon rumor, and dependent upon the memories, guesses, and suppositions of extremely old people upon facts that occurred in their youth, and is very unsatisfactory,—not sufficient to overcome the legal presumption of legitimacy. Besides, there are facts disclosed in regard to the manner in which it was obtained which, if not sufficient to cause it to be rejected, are certainly sufficient to cast doubt and discredit upon it. The finding of the district court as to the facts submitted, and the decree in regard to the distribution of the estate of John Leonard, will be affirmed.

The costs of the litigation were, by the decree of the district court, to be taxed against the administrators. It is contended that this was erroneous. The plain inference from the language used is that they are not to be paid out of the estate, nor out of any distributive portion of the estate, but by the administrators, from their own resources. If such is the construction, the decree is evidently erroneous. In this proceeding the administrators are to be regarded only in their official capacity, as agents and trustees in the distribution of the estate. Their relation to the estate as sons of Mrs. Church is to be ignored and disregarded. They, as administrators, were legally bound to make a proper distribution to those entitled to share. The right of the children of Thomas to share in the estate was challenged by Mary Church. Until the contest was adjusted the administrators could make no settlement or distribution. There is nothing to show that they precipitated the contest, were responsible for it, or in any way exceeded in their official capacity the strict and honorable limit of their duties. If this view is correct, no reason existed for charging them with costs, and the judgment against the administrators must be reversed. Nor should the costs be taxed against the estate as a whole. The Bond family were in no way responsible for it, and should not be taxed. The family of Thomas Leonard were, when challenged, compelled to intervene, and, having been successful in establishing their right, no reason can be shown for assessing them with costs. The county court, in the distribution of the estate, will no doubt assess the costs correctly. The proceeding is purely in equity, and, while the chancellor is allowed great discretion in adjudging costs, such discre-

tion can only be exercised within well-defined limits. 2 Daniell, Ch. Pr. (4th Ed.) 1376, 1377. "Victus victori in expensis condemnatus est" is the general rule in the court of chancery, as well as at law. It was also the maxim of the civil law. 2 Daniell, Ch. Pr. (4th Ed.) 1381; Vancouver v. Bliss, 11 Ves. 458; Staines v. Morris, 1 Ves. & B. 8; Millington v. Fox, 3 Mylne & C. 338; Saunders v. Frost, 5 Pick. 259; Clark v. Reed, 11 Pick. 446; Lee v. Pindle, 12 Gill & J. 288; Tomlinson v. Ward, 2 Conn. 396. We can see nothing in this case to take it out of the general and well-settled rule. The decree of the district court, in finding the petitioners entitled in the distribution to one third of the estate of John Leonard, will be affirmed. That part of the decree charging the administrators with costs will be reversed. The cause will be remanded to the district court of Boulder county.

Affirmed, except as to costs.

(3 Colo. App. 250)

#### BURDSAL'S ESTATE v. WALLEY.<sup>1</sup>

(Court of Appeals of Colorado. March 27, 1893.)

FUNERAL EXPENSES—LIABILITY OF ESTATE OF DECEDENT'S WIDOW.

A claim for funeral expenses was presented against the estate of a decedent, but the administrator found no property and filed no inventory. Decedent's widow subsequently died, and her administratrix enumerated, in the inventory of her estate, land standing in the name of decedent, reciting that such land should be transferred to the widow or her heirs. It did not appear what right the widow had to the property, or that decedent's estate was insolvent. *Held*, that said claim could not be allowed against the estate of the widow.

Appeal from Arapahoe county court.

J. J. Walley presented a claim against the estate of Luzetta Burdsal, which was allowed. From the judgment the administratrix, Elizabeth T. Hulbert, appeals. Reversed.

E. P. Harman, for appellant. H. W. Spangler and E. E. Schlosser, for appellee.

RICHMOND, P. J. Some time prior to April, 1888, Caleb S. Burdsal died intestate, and one Thomas E. Poole was appointed administrator of his estate. A claim was presented in the usual statutory form and manner against the estate by the appellee herein, J. J. Walley, for funeral expenses amounting in the aggregate to \$265. It appears from the record that the administrator failed to find any property belonging to Burdsal; consequently no inventory was filed, and in fact nothing has been done of any moment, so far as the questions presented in this case are concerned. Thereafter Luzetta Burdsal, wife of Caleb Burdsal, died, and Elizabeth T. Hulbert was appointed administratrix of her estate, and in the inventory she has enumerated, as part of the estate, the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , section 1, township 5 S., of range 70 W. of the sixth P. M., situate and being in the county of Jefferson, state of Colorado. By the inventory it appears that the title to this real estate

<sup>1</sup> Rehearing denied May 8, 1893.

stands on the record in the name of Caleb Burdsal, and it is recited should be transferred to Luzetta Burdsal, or her heirs, at the assessed valuation of \$400. It further appears that Walley, after the presentation of his claim against the estate of Caleb Burdsal, filed the identical claim against the estate of Luzetta Burdsal, which, upon hearing, was allowed, and judgment against her estate thereupon rendered. To reverse this judgment, Elizabeth T. Hulbert, administratrix, prosecutes this appeal.

The contention of appellant is that the estate of Luzetta Burdsal is not responsible for the funeral expenses of the husband. The contention of appellee is that Mrs. Burdsal contracted the debt, and that her estate was liable for the amount of the claim, and that, inasmuch as the administratrix is claiming property standing in the name of Caleb Burdsal, they have a right to claim payment of this amount from Luzetta Burdsal's estate. The question presented for our determination is certainly singular, and we must admit that there is some force in the position taken by appellee. Yet, nevertheless, we are unable to find warrant in law or in reason sufficiently potent to sustain the position assumed by them. The universally accepted rule is that the estate of a deceased person is responsible for the funeral expenses and other debts. This being true, and it not appearing from the record that the estate of Caleb Burdsal was insolvent, the question of Luzetta Burdsal's responsibility should not arise. On the contrary, it is shown that, notwithstanding the fact that the administrator of Caleb Burdsal's estate had failed to find property with which to liquidate the claim, nevertheless property did exist, subsequently discovered, which could have been and should have been inventoried as a part of his estate, and out of which the claim in question could have been paid. It is true that they have inventoried as a part of the estate of Luzetta Burdsal property standing in the name of Caleb Burdsal, and assert that the title should be in the name of Luzetta Burdsal, but how—whether as heir of Caleb Burdsal, or from any other cause or reason—we are not advised, and, as the record stands, this real estate, as well as certain personal property, about which some indefinite testimony is given, belongs to the estate of Caleb Burdsal, and should be administered upon by the administrator of his estate, and made to pay his obligations, including the bill of Walley. The mere fact of the administratrix of Luzetta Burdsal's estate asserting that this real estate is the property of Luzetta Burdsal does not make it so, and it was unquestionably the duty of the administrator of Caleb Burdsal to have inventoried and reported this real estate to the probate court when discovered, and petitioned for a sale of the same if the personal estate was insufficient to satisfy the debts of the deceased. Instead of doing this, the parties seek to make this an original claim against the estate of Luzetta, after having presented it against the estate of Caleb, to charge her personally with his burial expenses, on

the theory that she had superintended and directed the preparation and disposition of the body. We do not think they are in a position to assert, in the first instance, that the estate of Caleb, which is by the record now shown to be solvent, and amply sufficient to satisfy this claim, is responsible, and present the claim against his estate for allowance, and thereafter withdraw it, and make it in the nature of a personal claim against the estate of Luzetta, his wife. If it was a claim against the estate of Caleb, out of whose estate the claim was bound to be paid, then the wife could not primarily be held responsible. One cannot deny and affirm at the same time, and the position thus taken by the appellee is inconsistent. Notwithstanding the conclusion we have reached, we are nevertheless inclined to the opinion that the claim is a just one, and that it should have been allowed against the estate of Caleb Burdsal, and that the administrator and the parties interested should pursue his estate. Inasmuch as the administratrix of Luzetta Burdsal has set up a claim to property standing in the name of Caleb, we shall reverse the judgment without prejudice.

The judgment is reversed.

(18 Colo. 359)

#### In re LEASING OF STATE LANDS.

(Supreme Court of Colorado. April 22, 1893.)

##### STATE LANDS—LEASE—DURATION.

1. Const. art. 9, § 10, provides that the state board of land commissioners shall provide for the location, protection, sale, or other disposition of state lands "under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor." Laws 1887, p. 323, § 10, (Mills' Ann. St. § 3636,) provides that no lease of state land shall be for a longer term than five years, but nothing in this section shall prohibit the state board from leasing any of the state lands to such party "as shall secure to the state the greatest annual revenue." *Held*, that the five-years limitation is a regulation within the power of the legislature to fix.

2. Laws 1891, p. 256, providing that no lease shall be renewed until the expiration of 30 days after public notice of the application therefor shall have been published in the county where the lands are situate; and that such leases shall be granted to the party offering the highest rental before the expiration of such 30 days, does not impair the force of the five-years limitation, so as to allow such board to lease such lands for a longer period, when it is satisfied that it can thereby "secure to the state the greatest annual revenue."

3. The five-years limitation does not apply to Laws 1887, p. 331, § 8, (Mills' Ann. St. § 3634,) providing that stone, gas, and mineral lands may be leased for such length of time as the board may determine.

The opinion of the court is in response to the following communication and interrogatories from the governor:

To the Honorable, the Supreme Court of Colorado:

A question of serious import has arisen in the state board of land commissioners, and a resolution was passed at its last meeting, Tuesday, April 11th, 1893, directing me, as president of said board, and

governor of the state, under article 6, § 3, of the state constitution, to secure from your honorable court an opinion, at the earliest possible moment, upon the questions herein stated.

The act creating the present state board of land commissioners became a law on the 2d day of April, 1887. Laws 1887, p. 328, Mills' Ann. St. § 3627. Section 10 of said act (Mills' Ann. St. § 3636) reads as follows: "No lease of state land shall be for a longer term than five years. When any lease expires by limitation, the holder thereof may renew the same in manner as follows: At any time within the thirty days next preceding the expiration of the lease the lessee or his assigns shall notify the register of his desire to renew said lease. If the lessee and state board are agreed as to the valuation of the land, a new lease may be issued, bearing even date with the expiration of the old one, and upon like conditions: provided, always, that the former valuation shall not be decreased without the consent of the state board; and all expenses incurred by such board of appraisers shall be paid by the lessee: provided, that nothing in this section shall prohibit the state board from leasing any of the state lands to such party or parties as shall secure to the state the greatest annual revenue: provided, further, that the state board may refuse to renew a lease at any time when, in the judgment of said board, the best interests of the fund to which the land belongs require that such land be offered for sale." In 1891 (Laws 1891, p. 256) the said section was amended by adding thereto (but not otherwise changing or affecting the same) the following words: "No original lease shall be made to any party, nor shall any lease be hereafter renewed, until the expiration of thirty days after public notice of the application for such lease shall have been given by publication for one week in some newspaper of general circulation published in the county in which such lands are situate, the expense of which notice of publication shall be paid by the applicant for such renewal of the lease. Such leases shall be granted to the party or parties offering in good faith the highest rental before the expiration of such thirty days; and no lease for lands situated under a ditch or canal from which the same can be watered shall be leased upon a valuation of less than two dollars per acre." The constitution of the state (article 9, § 9) provides as follows: "The governor, superintendent of public instruction, secretary of state, and attorney general shall constitute the state board of land commissioners, who shall have the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law." And it is further provided in the said constitution (article 9, § 10) as follows: "It shall be the duty of the state board of land commissioners to provide for the location, protection, sale, or other disposition of all the lands heretofore or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law, and in such

manner as will secure the maximum possible amount therefor. No law shall ever be passed by the general assembly granting any privileges to persons who may have settled upon any such public lands subsequent to the survey thereof by the general government, by which the amount to be derived by the sale or other disposition of such lands shall be diminished, directly or indirectly. The general assembly shall, at the earliest practicable period, provide by law that the several grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust subject to disposal, for the use and benefit of the respective objects for which said grants of land were made; and the general assembly shall provide for the sale of said lands from time to time, and for the faithful application of the proceeds thereof in accordance with the terms of said grants."

Now, by the aforesaid constitutional provisions it appears that the state board of land commissioners have the exclusive "direction, control, and disposition of the public lands of the state," but that the legislature may prescribe "regulations." And it further appears that it is the duty of the said board to provide for the sale or other disposition of all the said lands "in such manner as will secure the maximum possible amount therefor;" the legislature, as before, to prescribe the "regulations." Pursuant to these constitutional provisions, it would appear that section 10, among others, found its place in the original act as a "regulation" of the disposition of said lands by leasing. The first sentence of that section raises the question whether it is a "regulation" or a prohibition. Its words are these: "No lease of state land shall be for a longer term than five years." But if it be determined to be a competent "regulation" under the state constitution, the question then arises whether or not as such regulation it is controlled, limited, or modified by the following words, to wit: "Provided, that nothing in this section shall prohibit the state board from leasing any of the state lands to such party or parties as shall secure to the state the greatest annual revenue." And in this connection it is proper to state to your honorable court the following facts, from which it may be seen that this is an important question upon a solemn occasion: There are lands under the control and disposition of the state land board within or near the corporate limits of the city of Denver, from which the state is now deriving "as annual revenue" on leases of five-years term, not exceeding in any instance fifty dollars per annum in forty-acre tracts, and for which on a lease for twenty years the said board now has offers for two thousand dollars per annum, but for a five-years lease the same parties offer less than one hundred and seventy dollars per annum. The interests of the state in the premises require immediate and deep consideration, and it is impossible for the said board, as the constitution requires, to "secure the maximum possible amount" for those lands, or "the greatest annual revenue" for

the same, as required by the proviso in said section 10, unless said prohibition as to five years is held to be invalid as a "regulation," or is controlled or limited by the aforesaid proviso. I beg, therefore, to request the opinion of your honorable court in answer to the following questions: (1) Are the words constituting the first sentence of said section 10 valid as a "regulation" of leasing state lands? (2) If so, under the proviso referred to, in said section 10, can the said board, when it is satisfied it can thereby "secure to the state the greatest annual revenue," lease the said lands for a longer period than five years, notwithstanding anything in the said section contained?

I have the honor to be, very respectfully,  
DAVIS H. WAITE,  
Governor of Colorado.

HAYT, C. J. We will answer the questions presented by his excellency, the governor, in the order in which they are propounded.

1. "Are the words constituting the first sentence of said section 10 valid as a regulation of leasing state lands?" The sentence referred to in the foregoing interrogatory reads as follows: "No lease of state lands shall be for a longer term than five years." In determining the question presented, it must be borne in mind that the statute has received the sanction of the legislative department of the government, and the approval of the executive. It has been repeatedly held by this court that statutes must be held constitutional unless the unconstitutionality of the act be established beyond a reasonable doubt. *People v. Richmond*, 16 Colo. 274, 28 Pac. Rep. 929. Of the constitutional provisions invoked, it is to be observed that the power of the state board is to be exercised under (1) "such regulations as may be prescribed by law," and (2) "in such manner as will secure the maximum possible amount therefor."

It is contended that the sentence quoted from section 10 of the law of 1887 is a prohibition upon the state board of land commissioners, and not a regulation, and therefore invalid; and, also, that it is in conflict with that provision of the constitution requiring the maximum possible amount to be secured. The word "regulation," as used in the constitution, has a well-defined meaning. As given by Webster, it is: "A rule or order prescribed for management or government; prescription; a regulating principle; a governing direction; precept; law; as, the regulations of a society." In *Gibbons v. Ogden*, 9 Wheat. 186, the supreme court of the United States had occasion to interpret that clause of the national constitution which reads: "Congress shall have power to regulate commerce," etc.; and the court held that the word "regulate," as used in that connection, means to prescribe the rule by which commerce is to be governed. So we think the provision, "under such regulations as may be prescribed by law," means such reasonable rules as may be prescribed from time to time by the legislative department of the government. Therefore, in leasing state lands, the board

must first look to the statutes to ascertain the regulations therein prescribed, and then, in exercising their constitutional powers, they must so act as in the judgment of the board will secure the maximum amount, under the prescribed regulations; the power to regulate being expressly reserved to the legislature. A fundamental rule of construction, applicable alike to constitutions and statutes, requires that, if practicable, such construction shall be given to different provisions of the same instrument as shall give effect to all parts. *Thatcher v. Thatcher*, 17 Colo. 404, 29 Pac. Rep. 800; *Brooks v. Commissioners*, 31 Ala. 227; *San Francisco v. Hazen*, 5 Cal. 169; *Leversee v. Reynolds*, 13 Iowa, 310; *Aldridge v. Mardoff*, 32 Tex. 204. If, as contended in this case, the state board has the power to lease the state lands in such manner as will, in its judgment, secure the maximum amount therefor, without regard to the statute, then the provision reserving the right to the legislature to prescribe regulations is not effective for any purpose. It would be useless to prescribe regulations if such regulations might be ignored whenever, in the judgment of the board, a greater revenue might be secured to the state, by adopting a course in conflict with the statute. Such a construction would place in the state board plenary power over the state lands. Instead of leasing them for 20 years, as now proposed, one board might lease all the state lands for a period of 99 years, and subsequent boards would, in effect, be stripped of all power. It is not to be inferred from this that all legislation upon the subject would be binding upon the state board. Should the legislature, under the guise of regulations, attempt to take away all power of disposition of the state lands from the state board, or should laws be enacted for the manifest purpose of favoring other than the highest bidder, such acts would be manifestly in violation of the constitution, and void. We shall not presume that any such vicious legislation will ever meet with favor at the hands of a co-ordinate branch of the government. It will be assumed that it will exercise its powers in accordance with the constitution, and for the best interests of the state at large. In the passage of the act before us no wrong intent is claimed. On the contrary, the legislature undoubtedly assumed that with the rapid development of our resources, and the current of immigration which has uninterruptedly poured into this favored commonwealth, the public interests would be best subserved by short leases, and frequent renewals. The beneficence of such a policy as a general rule is apparent, although in exceptional instances a different policy might seem to promise greater returns to the state. In our opinion, the five-year limitation is a regulation fairly within the power of the legislature to fix.

2. "Under the proviso referred to in section 10, can the state board, when it is satisfied it can thereby secure to the state the greatest annual revenue, lease the state lands for a longer period than five years, notwithstanding anything in the said section contained?" The act of 1887



is to be read in the light of the prior law, and the mischief sought to be remedied by the change. The former law provided, with reference to the renewal of leases, that "if the lease holder shall deposit with the secretary aforesaid a suitable bond and one year's rent on or before the expiration of his lease, a new lease shall issue, based upon the new appraisalment." Under this law the right was reserved to the lessee to renew, no matter if it should appear to the state board to be more advantageous to the state to sell the leased premises, or to lease the same to third parties. This option of renewal undoubtedly caused a loss to the state in some instances. It might happen that it would be very beneficial to the public to have the leased premises sold, or to have a new lease given to the highest bidder after proper advertisement, as provided by the amendment of 1891. Under section 10 of the act of 1887 the state board is authorized to renew the lease to the original lessee, if the board should deem it proper to do so. But the absolute right of the lessee to renew was taken away, and a new lease was not to be executed to him if others would pay a greater annual rental for the land; or if, in the judgment of the state board, the best interests of the fund to which the land belonged required that such land should be offered for sale, then no lease should be made. By these changes the apparent mischiefs of the previous law are provided against; and we are of the opinion that it was not the intention of the legislature, in adopting the provisions, to destroy or impair the force of the first sentence of the section, fixing a limitation of five years upon all leases.

An examination of the various legislative enactments bearing upon the subject discloses a general intent on the part of that department of the government to limit the duration of time for which the state lands may be leased. By the act of 1881 this limit was fixed at the period of 20 years. By the act of 1887 the right to lease for a period of 20 years was taken away, and a 5-year limitation substituted, in cases of farming and grazing lands; the leasing of stone, gas, and mineral lands being provided for by section 81 of the latter act. By the terms of this section it is expressly provided that such lands may be leased "for such length of time \* \* \* as the commissioners may determine." At the oral argument it was suggested that the five-year limitation was applicable to the leasing of these lands as well as to the agricultural and grazing lands of the state; the argument being that the discretion as to time given the board was subject to the five-year limitation. Under the five-year limitation contained in section 10 the board may, at its option, lease for a less period than five years. Hence to construe the words, "for such length of time \* \* \* as the commissioners may determine," as meaning for such length of time, not to exceed five years, would be to give no effect whatever to the language of section 8. For the reasons already given, such a construc-

tion cannot be indulged. We therefore agree with the attorney general that the five-year limitation does not apply to the leasing of such lands. The practical construction given to a statute by the public officers of the state, charged with the performance of public duties in connection therewith, is always entitled to consideration in cases of doubt. In this case counsel concede that the conclusions which we have reached are in harmony with the construction that has been heretofore placed upon the provisions under consideration at all times by the officers of the executive department.

(18 Colo., 346)

## LAMBORN v. BELL.

(Supreme Court of Colorado. April 17, 1893.)  
EMINENT DOMAIN — PRIVATE USE — WATER DITCH  
— ELECTRIC LIGHT PLANT — MEASURE OF DAMAGES.

1. Const. art. 2, § 14, provides that private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches, on or across the lands of others, for milling purposes. Article 16, § 7, provides that all persons shall have the right of way across private lands for the construction of ditches, canals, and flumes for conveying water for manufacturing purposes. *Held*, that a person has a right to condemn a right of way over private lands for a ditch to carry water to operate an electric light plant.

2. The term "milling," as used in the constitution, is synonymous with the word "manufacturing," and an electric light plant is a manufacturing establishment.

3. Since the statute provides that, in estimating the value of the property taken, the actual value "at the time of the appraisalment" shall be awarded, an instruction that the measure of damages was the actual value of the property on the date of filing the petition for condemnation, is reversible error, where the owner invokes the statutory rule.

Appeal from district court, El Paso county.

Proceeding by William A. Bell against Robert H. Lamborn to condemn a right of way across defendant's land for a ditch to carry water to furnish power to operate an electric light plant. From a decree for petitioner, defendant appeals. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

A hearing was had before a jury in pursuance of the provisions of the eminent domain act, and they found (1) that it was and is necessary for petitioner herein to take and appropriate the lands of defendant, described in the petition herein, for the purpose of furnishing petitioner with power to run an electric plant to generate electricity for the purpose of lighting the town and buildings of Manitou with electric light; (2) that it was and is necessary for petitioner herein to take and appropriate the lands of defendant, described in the petition, for purposes of irrigating the lands of petitioner lying under said ditch described in the petition; and assessed the actual value of the land taken at \$12.50.

A. B. McKinley, for appellant. Colburn & Dudley, for appellee.

<sup>1</sup>Laws 1887, p. 331, (Mills' Ann. St. § 3634.)

GODDARD, J., (after stating the facts.) The questions presented by the record are: First. Has the petitioner a right to condemn a right of way over the lands of the defendant for the purpose of carrying water to furnish power to operate an electric light plant? Second. Has he a right to have a ditch across said land for irrigation purposes for his own use, under the facts shown?

The first proposition depends upon the effect to be given to the following constitutional provisions: "That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches, on or across the lands of others, for agriculture, mining, milling, domestic, or sanitary purposes." Section 14, art. 2, Bill of Rights. "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public." Section 15, Id. "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, and the same is dedicated to the use of the people of the state, subject to appropriation as herein-after provided." Section 5, art. 16, Mining and Irrigation. "The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." Section 6, Id. "All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation." Section 7, Id. It is apparent from the foregoing provisions that our constitution is, in certain particulars touching the right to take private property for private use, exceptional, and, for certain enumerated uses, changes the

accepted rule that the use to which private property may be condemned must be public. The right of eminent domain is an exercise of sovereign power, and is generally conferred by legislative enactment; yet a constitutional provision that, in express terms, affirmatively confers the right for particular uses is likewise an expression of the sovereign will, and grants the right as effectually as if expressed in an act of the legislature, and can be enforced when such grant is supplemented by an act of the legislature providing the means for its exercise. "A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern constitution." *Willis v. Sanitation Co.*, (Minn.) 50 N. W. Rep. 1111. See, also, *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189. It becomes necessary, therefore, to determine whether the purpose relied on in this proceeding, as expressed in the first proposition, is within the class of uses enumerated in section 14 of article 2, and section 7 of article 16, of the constitution, above cited.

It is insisted by counsel for appellant that these constitutional provisions should be read in the light of the conditions existing at the time they were adopted, and be construed in relation to the evident purposes they were intended to subserve; that the necessity for irrigation, and the paramount industry of mining, were in contemplation by the framers of the constitution, and the term "milling" was used in section 14 of article 2 with relation to those purposes, and its meaning should be restricted to milling ore and grain. We think the term "milling," as used in that provision, should be given its modern acceptance, and held as synonymous with the word "manufacturing," if not of broader signification, and including that term. Webster, after defining the word "mill," says: "In modern usage, the term 'mill' includes various other machines, or combinations of machinery; \* \* \* as cotton mills, \* \* \* fulling mills, \* \* \* powder mills, etc., \* \* \* to some of which the term 'manufactory' or 'factory' is also applied." It was held in *Carlin v. Assurance Co.*, 57 Md. 515, that a flouring mill came within the term "manufacturing establishment," as used in a policy of insurance. In discussing this branch of the case, at page 526, Ritchie, J., says: "The right of the plaintiff to run his mill at night depends upon, whether the mill was a 'manufacturing establishment.' \* \* \* But what is to be deemed a manufacturing establishment, or, in other words, what is the signification of the verb 'to manufacture,' is for the court to define. The counsel for appellant contended that making flour from wheat, reasoning from

the etymology of the word, and the nature of the process, is not manufacturing. But whilst, from its derivation, the primary meaning of the word 'manufacture' is making with the hand, this definition is too narrow for its present use. Its meaning has expanded as workmanship and art have advanced; so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery, which, after all, is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages, are now commonly designated as 'manufactured.' Burrill defines 'to manufacture,' 'the process of making a thing by art,' and cites Buller, J., in *Boulton v. Bull*, 2 H. Bl. 463, 471. Abbott gives its meaning as 'whatever is made by human labor, either directly or through the instrumentality of machinery.' The definition in Webster is, 'to make or fabricate from raw materials by the hand, by art, or machinery, and work into forms convenient for use.' Worcester has, in substance, the same definition. A case directly applicable is that of *Schrieffer v. Wood*, 5 Blatchf. 215, in which animal charcoal, produced by the process of burning bone, in the same manner that wood is exposed to the action of fire, to produce common charcoal, and bone-dust, produced by pulverizing or grinding bones, are decided to be 'manufactures of bone.' The question here considered was involved in that case, and the decision accords with the view we have expressed. We think, therefore, that plaintiff's flour mill, driven as it was by steam, and furnished with a middling purifier, bran duster, belting, and other machinery, was clearly a 'manufacturing establishment.'" We cite the foregoing at length, as it upholds our view of the meaning to be given to the words "manufacturing purposes," and also shows that the purpose of appellee is within the ordinary meaning of those terms. So regarded, the word "manufacturing" can be given its well-understood meaning, and come clearly within the exceptions enumerated in section 14, art. 2, and be given its full signification in section 7, art. 16, and also in section 6, Id., wherein it is designated as one of the beneficial uses for which an appropriation of water may be made. With this view the different sections may be harmonized and effect given to both, a result always to be reached in the construction of such instruments if practicable. "The rule applicable here is that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms,

corresponding with the immense importance of the powers delegated, leaving as little as possible to implication." Cooley, *Const. Lim.* 72. That the words "manufacturing purposes," used in these several provisions, should be taken in their ordinary acceptation, we have no doubt; and the purpose of petitioner coming clearly within their ordinary meaning, we are to determine whether the exercise of the right is available to him under the terms of section 7, art. 16, and the legislation of the state upon the subject of eminent domain. While it may be conceded that the constitutional provision is not self-executing in the sense that it does not provide the manner in which compensation can be assessed, it nevertheless does confer the right in express terms; and it only remains to be determined whether provision is made to carry out such right. The eminent domain act provides (section 2, p. 201, Laws 1885) "that in all cases where the right to take private property for public or private use, without the owner's consent, \* \* \* has been heretofore, or shall hereafter be, conferred by general laws or special charter," etc. The constitutional provision above referred to must certainly be regarded as a general law, conferring the right within the language of this section; hence the act providing the procedure to ascertain the compensation makes the right available, and the question whether the constitutional provision is or is not in itself self-executing becomes immaterial. We think, under the provisions cited, the right to condemn a right of way for a ditch over appellant's land for the purposes designated is conferred, and that the eminent domain act provides for the exercise of that right.

The further question of the right of petitioner, under the facts in evidence, to avail himself of this right for irrigating his land, is not sustained. The delay of two years in completing the ditch to such land, in view of the admitted fact on the part of petitioner that he does not at the present time need the same, or intend to utilize it, is a virtual abandonment of the right for that purpose. The court instructed the jury that the measure of defendant's damages was the true and actual value of the property taken on March 16, 1887, which was the date of filing the petition for condemnation. The trial for the purpose of appraising and awarding compensation and damages did not occur until March, 1889. By statute it is provided that, in estimating the value of the property taken, the true and actual value at the time of the appraisement shall be allowed and awarded. The statutory rule as to the time of estimating the value has been declared imperative in several cases. *Railroad Co. v. Allen*, 18 Colo. 238, 22 Pac. Rep. 605; *Twin Lakes Hydraulic Gold Min. Syndicate, Lim., v. Colorado M. Railroad Co.*, 16 Colo. 1, 27 Pac. Rep. 258. It will be observed that in the cases cited, as in this case, the statutory rule was invoked by the owner; and in such case, we have no doubt, the strict statutory rule should be enforced. The constitution, art. 2, § 15, guarantees just compensation to the owner when property is taken without his con-

sent, and this right must be jealously guarded. If, however, there should be a diminution in the value of property sought to be taken, pending proceedings under the statute of eminent domain, there might be some question whether the statutory rule could be held to secure just compensation to the owner within the meaning and intent of the constitution. But in this case, the owner having invoked the statutory rule, the trial court should have directed the jury to award the value of the property at the time of the appraisement. For this error the judgment must be reversed, and cause remanded.

(18 Colo. 340)

RUST et al. v. CARPENTER et al.

(Supreme Court of Colorado. April 17, 1893.)

VENDOR'S LIEN—ENFORCEMENT—BONA FIDE PURCHASERS—ESTOPPEL.

1. Plaintiffs conveyed their interest in certain mining claims for a nominal consideration, with an agreement by which the grantees were to effect a consolidation of plaintiffs' claims with other conflicting claims, and develop the property; the price to remain a lien on the interest acquired in such consolidation until paid out of the proceeds from the development. The grantees effected the consolidation, and, before the agreement providing for the lien was filed for record, sold their interest to defendants. *Held*, that an action was maintainable in equity by plaintiffs to have it determined that defendants purchased with notice of their lien, and to have such lien established on the property, as against defendants, though it is not yet enforceable.

2. Since whatever title defendants hold is derived through the consolidation, they are estopped from denying that the consolidation was fully consummated.

3. Where defendants purchased the interest from plaintiffs' grantees, not only with notice of their agreement with plaintiffs, but also under an express promise to carry out the same, their contention that the amount paid the grantees should be applied in reduction of plaintiffs' claim cannot prevail.

Appeal from district court, Pitkin county.

Action by H. N. Carpenter and another against William A. Rust and Henry Paul to have it determined that defendants purchased certain mining claims with notice of plaintiffs' lien thereon, and to have such lien established on the property. Judgment was entered in favor of plaintiffs, and defendants appeal. Affirmed.

The other facts fully appear in the following statement by GODDARD, J.:

The appellees conveyed to Byron Shear and I. L. Johnson the Boulder, Nebraska, and Topsy lode mining claims, situate in Pitkin county, Colo., on the 8th day of August, 1888, for one dollar and other valuable considerations. On the same date an agreement was entered into by the respective parties wherein, among other things, it was stipulated that an additional \$40,000 was to be paid, under certain conditions therein specified, as a consideration for the property. That said Shear and Johnson should procure a consolidation of the claims so conveyed to be made with the Bushwhacker and Alpine, and certain portions of the Iowa and Joplin, mining claims; that this sum of \$40,000 should become and remain a lien

upon the interest acquired by them in such consolidation, until fully paid from the proceeds of such interest, after paying the expenses of development. That Shear and Johnson should use reasonable diligence in working and developing the consolidated properties in a manner to pay said indebtedness as soon as possible. The deed was filed for record the 18th day of August, 1888. The agreement was not filed for record until the 23d day of November, 1888. On the 10th day of August, 1888, Shear and Johnson entered into a contract whereby the Boulder, Nebraska, and Topsy claims were consolidated with the Bushwhacker and Alpine claims, and it was agreed that deeds should be made by the respective parties so as place in Shear and Johnson the title to an undivided four tenths of the consolidated property. Afterwards, and on the 31st day of October, 1888, Shear and Johnson executed a deed conveying all their right, title, and interest in and to said consolidated property to William R. Rust, which, it is alleged, was placed on record without authority, and in violation of an agreement between the parties thereto. That on the 14th day of November, 1888, Rust executed a deed conveying said interest to Henry Paul. It is alleged in the complaint that, at the time Rust and Paul received their respective deeds, they had notice of the agreement between appellees and Shear and Johnson, and purchased with full knowledge of appellees' rights thereunder. This action is brought to have Rust and Paul declared purchasers with notice, and that they be declared to hold the title to the four tenths of the consolidated property subject to a lien for the sum of \$40,000, as provided in the agreement between Shear and Johnson and these appellees, and that defendant Paul be enjoined from conveying the interest except subject to such lien. Demurrers were interposed by appellants, setting forth as a ground therefor that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were overruled, and appellants answered, denying the allegations of the complaint. Upon the trial of the cause the court found the issues joined in favor of appellees, and rendered a judgment as prayed for in the complaint. From this judgment, Rust and Paul prosecute this appeal.

Patterson & Thomas, for appellants.  
Oscar Reuter, for appellees.

GODDARD, J., (after stating the facts.) The court below found, upon the evidence adduced, that Rust and Paul, at the time of their respective purchases of the interest of Shear and Johnson in the consolidation, had notice of, and purchased with full knowledge of, the agreement under which appellees sold the Boulder, Nebraska, and Topsy claims to Shear and Johnson, and took the title to the interest so conveyed subject to appellees' claim and lien thereon. We think the evidence fully sustains the findings of the court, and with this view shall consider the questions presented by appellants' assignment of errors.

The first in order and importance is the right of appellees to maintain this action. In other words, is the relief sought within the jurisdiction of a court of equity? The court is asked to declare or establish a lien at a time when it is not enforceable, and no other relief is asked, or can be had. It is strenuously insisted by counsel for appellants that the action is premature, and that the facts in evidence do not show that any substantial right of appellees is in danger, and are insufficient to entitle them to the relief sought. We cannot agree with the proposition that no substantial right of appellees will be lost if appellants, or either of them, purchased the interest without notice of appellees' claim. The fact that the agreement has since been placed on record will not prevent Paul from conveying a title clear of appellees' lien, if either he or Rust purchased the interest without notice thereof; and it is therefore of vital importance to appellees that it be shown that they purchased with notice, and to have the facts ascertained, and their right to a lien on the property established, as against Rust and Paul, in this proceeding, although such lien is not now enforceable. The transaction between appellees and Shear and Johnson was entered into for the purpose of disposing of appellees' claims for the sum of \$40,000; such sum to be realized by effecting a consolidation with conflicting claims, and the development of the consolidated property. By its terms certain duties of a trust nature were imposed upon Shear and Johnson, and upon the performance of which depended the realization, by appellees, of the consideration to be paid for their property. These duties were—First, to perfect a consolidation; and, second, to develop the property, whereby the purchase price agreed to be paid out of the proceeds might be realized. It, in effect, placed the title to the property in Shear and Johnson, to enable them to carry out these purposes. The claim of appellees, therefore, as evidenced by this agreement, is something more than a mere lien on the interest. It also includes an equitable right in the property, and the proceeds thereof, to the extent of the purchase price agreed to be paid therefrom. And any one purchasing the title to the interest that Shear and Johnson acquired through the consolidation of appellees' property with other claims, with notice of the agreement between them and appellees, must take such interest subject to the performance of the terms, and burdened with the lien therein provided; otherwise, if the purchase was without notice. Appellants deny notice, and claim to hold title to the interest conveyed by Shear and Johnson freed from appellees' claim and lien. With such a substantial right asserted by one party, and denied by the other, must appellees lie by, and wait the happening of conditions upon which the enforcement of their claim depends, or are they entitled to have their right declared and established so that it may be made available when due, notwithstanding the efflux of time, and the death of witnesses? We think the latter the correct view, and

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that the facts in evidence bring this case within equitable cognizance, under the head of "Declarative Remedies," as defined by Pomeroy in his classification of equitable remedies, as follows: "Declarative remedies, or those whose main and direct object is to declare, confirm, and establish the right, title, property, or estate of the plaintiff, whether it be equitable or legal. The remedies of this class are often granted in combination with others, and in fact they sometimes need other kinds of relief as a preliminary step to make them effective; but, on the other hand, they are often granted by themselves, unconnected with anything else." 1 Pom. Eq. Jur. 93. While we find no adjudged case announcing this doctrine in a case similar, in all respects, to this, yet, in principle, we think our conclusion is sustained by the language of the court in *Boos v. Ewing*, 17 Ohio, 524. In that case, Boos sold a certain lot for \$1,200,—\$600 cash, and \$600 to be paid in six years. Certain judgment creditors levied upon and sold the lot before the six years had elapsed and the deferred payment became due. Before the confirmation of the sale, Boos filed his bill, setting forth his vendor's lien, and asking that sufficient of the proceeds of the sale be set aside to pay his claim, or that the sale be confirmed subject to his lien. Upon objection to the relief being granted, because his claim was not due, the court say: "It is admitted that the purchase money is not due, and that when due it may be paid without a resort to this land, or the fund which it has produced. But is that any reason why complainant should lie still, and see his securities swept away, by being placed in the hands of one who may vest the title in a purchaser without notice? He either has or has not a lien upon the land. If he has such lien, it is clearly his right to protect it. No one can compel him to part with it, against his will, nor should he be turned out of court when it is put in jeopardy, and will be lost, or the loss hazarded, irretrievably, without the aid of the court." So in this case appellees "either have or have not a lien upon the property." If they have, it should be protected; and we are unable to conceive a state of facts that would more strongly invoke the power of a court of equity to declare and sustain a valuable right, that may be lost, or greatly jeopardized, if the aid of the court is refused, than is shown in this record.

If we are correct in the view that the relief prayed is within the power of a court of equity to grant, it is immaterial whether a proceeding to perpetuate testimony was available to appellees or not. As this remedy is more effective to protect their right, and prevent imposition upon subsequent purchasers, the appellants are not in a position to urge the further objection upon which they rely for reversal, viz. that the consolidation was not perfected. Whatever title they hold is derived through, and in pursuance of, the consolidation, and they are estopped from denying that the consolidation was fully consummated.

It appearing from the evidence that ap-

pellants purchased the interest from Shear and Johnson, not only with notice of their agreement with appellees, but also under an express promise to recognize and carry out the same, their contention that the amount paid Shear and Johnson should be applied to the reduction of appellees' claim cannot prevail.

We think the action is maintainable, and that the proof amply sustains the conclusion of the court below. The decree is accordingly affirmed.

(18 Colo. 337)

#### RUNDLE v. CUTTING.

(Supreme Court of Colorado. April 17, 1893.)

REAL-ESTATE BROKERS—JOINT AUTHORITY—POWER OF INDIVIDUAL.

1. Where two persons are by parol jointly authorized to sell land, one of them cannot separately execute the agency.

2. A contract by a real-estate agent, whereby his principal is to convey land to the purchaser upon payment of a part of the price in cash and the balance within 20 days, is not within the terms of a contract whereby the agent is authorized to procure cash purchasers, and the deeds are to be executed by a third person, to whom the principal has given a power of attorney.

3. Where an agency to sell land has expired by express limitation, a subsequent execution thereof is invalid.

Appeal from district court, Arapahoe county.

Action to quiet title by Robert Fulton Cutting against Thomas C. Rundle. From a judgment for plaintiff, defendant appeals. Affirmed.

G. G. Symes and E. W. Waybright, for appellant. Wolcott & Valle, for appellee.

HAYT, C. J. On the 9th day of July, 1885, one William H. Stevens was the owner in fee of several hundred lots in Windsor Heights, an addition to the city of Denver. On that day he made an oral contract with Assyria Hall and Edward A. Reser, jointly. By the terms of this contract Hall and Reser, jointly, were authorized to contract for the sale of the whole or any of these lots, and pay the proceeds to Joseph A. Thatcher, who was duly empowered to execute the necessary conveyances. Stevens had acquired title as a result of foreclosure proceedings, and a number of prior purchasers were claiming the right to redeem certain lots from such foreclosure, and it was agreed that all such purchasers should have the right to redeem upon the payment of the sum of eight dollars per lot, to Mr. Thatcher, within a reasonable time. It was further agreed that whenever the sum of \$10,000, with interest from July 9, 1885, should be paid to Mr. Thatcher under the agreement, the balance of the property should be deeded to Hall and Reser. The time in which this might be done was limited to one year. In pursuance of this oral agreement, Stevens executed a power of attorney to Thatcher, also giving him a letter of instructions with reference to the matter. The letter reads as follows, viz.: "Denver, Colo., July 9, 1885. Joseph A. Thatcher, Esq., City—My Dear Sir: I in-

close herewith power of attorney authorizing you to make deeds for me and in my name for the lots included in the tract of land described in the power of attorney. The deeds are to be made and delivered by order of Assyria Hall on receipt of the purchase money for said lots, until you have received in the aggregate as purchase money on said lots the sum of ten thousand dollars, (\$10,000,) with interest from the ninth day of July, 1885, at ten per cent., and after you shall have received the sum of ten thousand dollars, the balance of said property remaining unsold to the said Assyria Hall or order, in payment for his commissions and expenses in making the sale of said property, provided, that you are to make no deeds for lots without receiving at least the sum of eight dollars (\$8.00) in cash for each lot sold until you shall have received the ten thousand dollars, (\$10,000,) and interest as aforesaid. Limitation by lapse of time, one year, subject to revocation. [Signed] W. H. Stevens." At the expiration of the year only a small number of lots had been sold. A number of parties, at the instance of their attorney, Mr. Waybright, had, however, taken advantage of the option, and redeemed. Hall and Reser sold a few lots, and deeds to such lots were made at the request of Hall, by Mr. Thatcher, under his power of attorney. About December 27, 1886, Hall, claiming that the contract had expired by limitation, made a sale of the lots then remaining unsold to appellee, Cutting, subject to the approval of Stevens. Stevens, having affirmed the sale, directed Thatcher to deed the property. In accordance with these directions, Thatcher, by authority of the power of attorney theretofore executed to him, deeded the property to Cutting. This deed bears date February 23, 1887. The negotiations leading up to it were conducted by one Chamberlin, acting for and in behalf of the grantee. On December 27, 1886, Reser, assuming to be acting under the original contract, also sold the property to appellant, Rundle. Upon this sale Rundle paid him \$100 of the purchase price in cash, and agreed to pay the balance within 20 days thereafter. Reser gave receipt for amount paid, in which it was stated that Stevens was to furnish abstract showing a clear title within 10 days, and to execute a deed with full covenants of warranty; balance of purchase price to be paid within 20 days. This paper was signed by Reser as agent for Stevens. A few days thereafter, and as soon as Rundle learned of the sale to Cutting through Chamberlin, he caused this receipt to be recorded in the office of the county clerk and recorder of Arapahoe county. The present action was instituted by Cutting against Rundle to remove the cloud upon the title of the former.

In determining the questions presented we shall first consider whether or not Reser had the right at any time to sell the property in controversy, as the agent of Stevens. If we look to the oral agreement solely, it is apparent that such right was not thereby conferred. The evidence shows that if any agency was in fact given orally by Stevens it was a joint agency to

Hall and Reser, and Reser alone could not execute the power. This is undoubtedly the general rule of the common law, and although, in commercial transactions, this rule is in some instances relaxed for general convenience in favor of trade, such modification has never been extended to cases like that now under consideration. Story, Ag. (8th Ed.) § 42; Insurance Co. v. Wilcox, 57 Ill. 185; Salisbury v. Brisbane, 61 N. Y. 617; Railroad Co. v. Stewart, 25 Iowa, 115; Johnston v. Birmingham, 9 Watts & S. 56; Kupfer v. Parish, 12 Mass. 185; Bank v. Belrne, 1 Grat. 226. If we look to the written instruments, they are against the agency of Reser, rather than in his favor. Again, Stevens did not authorize any one to make such a contract as the one entered into by Reser with Rundle. The agency given only authorized the procurement of cash purchasers; Thatcher being the agent appointed by Stevens, with the consent of all parties, to receive the money and execute the deeds. By the terms of the contract made by Reser, the property was to be tied up for at least 20 days, during which time other purchasers were to be prevented from buying. Speer v. Craig, 16 Colo. 478, 27 Pac. Rep. 891. In addition to the foregoing, the term of such agency as was in fact created had expired by express limitation, prior to the time of the attempted sale by Reser. The judgment of the district court must be affirmed without reference to the question raised by appellee upon the statute of frauds. It would be a work of supererogation to follow counsel into that field of investigation in this case. Affirmed.

(6 Wash. 173)

STAVER & WALKER v. MISSIMER et al.  
(Supreme Court of Washington. March 29, 1893.)

CONTRACT—CONSIDERATION—FORBEARANCE TO  
SUE—HOW ENFORCED.

1. An order for the payment of money, given by a debtor to his creditor, and accepted by the drawee, is a sufficient consideration for an agreement by the creditor to forbear suing on the original debt for a specified time; and the fact that a portion of such debt was not due when the order was given and accepted is immaterial.

2. A promise to forbear to sue on a debt for a specified time, based on a sufficient consideration, may be pleaded in bar to an action brought before the expiration of such time; and the debtor need not resort to a separate action for damages for breach of the promise, or plead his damages as a set-off in the original action.

Hoyt, J., dissenting.

Appeal from superior court, Snohomish county; John C. Denney Judge.

Action by Staver & Walker, a corporation, against C. A. Missimer and H. W. Illman, partners, etc., to foreclose two mortgages. From a judgment in defendants' favor and from an order overruling plaintiff's demurrer to the answer, plaintiff appeals. Affirmed.

The complaint alleged a balance of \$1,782.81 to be due on two mortgages, given to secure the sum of \$2,044, evidenced by four notes, each note dated November 10,

1890,—one for \$500, due March 10, 1891; one for \$500, due May 10, 1891; one for \$500, due July 10, 1891; and one for \$544 due August 10, 1891,—the first note having been paid prior to the commencement of suit. In their answer, defendants admit the amount claimed in the complaint to be unpaid, but allege as affirmative defense that prior to October 26, 1891, the defendants were further indebted to the plaintiff upon two unsecured notes,—one for \$330, due October 1, 1891, and one for \$486.97, due November 1, 1891,—and also an unsecured open account; and they further allege that on said 26th day of October, 1891, the said plaintiff entered into an agreement with the defendants to take an accepted order for \$1,000 on Eliza J. Blackman and Fannie L. Churchill, to be applied upon said unsecured notes and said open account when paid, and extend the time of payment on said secured notes and mortgages for one year from the said 26th day of October, 1891. Defendants further allege that in pursuance of said alleged agreement the following order for \$1,000 was given, and paid as shown by the indorsements thereon:

"Snohomish, Wash., Oct. 26th, 1891. Pay to the order of Staver & Walker one thousand dollars on lumber furnished by us, provided that amount be furnished by us, and, if not, then such less amount as may be furnished. It is understood that five hundred dollars of this order becomes due within thirty days from date hereof, and the balance within thirty days thereafter, and to be subject to the same liabilities and regulations as if the amount were paid to us. Missimer & Illman. Per Missimer. To Eliza J. Blackman and Fannie L. Churchill."

Indorsed across the face in red ink:

"Accepted October 26th, 1891. Mrs. E. J. Blackman. Fannie L. Churchill."

Indorsed on back:

"December 9th, 1891, five hundred dollars paid on within acceptance. Staver & Walker Co.

Feby. 16th, 1892, paid on	
within	\$ 250 00
Mch. 2d, 1892, paid on with-	
in	250 00
	<hr/> \$1,000 00

"Bell & Austin,

"Attorneys for Staver & Walker."

Plaintiff demurred to said answer for the reason, and on the ground, that the same did not state facts sufficient to constitute a good and valid defense to said action. The demurrer was overruled. Plaintiff replied, denying the agreement to extend the time of payment to October 26, 1892, as alleged in said answer, or to any other time.

Bell & Austin, for appellant. Ault & Munns, for respondents.

DUNBAR, C. J. So far as the testimony in this case is concerned, it is very conflicting; but considering all the circumstances in the case, especially the fact that appellant received additional security by the arrangement which was made, and the circumstances under which it was made, we



do not feel justified in disturbing the findings of the trial judge, who had the witnesses before him in the trial of the cause. The legal questions are raised by the demurrer to the answer; the appellant contending (1) that the answer failed to state any consideration for the alleged agreement to forbear to sue; (2) that a covenant not to sue for a limited time cannot be pleaded as a bar to the action.

As to the first proposition, appellant admits that payment of a note before the note becomes due is sufficient consideration for a promise or agreement to forbear to sue, but asserts that an order on a third person, and especially a conditional order, is not payment, and in no way changes the relation of the parties until payment thereon is made, except to extend the time of payment until the order is payable. The answer in this case, however, does not set up a conditional order, but alleges that an order was given and accepted, and such an order as was agreed upon by the parties; and, so far as the merits of the case are concerned, the order was paid, and respondents given credit for the amount. The answer also alleges that a portion of the debt was not due. The fact that it would have been due in a short time does not change the principle of law. After the acceptance of this order by Blackman and Churchill, appellant could have maintained an action against them for the amount accepted, and it can make no difference whether the order was taken as absolute payment, or as security for an unsecured debt. It is certainly sometimes a very great advantage and benefit to creditors to secure their unsecured accounts, and the value of the consideration is frequently equal to the full value of the debt secured. "A consideration has been well defined as consisting of 'any act of plaintiff from which the defendant or a stranger derives a benefit or advantage.' \* \* \* It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction." 5 Lawson, Rights, Rem. & Pr. § 2244. It is alleged in the answer that the promise was the inducement to the transaction, and, outside of the benefits flowing to the creditor from the transaction, it is evident that the giving of this order would be something of an inconvenience to business men situated as these respondents were at that time. We think there was a sufficient consideration to support the agreement to extend the time, and the authorities overwhelmingly support this contention.

On the second proposition, it is contended by appellant that the respondents' remedy for a breach of promise not to sue is a claim for damages, and that the agreement cannot be pleaded as a bar to the action. It seems to us that, outside of the fact that proof could only be made of damages which had already accrued at the time of the commencement of the action, and which for that reason would, in a great many cases, be an entirely inade-

quate remedy, it is marking out a crooked path for litigants to travel, and one that was in no wise contemplated by their contract. The law, in construing a contract, adopts rules to ascertain the intention of the parties to the contract, and when that intention is ascertained, if it is a contract which the parties had a right to make, the law will simply enforce it so as to make effective such ascertained intention, and will not make another and a different contract for the parties, and prescribe different remedies and different penalties. In this case the contract was a plain one. The terms were that suit should not be brought for one year. Why should it not be as plainly enforced? If the contract is to be given force at all, it ought to be given the same force as the original contract. There is just as much reason in holding that the defense to an action on a note before it becomes due on the original contract must be confined to a claim for damages, as there is to hold that the defense where the agreement as to time has been changed must be so restricted. In each instance it is purely and simply a question of the maturity of the note. No one would have questioned their right, under this agreement, to take the old notes up, and give new ones for the same amounts due one year from date. That was in substance what they did, and directness, instead of circumlocution, in administering the law ought to be the policy of the courts. We are aware that there is a great conflict of authority on this question, some cases holding that the remedy is by damages in a separate action, while others, to avoid multifariousness of suits, have been driven to a more inconsistent practice of compelling the defendant to allege his damages in the original action, while still others have enforced the contract that was made by the parties. The leading case supporting the last practice is *Robinson v. Godfrey*, 2 Mich. 408, where it is pointedly held that the promise operates directly upon the original contract, and to bar an action brought upon said contract before the time limited expires. The court in that case, in an exhaustive opinion, reviews the authorities, and points out the manner in which courts have been misled that have sustained the opposite view; and, in referring to the decisions in certain cases sustaining the view that the promise was a bar, viz. *Tatlock v. Smith*, 19 E. C. L. 158, *Stracy v. Bank*, Id. 337, and *Allies v. Probyn*, 2 Crompt. M. & R. 408, says: "These cases seem to establish the proposition that agreements not to sue, and in the same manner agreements to extend the credit, operate directly upon the rights and obligations of the parties to the contract, and, as the case may be, destroy or suspend the remedy. Indeed, it seems to us that the opposite view contended for makes a distinction where none exists, violates all legal analogies, frustrates the real intent of the parties, and makes the court an instrument of manifest wrong and injustice." To the same effect, *Blair v. Reid*, 20 Tex. 311, and *Leslie v. Conway*, 59 Cal. 442. In many other cases the right to plead the promise in bar seems to have been unquestioned,

the only contention being over the question of consideration. This is a new question in this state, and, being untrammelled by precedent, we feel free to adopt the rule that seems to us to be the most nearly in accord with the general principles of law applied by courts to the construction and enforcement of contracts; and we therefore decide that a promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, can be pleaded in bar to the action. No error appearing, the judgment is affirmed.

STILES and SCOTT, JJ., concur. HOYT, J., dissents. ANDERS, J., not sitting.

(6 Wash. 178)

ZINTEK et al. v. STIMSON MILL CO.  
(Supreme Court of Washington. March 29, 1893.)

NEGLIGENCE OF VICE PRINCIPAL.—YARD BOSS.

A yard boss, who has entire control of a mill yard, hires and discharges workmen, and superintends the piling of lumber, is not a fellow servant of such workmen, but represents the master; and the master is liable for the death of one of such workmen, killed by the falling of lumber negligently piled under the direction of the yard boss.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Francisca Zintek and others against the Stimson Mill Company for the death of Alexander Zintek while in defendant's employ. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Turner & McCutcheon, for appellants. Stevens, Seymour & Sharpstein, for respondent.

SCOTT, J. This action was brought by the plaintiffs to recover damages of the defendant for negligently causing the death of Alexander Zintek, who was at the time performing labor for the defendant at its mill yard at Ballard, in King county. At the conclusion of the plaintiffs' case, the court below granted a motion for a nonsuit, on the grounds that the deceased and one O. C. Nelson, under whom he was working, were fellow servants, and because no negligence had been proven against the defendant. The evidence shows that the deceased and one John Marzillger, at the time of the injury, were engaged in removing a pile of lumber, and were working under said Nelson, who was then, and had been for a long time prior thereto, yard boss in said mill yard. Near the lumber which the deceased and Marzillger were removing was another pile of lumber, which had been placed there while Nelson was yard boss, as aforesaid. The evidence shows that this lumber had been negligently piled, particularly from the bottom for some distance up, and that it had been carried to a height of 16 feet or more. After the deceased and Marzillger had nearly removed the lumber from the pile upon which they were at work, a portion of the upper part of this pile which had been negligently constructed broke off and fell

over, and in falling caught the deceased, and injured him so severely that he died from the effects thereof. There was testimony to show that said yard boss had entire control of the yard, that he hired and discharged workmen, and that the workmen about the yard worked under his orders; and also to show that it was the duty of said yard boss to superintend the piling of the lumber in the mill yard. He performed no labor himself, such as handling lumber, but had charge of the yard, and superintended the workmen and the management of the yard. No claim was made by the respondent, in its brief or upon the argument, that there was any contributory negligence upon the part of the deceased. It seems to us that the deceased and said Nelson cannot be held to have been fellow servants, under the circumstances of this case, by much the greater weight of the authorities, (see 1 Shear. & R. Neg. §§ 224-226 et. seq., and cases cited;) and there was proof of negligence upon the part of Nelson sufficient to go to the jury. It was, therefore, error to nonsuit the plaintiffs. The judgment is reversed, and cause remanded.

DUNBAR, C. J., and ANDERS, J., concur.

(6 Wash. 170)

BAST v. HYSOM et al.

(Supreme Court of Washington, March 29, 1893.)

APPEAL—OBJECTION NOT RAISED BELOW—JUDGMENT BY DEFAULT—VACATION.

1. On appeal from an order denying a petition to open a judgment rendered against petitioner by default, an objection that the same matter had previously been determined adversely to petitioner on his motion in the original action to vacate the judgment is not available, where it was not raised in the court below, and the parties went to trial on the petition on the merits.

2. A judgment by default for \$1,359 should be vacated where only \$200 was claimed by plaintiff before suit, and defendant has a defense even for this amount, and is inexperienced in the law, and he received information from one of plaintiff's attorneys that he need not appear and plead to the action until the succeeding term of court.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Petition by Engelbert Bast to vacate a judgment by default rendered against him, and in favor of Cornelius B. Hysom, Adelbert Folsom, and D. H. Moore. From an order denying the application, petitioner appeals. Reversed.

Bell & Austin, for appellant. Black & Edwards, for respondents.

SCOTT, J. On the 21st day of April, 1892, judgment was rendered by the superior court of Snohomish county in favor of the respondents Cornelius B. Hysom and Adelbert Folsom, against the appellant, by default, for the sum of \$1,359. The process in said action was served on appellant on the 31st day of March, 1892. Appellant moved to vacate the judgment upon the grounds that he had not ap-

peared and pleaded within the time prescribed through inadvertence and excusable neglect, and because one of the attorneys for the respondents had represented to him that said cause would not come on for hearing until the June term of said court, and that it would be unnecessary for him to do anything therein before said time. On the 31st day of May following, this motion was denied, and upon June 2d appellant filed a petition to vacate said judgment, setting up substantially the same grounds. At the hearing upon this petition the respective parties appeared, and proofs were submitted by each of them, and the court denied the application; whereupon an appeal was taken to this court.

The respondents urge that the appellant was barred from prosecuting this proceeding in consequence of his having previously moved to vacate the judgment on the same grounds. The appellant urges that the reason the court denied his motion was because he had not resorted to the proper proceeding; that, instead of filing a motion in the original cause, he should have proceeded by petition, as he did do subsequently. And he further insists that the respondents cannot now be heard to raise this objection, for the reason that they did not make it in the court below, but went to trial on the merits of the petition. We find nothing in the record to indicate upon what grounds the court denied the motion, but it does not appear that the respondents objected to the petition because said matters had been previously determined on the motion, or that they set up said proceedings as a bar thereto, and the parties did go to trial upon the merits. Consequently the point is not available here.

A number of affidavits were submitted to the court below at the hearing upon the petition, the contents of which it is unnecessary to set forth. If the appellant's claim is maintained, he has a defense upon the merits to said action, and we think the facts are such that the court should have vacated the judgment taken against him by default. According to the testimony of appellant, it appears that but \$200 was claimed of him before suit, and he disputes any liability even for this amount, and the facts alleged by him show a defense thereto. It also appears from this showing that he was inexperienced in the law, and was under the belief that it was unnecessary for him to appear or plead in said action until the next term of court succeeding its commencement, which would have been in June; and it further appears that he received information to this effect from one of the attorneys of the respondents. Said attorney, while denying the conversation as alleged by appellant, admits that he did have a conversation with him at the time with reference to the suit, which he details; and enough appears therefrom to justify the belief that the appellant understood from what was there said that it was not necessary for him to take any action in the premises until said June term of court. After appellant had notice that judgment had been taken against him, he proceeded with due

diligence to have the same set aside and the action reopened. From all the circumstances in the case, we are satisfied that the judgment of the court below, in denying defendant's application to have said judgment vacated, should be reversed; and it is so ordered, and the cause is remanded, with instructions to said court to permit the appellant to file an answer to the complaint in said action, and for such further proceedings as may be authorized in the premises.

DUNBAR, C. J., and HOYT and STILES, JJ., concur. ANDERS, J., not sitting.

(5 Wash. 577)

# REICHENBACH v. LEWIS et al.

(Supreme Court of Washington. March 10, 1893.)

## DISMISSAL OF APPEALS.

Since Code Proc. § 1419, provides for the dismissal of appeals to the supreme court under certain circumstances, precedents of other states are of no binding force.

On rehearing. Denied.

For former report, see 32 Pac. Rep. 460.

STILES, J. The judgment in this case was entered February 9, 1892, and on the 16th day of the same month the notice of appeal was given. No transcript was filed in this court within 60 days thereafter, and on the 15th day of October, 1892, upon motion of the respondent, the appeal was dismissed. At that time it appeared that the record in the case was on file, in connection with a second notice of appeal, which had been given August 8th. After the notice a motion to dismiss had been given. No excuse whatever was furnished upon the hearing of the motion for the delay in filing the transcript. The second appeal, coming on to be heard, has been dismissed because the notice of appeal was given at the time that the first notice was in force, and because there was on the 8th of August no matter pending in the superior court to which a notice of appeal could be addressed. Appellants now ask that under what they conceive to be the rule laid down in *Hill v. Finnigan*, 54 Cal. 311, the record and the first notice of appeal be taken together, and that the cause be heard.

The right to appeal, under our constitution, is perhaps one which could not be taken away, even by the legislature; but the method of appealing, and the time within which the appeal may be taken, are certainly subject to statutory regulation. Each state has its own laws upon that subject, and the constitution of the United States has no bearing upon or authority over it. Therefore, while the statutes and rules of the supreme court of California may constitute precedents, they are of no binding force anywhere outside of that state. So far as the dismissal of the first appeal was concerned, our statute (Code Proc. § 1419) is the only guide which this court has. An appellant has 6 months in which to appeal, and after the notice of appeal is given he has 60 days within which to file the transcript

in this court; and he has such further time as may be necessary if the cause for not filing it is found in any failure of the clerk of the superior court, or any other circumstance over which the appellant has no control. There was no showing of any of these matters sufficient to extend the time upon the motion to dismiss the first appeal; and it was not taking advantage of any technicality on the part of the respondent to move to dismiss, nor was it due to any failure of this court to regard any section of the statute providing for liberal construction, or for hearing causes upon their merits, that the order for dismissal was made. Both the motion and the order were based entirely upon the negligence of the appellants in failing to take the requisite steps within the reasonable time provided by law.

As to the second dismissal, it seems to us that the fact that a valid appeal had been taken, and was pending, should be sufficient, without any argument, to show that no such proceedings ought to be recognized. During all the time that the first notice was undisposed of, the respondent was held back from taking any action towards the recovery of her judgment. The May session of this court passed, and there was no record here ready for the hearing. The October session approached, and the time for setting causes arrived, and the record for the second appeal was only filed on the 26th day of September. No briefs were filed, and the cause could not be heard at that session; and thus, owing to the failure of the appellants, 11 months elapsed before it could be set down for trial in its order. Under these circumstances the appellants are not entitled to appeal to any equitable features of the statute, and they certainly do not come within any portion of its letter. However, for the reason that the appellants are so strong in their insistence that they should be heard, and that great injustice has been done them by the refusal of the superior court to open the judgment and let them in to defend after their default had been entered, we have taken the pains to look into the record, and to consider the brief of appellants on the two points urged by them, and do not find either of them well taken.

Petition denied.

HOYT, SCOTT, and ANDERS, JJ., concur. DUNBAR, C.J., concurs in the result.

(5 Wash. 665)

MANSFIELD v. FIRST NAT. BANK OF WHATCOM et al.

(Supreme Court of Washington. March 21, 1893.)

On rehearing. Petition denied.

For former report, see 32 Pac. Rep. 789.

STILES, J. Criticism is made of the opinion in this case because it is therein said that the Oregon statute contained no provision for the discharge of the debtor, or for change of the assignee. This will have to be qualified. The Iowa

statute dates back to 1857, and perhaps earlier. We have not the Session Laws of Oregon, which contain the enactments in that state upon this subject. But from the notes to 2 Hill's Code, c. 28, we find that in 1878 the Iowa statute seems to have been adopted in Oregon, verbatim; and this statute, without any provision for discharge of the debtor or change of the assignee, continued until 1885, when amendments were adopted which made the Oregon statute verbatim with our own statute of 1890. *Hahn v. Salmon*, 20 Fed. Rep. 801, 808. And all the cases in the Oregon supreme court were based upon the old law, except *Dawson v. Sims*, 13 Pac. Rep. 506, and *Helms v. Gilroy*, 26 Pac. Rep. 851. In *Jacobs v. Ervin*, 9 Or. 52, while the court doubted whether, under the statute of 1878, an assignee could move to set aside an executed transfer made by the debtor in fraud of creditors, yet when the debtor had made to one of his creditors a chattel mortgage, which was held to have been fraudulent as to other creditors, the assignee, having obtained possession of the mortgaged chattels, was held to represent creditors far enough to enable him to defend against a foreclosure. The decision in *Gammons v. Holman*, 11 Or. 284, 3 Pac. Rep. 676, was to the effect, merely, that an assignee could not attack the possession of one who had received personal property from the debtor, in good faith, as a security for advances. It was there said that the assignee took the legal title, and nothing more, and acquired just such rights in the property as his assignor had, and none other. No question of a creditor's rights was then in issue. Indeed, no creditor could have successfully attacked *Holman & Co.*, for the reason that there was no fraud. *Helm v. Gilroy*, 20 Or. 517, 26 Pac. Rep. 851, is substantially to the same effect as *Gammons v. Holman*. In *Dawson v. Coffey*, 12 Or. 514, 8 Pac. Rep. 838, the court refused relief to a creditor who had not recovered a judgment at law, and had an execution returned unsatisfied, and from what was said on page 518, 12 Or., and page 840, 8 Pac. Rep., we should infer the view of the court to have been that the proper proceeding was for the creditor to prove his claim, and then move the assignee to recover the value of the property fraudulently made way with. In *Dawson v. Sims*, supra, the sole question was whether there was jurisdiction to maintain an equitable action to aid an attachment lien, and it was resolved in the affirmative. This case was heard under the amendments of 1885; but there was no discussion of the law as a whole, or of the standing of an assignee as between the debtor and his fraudulent grantees, on the one side, and creditors, on the other. In *Stout v. Watson*, 19 Or. 251, 21 Pac. Rep. 230, there never was any intention to make an assignment under the statute, but the court held that what had been done was forbidden by the statute. It is possible that the decisions in the state of Oregon may have been somewhat influenced by the fact that until 1885 the statute was rather a regulation of the common-law assignment, and that the in-

fluence may continue in the future, notwithstanding the new features which have been added to it, which have not yet been there considered. But here we have set up the statute as a whole, substituting it for an existing insolvent law, which it has repealed by implication; and carrying with it, as it does, the two features of entire control over assignees and discharge of the debtor, we are unable to see how its evident purpose can be carried out without giving to the creditors, through the court and the assignee, the right to assail fraudulent conveyances, and bring into the administration all that ought, in equity and good conscience, to be distributed. In no other way will creditors be able to "secure a just division of the estates of debtors who convey to assignees." Any other method would simply result in a scramble among creditors, with the very preferences which the statute expressly denounces.

Rehearing denied.

DUNBAR, C. J., and HOYT, J., concur.

(5 Wash. 471)

TOWN OF SUMNER v. PEEBLES et al.  
(Supreme Court of Washington. March 21, 1893.)

On rehearing. Petition denied.

For former report, see 32 Pac. Rep. 221.

STILES, J. The opinion heretofore filed contains a wrong statement of fact, which is pointed out in the petition for rehearing. Kincaid's part of the plat referred to was of the southern portion of the town, and showed the street to be 32 feet wide, while Ryan's plat was of the northern portion of the town, and showed a street but 30 feet wide. Our understanding of the record was that Kincaid had, by the plat, contributed 16 feet, and Ryan 15 feet, making a street 31 feet wide throughout its length. The lots owned by the respondents lie, it is said, within 15 feet of the center line of the street. This error of statement seems to make no difference in the merits of the case, however. We think the opinion shows with reasonable clearness that this court holds that the original road was lawfully established, and that the new road was not. But there was an attempt by the proper authorities in 1863 to make a change to the exact location which was afterwards adopted by Kincaid in 1874, in such a manner and under such circumstances as estopped him to say that the proceedings taken for the change were not regular. One thing is certain: if Kincaid could change the road at all, it must have resulted in such a change alone as the law permitted, viz. a road 60 feet in width; and, if it did not result in a lawful road, then the road has never been changed, and the old road, although closed up for almost 20 years, is now subject to be again occupied by the public. The public cannot be forced into trades in the way proposed. It is either entitled to all that the law contemplated it should have, or it is not bound by the asserted change at all.

The decision made was based upon the assertion in the record that there had been a change through the act of Kincaid in 1874, not upon the only other theory, viz. that he had voluntarily opened a new road, and unlawfully closed up the old one.

Something is urged about the hardship to purchasers in this connection; but, bearing in mind that the public is entitled to a 60-foot road, we doubt whether the purchasers in this case are likely to suffer greater hardship than others who may, as purchasers, be now occupying premises which are part of the old road, where they would certainly be disturbed if the respondents' theories were adopted.

Petition denied.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur.

(5 Wash. 736)

ELWOOD v. STEWART et al.  
(Supreme Court of Washington. March 23, 1893.)

On petition for rehearing. Petition denied.

For former report, see 32 Pac. Rep. 735.

HOYT, J. The petition for rehearing in this case satisfies us that we did not make ourselves fully understood in the opinion rendered herein. We said something in reference to the title derived by the appellants under the execution sale, which was entirely unnecessary to the decision of the case. The principal thought which we had in mind at the time was that, under the well-settled rule applicable to such sales, the title derived by the purchaser is measured by the real, and not the apparent, title of the judgment debtor, and that as, under the facts disclosed by the record, the judgment debtor was not in a condition to assert any rights as against the mortgage in question, or the deed made in satisfaction thereof, the purchaser at such sale took subject thereto. We see no reason to change the opinion that we then had in regard to that matter, and the petition for rehearing must be denied.

STILES and SCOTT, JJ., concur.

MOSES v. PORT TOWNSEND S. R. CO.  
(Supreme Court of Washington. March 10, 1893.)

CARRIERS—CONNECTING LINES—LIEN FOR FREIGHT.

Where a railroad company contracts to transport for an agreed sum, paid in advance, chattels over its line, to a point on the line of another railroad company, the latter is bound with notice of the terms of the contract, and has no lien on such chattels for its freight charges. Per Dunbar, C. J., dissenting.

For majority opinion, see 32 Pac. Rep. 488.

DUNBAR, C. J. I dissent. The only way the majority opinion can be sustained is by invoking the doctrine of general

agency. The idea of general agency in this character of cases is purely artificial, and has no foundation in fact, or in the understanding of the parties to the contract. An agency is not an artificial condition, but it is a real condition or relative position of parties, based upon a contract, upon the real understanding and intention of the parties; and the agency, so far as the parties to the contract are concerned, cannot go beyond the intention of the parties at the time the contract was made. What was the understanding of the parties to this contract? Plainly, that the Burlington & Missouri River Railroad Company should deliver respondent's goods in Olympia for an agreed price, which the respondent paid in advance to that company. Here was a special agency created to do a special thing. There is no semblance here of a general agency, and, under the undisputed rule, he who deals with a special agent deals at his peril, and is bound to take notice of the exact powers conferred. Neither is there any element of apparent authority in this case. If the contract which Mrs. Moses made with the Burlington Company can be construed as clothing that company with apparent authority to bind her to pay more than she agreed to pay for the transportation of her freight to Olympia, then the distinction between a general and a special agency can always be obliterated by the plea of apparent authority. What is it that is made apparent by this contract? If the Union Pacific and subsequent transportation companies had taken the trouble to look at the bill of lading, one thing certainly would have been apparent, and that apparent thing was that the freight had been paid on the goods clear through to their destination at Olympia. The exercise of ordinary business care would have brought this notice home to the company that received the goods from the Burlington Company. It is conceded that, if the company had had the notice, its lien could not attach. Shall it be allowed to change the responsibility of the owner by refusing or neglecting to take notice which was within its reach? There is no privity between these connecting companies and the shipper, but there is privity between the connecting companies and the company from which they received the freight. It is in perfect harmony with the natural order of business that he who is employed must look to his employer for his recompense, and I see no good reason for changing the rule in the interest of transportation companies. These companies deal with each other; they are familiar with the business transactions of each other; most frequently have traffic arrangements; at all events they can easily make such arrangements between themselves if they see fit. The business is for their mutual benefit, and it is no hardship to hold that the company which procures another company to forward its freight should be taken to be its agent to carry the goods forward. A different rule altogether prevails where the charges have not been paid. There the party sees fit to put his goods in the care of any number of companies that is nec-

essary to transport them. He knows that of necessity they must be carried by different companies, and that each company is entitled to a fair consideration for its services; that, in order to insure their transportation without payment in advance, the companies respectively are entitled to a lien to secure their payment. This knowledge becomes incorporated into his contract. He is presumed to have contracted with reference to it. And here the doctrine of apparent authority attaches, and the shipper is presumed to have consented to the attachment of a lien to secure the freight charges. And when the extending company makes the ordinary inquiry, and ascertains that the freight is in this condition, it takes it, and its lien attaches upon this implied consent; for it must be borne in mind that the lien can only attach upon the idea of consent, expressed or implied, in the contract made with the owner. But where can we get the idea of consent in this case? It is certainly not expressed. It is just as plainly not implied. Not only so, but the very transaction itself negatives the idea of consent; for the respondent paid the charges to Olympia, the point of destination, and she certainly did not consent to pay the charges twice; and yet, if the doctrine of the majority is sustained, it must be upon this unreasonable hypothesis. It is a well-settled principle that a wrongdoer cannot confer on a carrier a right to assert a lien against the true owner, because the owner cannot be divested of his property without his consent. I think, then, that in an executed contract of this kind,—executed at least on the part of the shipper, by the payment of the through freight charges in advance, as agreed upon,—each successive carrier over connecting lines of railroads becomes the agent of its predecessor; that each successive carrier acts in subordination to the contract, and must be held to take notice of the conditions of the contract; and I think the doctrine is well established that in cases of connecting carriers the succeeding carrier is the agent of the initial or first carrier. The rule is thus laid down by Hutch. Carr. § 273: "Whenever, therefore, as in England and in many of the states of this country, upon the delivery of goods to a common carrier consigned to a particular point, the law obliges him to become responsible for the carriage to that place, all subsequent carriers who may be employed to aid in the through transportation do so as agents of the carrier to whom they are first delivered, and are protected by his contracts." In this case the goods were delivered to the Burlington Company, consigned to a particular point, viz. Olympia. The law obliges that company to become responsible for their carriage to that place, because it had received the pay for the through transportation. Consequently, according to the text, the Union, the Northern, and the Port Townsend Southern were the agents of the Burlington Company. "When goods are sent not according to the contract with the owner, or by some other route, there is no lien for freight on them, and, if the goods are withheld under a claim of

lien, an action of trover will lie for the value." *Marsh v. Railroad Co.*, 9 Fed. Rep. 973. "The connecting carrier, by receiving the goods from the contracting carrier, becomes its agent for the purpose of completing the contract with the shipper." *Halliday v. Railway Co.*, 74 Mo. 159. To the same effect: *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Van Buskirk v. Purinton*, 2 Hall, 601; and *Robinson v. Baker*, 5 Cush. 137. If a bill of lading or way bill accompanying the goods shows that the freight has been paid wholly or in part for the through route, the succeeding carriers would be affected with knowledge of such payment; for if they consult the bill of lading they will have actual knowledge, and if they do not consult it they may be regarded as guilty of negligence, and constructively affected with knowledge of what the bill of lading actually shows. 1 Jones, Liens, § 297. This was the view the court took of the law in this case, both in sustaining objections to the testimony offered, and in its instructions to the jury. Most of the cases cited by the majority base their arguments upon the theory that transportation companies are compelled to receive and forward freight. If that were so, then there would be some equity and justice in holding that they would have a lien for their services in any event. But such is not the law. If a connecting company is not satisfied with the responsibility of the company which has the goods in charge in the first instance, it can demand its pay in advance, and, if it is not paid, it need not carry the goods. The law on that subject is well settled. In my judgment there was no error committed in the trial of this cause, and the judgment should be affirmed.

(5 Wash. 482)

**CITY OF SEATTLE v. DORAN.  
SAME v. ANDERSON.**

(Supreme Court of Washington. Jan. 6, 1893.)

For majority opinion, see 32 Pac. Rep. 105.

**STILES, J.** In my judgment the court is in error in its treatment of the case of *Wilson v. City of Seattle*, 2 Wash. St. 548, 27 Pac. Rep. 474. It is correct in saying that the language used in that decision was unfortunate, for the proper ground of that decision was that in a case of certiorari, where nothing was presented but the record, the court could know whether there had been publication or not only from the record; and, as that contained no proof of any publication, the conclusion must necessarily be that there had been none. But certiorari was permitted in the *Wilson* Case only because the property owner had no other way of preserving his rights, and the judgment resulted in setting aside the assessment because the law had taken away the defense of the owner upon all but technical grounds. Here, however, the proceeding is a foreclosure under the charter of 1896, and all

defenses can be presented, and the whole matter adjusted upon an equitable basis. Therefore, the *Wilson* Case has no application, and I concur in the result.

(6 Wash. 134)

**DENNY HOTEL CO. OF SEATTLE v.  
SCHRAM.**

(Supreme Court of Washington. March 24, 1893.)

**CORPORATIONS—SUBSCRIPTIONS TO STOCK.**

1. At common law a subscriber to the stock of a corporation is not liable on his subscription till the full capital stock is subscribed.

2. Under 1 Hill's Code, § 1497, providing that no corporation shall commence business until the whole amount of its capital stock has been subscribed, a subscriber is not liable on his subscription till the full capital stock is subscribed.

3. 1 Hill's Code, § 1498, provides that two or more "persons" may form a corporation in a certain manner. *Held*, that although 2 Hill's Code, § 1709, provides that "person" shall be construed to include a corporation, a corporation cannot become a subscriber to shares in another corporation.

4. A subscription by a corporation to the stock of another corporation, to the amount of \$64,000, will not be enforced, when the capital stock of the subscriber is only \$5,400, since there is an apparent inability to pay the assumed liability.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by the Denny Hotel Company of Seattle against John Schram to recover subscriptions to stock in plaintiff corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Burke, Shepard & Woods and Hawley & Prouty, for appellant. Hughes, Hastings & Stedman, for respondent.

**DUNBAR, C. J.** There are two controlling questions in this case: First. Is a subscriber to the stock of a corporation, in this state, liable for the amount of his subscription upon the failure of the corporation to obtain subscriptions to the extent of the full capital stock? Or, expressed in other words, is the obtaining of the subscription to the extent of the full capital stock, a condition precedent to the liability of the subscriber? Second. Can a corporation, under the laws of this state, become an incorporator by subscribing for shares in another corporation?

On the first proposition the contention by respondent that the subscriber is not liable, we think, is sustained by the overwhelming weight of authority, as well as by right reasoning, and the plain principles of justice and fair dealing. While it may be a well-recognized principle, as asserted by appellant, that defenses to subscriptions are not favored by the courts, the principle can only be recognized in its application to inequitable defenses. Contracts of subscription and capital stock of corporations, like other contracts, are entered into by individuals with reference to the responsibilities imposed; in this case, no doubt, with reference to the relative responsibilities of the subscribers, and the



character and cost of the hotel to be constructed. The inequitable result of holding the subscribers bound in a case where the whole amount of the stock is not subscribed is set forth with so much clearness and particularity in *Corporation v. Ropes*, 6 Pick. 23,—a leading case on the subject,—and the arguments and illustrations of the court in that case are so often repeated, and so nearly universally indorsed, that we will content ourselves with a reference to, and an indorsement of, the reasoning in that case. Even in the absence of statutory requirements, such seems to be the prevailing holding. "It is an implied part of the contract of subscription that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed. This condition precedent to the liability of the subscriber need not be expressed in the corporate charter, nor the subscription itself. It arises by implication from the just and reasonable understanding of the subscriber that he is to be aided by other subscribers. This rule is supported also by public policy, in that corporate creditors have a right to rely upon a belief that the full capital stock of the corporation has been subscribed." *Cook, Stock, Stockh. & Corp. Law*, (2d Ed.) § 176. "It is a general principle that the members of a corporation cannot be required to pay assessments upon their shares until the company is authorized by law to begin the prosecution of its enterprise." 1 *Mor. Priv. Corp.* § 137. The capital of a corporation being fixed by its charter, the corporation has no authority to begin business until the whole amount of such capital has been subscribed. Hence it follows that the members cannot be required to pay assessments until the full capital stock is subscribed. "When the capital stock and number of shares are fixed by vote or by-law, no assessment can be lawfully made on a share of the subscriber until the whole number of shares has been taken." *Wat. Corp.* § 183. "As a general rule, where, on the organization of a corporation, the number of shares of the capital stock, and the sum to be paid for each share, are agreed upon, and inserted in the agreement of subscription, the subscribers are not bound to pay their subscriptions until the requisite number of shares is filled up by subscriptions." *Thomp. Liab. Stockh.* § 120. *Green's Brice, Ultra Vires*, p. 153, after stating the rule that corporations having the power to raise a definite capital may begin their business before that capital, or any portion thereof, is obtained, says, in note a: "The American rule seems to be the reverse of that stated in the text. Where the number of shares and the amount of capital is fixed, the whole stock must be subscribed before the corporation can begin business, unless the constituting instruments expressly remove this restriction." The cases cited by these authors fully sustain the text, and we think the rule, in America, at least, is firmly established, unless a contrary contention appears expressly or by implication, either in the charter or the contract of subscriptions.

But, outside of the decisions on general principles of law and equity, the statute of our own state, it seems to us, puts this question beyond a peradventure. Section 1497, 1 Hill's Code, provides that "no such corporation shall commence business \* \* \* until the whole amount of its capital stock has been subscribed." The only object of collecting assessments from the subscribers is to carry on the business of the corporation; and the law prohibiting it from commencing business until the whole amount of its capital stock has been subscribed, by the strongest implication, at least, prohibits it from collecting assessments before that condition is complied with. We see nothing in the articles of incorporation to take this case out of the general rule, or that will estop the subscribers from making the defense pleaded herein.

As to the second proposition, a corporation can only be formed in the manner provided by law, and has only such powers as the law specifically confers upon it. We do not think that a corporation was within the contemplation of the legislature when they used the expression, "two or more persons," in section 1498, 1 Hill's Code.<sup>1</sup> It is true that section 1709, 2 Hill's Code, provides that the term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. But it does not follow, by any means, that the term "person" is always to be construed as a private corporation, any more than it is always to be construed as the United States. *Mor. Priv. Corp.* § 433, says: "A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly by persons acting as its agents or tools;" citing *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475. The author, continuing, says: "The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations." This, it seems to us, for manifest and manifold reasons, is in accordance with public policy; and we therefore decide that, under the existing laws of this state, one corporation cannot subscribe to the capital stock of another corporation. And in any event, in this case, the amount of the capital stock of the building company was so exceedingly small, compared with the amount of the liability which it sought to assume, (its subscribed stock being \$64,000, and its capital stock only \$5,400) that there was no apparent ability to pay the amount subscribed; and, while it may be true that a party's contract will not be held void if it is not apparent that he is worth the entire amount of money necessary to carry it out at the time it is made, yet the disparity here is too great, and there is not only not "an apparent ability to pay," but there is an apparent inability to pay. We find no error in the proceed-

<sup>1</sup> Hill's Code, § 1498, provides that "two or more person," may form a corporation in a certain prescribed manner.

ings of the court below, and the judgment is therefore affirmed.

STILES and SCOTT, JJ., concur.  
HOYT, J., did not sit.

(6 Wash. 152)

DENNY HOTEL CO. OF SEATTLE v.  
GILMORE.

(Supreme Court of Washington. March 25,  
1893.)

CORPORATIONS—SUBSCRIPTIONS TO STOCK—ESTOP-  
PEL.

Where a subscriber to the stock of a corporation does not know that one of the subscribers is another corporation, contrary to law, he does not, by paying a part of his subscription, waive his right to resist further liability on the ground that the full amount of stock was not subscribed.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by the Denny Hotel Company of Seattle against David Gilmore to recover subscriptions to stock in plaintiff corporation. One of the other subscribers to the stock was another corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Burke, Shepard & Woods and Hawley & Prouty, for appellant. Frank G. Had-dock, (James Leddy, of counsel,) for respondent.

DUNBAR, C. J. The questions raised in this case are substantially the same as those raised in the case of Hotel Co. v. Schram, 32 Pac. Rep. 1002, the only distinguishing feature being that in this case the defendant paid \$500 in response to the first call; and it is urged by appellant that he has therefore waived any right he may have had to object to the validity of other subscriptions, or to question the authority of the corporation to sue. It is stoutly contended by the respondent that he never subscribed for any number of shares of stock, but that his name was attached to the subscription list without his consent, and against his express commands, and that he did not ratify the placing of his name to the subscription list after it was brought to his notice, but that he agreed to give, for the assistance of the enterprise, what he felt able to give, but that he would not bind himself to pay anything, and that what he did pay was not in payment of shares subscribed for, but purely as a donation. The evidence on this point is conflicting; but, especially in consideration of the rather unusual fact in such cases, that respondent's name was not signed by himself, we would hardly feel justified in reversing this judgment on the testimony presented on this point. But, even conceding that he paid it on account of the alleged subscription, it was not a relinquishment of any known right; for the testimony shows that the respondent had no knowledge of the character of the subscribers, and therefore, not knowing his rights, he could not be held to relinquish them. For the reasons assigned

in Hotel Co. v. Schram, supra, the judgment is affirmed.

SCOTT and STILES, JJ., concur.

(6 Wash. 13)

TIMM v. STEGMAN et al.

(Supreme Court of Washington. March 1,  
1893.)

GARNISHMENT—JURISDICTION—AFFIDAVIT—EVI-  
DENCE.

1. Under 2 Code, § 524, providing that after the issue of an execution the judge, on proof by affidavit or otherwise that any person has property of the judgment debtor, or owes him more than \$50, may require such person to appear and answer concerning the same, such affidavit need not state that an execution has been issued, since a judge will take judicial notice that an execution has been issued in his own court.

2. But garnishment proceedings under such statute are void for want of jurisdiction, where no execution was ever issued.

3. Where a person summoned as garnishee testified that he did not owe defendant any debt, individually, and that, though he individually signed a note payable to defendant, he signed it as trustee for others, there was nothing on which to base a judgment against him.

4. It was a further bar to a recovery against him that the note was not in the hands of the judgment debtor, and not then due.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by Peter Timm against D. Stegman and others on a note executed by Stegman. There was a judgment for plaintiff, and Heinrich was summoned as garnishee, and a judgment rendered against him, from which he appeals. Reversed.

Parsons & Corell and Blaine & De Vries, for appellant. Heilig & Hartman and W. H. Reid, for respondent.

SCOTT, J. Respondent, Peter Timm, obtained a judgment against D. Stegman, Samuel S. Loeb, and John Frazier in the superior court of Pierce county; and the appellant was summoned to appear and answer, under sections 524, 525, 2 Code, relating to proceedings supplementary to execution. Judgment was rendered against the appellant in said proceedings, and he alleges that the same was erroneous, first, because the affidavit which was filed as a basis for the order summoning him to appear did not state that an execution had been issued upon the judgment. We do not think it is necessary that the affidavit should state that an execution had been issued. The statute provides that after the issuing or return of an execution, etc., upon proof, by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has any property of said judgment debtor, or is indebted to him in an amount exceeding \$50, the judge may require such person, or an officer of the corporation, to appear at a time and place specified, before him, or a referee appointed by him, and answer concerning the same. The affidavit required only goes to the proof of indebtedness to, or

possession of property of, the judgment debtor. The judge would take judicial knowledge of the fact that an execution had been issued in his own court, and it would be unnecessary to make proof of that fact by affidavit. But in the statement of facts in this case it does not appear that an execution had been issued, and the judge certifies that all the material facts in relation to such proceedings are contained in such statement. An essential fact, necessary to the jurisdiction of the court in this matter, was the rendition of a valid judgment against the principal debtor, and the issuance of an execution thereon; otherwise, the court had no jurisdiction to make the order requiring the appellant to appear, and the appellant had no right to waive a jurisdictional matter in the premises. Such proceedings are in rem, whereby the execution creditor seeks to subject the property of the execution debtor to the satisfaction of his debt, and the requirements of the statute necessary to bring such property within the jurisdiction of the court must be complied with. *McDonald v. Moore*, 65 Iowa, 171, 21 N. W. Rep. 504.

At the hearing held in pursuance of such order the appellant testified as follows: "Question. Mr. Hemrich, do you owe Mr. D. Stegman anything on a note, or otherwise? If so, state fully. Answer. I signed a note for Stegman as trustee for the brewers here, not individually. Q. How much was that note for? A. It was for \$6,500, with \$2,000 paid, which left a balance due on the note of \$4,500. Q. How much do you still owe on that note? A. \$4,500. Q. When was it due? A. On the 15th of February, 1892. Q. Do you remember, Mr. Hemrich, when that note was made, whether there was anything said about its being made to Stegman, personally, or to Stegman's order? A. I was under the impression at that time that something was said about it to be made to Stegman. Whether it was or not, I don't know. I don't want to swear to this point, because I am not positive about it. Q. Do you remember when this note was given, Mr. Hemrich? A. I can't state. It was done at the same time this note was made. Q. Do you identify that note? A. Yes, sir; it is my signature. Q. Was that note made to Stegman in all respects similar to this? A. I can only identify my own handwriting. I did not read the note, only so far as the amount, and could not swear whether it was negotiable or not. We spoke of it at the time,—it should be so. Whether it was made out that way or not, I don't know. Q. Where is that note now, if you know? A. It was in the hands of one Trounce. Q. Can you state, Mr. Hemrich, whether that note was a negotiable or nonnegotiable note, definitely? A. No; I cannot state, positively. Q. And that is the only matter upon which you are indebted to Mr. Stegman in any way? A. Yes, sir. Q. And that is as trustee? A. As trustee for a number of persons. Q. Mr. Hemrich, did you sign that note as trustee, or sign it in your individual capacity? A. There was nothing

upon the note to show that it was signed as trustee. Only my individual name appears upon the note. There is nothing on the note to indicate that it was done as trustee." There was no such admission in the testimony as would warrant the rendition of a judgment against the appellant. Before such a judgment can be rendered, it must clearly appear that the person summoned has property belonging to the judgment debtor, or that he is indebted to him. In this case it did not appear that Mr. Stegman owed this debt individually, although he signed the note individually, but he claimed that his liability thereon was as a trustee for others. Furthermore, it appeared that the note was not then due, (his testimony was given January 23, 1892,) and that it was not in the hands of the judgment debtor, but in the hands of a third party, not before the court. Upon this testimony the court had no authority to render any judgment against the appellant. The judgment is reversed.

DUNBAR, C. J. and ANDERS and STILES, JJ., concur. HOYT, J., concurs in the result.

(6 Wash. 25)

DWYER et al. v. SCHLUMPF et al.  
(Supreme Court of Washington. March 6, 1893.)

APPEAL—NOTICE—BEFORE FINAL JUDGMENT.

Where notice of appeal is given by plaintiffs before final judgment as to all the defendants, the appeal must, whether the case be considered single or separate as to defendants, be dismissed.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by P. V. Dwyer and others against A. F. Schlumpf and others to foreclose a material man's lien. Before final judgment had been entered against all the defendants, plaintiffs gave notice of appeal. Dismissed.

Burke, Shepard & Woods, for appellants. Fishback & Hardin, White & Munday, Strune & McMicken, and Jas. Kiefer, for respondents.

HOYT, J. The record in this case shows that the notice of appeal was given before final judgment had been entered against all of the defendants who had appeared in the action. Founded upon this fact, respondents move the court to dismiss the appeal. The motion must be granted. If we consider the case as a single one as between the plaintiffs and all of the defendants, an appeal could not be taken until there had been a final disposition of the issues as to all the defendants who had appeared in the action. If treated as separate actions between the plaintiffs and each of the defendants, there should have been separate appeals. It follows that, however we construe the record, the appeal taken was ineffectual.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

(6 Wash. 31)

**MASON v. McLEAN et al.**

(Supreme Court of Washington. March 7, 1893.)

**JUDGMENT—VACATION—REVIVAL OF FORMER JUDGMENT—PRESUMPTIONS ON APPEAL—EXCEPTIONS.**

1. A decree declaring the rights of certain persons in an action is not vacated by a subsequent decree declaring the rights of such persons to be as stated in the former decree, except as to a person who has since intervened; and hence, the subsequent decree being itself afterwards vacated, the former is revived.

2. The refusal of a motion for default will be presumed to have been on "good and sufficient cause," within 2 Code, § 413, where the grounds on which such refusal was based are not stated in the record.

3. The appointment of a guardian ad litem for minor children, made by the court of its own motion, will be presumed regular where no application by the children themselves for the appointment is stated in the record.

4. An exception to "the findings of fact and of law and the judgment" of the court is not sufficiently specific to call the court's attention to an error in allowing an attorney's fee not referred to in the findings.

Appeal from superior court, Lewis county; Edward F. Hunter, Judge.

Action in ejectment by Allen C. Mason against Annie M. McLean and others. Judgment for defendants. Plaintiff appeals. Modified and affirmed.

Jas. Wickersham, for appellant. J. H. Naylor, for respondents.

SCOTT, J. On the 31st day of August, 1883, one James L. Holbrook made a will, devising all of his real estate to his wife, Charlotte E., and providing that each of his seven children, naming them, should have the sum of \$10. On the 7th day of July, 1883, he made a second will, in which he devised his real estate to his said wife, and appointed her executrix without bond, and provided that the estate should be settled without the intervention of the probate court, except to admit the will to probate, and did not make any provision for his children therein, or name them in said last will. After the decease of the testator, and on the 12th day of October, 1883, said second will was admitted to probate by the probate court of Lewis county in the then territory of Washington, upon the petition of the said Charlotte E. Holbrook. Subsequently, on the 6th day of April, 1884, the first will was also admitted to probate in said court, upon a like petition, and upon the testimony of witnesses to the effect that the testator intended that the two wills should stand as one instrument,—the last one as a codicil to the first. Said instruments were thereafter treated as one will, whereby all the real estate was given to the wife of the deceased. It is admitted that all of such real estate was the community property of the said James L. and Charlotte E. Holbrook. Some time after this, Mrs. Holbrook married a man by the name of Shaw, and on the 28th of December, 1885, she and her then husband made a mortgage to one Simmons, to secure a loan for \$2,500, obtained from him on said real estate, the appellant guaranty-

ing the payment of said loan. The mortgagors did not pay the loan in question. In March, 1887, five of the children of said testator began a suit against said Charlotte E. and her then husband, the two remaining children, and Simmons, the mortgagee, in the district court of Lewis county, claiming title as heirs of said James L. Holbrook, and seeking a decree declaring the children to be the owners of an undivided half of the land in question, and asking that the mortgage made to Simmons be declared a lien only upon the other half, owned by their mother. This suit was begun upon the theory that the acts of the probate court in admitting the wills to probate, and its proceedings thereon, were void.

On the 6th day of February, 1888, Mrs. Shaw entered into a stipulation with the children, whereby it was agreed to place the real estate in the hands of a receiver to be appointed by the court, for the purpose of selling it at not less than \$6,000, and it was further agreed that this money should be divided, one half to Mrs. Shaw and one half to the children, but that the Simmons mortgage should be paid out of Mrs. Shaw's half. On the 10th day of February, 1888, the district court made a decree in conformity with the stipulation, and decreed the children to be the owners of an undivided half of the lands described, and appointed a receiver to sell the lands. No further action was had under the decree, the receiver appointed not qualifying. On September 6, 1888, Mrs. Shaw, who was then a widow again, made a quitclaim deed of all the lands in question to the appellant, who, on November 30, 1888, paid the Simmons mortgage, and secured the discharge thereof. On the 30th day of January, 1889, the appellant filed in said district court a petition to intervene in said action, setting up his title and the Simmons mortgage, and alleging that the stipulation of February 6, 1888, entered into between the children and Mrs. Shaw, was fraudulent in character. He was allowed to intervene as the successor in interest of Simmons and of Mrs. Shaw. August 19, 1889, a decree was entered in this proceeding in intervention, whereby it was declared that the rights of the parties in the original action were as stated and declared in the decree entered on the 10th day of February, 1888, except that the interests of all of said parties were subject to the lien of said Allen C. Mason for the amount paid by him in procuring the satisfaction of the mortgage to Simmons. On May 2, 1890, in pursuance of a petition filed by the plaintiffs in the original action,—the children aforesaid,—the decree upon the proceedings in intervention was found to have been wholly unauthorized and illegal, and it was vacated and set aside; whereupon said children entered upon and took possession of the real estate, and this action was brought by the appellant in ejectment to oust them therefrom. A trial was had, which resulted in a judgment in favor of the defendants, and plaintiff appealed to this court.

We are of the opinion that the second will could not be held to have been intended as a codicil to the first, under the cir-

circumstances. It was expressly declared in the instrument itself to be the last will and testament of the testator. The proof upon which the same was found to have been intended as a codicil was clearly incompetent. The children not having been named in the said will, under the previous holdings of this court, it was inoperative as to them; and upon the death of the testator one half of the community lands vested in the children, the first will having been revoked by the subsequent one. Furthermore, if the appellant wanted to insist that the lien of the Simmons mortgage covered the entire land, he should have sought to preserve his rights therein by a foreclosure thereof, and not by taking a deed to the premises, and paying off the mortgage. This deed from Mrs. Shaw was taken after she had entered into the stipulation with the children, and after the decree rendered thereon in the suit instituted by the children, and appellant took his deed to said lands with full notice of all the rights of the parties therein.

It is contended by the appellant that the decree rendered upon his proceedings in intervention had the effect of setting aside and vacating the decree previously entered in the original action brought by the children, and that the action of the court in setting aside the decree rendered upon the proceedings in intervention did not have the effect of reviving the former decree, but left said action as though the same had never been determined in any way. It is further contended by the appellant that the defendants in this action were estopped from attacking the decree rendered in favor of the appellant in his proceedings in intervention, for the reason that the same was rendered upon the consent of all parties. As to the first proposition, we do not think that the judgment had the effect of setting aside the decree previously rendered. In fact, it purported to keep the same alive, except that the rights of the appellant, in so far as he had obtained any rights to said lands by the payment of the mortgage, were held paramount to those of all the parties; and, when the proceedings in intervention were set aside, the effect thereof was to allow the original decree to stand as made. As to the second proposition, we find nothing in the record to justify the contention upon the part of the appellant that said decree was rendered in pursuance of an agreement by the parties to said action, sufficient to hold that they were estopped from attacking the same, even if such a defense were available in this action.

Error is alleged upon the refusal of the court to grant a motion made by the plaintiff for a default against the defendants, on the ground that they had failed to answer or plead within the time prescribed after service. This much appears by a transcript of the record showing the order of the court made, denying the motion for a default, and the exception of the plaintiff thereto. The record is silent as to whether any showing was made upon which the court based its action in refusing the motion. Section 413, vol. 2, of the Code provides that the court may, in its discretion, set aside any default upon an

affidavit showing good and sufficient cause therefor. We cannot presume, under the circumstances, that the court arbitrarily refused to grant the plaintiff's motion for a default, without any showing by the defendants as to why the same should be refused. Doubtless the same reasons which would authorize a court to set aside a default would justify it, if then made to appear, in refusing to grant the default in the first instance, and the presumption must be in this case that the action of the court in the premises was warranted by a showing made at the time. Were the fact otherwise, it would be necessary for the appellant, in settling a statement of facts, to incorporate the proceedings of the court in this particular in the statement, with an allegation that said ruling was made without any showing by the defendants as to why the motion should not be granted. But the statement of facts does not contain this nor any allegation with reference thereto.

Error is alleged as to the appointment of a guardian ad litem for the minor children. The appellant alleges in his brief that such guardian was appointed by the court upon its own motion, without any application or consent thereof by the children, and the appellant alleges that, as some of said children were over 14 years of age, the court could not assume to act arbitrarily in the premises. This point is made to appear in the record in the same way as the preceding one, and there is no showing or allegation in the statement of facts which was settled that a request for such appointment, or petition therefor, was not made by the children, and consequently it will be presumed that the appointment was regularly made.

Error is alleged as to the action of the court in allowing the defendants an attorney fee of \$125 against the appellant. Certain findings of fact were made by the court in this case, wherein it was found that, by virtue of the decree made as aforesaid on the 10th day of February, 1888, in the former action, the children were the owners of an undivided half of all of said real estate, and that said parties, including Simmons, were all regularly before the court, and that the mortgage executed to Simmons was a lien only upon the half of said estate which went to the wife; and it was found that said decree of February 10th was still in full force, and that the appellant in this action took nothing by virtue of the mortgage and the deed of said lands as against the half so found to be owned by the children; that the attempted probate of the paper writing purporting to be the first will of said Holbrook was absolutely null and void. It was ordered and adjudged that the action in ejectment be dismissed, and that, as the plaintiff in said suit had knowledge when he instituted it that part of the defendants were infant children, in whose defense it became necessary for the court to appoint a guardian ad litem and attorney, it was ordered and adjudged that he should pay to said guardian and attorney the sum of \$125, together with all costs of suit. The judgment concludes with the following clause: "To which findings of fact and of

law and the judgment and order of this court the said Allen C. Mason, plaintiff, by his counsel, in open court, duly excepted, and the exception is noted and allowed. There was nothing said in the findings of fact with reference to this sum allowed the guardian ad litem, he being the attorney also for such minor children. We do not think it can be held that the exception in this instance specifically called the court's attention to the error in allowing said attorney's fee. We are clearly of the opinion that the court had no right to render any judgment therefor. No motion to modify the judgment was made, and, for aught we know, this particular matter was never called to the attention of the court in any way, unless it can be held that the court's attention was called thereto by the exception taken as aforesaid. This exception is general in its nature, and specifies no grounds wherein said judgment is erroneous. The first appearance of any special objection to the so-called "attorney's fee" is contained in appellant's brief in this court. Under the circumstances, as the action of the court was clearly erroneous in rendering judgment for said attorney's fee, the same will be stricken from its judgment, and the same modified to such extent. But the appellant should not recover the costs of this appeal.

It might be well to add that, were the appellant to recover costs in this court, none would be allowed for the transcript, owing to the imperfect condition in which we find the same. No index is annexed thereto, as required by the rules of the court, although it purports to contain an index, which, however, is very defective and insufficient. It has been of no benefit whatever in assisting the court to go through and investigate the voluminous record. Furthermore, nearly all of the proceedings in all of said matters are set forth three times in the record. This includes all the pleadings, with the various orders of the court thereon, and the documentary evidence introduced, and has resulted in bringing up a voluminous record, two thirds of which is entirely unnecessary, and has only served to embarrass the court in its investigation of the cause. Had the same been called to the attention of the court prior to the argument, no hearing would have been permitted thereon in its then imperfect state, and appellant most likely would only have been permitted to correct the same on terms. Judgment affirmed, except as to the attorney's fee of \$125, aforesaid, which is disallowed and stricken out.

DUNBAR, C. J., and ANDERS and STILES, J.J., concur.

HOYT, J. I concur in the result.

(6 Wash. 50)

#### BINNIAN v. BAKER.

(Supreme Court of Washington. March 7, 1893.)

#### CONVERSION—PLEADING—POSSESSION.

In an action by a mortgagee of personal property for conversion against a subse-

quent mortgagee of the same property, who has sold and bought in the property under his mortgage, a complaint which does not allege possession, right of possession, or demand of possession fails to state a cause of action, since in Washington a chattel mortgage vests no title or right of possession in the mortgagee, and since his lien was not affected by the sale of the property under the subsequent mortgage.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Henry Binnian against A. J. Baker for conversion by defendant of property on which plaintiff had a mortgage. There was judgment for plaintiff, and defendant appeals. Reversed.

Battle & Shipley and White & Munday, for appellant. John Fairfield and Daniel T. Cross, for respondent.

DUNBAR, C. J. On August 23, 1890, one Taylor borrowed of Henry Binnian, respondent herein, the sum of \$335, for which he gave his promissory note, and to secure the payment of said sum executed and delivered to respondent a chattel mortgage on a certain lot of horses. Subsequently he mortgaged the same horses to A. J. Baker, appellant herein. Baker sold the horses in accordance with the terms of his mortgage, and bought them in at the sale. Binnian then brought his action against Baker to recover damages alleged to have been sustained by plaintiff through the alleged taking and converting to his own use by Baker of the property above mentioned. He did not allege the value of the horses, and did not allege demand for their possession, or that he was entitled to their possession, and he set forth the mortgage in extenso, under the provisions of which he was authorized to sell the property upon the violation by the mortgagor of any of the conditions of the contract, alleging the wrongful taking of the property by Baker, and that he wrongfully sold the same, to plaintiff's damage in the sum of \$500. The answer was a general denial. Upon the trial the appellant objected to the introduction of any testimony, on the ground that the complaint did not state a cause of action. The objection was overruled. Trial was had, which resulted in a verdict for respondent for the sum of \$426. Judgment followed, and appellant appeals to this court, alleging many errors, but it will only be necessary to notice the first, viz. that the court erred in not sustaining the objection to the admission of testimony on the ground that the complaint did not state facts sufficient.

This court held, in *Silsby v. Aldridge*, 1 Wash. St. 117, 23 Pac. Rep. 836, that a chattel mortgage under the statutes of this state does not convey to the holders of the mortgage any title to the property in question. The mortgage, then, being only a security, the mortgagee has no right in the property other than his right to foreclose. His lien has not been affected in any way by the sale of the property under the subsequent mortgage. All the interest that passed to Baker by virtue of his purchase of the horses was the interest that Taylor had in the horses, which was simply the equity of redemption. Taylor

was entitled to the possession of the property under the terms of the mortgage, and Baker, as the purchaser of Taylor's interest, became entitled to this possession; and the complaint contains no allegation of either actual possession at the time of the alleged conversion, nor of right of possession, nor of demand of possession. We think the allegations of the complaint entirely insufficient to maintain the action, and that the judgment must be reversed, and the case remanded to the lower court with instructions to dismiss the action.

SCOTT, STILES, and HOYT, JJ., concur.

(6 Wash. 39)

EWING v. VAN WAGENEN et al.

(Supreme Court of Washington. March 7, 1893.)

INSOLVENCY—STATUTE—REPEAL—PENDING PROCEEDINGS—APPOINTMENT OF RECEIVER.

1. Act March 6, 1890, relating to assignments for the benefit of creditors, did not put an end to insolvency proceedings then pending, under provisions of the Code of 1881, relating to the same subject, although such provisions were thereby unqualifiedly repealed, and although no assignee in whom title to the debtor's property could vest had at the time been appointed.

2. A receiver, appointed under Code 1881, § 2022, to take possession of a debtor's property for the benefit of creditors during a stay of proceedings pending notice, was to every intent an assignee; and all rights which would have come to an assignee, if the usual course had been followed, vested immediately in him.

Appeal from superior court, Pierce county; F. Campbell, Judge.

Action by Coke Ewing, assignee in insolvency of William Page and others, against F. D. Van Wagenen and others. From a judgment overruling a number of demurrers to defendants' answers, and dismissing the action, plaintiff appeals. Reversed.

W. H. Pritchard and E. T. Dunning, for appellant. Wm. H. Reid and Crowley & Sullivan, for respondents.

STILES, J. This appeal presents another phase of the same matter heretofore presented in *Traders' Bank v. Van Wagenen*, 2 Wash. St. 172, 26 Pac. Rep. 253. Appellant, as the assignee in insolvency of the individuals composing the firm known as the Buckley Lumber & Shingle Manufacturing Company, commenced his action against the insolvents, their respective wives, and others, who, it is alleged, are holding certain real estate conveyed by the insolvents in fraud of their creditors, to have the several conveyances set aside and the title cleared, so that the property may be subjected to the payment of debts which would otherwise be unprovided for. The allegation of the amended complaint is that on the — day of April, 1891, Frederick Mottet was duly appointed assignee; that on the 6th of October, 1891, he resigned, and his resignation was duly accepted by the court, and that on the same day the appellant was duly appointed as assignee in the place of Mr.

Mottet. To this allegation each of the defendants answered as follows: "That said insolvency proceedings referred to in the complaint were begun January 22, 1890, and said assignment was made on said date, under the provisions of the laws of the state of Washington then in force; that this action is brought by plaintiff under color and pretense of authority of said insolvency proceedings, and since the making of said assignment said laws of the state of Washington under which said insolvency proceedings were instituted have been repealed, and have become without force and effect." The plaintiff demurred to this separate defense in each answer, on the ground that it did not state facts sufficient to constitute a defense. The demurrers were overruled, and, plaintiff electing to stand on his demurrers, the action was dismissed at his cost, and he appeals from the judgment thereupon entered.

Upon the face of these answers the only question which we are required to determine is whether the act of March 6, 1890, entitled "An act to secure creditors a just division of the assets of debtors who convey to assignees for the benefit of creditors," had the effect to put an end to all insolvency proceedings then pending in the courts of the state, where no assignee had been elected when the act took effect. It is admitted by the respondents that, upon the appointment of an assignee under the insolvency law found in the Code of 1881, all the assigned property of the insolvent passed to such assignee, and could not afterwards be divested by the legislature. Under such concession it would not be strictly necessary that we go further in this case, since between the time when the petition for insolvency was filed, January 22, 1890, and the time when the act of March 6th went into effect,—almost five months,—there was ample time for proceedings under the Code, through which an assignee might have been appointed. The fact that it is alleged that Mr. Mottet was appointed assignee in April, 1891, would not justify this court in presuming that no other assignee was appointed before June 7, 1890, when the act of that year became operative. There are several provisions of the Code of 1881 which would lead to a different prima facie conclusion. Section 2018 required the judge receiving a petition to make an order requiring all creditors to show cause, etc.; and section 2021 directed that the clerk issue a notice calling the creditors together within 30 days from the date of publication of the notice; and section 2031 provided that if, on the day appointed for the meeting, creditors, having been duly summoned, did not attend, or refused to appoint an assignee, it should be lawful for the judge to authorize the sheriff to accept the surrender of the property offered by the debtor, and perform in every respect the functions of an assignee. That these things had been done in case no assignee had been regularly appointed by the creditors could be fairly presumed in favor of the demurrer to the answers in this case; but, although such might be the condition of things, we



cannot overlook the fact that neither party in this case has suggested that any such appointment was made. The case has been presented here largely upon the assumption that a receiver had been appointed,—perhaps under the provisions of section 2022,—and that such receiver held the property until the time of Motter's appointment, in April, 1891. No such fact appears in the record in this case, but a glance at the case of *Traders' Bank v. Van Wagenen*, supra, shows that originally a receiver to take charge of the insolvent's estate was duly appointed, and it would seem, therefore, that we should not be discussing a purely imaginary state of things if we follow the briefs of counsel, and assume it to be a fact that there was such a receiver.

The position assumed by the respondents is that, whatever might be the temporary orders in a case of insolvency under the Code of 1881, until an assignee had been appointed, no title to any part of his estate could be divested out of the debtor, for the reason that that statute contained no apt provision for the accomplishment of a divestiture except that found in section 2046, wherein it was declared that the property of an insolvent debtor should be fully vested in his assignee for the benefit of his creditors from and after the surrender of his property. The surrender, it is said, could not be accomplished until there was an assignee to whom the surrender could be made; and the receiver, in such a case, would be merely a temporary appointee to preserve the property from being wasted pending the appointment of an assignee; and the conclusion of their argument is that, notwithstanding the appointment of a receiver, there having been no assignee until long after the act of 1890 had gone into effect, repealing the insolvency sections of the Code of 1881, there could then be no further proceeding in the matter, and the whole attempt at an assignment would fail. There is much plausibility in these propositions, and if, upon a review of the whole statute, it is found that this property had not been placed in such a position that the court could exercise jurisdiction to appoint an assignee and proceed with the matter, the conclusion, however surprising and unfair it might be, would have to be accepted. At the outset, so far as the two laws are concerned, we have recently held that the act of 1890 by implication repealed the Code provisions on the subject of insolvent debtors. *Mansfield v. Bank*, (Wash.; filed Feb. 6, 1893.)<sup>1</sup> It is true, also, that wherever the jurisdiction exercised in proceedings depends wholly upon statute, which is repealed without any saving provision in the repealing act, the jurisdiction is gone, and all pending proceedings go with it. *End. Interp. St. § 479; Suth. St. Const. § 165; New London N. R. Co. v. Boston & A. R. Co.*, 102 Mass. 386; *Stephenson v. Doe*, 8 Blackf. 508; *People v. Livingston*, 6 Wend. 526. There was no saving provision whatever in the act of 1890. All laws and parts of laws in conflict with the

provisions of that act were repealed by one sweep, without an apparent thought that the greatest confusion might follow. It is almost inconceivable that the legislature could have intended such results as are threatened in this case if the respondents' contention be sustained, for what will become of the estate actually reduced to the possession of the assignee? Must it be returned to the debtors, or will it become the subject of a scramble among their creditors through garnishments of the assignee? As we said in the *Traders' Bank Case*, supra, the law of 1881, so far as the debtor was concerned, appeared to regard the matter of his discharge only, and was framed with a view to the immediate and final appropriation of his property to the payment of his debts from the time of his filing his petition, without much regard to formalities. Nothing contained in either the old or the new statute contemplates a rejection of the debtor's proffer of his property, and there is certainly nothing to show that a contingency might arise where any property in possession of the court or an assignee would have to be surrendered to him. Section 2033, and the sections immediately following, provide for what shall be done in case any creditor, within 10 days after the appointment of an assignee, deems it necessary to oppose "it" on the ground of some fraud committed by the debtor. If the fraud is established, the debtor is deprived of the benefit of the law; if the allegations fail, he is immediately discharged. But not a word is said about the assignee's turning over the property when fraud has been proven; on the contrary, section 2038 expressly provided that the judge might at once "approve the appointment," if he thought that waiting for the trial of the fraud issue would cause the interest of the creditors to suffer. These are all awkward expressions, but we must make the best of them, to the effect that the intent of the law may be enforced. The view of this statute entertained by the territorial supreme court was forcibly expressed in *Lammon v. Giles*, 3 Wash. T. 117, 13 Pac. Rep. 417, to the effect that a proceeding under it partook more nearly of the nature of a suit in equity than of that of any other procedure known to the law, and that the courts must fall back upon their equity powers to enable them to make a complete administration of it. But of what use would be any consideration of this kind if a technical want of acceptance and vesting of the title in an assignee were to be allowed to defeat the entire operation of the law upon a repeal of this kind? It seems to us that our statute contemplated that by the filing of the petition in insolvency the estate of the debtor was brought into the court, there to remain as a trust fund for the benefit of creditors, whether the result should be a discharge of the debtor or not, and that a repeal of the law by another law regulating the same subject-matter ought not to be taken as sufficient to deprive the court of all jurisdiction where the assignee had not been appointed June 7, 1890. The record now

<sup>1</sup>32 Pac. Rep. 789.

shows that there is an assignee, though it does not specify whether he was appointed under the formalities of the Code of 1881 or of the act of 1890. If the court had jurisdiction to appoint, the defendants have no right to shield themselves behind any irregularity in the manner of his appointment.

Returning to the matter of the receiver, however, we are well satisfied that in this particular case all question was removed by the appointment of that officer. Ordinarily a receiver is a mere officer of the court, who takes the custody of property for the benefit of the party ultimately proved to be entitled to it, and neither the title nor the right of possession is changed by his appointment. *Union Nat. Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. Rep. 1013. But under section 2022, Code 1881, the court was authorized, notwithstanding the stay of proceedings pending the notice to creditors, upon the sworn application of any creditor, to appoint a receiver to take possession of all property of the debtor for the benefit of all his creditors. There was here no question of holding for the party ultimately shown to be entitled to the property. The petition of the debtor conceded all the facts on his side, and the application of the debtor showed the emergency justifying the immediate sequestration of the property, and its devotion to the beneficiaries named, viz. the creditors. The order appointing a receiver was the creation of an equitable execution in favor of each creditor for his proportion of the proceeds of the estate, and the appointee, although nominally a receiver, was to every intent an assignee. No conveyance of property to either the assignee or the receiver was necessary under this statute, as in some statutes of similar character; as, for example, the national bankruptcy act of 1867, (*Hampton v. Rouse*, 22 Wall. 263;) nor did the law require a decree of the court to divest the title out of the debtor, as have other laws, as, e. g. the national bankrupt act of 1841, (*Oakey v. Bennett*, 11 How. 44.) By section 2024, when the creditors had agreed upon an assignee, and a statement of their deliberations had been filed in the clerk's office, the only thing the court did was to fix the assignee's bond. Some order would, of course, be natural and proper, but it was not prescribed, and would be necessarily informal, perhaps a mere approval of the action of creditors. Section 2046 provided that from and after his surrender the property of the insolvent should be fully vested in his assignee; but it was not more fully vested in the assignee than the property of an insolvent corporation is vested in a receiver under chapter 13, Code 1881. It seems to us that titles do not come in question in such cases. The assignee or receiver, under the court's orders, can dispose of titles, but where they are in the mean time makes no difference. In *Lammon v. Giles*, the court appointed a receiver on the petition of the debtor, and the whole estate seems to have been wound up under his administration,—a proceeding approved by the supreme court. We see no reason why the same course might

not have been followed with perfect legality in this case, if no regular assignee had been appointed. When the receiver was appointed, he took the estate absolutely for the creditors, not to hold until an assignee could be appointed; and the property, and all rights which would have come to an assignee if the usual course had been followed, immediately "vested" in him. It must follow that this assignee could maintain this action, and that the repeal of the statute was insufficient as a defense.

The respondents object to the complaint on the ground that wherein it alleges the transfer of real estate from husband and wife it shows a mere transfer from one joint debtor to another. This point is made upon the theory that the complaint is framed under the view that the wives of the partners were in some sense the business partners of their husbands, so that a transfer from husband to wife would be merely the conveyance from one joint debtor to another. It is, of course, a general rule that, where property is transferred by one joint debtor to another, this does not constitute such a fraud as would justify the interference of a court of equity, because the property is still subject to execution, and the title to said property is not in any way clouded by the transfer. But we do not read the complaint in this respect as the respondents seem to. The wives in this case were not members of the partnership, nor is it alleged that they were. They are the persons to whom the partners have conveyed the legal title to what is alleged to have been community property. Such a conveyance would be good as between husband and wife, so as to vest the entire title in the wife as a gift; or it might be an actual purchase by the wife. But, as against creditors, either a gift or a purchase, made with an intent to defraud creditors, would be void as to creditors. The wives are not alleged to be joint debtors, nor are they sued as such. The legal title is what the assignee seeks to bring into the estate. The deeds outstanding appear to place the title where it ought not to be, and his action is a proper proceeding to clear the title of the clouds raised by these deeds.

The point raised in behalf of the respondent *Allen J. Gilmour*, that the appellant has not replied to his allegations of fact showing good faith on his part in connection with the transactions between himself and one of the other insolvents, and that, therefore, his answer is to be taken as true, and constitutes a complete defense, is not well taken. One of appellant's demurrers was addressed to his special defense based upon the repeal of the insolvent act of 1881, and the cause now stands with that demurrer undetermined. The appellant has not yet been called upon to reply to the affirmative defense, since parties are not obliged to plead piecemeal.

The objection taken in this case that no statement of facts appears in the record is unavailable. The statute does not provide for or require a statement of facts in an equity cause where the whole case

has been determined upon pleadings. So, also, the objection that no bond has been given for costs cannot be sustained. The bond for \$15,000, which was required by the court to stay proceedings, covers the costs as well as the damages which the respondents might have recovered in case of appellant's failure to sustain his appeal. When the court is called upon, under Code Proc. § 1408, to fix the amount of bond for a stay of proceedings, the plain implication of the statute is that the bond shall cover all the damages which accrue by reason of the stay, including the costs of the appeal. The judgment dismissing the complaint is reversed, and the cause remanded. The plaintiff's demurrer to the defense based upon the repeal of the insolvency law of 1881 will be sustained, and the cause will proceed in accordance with this opinion.

DUNBAR, C. J., and HOYT, ANDERS, and SCOTT, JJ., concur.

(6 Wash. 52)

RICHARDSON v. CARBON HILL COAL CO.

(Supreme Court of Washington. March 7, 1893.)

NONSUIT—AMENDED COMPLAINT—INJURY TO EMPLOYEE—ASSUMPTION OF RISK—NEGLIGENCE OF DEFENDANT'S PHYSICIAN.

1. Where at the close of the testimony plaintiff obtained leave to file an amended complaint to correspond with the proofs produced, a motion for nonsuit before the filing of the amended complaint, on the ground that the complaint did not state a cause of action, should not be granted.

2. Plaintiff, a laborer in defendant coal company's employ, at the invitation of one of defendant's foremen got on the brake beam of a locomotive, to go through a tunnel to defendant's office, and, the beam being crowded with men, he stood on the outer edge, and was struck by a projecting rock, causing the injuries complained of. The engine, as plaintiff knew, was not at the time in the hands of the regular train men, but was operated by other of defendant's employees. To reach the office it was not necessary for him to pass through the tunnel, and it was not customary for any of the employees to ride on the brake beams of the locomotive except the brakemen. *Held*, that plaintiff assumed the apparent risk of the journey, and that no recovery would lie.

3. Defendant retained \$1 per month from its employees for the maintenance of a hospital, and to employ a physician to attend sick or injured employees. When plaintiff was injured he was carried to a relative's house, and defendant's foreman sent a physician who attended those placed in the hospital to care for plaintiff. Plaintiff's brother called on the superintendent, and asked for another surgeon, plaintiff not being satisfied with the one attending him, and was told that defendant would not hire another, but would see that defendant's physician attended him. Plaintiff was never called on to pay for the medical services he had received. *Held*, that defendant had assumed to provide medical attendance for plaintiff. Hoyt and Stiles, JJ., dissenting.

4. Where the physician who attended plaintiff was in a drunken condition on nearly every occasion when he called to attend him, and in consequence of his negligence plaintiff's injuries were much aggravated, such facts were sufficient to raise a presumption that defendant

was negligent in employing such a physician, and a motion for nonsuit should not have been granted.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Albert W. Richardson against the Carbon Hill Coal Company for personal injuries sustained through defendant's alleged negligence. There was a judgment for defendant, and plaintiff appeals. Reversed.

Pritchard, Stevens, Grosscup & Seymour, for appellant. Judson & Sharpstein, for respondent.

SCOTT, J. The respondent, a corporation, was engaged in the business of mining coal, and transporting the same to shipping points. The appellant was employed by said company as a laborer, but did not have continuous employment. On the 15th day of April, 1890, while going to the company's office for his pay, not being at work upon said day, he, with several others, got upon a brake beam in front of an engine used to haul the coal cars for said company, to ride through a tunnel on his way to said office. There were no cars attached to the engine, and no room for him elsewhere than on the brake beam. The room upon said brake beam was so occupied that appellant sat at one extreme outer edge, and in passing through the tunnel a projecting rock caught his knee, which must have been at that time outside of the line of the engine, and threw him to the ground with such force as to break one of his legs, and to dislocate it at the hip joint. He was treated by Dr. Garner, a physician in the employ of the company, and he brought an action for damages for injuries sustained in getting thrown from the engine, and also for negligent and unskillful treatment of his injuries by said physician. At the conclusion of his testimony he asked and obtained leave from the court to file an amended complaint in accordance with the proofs introduced. Immediately thereafter, before the filing of said amended complaint, the defendant moved for a nonsuit, because the complaint did not state facts sufficient to constitute a cause of action, and because the proof was insufficient to support a recovery. The motion for a nonsuit was granted, and plaintiff appealed. Under the circumstances, no question going to the sufficiency of the complaint can be considered, for the plaintiff had obtained leave to file an amended complaint to correspond with the proofs; and upon the motion for nonsuit the cause should be treated as though a sufficient amended complaint had been filed. Consequently, if the proofs showed that the plaintiff had a cause of action, the court erred in directing a nonsuit.

The plaintiff sought to recover upon two grounds. As to the first ground,—relating to the liability of the defendant for the injuries sustained in getting thrown from the engine,—we are satisfied that the ruling of the court was right, because the proof showed that the plaintiff was guilty of contributory negligence. To have reached the company's office it was not necessary

for him to have gone through the tunnel, for another way had been provided by the company to go thereto. The proof showed that it was not customary for the employees of the company to ride upon this brake beam; that when they did carry men through the tunnel on the railroad—as they did occasionally—the men rode in the coal cars, and that the brake beam had been provided only for the brakemen. It was apparent from the very situation that a person occupying a place at the outer end of the brake beam crowded with men, as was this one, was in a dangerous position in going through a narrow and dark tunnel. At that time the engine was not in the hands of the regular trainmen, but was being operated by other employees of the company, and the plaintiff knew this. He, with several others, was told by one of the company's foremen to get on and ride, and in response to this invitation he got upon the brake beam, with the result as aforesaid. The appellant must be held to have known that when he took the position on the brake beam as he did, for the purpose of passing through the tunnel, there was considerable danger connected therewith, and he must be held to have assumed the apparent risk of the journey under the circumstances. Consequently it is not necessary to determine whether the company would have been liable for the injury if the appellant's own negligence had not contributed thereto.

The proof is too uncertain and meager to determine what rights the plaintiff has under his second cause of action for additional injuries sustained in consequence of the neglect and unskillful treatment of him by Dr. Garner. The proof shows that it was the custom of the company to retain one dollar per month from the pay of its employees, and there was testimony to show that the fund so created was for maintaining a hospital, and employing a physician, for the purpose of caring for and treating employees of the company when they were in need of the same. There was no proof to show that said employees were only entitled to such treatment in case they were injured while in the performance of their duties as employees of the company. The proofs show that there was a building known as the company's hospital, and that Dr. Garner was the company's physician, and that he was employed by the company, in accordance with such understanding, to treat its employees. There was no proof of any express contract between the company and the appellant with reference to his right to medical and surgical treatment, other than that which arises from the circumstances proven. It appeared that the company was operating several coal mines, and had several hundred men in its employ. There was nothing to show that the miners or laborers of the company other than its officers had any right to supervise the expenditure of this fund in any way, or any control of the hospital or the selection of a physician. It does not appear whether this hospital was maintained by the company as a charitable institution, or whether it was for the

purpose of deriving profit therefrom, and a determination of this question bears materially upon the plaintiff's rights in the premises. If said hospital was maintained as a charitable institution, and was not designed as a source of profit to the company, but was simply provided as a place in which its laborers might stay, when sick or disabled, for the purpose of being cared for, and the company simply further undertook to provide a physician also for treating the men without expense to them, the whole being in the nature of a gratuity on the part of the company, it would only be liable for a failure to exercise due care in selecting a competent physician. Under such an arrangement the company could not be held to have agreed to treat the injured employee through the agency of a physician, but only agreed to procure for him the services of one, and he would not be the servant of the company. If, on the other hand, the company was conducting a hospital with its own physician for the purpose of deriving profit therefrom, or if it contracted with the appellant to furnish him with the services of a competent physician, and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him. 1 Shear. & R. Neg. § 831; 9 Amer. & Eng. Enc. Law, p. 772, note "Torts of Hospitals;" *Glavin v. Rhode Island Hospital*, 12 R. I. 411.

There was testimony to show that the appellant was very negligently and unskillfully treated by said Dr. Garner, by reason whereof his injuries and sufferings were much aggravated, and which caused the injured leg to become much shorter than the other one, and much weaker than it otherwise would have been; and that such injuries were thereby rendered permanent in character. There was testimony to show that Garner was not a competent physician, in fact that he was grossly incompetent; that he was habitually very seriously under the influence of liquor, so as to render him unfit for duty, and was in this condition on several occasions when he called upon and treated the appellant. There was no direct proof to show that the company had been negligent in selecting him as its physician, nor as to how or when he was selected, or how long he had been in the employ of the company, or how well he had been recommended, if at all; nor do we undertake to say what the company should do, in employing a doctor, towards ascertaining his competency and qualifications. That the company must in any event have exercised reasonable care in the selection of such a person is evident. It is also evident that the mere possession of a diploma or license to practice by a physician would not be sufficient evidence of his competency, for, having this, he might still be totally unfit to perform the services of a physician or surgeon. Under the circumstances of this case, we think the proof was sufficient to raise a presumption of negligence upon the part of the company in employing this physician, and therefore it was incumbent upon the company to rebut this presumption and to

show that it had exercised reasonable care in selecting him. The facts attending this matter are peculiarly within the knowledge of the company, and the burden of proof in this particular under the circumstances should be held to be upon it. 1 Shear. & R. Neg. §§ 58, 59. It follows that, whatever the contract may have been between the appellant and the company, and however it may have been conducting the hospital, and under whatever circumstances it may have employed or furnished the physician, the court erred in granting the nonsuit, for, regarding the case in its most favorable aspect for the company under the proofs offered, without any further explanation or rebuttal, the company would be liable for negligence in employing Garner, if it is true that he was an unfit person for such a position. Of course a greater liability would rest upon the company if it was conducting the hospital for the purpose of deriving a profit therefrom, or if it had contracted with the appellant to provide him suitable and skillful medical treatment. It is contended by the respondent that there is no proof whatever of any contract relation existing between it and the appellant with reference to providing him a hospital, or to provide a physician for him. But we do not agree with this. It appears, as before stated, that the company deducted regularly one dollar a month from the pay of each of its laborers, which was generally understood to be for the purposes stated. Furthermore, at the time the appellant was injured one Mr. Lewis, who, as there was proof to show, was employed by the company as "general foreman of the mines," sent after Dr. Garner, the company's surgeon, to come and attend him. Some time thereafter one Mr. Davis, who was the superintendent of the company, inquired why appellant was not brought to the company's hospital, he having been taken to the house of a relative at the time he was injured, and he was told that they preferred to keep him there, so that his mother could better wait upon him. It also appeared that at one time a brother of the appellant called upon Mr. Davis, and complained of the way Garner was treating appellant, and told him they wanted another surgeon, and asked him if the company would stand the expense of another surgeon, and Mr. Davis informed him that the company would not do so, but that they might get another doctor if they chose to, and the company would see that Dr. Garner was there. The appellant was never asked to pay for Garner's services. The company assumed to provide a physician to treat the appellant by the acts of its said officers. It further appears that some time after the appellant was injured a meeting of the miners was called for the purpose of appointing a committee to take charge of the hospital, and to supervise the expenditure of the fund raised by the assessment, as aforesaid, upon the laborers. Under all the circumstances, we think there was sufficient proof to go to the jury as tending to establish the liability of the company upon one of said grounds for the

additional injuries sustained by appellant in consequence of the neglect and unskillful treatment of him by said physician, and therefore the court erred in directing a nonsuit. The judgment is reversed and cause remanded, with instructions to the lower court to designate a time within which the parties may file new pleadings, and to retry the cause.

DUNBAR, C. J., and ANDERS, J., concur.

(March 27, 1893.)

HOYT, J., (dissenting.) I agree with the majority of the court that the proofs failed to show any liability on the part of the company for the result of the accident by which the plaintiff was injured; but I am unable to agree with them that a prima facie case, showing any liability on the part of the respondent growing out of the attendance of Dr. Garner upon the appellant, was established by the proofs. There was absolutely no proof tending in the least degree to show any agreement or understanding between the respondent and the plaintiff that he should be furnished with medical attendance when away from the hospital of the company. The most that the proof tended to show was that, by reason of the payment of certain hospital dues, it was understood that the employee should be entitled to the privileges of the hospital maintained by the company in the vicinity of its mine. It follows that there was no proof whatever tending to show that the company owed any duty to appellant to provide him medical attendance at the home of his friends, where he was taken for the reason, as alleged by them, that he could have better care there than at the hospital of the company. Under these circumstances, the fact that the surgeon who happened to be called upon to attend the plaintiff was the same one who was employed by the company can, in my opinion, in no sense tend to show any liability of the company resulting from want of skill on the part of such surgeon in his treatment of the plaintiff; and, even if we assume that such surgeon was requested to render the services by the company, the rule of liability would not be changed. If the company was under no obligation to furnish the services, the fact that it simply permitted the plaintiff to avail himself of the services of a person in their employ could not charge the company with liability. The attendance would still be at the instance of the plaintiff, and not at all at the instance of the company. What they would do in such a case in a legal sense would be to waive their right to control the surgeon, and allow him, at the instance of the plaintiff, to render the services. The case is not presented in which the company should assume the absolute control of a person situated as the plaintiff was, and refuse to allow any other than its surgeon to attend upon him. In such a case the company itself could perhaps be said to have charge, and might very well be held responsible for the result; but in this case there is not only an absence of proof tending to show any

such assumption on the part of the company, but there is direct testimony tending to show the fact that the company expressed an entire willingness that any other surgeon should be employed, but stated that it would not be responsible for his compensation. In my view the proofs present simply the case of one allowing his surgeon to render a favor for another person at his request; and to hold that by so doing he became responsible for any injury that might happen on account of the services thus rendered would, I think, establish a most dangerous doctrine, and tend much to repress the charitable instincts of the human race, which, under the most favorable circumstances, are not very free to manifest themselves. In my opinion, the judgment of the lower court should have been affirmed.

STILES, J., concurs.

(7 Wash. 617)

#### WARD v. HUGGINS.

(Supreme Court of Washington. March 20, 1893.)

##### SETTING ASIDE TAX DEED—LIMITATIONS.

Code 1881, § 2939, providing that suits for the recovery of land sold for taxes shall be commenced within three years from the time of recording the tax deed, of sale, and not thereafter, except by the purchaser at the tax sale, does not apply to cases where the tax deed was executed before its passage; such statute not being intended to constitute a general limitation, applicable to all deeds executed on tax sales. Per Hoyt and Stiles, JJ., dissenting.

For majority opinion, see 32 Pac. Rep. 740.

HOYT, J., (dissenting.) I am unable to agree with the conclusions of the majority of the court in this case. In my opinion the provisions of the statutes relied upon by the majority of the court as statutes of limitation cannot properly be construed as such, excepting as they are applied to sales for taxes under the acts of which they constitute a part. The organic act of the territory provided that no act shall embrace more than one object, and that shall be expressed in the title. Each of these provisions was contained in an act providing for the assessment and collection of revenue. The titles to said acts were substantially the same. That of 1877 was as follows: "To provide for the assessing and collecting of county and territorial revenue." If the section providing for a limitation of the time in which actions can be commenced, contained in this act, is to be construed as a general statute of limitation, it is void, and of no effect, for the reason that it is not embraced within the subject-matter of the act, as expressed in the title. On the other hand, if it is not to be construed as a general statute of limitations, it can only be construed as a part of the machinery for the assessment and collection of revenue as provided in said act, and could have no force or effect when applied to sales made under any other act than

that in which it was incorporated; and, as the deed in question in this action was not executed upon any sale made under the provisions of this act, the limitation could not apply to it. What has been said as to the act of 1877 is also true as to the provision contained in section 2939 of the Code of 1881, for the reason that as we have seen above, such section, if construed as a general statute of limitations, would not be embraced in the title of the act. The same legislature that passed this act also passed an act relating to the limitations of actions; and if it had been its intention to provide a general statute of that kind, to apply to all deeds executed upon tax sales, it would probably have included such provision in said last-named act. I am therefore of the opinion that the legislature never intended such provision, in either of the acts referred to, to constitute a general statute of limitations, applicable to all deeds made upon tax sales, and that, if it did so intend, such intention cannot be given force, for the reason that to do so would be to violate the provisions of the organic act above referred to. If such provisions are construed as a part of a scheme for providing revenue, they are reasonable, and clearly constitutional. If otherwise, they are oppressive and dangerous. For these reasons I think that neither of these statutes could be invoked in aid of the claim of the defendant under the tax deed.

STILES, J., concurs in the foregoing.

(6 Wash. 26)

#### SLOAN et al. v. LANGERT et al.

(Supreme Court of Washington. March 6, 1893.)

##### ATTACHMENT BOND—ACTION ON—EVIDENCE—MALICE.

1. Where an attachment bond is executed to several, with a condition to pay them such damages as they may sustain by the wrongful suing out of the attachment, all the obligees may join in an action on the bond, though the attachment was levied on the individual property of only one of them.

2. In an action on an attachment bond, defendant should be permitted to show that he did not act maliciously, so as to prevent the recovery of exemplary damages allowed in such case by 2 Hill's Code, § 295.

3. The advice of counsel on a full statement of facts is admissible to rebut malice, and defendant is competent to testify to the giving of such advice, as well as the counsel.

4. The dissolution of an attachment is only prima facie evidence that it was rightfully dissolved, and does not preclude an investigation of that question in an action on the bond.

Appeal from superior court, Thurston county; J. W. Robinson, Judge.

Action by W. D. Sloan and Joseph Deer against Charles Langert and others on an attachment bond. From a judgment in plaintiffs' favor, defendants appeal. Reversed.

W. I. Agnew and M. J. Gordon, for appellants. Phil. Skillman, for respondents.

DUNBAR, C. J. Appellants sued out a writ of attachment against the property of the respondents, which was after-

wards dissolved. This action was upon the bond for damages. The complaint alleges, in paragraph 5, that the sheriff levied upon certain property of Joseph Deer, one of the plaintiffs. The property attached consisted principally of liquors, cigars, bar and bar fixtures, tobacco, and other personal property, contained in two saloons in the town of Tenino; also, a certain lunch counter, with its attachments. Paragraph 7 alleges that at the time of the attachment aforesaid the said Deer was the owner and in possession of the two saloons and of the lunch counter referred to in paragraph 5, and that by reason of said attachment, and the retention of said property by the sheriff, his business was wholly interrupted for a certain length of time. Paragraph 12 alleges that owing to the seizure of the property aforesaid by the sheriff, and the interruption of the business then being carried on by said plaintiff Deer, and of the depreciation in value of the property attached, and by reason of the damage done to their credit, standing, and character as business men, and by reason of the fact that said writ was maliciously and oppressively sued out by said Langert, the plaintiffs suffered and sustained damage in a large sum, to wit, in the sum of \$1,500. Appellants moved the court to strike out said paragraphs 5, 7, and 12 for the reason that the matters referred to in said paragraphs did not refer to or relate to any joint cause of action accruing to plaintiffs, Sloan & Deer, but that they relate solely to Joseph Deer, one of the plaintiffs. The motion was overruled, and the action of the court in overruling the motion was one of the errors assigned here.

No authorities are cited by appellants in support of this proposition; but from our own investigation, and from the authorities cited by respondents, we do not think it can be sustained. Under the writ the joint property or individual property of either defendant could have been attached. Suppose the joint property and individual property of both defendants had been attached. It cannot be contended that three suits on the bond would have been necessary to recover the damages engendered. The law does not favor a multiplicity of suits, and a remedy on a bond should not be more restricted than the operations of the writ. In *Boyd v. Martin*, 10 Ala. 700, it was held that upon a bond executed to several, with condition to pay for such costs as they might sustain by reason of the wrongful suing out of the attachment, an action may be maintained, though the attachment was levied on the separate property of each, in which they had not a joint interest; and the court, in its argument, said: "How the damages are to be divided between the parties is a matter with which the defendants have no concern, as they will be protected by this recovery from another action by both or either." See, also, *Wade, Attachm.* § 297; *Drake, Attachm.* § 163; *Summers v. Farish*, 10 Cal. 347. It is true that in *Alexander v. Jacoby*, 23 Ohio St. 358, it was held that an action on such undertaking may be prosecuted by those

obligees who have an interest in the damages sought to be secured, without making other obligees, who have no interest in the action, parties thereto; but that case did not go so far as to hold that, if they were made parties, damages to other obligees could not be respectively averred.

After the motion to strike was overruled, the defendants demurred to the complaint for the reasons (1) that it appeared upon the face of the complaint that there was a defect of parties plaintiff, and (2) that it did not state facts sufficient to constitute a cause of action. It is evident that there was no defect of parties plaintiff shown on the face of the complaint; but construing it as a demurrer for a misjoinder of parties, which was the evident intention of the pleader, it was properly overruled, for it raises the same question which was raised upon the motion to strike, and the same principle governs the objections made by appellants to the testimony of the plaintiff Deer.

The court, among other instructions, gave the jury the following: "Under our attachment law with reference to these damage suits, there are two branches of damages,—two classes. One is known as 'actual damages,' and the other as 'exemplary damages.' And, if you further find from the evidence that such attachment was sued out maliciously by Mr. Langert, then these plaintiffs may recover, in addition to their actual damages sustained,—if any have been sustained,—such exemplary damages as in your judgment they are entitled to recover; that is, damages by way of punishment for having acted with malice." This instruction is alleged as error by the appellants, under the ruling of this court in *Dray Co. v. Hoefler*, 2 Wash. St. 45, 25 Pac. Rep. 1072. The court in that case did not undertake to decide that any exemplary damages could be recovered in cases where the statute specially provides for recovery of exemplary damages. Section 295, 2 Hill's Code, seems to put the right to recover exemplary damages in a suit on an attachment bond at rest; for it provides, in so many words, that, "if it be shown that such attachment was sued out maliciously, he may recover exemplary damages." Being entitled, then, to recover exemplary damages in case the attachment was sued out maliciously, the defendants should be allowed to introduce testimony tending to rebut the presumption of malice. In this case the defendant was not allowed to testify that he believed the matters stated in the attachment affidavit were true at the time of the issuance of the attachment. Considering the fact that a man is not liable to dispute facts, to the truthfulness of which he has previously sworn, this would probably not have been the most convincing testimony in the world; but it was competent testimony, and the jury should have been allowed to weigh it.

Defendant Langert also offered to prove that before suing out the writ of attachment he made a full statement of his case to T. V. Eddy, his counsel, and upon such statement was advised by the said counsel that he had good grounds for attachment,



and that he acted in good faith. The introduction of this testimony was also refused by the court. In this we think the court plainly committed prejudicial error. On this proposition the authorities are uniform, and citations are therefore unnecessary. It is conceded by the respondents that the advice of the counsel would be competent testimony tending to rebut the presumption of malice, but it is urged that the fact of such advice having been given must be testified to by the counsel, instead of the defendant. This position, we think, is untenable. If the giving of such advice is a fact competent to be proven in a case, like any other fact, it can be proven by any one who has knowledge of it. It might not go to the jury with the same force from the defendant as it would from the counsel, but that would be the misfortune of the defendant, and could not possibly be any reason for prohibiting him from testifying to the fact. As we have before said, the weight to be given to the testimony is a matter exclusively within the province of the jury.

The court also instructed the jury as follows: "Your verdict must be for plaintiffs. The fact that the attachment was dissolved by the court entitles the plaintiff to nominal damages, without any further evidence." This would be true if no evidence were offered on the other side; but we think the fact that the attachment was dissolved is only *prima facie* evidence that it was rightfully dissolved, and does not preclude an investigation of that question in an action on the bond. For the errors mentioned the judgment will be reversed.

STILES, HOYT, SCOTT, and ANDERS, JJ., concur.

(6 Wash. 84)

WOLFERMAN v. BELL et al.

(Supreme Court of Washington. March 9, 1893.)

#### ALTERATION OF INSTRUMENT—EFFECT.

In foreclosure, the fact that the mortgage note on its face shows an alteration, so as to make it mature at an earlier date than originally written, is no ground for a judgment denying foreclosure, where the action was not brought until after the maturity of the note and mortgage as originally written, and its execution, and that of the mortgage for the consideration therein expressed, are admitted, and there is no evidence that the mortgagee was guilty of any fraud.

Appeal from superior court, Spokane county; W. G. Langford, Judge.

Action by Laura Wolferman, administratrix, etc., of George C. Schneider, deceased, against Harry C. Bell and others, to foreclose a mortgage for nonpayment of principal and interest. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

The mortgage was given to secure two notes, due, respectively, one and two years from date; and the defense made at the trial was that an alteration appeared on the face of one of such notes, in that its date had been changed from April 17, 1890, to June 7, 1899. This action was com-

menced November 4, 1891, long after the maturity of the first note, as though no change had been made in the date, and an answer was finally filed, issues made up, and the case was tried June 14 and 17, 1892, long after both notes had matured, according to their tenor and effect.

Turner, Graves & McKinstry, for appellants. Feighan, Wells & Herman, for respondent.

DUNBAR, C. J. It would be profitless in this case to undertake to review the authorities, for they are numerous and irreconcilable; some courts holding that an alteration of the face of a writing raises no presumption either way, but that the question is one for the jury. Other courts have held that the alteration raises the presumption that it was made before delivery; others that in such cases the presumption attaches that the change was made after delivery, and that it must be explained before it is received in evidence; still others that it raises such a presumption only when it is suspicious; while in California it is held that the change in the printed words of an instrument raises no presumption against the instrument, while a change in the written words does raise such presumption. The rule that the alteration raises a presumption against the instrument cannot be indulged without conflicting with the general proposition that fraud is never presumed, and with another general proposition, that the burden of proof is upon the party who pleads an affirmative defense. If it is put in issue by the pleadings, it is a fact in the case to be determined by the jury, subject to the same rule of presumption as any other fact to be proven in the case. There is an abundance of authority to sustain this view, and we think it a reasonable one. As far as this particular case is concerned, there is no testimony whatever tending to show fraud on the part of Schneider and those claiming under him. The testimony of Bell and his wife cannot be considered by this court. They were certainly testifying concerning a transaction had by them with the deceased man, Schneider, and the testimony falls plainly within the inhibition in section 1646 of the Code. It matters not that the testimony was not objected to. It is objected to here. This court is trying the case *de novo*, and it must try it on legal testimony.

There was no testimony on the subject of the alteration. The notary simply swore that no change was made in the instrument in his office at the time it was delivered, but he did not pretend to testify that the instrument had not been altered before it was delivered. His testimony amounts to nothing. But the testimony is abundant that the interlineation is not in the handwriting of Schneider. An inspection of the original instrument does not lead us to the same conclusion that it does the attorneys for the appellants. It is evident, we think, that the added words were not written at the same time that the note was written and signed by Bell, or with the same ink or pen; but

It seems to us tolerably plain that they were written with the same ink that was used by Belle Bell when she signed the notes, and by Harry C. Bell and Belle Bell when they signed the mortgage, and with the same pen, which was evidently a heavier and duller pen than was used in writing the body of the notes; and that the added words and figures very closely resemble the handwriting of Bell, as shown by the letters introduced in evidence; and, outside of any extrinsic evidence on the subject, we should be inclined to come to the conclusion that the change was made when Mrs. Bell signed the notes and mortgages; and the letters from Bell to Schneider tend to strengthen us in that view. In such an event the judgment of the court is more favorable to the appellants than it should be; but it is not complained of here, and will not, therefore, be disturbed.

But the appellants could not prevail here in any event. They admit the execution of the notes and mortgages, and for the consideration expressed. There is not a syllable of proof of fraud on the part of respondent. According to their own version of the transaction, the first note had become due long prior to the commencement of the suit. By the terms of the contract this matured the second note, and as a matter of fact it was matured by lapse of time, without reference to default in payment of the first note, before the case was tried; so that the respondent obtained judgment for no more than he was entitled to, and there is no principle of equity which will justify this court in disturbing it.

The judgment is therefore affirmed.

HOYT, J., concurs. ANDERS, STILES, and SCOTT, JJ., concur in the result, upon the last ground stated.

(6 Wash. 75)

#### CHRISTENSEN v. UNION TRUNK LINE.

(Supreme Court of Washington. March 9, 1893.)

#### STREET-CAR COMPANIES—NEGLIGENCE—COLLISION—EVIDENCE.

1. Owing to a washout, a city constructed a temporary roadway, about 120 feet long, near a street-car track, and persons driving along the street were compelled to cross the street-car track when they reached the temporary roadway, and again when they left it. *Held*, that a driver of a wagon who, with full knowledge of the dangerous character of the place, crossed the car tracks onto the temporary roadway without looking for an approaching car, which struck him as he was attempting to cross back at the end of the temporary roadway, was guilty of contributory negligence, and could not recover from the street-car company.

2. Where the temporary roadway was of sufficient width to permit the street cars to pass wagons or other vehicles, the motoneer was guilty of no negligence in failing to stop the car or slacken its speed after discovering the driver on the temporary roadway, since he was not bound to anticipate that such driver would attempt to cross the car tracks in front of the car.

3. In an action for injuries sustained from a collision with a street car, evidence that the motor man in charge had run his car at a high rate of speed on other occasions is irrelevant.

4. Evidence that no conductor was on the car at the time of the accident is inadmissible in evidence, in the absence of a showing that his presence was necessary or requisite for the safe running of the car.

5. Error in admitting evidence that the motor man was discharged after the accident is harmless, where it is shown to be a rule of the company to discharge all motor men who meet with accidents under any circumstances.

6. Costs may be taxed for witnesses who attend court and testify on the trial without the service of a subpoena.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by Mike Christensen against the Union Trunk Line, a corporation, for the killing of plaintiff's horse by a collision with one of defendant's street cars. From a judgment in plaintiff's favor, defendant appeals. Reversed.

Smith & Littell and Hawley & Prouty, for appellant. Trusten P. Dyer, for respondent.

ANDERS, J. On October 27, 1891, the appellant was the owner of an electric street-car line, and was operating the same on South Fourteenth street, in the city of Seattle. Upon this street, which runs north and south, there is an elevation known as "Beacon Hill," from the top of which the railway track descended towards the north on a grade of about 10 percent., according to the evidence. From the crest of the hill northward, that part of the street that was usually traveled was on the east side of the street-car track. Between Canal and Lane streets, however, or in that vicinity, there had been a washout on the east side of the track, and, while the city was repairing the damage, it had constructed a crossing over the railroad track to the west side of the track, and a plank road leading north down the track a distance of about 120 feet, and then crossing back to the east side of the track. The first, or upper, crossing was about 700 feet from the brow of the hill. At the lower end of this temporary roadway, on the west side of the railway track, and close to the lower crossing, there was an excavation on that side of the street some four or five feet deep, so that teams could not be driven further south without crossing back to the east side of the railroad. About 9 o'clock in the forenoon of said October 27th the respondent, who was a teamster, and engaged in hauling cord wood from Beacon hill, passed down on the east side of the street with a team of horses and a wagon loaded with wood, while one of appellant's cars was also going down the hill in the same direction, (north,) crossed over to the west side of the track, and thence continued down the temporary roadway to the lower crossing, when the hub of the hind wheel of his wagon was struck by the passing car. As the car passed on, the horse nearest thereto sprang forward with such force that he detached himself from the wagon by breaking the whiffletree and harness. The other horse was thrown down the embankment, and the loaded wagon fell upon him, and so injured him that he soon after died.

The wagon was somewhat damaged, but whether by the collision or the fall is not certain, though the probabilities are that it was by the latter. The respondent brought this action to recover damages thus sustained, and which he alleged were caused by the negligence of the appellant in thus running its car against his wagon. The appellant, by its answer, denied that it was in any manner negligent or careless in the management of its car, and alleged that whatever damage the respondent sustained was caused by his own carelessness and negligence. There was a verdict for the plaintiff, and defendant filed a motion for a new trial. The motion was denied by the court, and judgment was entered upon the verdict, to reverse which the defendant has brought the cause to this court.

It is contended on behalf of the appellant that the judgment must be reversed, for the reason that the evidence shows that the injury complained of was not the result of negligence on the part of the motor man in charge of the car, but was caused solely by the want of ordinary prudence and care on the part of respondent. If it be true that the accident would not have occurred but for respondent's own negligence, he has no cause of complaint against appellant, even although the latter may have also been negligent. The fact—if it were a fact—that appellant was running its car at an unusually high rate of speed at the time of the accident is no excuse for the want of a reasonable measure of care and prudence on the part of the respondent to avoid injury. *Railroad Co. v. Houston*, 95 U. S. 697. The testimony is too voluminous to be stated fully, but a careful examination of it leads us irresistibly to the conclusion that the judgment cannot be sustained. The respondent's own testimony shows that he had for some time been engaged in hauling wood down South Fourteenth street from Beacon hill, and was not only familiar with the character and condition of the street, and the temporary roadway on the west side of the railroad track, but also with the running of the cars at that particular point. He says he had been over the road a great many times, and knew there was danger in going on the temporary roadway if the cars were coming up. He further says that while coming down the hill he met a car going up, and that he knew at that time that the car coming down and the car going up the hill usually met at the top of the hill; and yet he states that he did not look for the car until he got to the upper crossing, and did not see it until he was crossing over the track, and did not hear the bell ring until he got into the narrow space on the west side of the track. He also says that the car was then coming down at the rate, as he afterwards "figured out," of from 16 to 20 miles an hour. He proceeded down the temporary passage way to the lower crossing, and undertook to cross back to the east side of the track, in front of the approaching car, thinking he could do so "all right," but, finding he had not time, he "swung his horses to the west." This movement of his team brought the back end of the

wagon nearest the railway, and the dashboard of the car, in passing, struck the hub of the hind wheel, as before stated. The respondent testified, further, that the car was so near him when he turned his horses that it almost instantly came in contact with his wagon. The testimony of other witnesses also shows that the respondent attempted to cross the track ahead of the car, but apparently changed his mind, and "pulled" his horses back and away from the railroad. There is no doubt, therefore, as to what the respondent did at and immediately prior to the accident; and we think that it was his own want of that reasonable care and watchfulness which the occasion demanded that brought about the injury of which he complains. In the first place, it was negligence on the part of respondent to cross from the east side of the track to the narrow passage on the west without looking for the approach of the car which he knew was about to pass down the hill, if in fact, as he claims, it was a dangerous place. And it was still more negligent for him to undertake to cross back when the car was so near him. His excuse for so doing is that the way was too narrow for the car to pass his wagon, and that it was therefore the duty of the person in charge either to stop the car, or go at such rate of speed as would have permitted him to pass over the track to a place of safety. It was undoubtedly the duty of the motor man in charge of the car to use all reasonable precautions to prevent injury to the respondent, but it was not negligence on his part not to anticipate that the respondent, who was travelling on the public highway, in the same direction, and by the side of the railway track, would suddenly undertake to cross the track in front of the car. He had a right to presume that the respondent would remain off the track, and not knowingly place himself or his property in imminent danger; and he was not bound to regulate his speed at such a rate as would certainly avoid injury to any one who might attempt to cross the road in an unreasonable and improper manner. *Meyer v. Railway Co.*, 6 Mo. App. 27. The evidence, as a whole, clearly shows that the traveled way on the west side of the street was, at all points, of sufficient width to permit the cars to pass wagons or other ordinary vehicles that might be there, and that the lower crossing was the widest part thereof. This was shown by the testimony of the man who constructed it for the city, by measurements of respondent's wagon and the width of the plank on the day on which the accident occurred, and by actual tests on the same day. On that afternoon Mr. Atwood, who was then driving up the street in a wagon of the same width of track as that of respondent, and with hubs but one inch shorter, stopped at the narrowest portion of the planking, and got off his wagon, as one of appellant's cars was passing, so as to be able to observe how close it would go to the wagon; and he testified that the car was not nearer than nine or ten inches to the wagon. One other witness testified that he had driven along the same road, when the

street cars were passing up and down, without difficulty; and both the motor man who was running the car when the accident happened and a former conductor testified that they had frequently passed teams at that place with the cars, the latter stating that he had seen the cars pass both lumber and wood wagons between the upper and lower crossings. It will therefore be seen that if the respondent had stopped when he saw the car approaching the crossing, and waited, as the motor man says he thought he would do, until it had passed, no collision would have occurred, and no damage would have been done. The discrepancy between the testimony of the respondent and some of his witnesses and that of the witnesses just mentioned, as to the width of the road at the place of the accident, can be readily accounted for by the fact that the railway company, after the accident, moved the track some 18 inches further to the west, and that the distance from it to the sidewalk at the time of the trial was taken as the width of the traveled way at the time of the accident.

It is claimed by the learned counsel for the respondent that, notwithstanding the fact that the respondent may have been guilty of negligence in attempting to cross the track, the appellant was not justified in running him down; and we have no doubt of the correctness of that proposition. But we fail to find sufficient evidence in the record to warrant the conclusion that the motor man having the management of the car was derelict in the discharge of any duty he owed to the respondent. He rang the bell violently from the time he discovered the respondent on the east side of the track until he reached the lower crossing, and when he saw that the respondent was about to cross the track in front of him, and that he would be unable to stop the car in time to prevent a collision in case he did cross, he "hallooed 'Look out!'" so loudly that he was heard by persons who were at a considerable distance down the street. There was a brake at each end of the car, and both of them were in good condition and firmly set. In short, as was said by one of the witnesses who was a passenger in the car at the time, he did everything he could do to stop the car, and to prevent injury to the respondent. Indeed, it appears by undisputed testimony that the respondent himself stated, soon after the collision occurred, that the motor man tried hard to stop the car, and was not to blame for failing to do so. He then made no claim for damages on account of any mismanagement of the car, but did claim that the appellant was responsible for having, as he then supposed, built this narrow roadway, and left open the excavation into which he fell at the lower end thereof. It was not until he learned that the city, if anybody, was responsible for the condition of the street, that he made any complaint as to the speed of the car. The rights and duties of street-railway companies and persons using the streets of cities in the ordinary way are very clearly and tersely defined in the late case of *Carson v. Railway Co.*, 23 Atl. Rep. 369, in

which the supreme court of Pennsylvania said: "Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways and those using the streets in the ordinary manner. It is the duty of the railways to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Its failure to exercise the care which the rate of speed and the condition of the street demand is negligence. On the other hand, new appliances, rendered necessary by the advanced business and population in a given city, impose new duties on the public. The street-railway company has a right to the use of its track, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour, but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen, and so avoided, an approaching train, and this appears from his own evidence, he may be properly nonsuited. \* \* \* Orr testified that he knew the crossing; that he listened for the sound of the gong, but, not hearing it, drove on the track, and was instantly struck. He drove in front of a moving car, so near to him as to make a collision inevitable. If he had looked he could have seen the car, and stopped, and the accident would have been avoided. Not to do so was, in the language of *Railroad Co. v. Bell*, [122 Pa. St. 58, 15 Atl. Rep. 561.] 'gross carelessness,' and justly defeats the action brought to recover from another damages that were self-inflicted. It is the duty of one about to cross a street-railway track to look, so that he may not walk directly in front of a moving car, to be struck by it." In that case the plaintiff's employe, without stopping or listening, drove directly upon defendant's tracks, and then looked up and saw the car so near to him that there was no escape. In the case at bar the plaintiff both saw and heard the approaching car, and yet attempted to cross the track. His experiment failed, and he alone must bear the consequences of his miscalculation.

In view of the fact that there must be a new trial of this cause, we will next consider some of the alleged errors in reference to the admission of testimony over the objections of appellant. It is contended that the court erred in permitting the plaintiff to show that this particular motor man had run his car at a high rate of speed upon other occasions, and we think the court did err in so doing. It was a fact collateral and irrelevant to the issue, and one which the defendant could not be expected to be prepared to rebut without previous notice. 1 Greenl. Ev. § 52. And, in view of the fact that there was no testi-

mony showing that a conductor was requisite or necessary in order for the safe running and management of the car, we think it was error to admit testimony to show that there was no conductor upon this particular car at the time of the accident. If a conductor was necessary to the proper management of the car, that fact should have been shown, and, if unnecessary, then the fact that there was none was immaterial, and should have been excluded from the jury. We are also of the opinion that the court should not have permitted the respondent to show that the car driver was discharged by appellant soon after the accident occurred; but, inasmuch as it was also shown that it was the rule of the company to discharge all motor men who met with accidents under any circumstances, we think the ruling was not sufficiently prejudicial to entitle the appellant to a reversal of the judgment on that ground. There was no error in the court's refusing to grant, in its entirety, appellant's motion to retax the costs in this case. We are unable to see why a witness who attends a trial and testifies therein without the service of a subpoena upon him is not justly entitled to compensation therefor, nor can we perceive "how any party can be injured in having to pay mileage and attendance merely for the witnesses of an adversary who attends upon request or agreement, when the additional expense of officers' fees and mileage for issuing and serving of a subpoena, swelling largely the claim for disbursements, could do no more than to procure the attendance of the witness." *Crawford v. Abraham*, 2 Or. 166. See, also, *Wheeler v. Lozee*, 12 How. Pr. 448; *Farmer v. Storer*, 11 Pick. 241. It is not necessary to discuss the remaining objections of appellant, as they may not arise on another trial. The judgment of the lower court is reversed, and the cause remanded for a new trial.

STILES and HOYT, JJ., concur.

(6 Wash. 107)

#### STATE v. SUFFERIN.

(Supreme Court of Washington. March 10, 1893.)

##### BURGLARY—WHAT CONSTITUTES—INDICTMENT.

Under 2 Hill's Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, etc., "or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit," burglary may be committed in any of the places particularly specified, and in any other building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit; and an indictment which charges the breaking and entry of an office is sufficient, without also charging that such office is a place where goods, merchandise, or valuable things are kept for sale or deposit.

Appeal from superior court, Jefferson county; Morris B. Sachs, Judge.

George Sufferin was convicted of burglary, and appeals. Affirmed.

The indictment charged an entry into the office of A. F. Learned "with intent to

commit a felony, to wit, the crime of grand larceny, by then and there one hundred and thirty (\$130.00) dollars, in currency and silver, lawful money of the U. S. of A.; one overcoat, of the value of six dollars, the personal property of A. F. Learned; one overcoat, of the value of ten dollars, the personal property of one W. F. Learned; one overcoat of the value of thirty dollars, the personal property of one C. M. Sweeny; and one overcoat, of the value of ten dollars, and one hat, of the value of two dollars and fifty cents, the personal property of A. S. Fulton,—all of which said personal property, then and there in said office being, then and there feloniously and burglariously to steal, take, and carry away," etc.

Andrew F. Burleigh, for appellant. R. E. Moody, Pros. Atty., for the State.

HOYT, J. Appellant attacks the indictment upon which he was convicted in the court below upon two grounds: (1) Because it was not alleged therein that the office which was broken and entered was a place in which goods, merchandise, or valuable things were kept for sale or deposit; and (2) because there is no sufficient allegation that the entry was with the intent to commit a felony.

The argument in regard to the first objection is that the words, "office, shop, store, warehouse, malt house, still house, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, and water craft," as used in our statute, are each qualified by the provision following, "or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit."<sup>1</sup> We are unable to construe the statute in this way. To us it seems clear that the statute was intended to provide that burglary may be committed upon and in any of the places particularly specified, and, in addition thereto, upon and in any other building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit. There is, of course, a line of decisions which hold that statutes somewhat similar to ours should be construed as contended for by appellant, but in no case has a statute just like ours been thus construed. We are therefore free to construe our statute as we think the legislature intended; and, thus construing it, we are satisfied that an indictment which charges the breaking and entry of an office, without also charging that such office was a place where goods, merchandise, or valuable things were kept for sale or deposit, is good.

As to the other objection, it is directly charged that the entry was with intent to commit a felony, and under our statute this alone would perhaps be sufficient; but it is not necessary that we should so hold, to sustain this indictment, as it is further alleged that such felony was grand larceny, followed by a statement of the acts intended, which, if carried into effect, would have constituted such offense.

The indictment, taken as a whole, suffi-

<sup>1</sup> 2 Hill's Code, p. 662, § 46.

ciently charged the crime of burglary, under our statute, and the judgment and sentence rendered thereon must be affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur. ANDERS, J., did not sit at the hearing.

(6 Wash. 61)

TURPIN et al. v. WHITNEY et al.

(Supreme Court of Washington. March 8, 1893.)

**DISSOLUTION OF ATTACHMENT—JUDGMENT.**

The denial of a motion to dissolve an attachment, whether erroneous or not, is no ground for reversing a correct judgment in the main case, continuing the lien of the attachment on the property covered by the levy, since, under 2 Hill's Code, § 312, the sheriff has a right to sell the attached property under a judgment in personam, and defendants' remedy, if they have any, is on the attachment bond.

Appeal from superior court, Thurston county; J. W. Robinson, Judge.

Action by Turpin & Manville against A. D. Whitney & Son for the price of goods, wares, and merchandise sold by plaintiffs to defendants. A writ of attachment was issued in plaintiffs' favor, and judgment by default was subsequently rendered. Defendants appeal. Affirmed.

Eddy, Gordon & Agnew, for appellants. John C. Kleber and Phil. Skillman, for respondents.

DUNBAR, C. J. Respondents brought their action against appellants to recover \$400.72 on account of goods sold and delivered to appellants by respondents. On the same day the complaint was filed the respondents filed an affidavit and bond upon which an attachment was issued out of the superior court of Thurston county against the property of appellants, and a levy was made thereunder. Appellants moved to dissolve the attachment, and affidavits and counter affidavits were filed in support of, and opposed to, said motion. Upon the hearing the motion was denied, to which ruling of the court the appellants excepted. No answer or other pleading was interposed to the complaint. In due course of time, appellants' default was decreed, and judgment was rendered according to the prayer of the complaint, and the lien of the levy under the writ of attachment proceedings was continued in said judgment upon the property covered by said levy and attachment.

The only error alleged here is the action of the court in overruling the motion to dissolve the attachment, and it is claimed that the judgment should simply be a judgment in personam. Inasmuch as the judgment in the main case is conceded to be right, it would be idle to reverse the judgment, even though we should conclude that the court erred in not sustaining the motion to dissolve the attachment,—a question upon which we do not now pass; for the effect would have been the same whether, by the terms of the judgment, the lien of the attachment proceeding was continued in the judgment, or not, for if the

judgment had simply been in personam, under the provisions of section 312, 2 Hill's Code,<sup>1</sup> the sheriff would have satisfied the judgment out of the attached property. The matter appealed from here does not affect the merits of the action, and appellants must seek their remedy, if they have any, on the attachment bond.

The judgment is affirmed.

HOYT, SCOTT, and ANDERS, JJ., concur.

(6 Wash. 37)

SAYWARD et al. v. NUNAN, Sheriff, et al.

(Supreme Court of Washington. March 10, 1893.)

**BILL OF SALE — CHATTEL MORTGAGE — RECORD — EXECUTION—CLAIMS BY THIRD PERSONS.**

1. Failure to record a bill of sale within 10 days after its execution, as required by 1 Hill's Code, § 1454, protects only such persons as have obtained intervening rights after its execution, and before it was filed for record, and not creditors who became such after it was recorded.

2. Where a bill of sale absolute on its face is intended merely as a chattel mortgage, the mortgagee, who has not reduced the property to possession, cannot maintain, as owner, proceedings under 2 Hill's Code, §§ 491-495, relating to claims of third persons to property levied on under execution, since a chattel mortgage does not pass title to property, but only creates a lien thereon.

3. Where an absolute bill of sale is given as security for a debt, the transaction will be considered a chattel mortgage, though an unsigned defeasance might, if executed, have converted the transaction into a conditional sale.

4. Proceedings under 2 Hill's Code, §§ 491-495, relating to claims of third persons to property levied on under execution, are tried on the allegations of the affidavit of the claimant, and a complaint subsequently filed by him is properly stricken from the files.

5. Execution creditors are not concluded, as against claimants of the property under a prior bill of sale, from showing that there was no change of possession, by a written acknowledgment of the judgment debtor that a third person had assumed control of the property as an agent for the claimant.

6. Where the claimant fails to make good his title, judgment is properly rendered in favor of the execution creditors for the amount of their judgments, not exceeding the value of the property, without ordering payment to the claimant of the amount of a prior mortgage; his remedy being in an independent action.

Hoyt, J., dissenting.

Appeal from superior court, Island county; Henry McBride, Judge.

Proceedings by W. P. Sayward under 2 Hill's Code, §§ 491-495, to establish a claim against personal property levied on by Thomas Nunan, sheriff, under an execution issued in favor of Alexander Maitland and W. J. Weedon, and against W. H. Thayer. From a judgment in favor of the execution creditors, Sayward and his sureties appeal. Affirmed.

Battle & Shipley, for appellants. Frank P. Lewis and Burt J. Humphrey, for respondents.

<sup>1</sup>This section requires the sheriff, on judgment in plaintiff's favor, to satisfy the same out of the attached property.

SCOTT, J. The respondents Maitland and Weedon obtained a judgment against one W. H. Thayer. Executions were issued thereon to Thomas Nunan, sheriff of Island county, and were levied by him upon a certain quantity of logs in controversy in this action. The appellant W. P. Sayward, claiming to be the owner of said logs and entitled to the possession thereof, instituted proceedings under sections 491-495, inclusive, vol. 2, of the Code, relating to claims by third persons to property levied upon. The appellants Mercer and Bucklin were his sureties upon the bond given in pursuance of said proceedings. A trial was had, and judgment rendered in favor of the execution creditors, and the claimant and his said sureties appealed.

It is conceded that prior and up to April 7, 1891, said W. H. Thayer was the owner of certain property known as the "Useless Bay Logging Camp," which included teams and a logging outfit, and that he had various contracts with parties thereabouts, permitting him to cut standing timber on their lands respectively, and to remove the same, which were known as logging contracts. Appellant Sayward was and is the owner of the Port Madison Mills, and through one G. A. Meigs, his agent, had, prior to April 7, 1891, furnished Thayer with supplies which were used by him in the operation of said logging camp; and he claimed that Thayer was indebted to him therefor on said April 7th. Prior to this time Thayer had sold and delivered to Sayward a boom of logs, and, on said April 7th, Thayer executed and delivered to Sayward a paper writing purporting to be an unconditional and absolute bill of sale, including and specifying all the property used in operating said logging camp, together with the various timber contracts aforesaid. Prior to this time Thayer had given to one Holcombe a mortgage to secure the sum of \$1,400 owing by him to Holcombe, and interest thereon, which mortgage covered a part of the property belonging to said camp and included in said bill of sale, which was made subject to this mortgage. The bill of sale was not filed for record until the 21st day of April, 1891. The levies upon the logs in question were made in the month of October following, and the case turns on the effect which is to be given to this instrument. The appellants contend that said instrument is what it purports to be,—an absolute bill of sale,—while the respondents contend that it was understood to be, and is in effect, a mortgage only. It is further contended by the respondents, if said instrument is to be regarded as a bill of sale, that in consequence of its not having been recorded within 10 days after it was given, as is required by section 1454, vol. 1, of the Code, it is absolutely void as to the existing or subsequent creditors, if the property, as is claimed, was not taken possession of by the vendee. This contention, however, is not well founded. The failure to record the bill of sale within 10 days would only protect such parties as had obtained intervening rights after its execution, and

before the time it was filed for record. *Crippen v. Fletcher*, 56 Mich. 387, 23 N. W. Rep. 56. The respondents' rights under said execution levies did not accrue until some time after the instrument was recorded. It is contended by the appellants that there was an actual transfer of the possession of said property to Sayward at the time the bill of sale was executed, and that said camp was thereafter conducted under the management of his agents. We are satisfied, however, from an examination of the proofs, that there was no change of possession in fact, especially such an open and notorious change of possession as is required in such a case. *Steele v. Benham*, 84 N. Y. 634; *Sledenbach v. Riley*, 111 N. Y. 560, 19 N. E. Rep. 275. It is claimed that the camp was in charge of one Nickols, a brother-in-law of Thayer, by virtue of an instrument as follows: "Useless Bay, April 7, '91. I have this day bargained and agreed to take charge of the logging camp purchased of W. H. Thayer by W. P. Sayward, of Port Madison Mills, and manage the same to the best of my ability, at the rate of sixty-five dollars per month. H. B. Nickols." Nickols' name to this instrument was signed at the time by Thayer, and the great preponderance of the proof is to the effect that Thayer continued the operation and management of the camp after the execution of the bill of sale, practically in the same manner as it had been conducted by him before it was given. Orders were sent to him from the mill at various times for logs, and he purchased supplies from time to time of Sayward, who carried on a store in connection with his mill, said supplies being for the purpose of carrying on the camp, and for supplying clothing and other articles to the men employed about said camp, and such articles were charged to Thayer individually. Of course, the failure to take possession would not be a material matter if the bill of sale was in fact what it purported to be,—an absolute transfer of the property; it having been recorded prior to the time the rights of the respondents accrued. If said instrument is to be regarded as a chattel mortgage, the property not having been reduced to the possession of the mortgagee, he could not maintain this proceeding as owner to recover possession thereof under the holdings of this court, as a chattel mortgage under our law does not pass the title to the property, but only creates a lien thereon. *Silaby v. Aldridge*, 1 Wash. St. 117, 23 Pac. Rep. 836; *Kerron v. Manufacturing Co.*, 1 Wash. St. 241, 24 Pac. Rep. 445. Furthermore, it is questionable, at least, if said instrument was merely given as security, whether the recording of it would help the appellants' claim in any way. If it is to be treated as a mortgage, section 1648, vol. 1, of the Code, provides that a chattel mortgage shall be void against creditors of the mortgagor or subsequent purchaser, and "incumbrances" of the property for value and in good faith, unless it is accompanied by an affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or de-



fraud creditors, and is acknowledged and recorded in the same manner as is required by law in the conveyance of real property. This instrument was not so executed. To hold that the affidavit and acknowledgment are not required where a bill of sale is given as security, and is in effect a mortgage, would be to render such provisions of the law in relation to chattel mortgages nugatory, for the same could be avoided, and fictitious claims created and spread upon the records, by giving a mere bill of sale,—a fraudulent device,—instead of a mortgage. *Jones, Chat. Mortg.* § 275; *Shaw v. Wilshire*, 65 Me. 485; *Bird v. Wilkinson*, 4 Leigh, 266-295; *Bank v. Damm*, 63 Wis. 249, 23 N. W. Rep. 497; *Yenni v. McNamee*, 45 N. Y. 614. If it was intended as a mortgage, it could hardly come under section 1454, because the bill of sale would not operate to transfer the property. Section 1646, same volume of the Code, provides that mortgages may be made upon all kinds of personal property, but does not require the same to be in any particular form; and if a bill of sale is given as security, and is only in fact and effect a chattel mortgage, it should be held to be within the provisions of the act relating to chattel mortgages.

Under the great weight of the proof, appellants' claim that the instrument in question was an absolute bill of sale cannot be maintained. It is admitted that neither Sayward nor any of his agents had seen the property in question prior to or at the time of the execution of the bill of sale, nor until about a month thereafter. The consideration expressed in the bill of sale was \$500, and it was made subject to the Holcombe mortgage. This mortgage was subsequently paid by Sayward, but, instead of canceling the same, he took an assignment thereof, and held the debt against Thayer. The amount paid therefor was \$1,850, and this, with the \$500 expressed in the bill of sale, made \$2,150 as the total consideration for the property in question. The appellants could not tell anything about the condition or value of the property described in the bill of sale. The testimony upon the part of the respondents shows that such property, on April 7, 1891, was worth \$6,500. While this estimate may have been somewhat excessive, it fairly appears that said property was worth a great deal more than \$2,150, and the discrepancy between the consideration expressed and the value of the property is so great as to afford a strong presumption that the intention of the parties was not to make an absolute transfer of the title. It is claimed by the appellants that, at the time the bill of sale was executed, Thayer was credited with \$500 upon his account, which it was claimed he was owing at the time to Sayward. Thayer disputed this, and claimed that at said time Sayward was indebted to him for logs he had delivered to him over and above the amount he owed for merchandise. In this respect we think the weight of the testimony is with the respondents. The accounts were in the appellants' possession, and were not produced upon the trial, nor was the failure

to produce them satisfactorily accounted for. There was no accounting between them at the time the bill of sale was given, and there had been none previously. The most that could be claimed for this bill of sale is that it was a conditional sale of the property, and, if this claim could be maintained, it would operate to transfer the title to appellant Sayward, sufficient for him to maintain this proceeding to recover possession as owner.

While the negotiations were pending, Thayer claims that he took a chattel mortgage to one Meigs, the agent of Sayward in charge of said mills, and that he refused to accept it, but said that he would take a bill of sale of the property; claiming, as Thayer testifies, that it would afford them better security. Consequently, the bill of sale in question was prepared, and with it was a defeasance which was submitted to said Meigs by Thayer, to be executed and returned to him. This instrument referred to the bill of sale, and provided that the property therein described should be conveyed to Thayer, subject to the following conditions: "Provided, the said W. H. Thayer shall faithfully and diligently conduct and manage the business of logging with the above-described outfit and property, for which purpose we hereby agree and bind ourselves to hire and employ, and do hereby hire and employ, him as manager for the period of three years from the date hereof, and shall, from the proceeds of said business, or by other means, pay or cause to be paid to us, our executors, administrators, or assigns, within three years from the date of this instrument, the full sum of his indebtedness due us for supplies and cash to run said camp;" and it provided that Thayer might demand such recovery at any time within the three years upon the payment of such indebtedness. This last instrument was never executed. Thayer testifies that Meigs agreed to execute the same, and send it to him; that, upon the night when the bill of sale was executed, Meigs claimed that he was too tired to proceed with the business further, but would postpone it till morning; and that he only appeared in the morning a few minutes before the time for Thayer to leave the mill for the logging camp on the steamer then about to start; and that thereupon Meigs said he would execute said instrument, and send it to Thayer. Meigs denied having had any such conversation, and that such a document was ever submitted to him or called to his attention, and he denied that they had ever talked about a chattel mortgage. His testimony, however, was overborne by that of the respondents. Had such a defeasance as is above described been executed, it would have tended strongly to support the claim made by appellants that at least a conditional sale of the property was effected. But it appears that Sayward, through his agents, undertook to place himself in such a position that he could claim the property had been absolutely sold to him. In this he has completely failed under the proofs, and we do not think that the unsigned document, under the circumstances, should have the effect

of making the transaction a conditional sale instead of a mortgage. In a case of doubt as to whether an instrument is to be treated as effecting a conditional sale of property or as a chattel mortgage, it is generally resolved in favor of the latter. 1 Cobby, Chat. Mortg. § 84; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. Rep. 394.

Certain errors are alleged by the appellants in rulings made by the court during the progress of the trial. After filing his affidavit and bond, Sayward filed a complaint settling up his claim to said property, and upon a motion of the respondents this complaint was stricken from the files. There was no error in this, for in such proceedings the case is tried upon the allegations of the affidavit. Appellants contend that the court erred in allowing the respondents to show that Thayer claimed to be, and was, in possession of the property, and conducted the camp, after the execution of the bill of sale, because Thayer had signed Nickols' name to the paper in question. Respondents, however, were not concluded by the action of Thayer in the premises, and had a right to go into the whole transaction. Appellants allege that the court erred in rendering a judgment against them for the amounts claimed by the respondents, disregarding the right of appellant Sayward to be first paid the amount due him from Thayer upon his account and on the Holcombe mortgage; but there was no error here. The court rendered the proper judgment in the premises for the amount of the respondents' claims, the same not exceeding the value of the property in controversy. Sayward could not recover Thayer's indebtedness to him in this proceeding, whatever legal proceedings he could take with regard thereto thereafter. Section 495, aforesaid, provides for the judgment that was rendered where the claimant fails to make good his title to the property. The appellants allege that the court erred in refusing to permit them to show the condition and value of the property included in the bill of sale before and after April 7, 1891. There was no error here. There was no proof made or offered that the condition and quantity of the property was the same at the particular times when they wanted to prove its value as it was when the bill of sale was executed. Several other errors were alleged by the appellants, but the same go to immaterial matters, and have no bearing upon the question as to what the effect of the purported bill of sale was. Consequently, it is unnecessary to further allude to them. Affirmed.

DUNBAR, C. J., and STILES and ANDERS, J.J., concur. HOYT, J., dissents.

(24 Or. 108)

WEISS et al. v. MEYER.

(Supreme Court of Oregon. April 27, 1893.)

VACATING JUDGMENT FOR COSTS—EXCUSABLE NEGLIGENCE—DISBURSEMENTS.

1. Under Hill's Ann. Laws, § 102, providing that the court may, in its discretion, relieve a party from a judgment taken against him

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through his mistake or excusable neglect, it may relieve him from a judgment entered against him for costs and disbursements through his excusable neglect in not filing objections to the cost bill within the time prescribed by law.

2. Where the affidavit of the party seeking relief shows that no objections to the bill of costs and disbursements were filed within the time prescribed by law because of the illness of his counsel, there was no abuse of discretion on the part of the trial court in allowing the objections to be filed after the expiration of the statutory time.

3. An item of \$75, claimed to have been paid by defendant for surveying and making a plat of the land in controversy, is not a "disbursement," within the meaning of the statute, which can be charged against the adverse party in the bill of costs.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Gottlieb Welas and others against Emanuel Meyer. Judgment was entered against plaintiff for costs and disbursements. Subsequently, after the time for filing objections to the cost bill had expired, plaintiff was allowed to file his objections, and defendant appeals. Affirmed.

Milton W. Smith, for appellant.

PER CURIAM. The questions arising on this appeal will be discussed in the order presented in appellant's brief.

1. Can the court relieve a party from a judgment entered against him for costs and disbursements through his excusable neglect in not filing objections to the cost bill within the time prescribed by law? It seems to us this question is answered in the affirmative by section 102, Hill's Ann. Laws, which provides that "the court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or such other act to be done, after the time limited by this Code, or by an order enlarge such time, \* \* \* and may, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

2. Was there an abuse of discretion by the trial court in vacating the judgment entered against the plaintiffs for costs and disbursements, and allowing objections to be filed to the cost bill in this case? We think not. The affidavit in behalf of plaintiffs shows that the reason no objections to defendant's bill of costs and disbursements were filed within the time prescribed by law was on account of the illness of plaintiffs' counsel; and, while the affidavit is not as full and complete as it should perhaps have been, yet we are unable to say that there was an abuse of discretion on the part of the trial court in allowing the objections to be filed. The question was largely within the discretion of the trial court, and is only reversible here for an abuse of that discretion.

3. Was there error of the trial court in refusing to allow an item of \$75, claimed to have been paid by the defendant to one A. J. Adams for surveying and making a plat of the land in controversy? We are clearly of the opinion that this item was no more necessary as a "disbursement," within the meaning of the statute, than

clerical service in the preparation of the pleadings, or the board and expenses of himself or counsel while attending the trial, or any other expense incident to a trial, and for which the law does not contemplate there shall be a charge against the adverse party. The judgment of the court will therefore be affirmed.

(24 Or. 106)

#### HISLOP v. MOLDENHAUER.

(Supreme Court of Oregon. April 27, 1893.)  
COSTS—TIME OF FILING OBJECTIONS—EXCUSE FOR  
DELAY—JOURNAL ENTRY—CONTRADICTION BY  
MEMORANDUM OF CLERK.

1. Where a cost bill is duly filed, objections thereto filed five months thereafter come too late in the absence of reasonable excuse for failure to file the objections within the two days allowed by law.

2. The recitals of a journal entry as to the day on which a judgment was rendered cannot be contradicted in the supreme court by a certified memorandum kept by the clerk of the trial court.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by T. Hislop against W. J. Moldenhauer, in which there was a judgment for costs in favor of defendant. From a judgment of the trial court, affirming a ruling of the clerk sustaining objections filed by plaintiff to the bill of costs, defendant appeals. Reversed.

John Ditchburn, for appellant. John H. Hall, for respondent.

PER CURIAM. Held: (1) Where a judgment for costs and disbursements is rendered in favor of the defendant, and a cost bill in due form is filed within the time allowed by law, and no objection filed or made thereto within two days thereafter, it is error for the trial court to permit objections to such cost bill to be filed five months thereafter, without a showing that the failure to file objections within the two days allowed by law was through the plaintiff's mistake, inadvertence, surprise, or excusable neglect. (2) That a journal entry reciting that a judgment was rendered and entered on the 24th of May, 1892, cannot be contradicted in this court by a memorandum kept by the clerk, and certified by him, indicating that it was actually rendered on the 20th of the month.

(24 Or. 118)

#### GRAFTON et al. v. CITY OF SELLWOOD.

(Supreme Court of Oregon. April 27, 1893.)  
MUNICIPAL CORPORATIONS—CONTRACT FOR CITY  
HALL AND JAIL—VALIDITY—EXECUTION PRIOR  
TO TAKING EFFECT OF ORDINANCE—ACTION FOR  
BREACH—ANSWER—FAILURE TO REPLY.

1. Sess. Laws 1889, p. 503, (constituting the charter of the city of Sellwood,) § 28, subd. 18, gives the council power to provide for the erection of a city jail. Section 29 provides that the power shall only be exercised by ordinance unless otherwise expressly provided. Section 14 provides that, within three days after the passage of an ordinance, copies of the same shall be posted in at least three public places in said city, and all ordinances shall take effect

within five days after such notice, unless otherwise ordered. Held, that a contract for the erection of a city hall and jail for such city executed one day prior to the taking effect of the ordinance authorizing such contract was void.

2. Where, in an action on such contract against the city, defendant, in a separate answer, alleges that it was executed one day prior to the taking effect of the ordinance authorizing it, an issue of fact is presented, for a failure to reply to which the court may render judgment for defendant.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Jacob A. Grafton and L. T. Procter, copartners as Grafton & Procter, against the city of Sellwood, to recover damages for breach of a contract for the erection by plaintiffs of a city hall and jail for defendant. From a judgment for defendant, plaintiffs appeal. Affirmed.

B. M. Smith and Strode & Walt, for appellants. W. H. Adams, for respondent.

MOORE, J. This action was brought by the appellants to recover \$700 damages on account of an alleged breach of contract. The plaintiffs, in substance, allege that the defendant, prior to January 2, 1892, duly levied a special tax of three mills on all the taxable property within its limits, amounting to \$1,200 or more, for the purpose of erecting a city hall and jail, and collected about \$600 of said tax; that on December 28, 1891, an ordinance was duly passed and approved which authorized the proper officers of the defendant to enter into a contract with plaintiffs for the erection of said city hall and jail; that on January 2, 1892, in pursuance of said ordinance, a contract was entered into between the parties whereby plaintiffs agreed to furnish the material and erect said building for \$1,175; that plaintiffs immediately commenced the erection thereof, and expended in labor and material thereon \$400, when, on January 6, 1892, the defendant, by an ordinance, repealed the ordinance of December 28, 1891, rescinded the contract of January 2, 1892, and notified the plaintiffs thereof, by reason of which they were obliged to abandon the same, and thereby lost the profits on said building, amounting to \$300; that all the ordinances in relation to the levy of said tax, and authorizing the defendant to enter into said contract, were duly posted as provided by law, and duly went into force and effect. The defendant denies the material allegations of the complaint, and, for a separate answer, alleges that the ordinance approved December 28, 1891, was not posted until December 31, 1891, and did not go into effect until January 3, 1892, one day after the execution of the alleged contract; that plaintiffs had not, at the time they were so notified, furnished any material or labor thereon. For a second separate defense, the defendant alleged that, prior to the execution of plaintiffs' alleged contract, defendant had entered into a contract for lighting the city for a term of five years, at \$75 per month, amounting to \$4,500; that it had also purchased a fire engine for \$950, and given a negotiable bond therefor; and that its charter only permitted an indebted-

edness of \$1,000 to be incurred. Plaintiffs moved the court to strike out the separate defenses, which motion was overruled by the court, and they were given 10 days to reply, but, failing to do so, judgment was rendered against them for costs and disbursements, from which they appeal.

The appeal presents but one question, did the answer contain a defense which entitled the defendant to a judgment for want of a reply? It is only necessary to consider one of these defenses, as we think that is decisive of the case. The complaint alleges that the ordinance of December 28, 1891, had been duly posted as provided by law, and duly went into force and effect, but it does not allege that it was in force at the time the contract was executed, on January 2, 1892, while the answer directly alleges that said ordinance was not in force at that time. Subdivision 18 of section 28 of the charter of Sellwood, filed in the office of the secretary of state February 25, 1889, (Sess. Laws 1889, p. 503.) gives the council power "to provide for the erection of a city jail." Section 29 provides that the power and authority given the council by section 38 can only be enforced and exercised by ordinance, unless otherwise expressly provided. Section 28 contains 41 subdivisions, giving power to the council. Section 29 probably refers to section 28, instead of section 38, which relates to the manner of taking an appeal from the action of the council to the circuit court. No jail could be erected without an ordinance for that purpose. When the mode of procedure is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation. Dill. Mun. Corp. § 449. Section 14 provides that, within three days after the passage of an ordinance, copies of the same shall be posted in at least three public places in said city, and all such ordinances shall take effect within five days after such notice, unless otherwise ordered. "When ordinances are required to be published before they shall go into effect, this requirement is essential, and the publication must be in the designated mode." Dill. Mun. Corp. § 331. The time when the ordinance of December 28, 1891, took effect was a question of fact. Any contract entered into prior to that time would be void under the charter. The answer presented an issue upon this question of fact, and, in default of a reply thereto, the court was authorized to render judgment against plaintiffs, and the judgment appealed from must therefore be affirmed.

(24 Or. 89)

#### HOUSE v. JACKSON et al.

(Supreme Court of Oregon. April 24, 1893.)

SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT  
—CONSIDERATION—SUFFICIENCY OF DESCRIPTION  
—ACTION BY ASSIGNEE OF CONTRACT.

1. A lease for years, at a specified yearly rental, recited that the lessors agreed to sell the land to the lessee, at any time before the expiration of the lease, for \$2,500, and the lessee agreed that, if he failed to purchase the

land before the expiration of the lease, he should forfeit all rights to any improvements made thereon. It appeared that the lessee had occupied the premises for five years under a prior lease, at the same rental, and had put certain improvements thereon which he threatened to remove if he did not obtain a renewal, and that he would not have taken such renewal except for the option to purchase. *Held*, that there was sufficient consideration for the option, and specific performance should not be denied for want of mutuality in the contract.

2. In such lease the premises were described as "that certain tract of land situated on Sauvies island, and known as the 'Jackson Ranch,' and more particularly described in certain deeds from M. and F. and R. to J., and recorded in the records of M. and O. counties, Oregon, and containing 287 acres, more or less." Witnesses, who are not surveyors, testified that they knew the Jackson ranch, on Sauvies island, and could locate its boundaries. *Held*, that the description was sufficiently certain.

3. The assignee of the lessee of such contract may maintain an action against such lessors for specific performance of the provision agreeing to convey such land.

Appeal from circuit court, Multnomah county; George H. Burnett, Judge.

Action by E. House against Ellen L. Jackson and William R. Jackson for the specific performance of a contract to convey certain land. From a decree dismissing the complaint, plaintiff appeals. Reversed.

W. W. Thayer and L. A. McNary, for appellant. S. B. Huston, for respondents.

MOORE, J. This is a suit brought by the appellant against the respondents to compel the specific performance of a contract to sell real property, contained in the following agreement:

"This indenture of lease, made and entered into on this 19th day of January, 1887, by and between Ellen L. Jackson and Wm. R. Jackson, her husband, of Washington county, Oregon, parties of the first part, and J. B. Haley, of Multnomah county, Oregon, party of the second part, witnesseth that the said parties of the first part, for and in consideration of the yearly rental of one hundred and fifty dollars, and the covenants and agreements hereinafter mentioned, lease unto said party of the second part, for the term of five years and three months from the first day of January, 1887, the following described premises, to wit: That certain tract of land situated on Sauvies island, and known as the 'Jackson Ranch,' and more particularly described in certain deeds from Mier & Frank and Richard Hall to W. R. Jackson, and recorded in the records of Multnomah and Columbia counties, Oregon, and containing two hundred and eighty-seven (287) acres, more or less. And the said party of the second part herein agrees to pay the said yearly rental of one hundred and fifty (\$150) dollars in the following manner, to wit: Seventy-five (\$75) dollars on the first day of July and the thirty-first (31st) day of December of each and every year during the continuance of this lease. And the said parties of the first part further agree to sell said tract of land, and convey the same by a good and valid deed, to the said party of the second part, at any time before the ex-

piration of this lease, for the sum of twenty-five hundred (\$2,500) dollars. And the said party of the second part hereby agrees that in case he fails to purchase said tract of land before the expiration of this lease, for the above-stipulated consideration, he shall forfeit to the said parties of the first part all rights and claims to any improvements that he shall have made thereon. And the parties to this agreement and lease hereby bind themselves, their heirs, executors, administrators, or assigns, to the faithful performance of the covenants and agreements herein mentioned. In witness whereof, we have hereunto set our hands and seals on the day and year above written. Ellen L. Jackson. [Seal.] Wm. R. Jackson. [Seal.] John B. Haley. [Seal.] Executed in the presence of Chas. A. Butler, J. W. Morgan.

"It is further stipulated and agreed by and between the parties of the first and second part, in the above and foregoing lease, that all said sums of money therein agreed to be paid by said J. B. Haley, for rent or otherwise, shall be paid to the said Ellen L. Jackson, her heirs and assigns. Ellen L. Jackson. [Seal.] Wm. R. Jackson. [Seal.] John B. Haley. [Seal.] Executed in the presence of Chas. A. Butler, J. W. Morgan."

"That J. B. Haley went into possession and occupied said premises; paid the rent due thereon until about November 30, 1889, when, in consideration of \$200, he assigned all his interest therein to one W. G. Pomeroy. That Pomeroy went into possession, paid the rent, and occupied the premises until about September 12, 1890, when, in consideration of \$500, he assigned all his interest therein to D. Reghetto and plaintiff, who went into possession thereof. That said Reghetto, about December 1, 1891, assigned his interest to plaintiff, who continued to occupy the premises, paid the rent due thereon, and on January, 1892, tendered to defendants \$2,500, and demanded a deed thereto. That the defendants refused to accept said tender, or to execute said deed, whereupon plaintiff deposited said amount with the clerk, and commenced this suit.

After the issues were completed the cause was referred to George A. Brodie, who found that the equities were with the plaintiff, and that he was entitled to a decree; but the court set aside said findings, and entered a decree dismissing the complaint, from which the plaintiff appeals. To support the decree, the respondents contend—First, that the contract is not mutual; second, that the premises cannot be identified from the description; and, third, such contracts cannot be enforced by an assignee.

1. The rule is well established that, to entitle a party to specific performance of a contract, there must have been at the time of its execution a mutuality, both as to the obligation and the remedy,—an agreement to buy, as well as an agreement to sell,—and that a party not bound by the agreement has no right to call upon the court to enforce performance against the other party, by expressing a willingness to accept the terms of the contract. Wat. Spec. Perf. § 196. This general rule, like

most others, has its apparent exceptions. "It is now well settled that an optional agreement to convey, or to renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced, in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties, that may be the true consideration for it." *Id.* § 200. Such exception is less real than apparent, for when the option is accepted the minds of the parties have met, and agreed upon the terms of the contract, and it thus becomes mutual, and is enforceable by either party. If no consideration for the option exists, it may, upon notice to the other party, be withdrawn at any time before acceptance. In the case at bar there is no agreement on the part of Haley to purchase the property, and his option is not binding upon the defendants unless some consideration therefor existed at the time the contract was executed. Was there any consideration for the option? is the first question presented. It has repeatedly been held that a lease of real property, containing an option to purchase the same, and the contract to pay the rent, was a sufficient consideration to support the option. In *Souffrain v. McDonald*, 27 Ind. 269, Elliott, J., in support of this doctrine, says: "The stipulation, on the one side, to lease the lot for a period of two years, with the right of the lessees, within that time, to purchase the same at the price and on the terms stated in the agreement, and, on the other party, to pay the rent agreed upon, and to erect the fence, must be considered as constituting one entire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent and build the fence must be deemed to have been made in consideration, as well for the privilege of becoming the purchasers of the lot, as for its use." In *Stansbury v. Fringer*, 11 Gill & J. 149, real property had been leased for a term of 12 years in consideration of the payment of the taxes, and of the erection of a dwelling house thereon, with an option to purchase the same. In a suit for specific performance, Chambers, J., says: "When a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from, or compensate for, the consideration, or any portion of it, exclusive of other stipulations, unless the parties have expressly so declared." In a similar case the court, in *Maughlin v. Perry*, 35 Md. 353, says: "As a part of the consideration of the lease constituting the contract between the parties, Wells, the lessor, covenanted to sell the property to Hyson, his lessee, for \$1,500, at any time during the existence of the lease. This was a continual obligation, running with the lease, on the part of the lessor, with the option in the tenant to accept the same, or not, within that time." From the testimony of Haley, the lessee, it ap-

pears that when the lease was executed he considered the rent worth \$150 per year, and from this the respondents contend that there was no consideration for the option. The defendant William R. Jackson testifies that Haley had occupied the premises for a term of five years under a prior lease, and paid the same rent therefor, and that he had erected a house and barn thereon, which he threatened to remove if he could not secure a renewal of the lease. Haley also testifies that he would not have taken the present lease if it had not been for the option, as he wanted to get the benefit of the improvements he had made on the place. We think it conclusively appears that the improvements made upon the property under a prior lease constituted the real consideration for, and are sufficient to support, the option contained in the present lease.

2. The description contained in the agreement must be so definite as to show what the purchaser supposed he was contracting for, and what the vendor intended to sell. The description may be wholly or partly contained in a separate document, which, if referred to by the other portions of the written contract in such manner as to connect them, becomes a constituent part thereof. A description of the subject-matter in a deed is sufficient when it complies with the maxim, "*Id certum est certum reddi potest.*" Pom. Spec. Perf. Cont. §§ 152, 153. If the land has, as a tract or lot, acquired a name to distinguish it, and by which it is known, the same may be conveyed without a reference to boundary lines. Sedg. & W. Tr. Title Land, § 461; Radford v. Edwards, 88 N. C. 347; Truett v. Adams, 66 Cal. 218, 5 Pac. Rep. 96. In the case at bar the testimony of the witnesses shows that the tract described is known as the "Jackson Ranch." It also appears that it is or was known as the "Joy and Jackson Ranch." There is no conflict, however, in the identity of the property, when described by either name. The object and purpose of a description of real property is to mark out and designate the boundaries of a portion of the earth's surface, and, if this can be done as well by one name as another, that object has been fully accomplished. The rule for determining the sufficiency of a description in a deed or any other writing in relation to real property is as follows: Can a surveyor, with the deed or other instrument before him, locate the land and establish the boundaries? Willamette, etc., Co. v. Gordon, 6 Or. 175; Pennington v. Flock, 93 Ind. 378. In Smiley v. Fries, 104 Ill. 416, Schofield, J., says: "This court has ruled that any description by which the property might be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient." When a deed refers to another, or to a map, for a more specific description of the land conveyed, the deed or map to which reference is thus made is considered as incorporated in the deed itself. Devl. Deeds, § 1020. The contract refers to certain deeds from Mier & Frank and Richard Hall to W. R. Jackson, and recorded in Multnomah and Columbia counties, Or., thus making these deeds a

part of the contract for a more specific description. The contract recites that such deeds were recorded in both counties, and between the parties is a conclusive presumption that such fact exists, and required no proof thereof. Hill's Code, § 775. The evidence of parties who are not surveyors shows that they know the Jackson ranch, on Sauvies island, and can locate the boundaries thereof. If they can do this without the deeds, is it not safe to presume that a surveyor, with these deeds in his possession, could do the same? Counsel for respondents has cited many authorities to show that the description contained in the lease is not sufficient to identify the property. In nearly every case thus cited the description was clearly defective, and it was impossible, from an inspection of the memorandum, to locate the premises. He attaches much importance to the case of *Whiteaker v. Vanscholack*, 5 Or. 113, in which Mosher, J., says: "Not only must a contract for the sale of lands be in writing, under the statute, but the lands must be certainly described in the writing, so as to be capable of identification without reference to extrinsic proof." We think this language, limiting the foregoing rule, is too narrow, and that the same learned justice in *Raymond v. Coffey*, 1d. 132, gave a proper interpretation of the rule, when he said: "It is too late to controvert the legal proposition that what constitutes a boundary in a deed is a fact for the jury, and may be proved by any kind of evidence which is competent to prove the fact." "In explaining by oral testimony where and how the objects referred to in the written documents were in fact made or existed, those muniments of title are not altered by parol evidence." Such has been the rule of this court since that time. *Boehreinger v. Creighton*, 10 Or. 42. We think the description sufficient to identify the property. There is no conflict between the parties as to the particular land intended, and each understood it to be just what it purports to have been.

3. The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed, and when an agreement has been made for the sale of lands the vendor is deemed the trustee of the purchaser of the estate sold; and the purchaser, trustee of the purchase money for the vendor. The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser. *Kerr v. Day*, 14 Pa. St. 112. Haley had an estate in the premises, and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor. The evidence shows that at the time the contract was executed the property was worth no more than the amount named in the option, and several witnesses fix the value at that time at a

much less sum. Because the value of the property has increased, is that any reason why a court of equity should refuse to decree specific performance of a contract which was fair and equitable at the time it was executed? It is said that such decrees rest in the discretion of the court. This does not mean the exercise of an arbitrary will, governed by mere pleasure of the court, but is controlled by fixed rules and principles, in view of the special features and incidents of each case. Courts cannot make contracts for parties, but should enforce them, in the furtherance of justice, when fair and equitable. The decree of the court below will be reversed, and a decree here entered for the specific performance of the contract.

(24 Or. 100)

**STATE v. HENDERSON.**

(Supreme Court of Oregon. April 24, 1898.)

**MURDER—HEAT OF PASSION—EVIDENCE.**

1. Where, on a murder trial, it appeared that the design to kill deceased was not formed until some time after the dispute which led to the homicide had begun, and when both parties were under the influence of passion, an instruction that though the design was formed in the midst of the conflict, when reason was obscured by passion, it would still be murder in the first degree if defendant had left at the time enough reason to enable him to know that he was about to take, and intended to take, his adversary's life, is erroneous, as failing to make sufficient allowance for an act committed in the heat of passion.

2. Declarations made by deceased at the time of and during the affray were admissible as part of the *res gestae*.

Appeal from circuit court, Clackamas county; T. A. McBride, Judge.

William Henderson was convicted of murder, and appeals. Reversed.

H. E. McGinn, for appellant. W. N. Barrett, Dist. Atty., for the State.

**BEAN, J.** The defendant was indicted, tried, and convicted of murder in the first degree in killing one Cyrus Suter, by stabbing him with a pocketknife. The evidence tended to show that the deceased and the defendant had, for some two or three hours immediately prior to the homicide, been playing cards and drinking liquor in a saloon at Canby; that some dispute had arisen over the game, and defendant had threatened to quit playing, but, at the solicitation of the deceased, continued in the game, and, just prior to the killing, the dispute or quarrel was renewed, when the defendant again arose from the table, and said he would not play any more; that Suter had been trying to run over him all day. The deceased, who was a much larger and stronger man than the defendant, then got up from the table, approached and took hold of the defendant,—whether in a peaceable or violent manner the witnesses are not agreed,—when, as claimed by the state, defendant stabbed him with an ordinary pocketknife, whereupon the deceased seized a chair, and attempted to strike him with it, but was prevented from doing so by a bystander. The defendant and deceased

then engaged in a hand to hand conflict, and defendant was thrown and held down on the floor by the deceased until the bystanders interfered. At some time during this affray the fatal wound was inflicted, but just at what time is not clear.

1. The court, in its instructions to the jury, in defining the crime of murder in the first degree, said: "The law also requires, in order to constitute murder in the first degree, that the design should be formed in cool blood, and not hastily, on the occasion, and, unless it is so formed in cool blood, there can be no murder in the first degree; but by 'cool blood' is not meant that a party must be in a wholly unexcited and philosophical state of mind. If he still has left the power of controlling the operations of his mind, and realizing the act that he is doing, and its nature and quality and wrongfulness, he may be said to be in cool blood, even though he may be somewhat excited or somewhat angry." As applied to the facts of this case, it seems to us this instruction must have led the jury to believe that no heat of passion on the part of the defendant short of the dethronement of reason would reduce the crime below murder in the first degree. To constitute murder in the first degree, it is necessary that the design to take life be formed and matured in cool blood, and not hastily, upon the occasion. Code, § 1727. It must be the result of a deliberate and premeditated act, in pursuance of a design formed, and matured when the perpetrator is master of his own understanding, and after time and opportunity for deliberate thought. But if, after the mind conceives the thought of taking life, the conception is meditated upon, and a deliberate determination formed to do the act, then, no difference how soon the fatal resolve is carried into execution, it is murder in the first degree. But when the purpose or intent to kill is formed in the midst of the conflict, and followed immediately by the act, it can only be murder in the second degree, even if the passion and provocation are not sufficient to reduce it to manslaughter; for the time and circumstances are not such as to allow deliberate thought, and yet it is the result of a formed design and purpose to kill, and the perpetrator still has left the power of controlling the operations of the mind, and realizing the act he is doing, and its nature and quality and wrongfulness, and, under the instruction given by the court in this case, would be in cool blood. It is perhaps difficult to formulate any general rule as to the extent to which the passions must be aroused and the reason disturbed to reduce the offense below murder in the first degree, but it certainly will not do to say that reason must be entirely dethroned, and the passion so overpowering as for the time to shut out knowledge and destroy volition. 2 Whart. Hom. § 969; Kerr, Hom. § 68; Maher v. People, 10 Mich. 212; State v. Hill, 4 Dev. & B. 491; Young v. State, 11 Humph. 200. Such a mental disturbance would be almost, if not quite, equivalent to utter insanity. The rule, as stated by Christiancy, J., in the leading case of Maher v. People, supra, is "that reason



should at the time of the act be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment." "And," says the same learned judge, "if the act of killing, though intentional, be committed under the influence of passion, or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than that of any wickedness of heart, or cruelty or recklessness of disposition, then the law, out of indulgence to the frailty of human nature, or rather in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder." Where the provocation is not sufficient to induce such a state of mind, in an ordinary man, of fair average intelligence, or if there has been time for the passion to subside, and reason to resume its sway, or if there is evidence of actual malice, or if the act be perpetrated by, or circumstances indicate that it was the result of, a wicked and malignant disposition and heart, in all such cases it will still be murder in one or the other degree. In order to reduce the offense below murder, all these things must be wanting, and the act must be done while reason is obscured by passion, so that the perpetrator acts rashly, and without reflection and deliberation. In the case at bar it is apparent that the design to kill was formed at some time after the dispute and quarrel had commenced, and when both parties were more or less under the influence of passion, and the instruction under consideration asserts the principle, as applied to the facts, that although the design may have been formed in the midst of the conflict, when reason was obscured by passion, it would still be murder in the first degree if defendant had left at the time so much of reason and reflection as to enable him to know that he was about to take, and to intend to take, the life of his adversary; and this, it seems to us, fails to give to the defendant the indulgence which the law accords to the frailty of human nature when provoked to passion, and was error.

2. The next assignment of error is the use by the court, in its charge to the jury, of the expression "enormous bodily harm," in connection with the danger which defendant must reasonably have apprehended before he was justified in taking the life of Suter. The defendant objects to this expression, on the ground that, under the facts as he claimed them to be, if he had reasonable ground to believe that he was in danger of death or great bodily harm, and, under such belief, killed Suter, he was justified, and that the expression "enormous bodily harm" was calculated to lead the jury to believe that the danger to be feared must be more serious than great bodily harm. The term "death or great bodily harm" is the ordinary language of the books, although there are to be found

expressions in which the word "enormous" is used; but, since this case must go back for a new trial, it is unnecessary for us to determine at this time whether "enormous" is synonymous with "great" when used in this connection, but it is proper to suggest, in the language of the supreme court of Tennessee in a case in which it was held error to use the word "enormous" in place of "great," that "when the path is plain, and well marked by long and constant travel, it is always safe to pursue it, while it is always dangerous to undertake to make a new one to the same end, or to qualify old, unbroken, and well-understood expressions of what the law is." *McDonald v. State*, 89 Tenn. 161, 14 S. W. Rep. 487.

3. We think there was no error in refusing to strike out the testimony of the witness Thomas as to the threats made by the defendant, and also as to the statement of the deceased. The former was the best recollection of the witness as to what the defendant said, and the latter was a declaration of the deceased made at the time and during the affray, and was therefore a part of the res gestæ, and admissible as such. The judgment is therefore reversed, and the case remanded for a new trial.

(24 Or. 61)

#### STATE v. FOOT YOU.

(Supreme Court of Oregon. April 19, 1903.)

HOMICIDE—EVIDENCE—DYING DECLARATIONS—ASSIGNMENT OF ERRORS—NEW TRIAL—APPEAL.

1. The facts that declarations, made by the victim of a murder under sense of impending death, were the result of questions propounded by an attorney, the absence of cross-examination, the use of an interpreter, the presence only of friends and prosecuting officers, and that accused was unrepresented by counsel, are matters affecting merely the weight and credibility, and not the competency, of such declarations.

2. A court may, without prejudicial error, allow the state to introduce evidence in a criminal trial, on the understanding that it shall afterwards be connected with the case, and, if not, that it shall be withdrawn.

3. Errors in criminal cases can be made available only on exceptions duly taken at the trial. *State v. Abrams*, 8 Pac. Rep. 327, 11 Or. 172, affirmed. *State v. Cody*, 23 Pac. Rep. 891, 18 Or. 506, overruled.

4. Refusal of a new trial for insufficiency of the evidence cannot be assigned as error in criminal cases. *State v. Olds*, 24 Pac. Rep. 394, 19 Or. 397, overruled.

Appeal from circuit court, Multnomah county; J. C. Fullerton, Judge.

Foot You, having been convicted of murder, appeals. Affirmed.

Rufus Mallory, for appellant. Geo. E. Chamberlain, Atty. Gen., A. F. Sears, Jr., and W. T. Hume, Dist. Atty., (McGinn, Sears & Simon, of counsel,) for the State.

BEAN, J. This is an appeal from a judgment of conviction of murder in the second degree, on an indictment charging the defendant with the crime of murder in the first degree, in shooting and killing one Ching Bo Qung on the 13th of April, 1892. The homicide occurred in a Chinese saloon, in the city of Portland, known as the "Temperance Saloon," in the back room of which was being conducted at

the time a Chinese gambling game called "tan tan." That Ching Bo Qung was shot at the time and place mentioned, and that he afterwards died of the wound then inflicted, was not disputed at the trial, but the principal controversy was as to whether defendant did the shooting. The claim for the state was that the deceased went to this saloon for the purpose of collecting some money he claimed to be due him on a lottery ticket, and, passing into the "tan" room, demanded the money of the defendant, who was conducting the game, but defendant refused to pay it, whereupon deceased said he would have the defendant arrested, or the house "pulled," if he did not pay, and turned to go out. Just as he reached the front door, defendant, who had followed, fired two shots at him, one of which took effect in the back, inflicting a wound of which he died in a short time. The defendant claimed that he was not present at the time of, and did not do, the shooting, but that it was done by one Lou Choy, who was in charge of the game, to prevent the deceased from stealing and carrying away money that did not belong to him; that, at the time of the shooting, the "tan" game was being conducted by Lou Choy and two other Chinamen, and there were three bags of money and some loose change upon the table; that while the game was being played, the deceased entered the "tan" room, accompanied by three or four Chinamen, one of whom presented a pistol at the men in charge of the game, while the other rushed to the table and grabbed for the money, and deceased succeeded in getting one sack, which he started to carry away, when he was followed, and shot by Lou Choy.

On the trial, to maintain the issues on the part of the state, the district attorney offered in evidence two statements written by Mr. Simon, and signed by the deceased, purporting to be dying declarations by him of the circumstances attending the crime, and the identity of the person by whom it was committed. Before offering these papers, the state called witnesses who were present at the time they were prepared and signed, who testified that the deceased, at the time the papers were signed by him, was under a sense of impending death, and had no hopes of recovery; that the statements were made in Chinese, translated into English by a Chinese interpreter, reduced to writing by Mr. Simon, an attorney employed to assist in the prosecution, and then read and translated back to the deceased, who said they were correct, and signed them. The statements were then admitted in evidence, and read to the jury, against the objection and exception of the defendant. In view of the testimony and the statements aforesaid, it can hardly be claimed that they were not made under a sense of impending death, and were incompetent on that account; but the contention for appellant seems to be that the circumstances under which they were made were such as to render them so completely unreliable as to make them incompetent as evidence. It appears from the testimony that, two or three days after the shooting, Mr.

Lafferty, assistant district attorney, and Mr. Simon, special counsel employed to assist in the prosecution, accompanied by a Chinese interpreter, visited the deceased at the hospital where he had been taken for treatment, for the purpose of obtaining a statement from him; that in reply to questions propounded to him by Mr. Simon, through the interpreter, the deceased made a statement of the circumstances of the shooting and the identity of the party, which was translated into English by the interpreter, and reduced to writing by Mr. Simon, and then read by Mr. Simon to the interpreter, and by him translated to the deceased in Chinese, who said it was correct, and signed it. In this statement the deceased said, he only caught a glimpse of the man who shot him, but thought he would be able to identify him. The following day the defendant was taken to the hospital for identification, and, in the presence of the same parties as on the previous day, and of the defendant, the deceased made and signed another statement, in the same manner as the first, in which he said that he recognized the defendant as the person who was conducting the game at the time he went into the "tan" room, and who followed him, and shot him in the back as he was about to pass through the front door. The person who acted as interpreter, at the time both of these declarations were made, was called as a witness on the trial, and testified that he correctly interpreted the questions propounded by Mr. Simon, and the answers of the deceased thereto, and also translated the statements, as reduced to writing by Mr. Simon, to the deceased, and that the deceased said they were correct; and Mr. Simon testified that he correctly reduced to writing the statements of the deceased, as interpreted to him, and correctly read them to the interpreter for the purpose of being translated to the deceased; so that it appears, from the evidence, that the statements as offered in evidence purported to be the dying declarations of the deceased. They were shown to have been made under a sense of impending death, and to be statements of the deceased as to the cause of his death, and the identity of the party who inflicted the fatal wound, and were properly admitted in evidence. 1 Greenl. Ev. § 161; People v. Bemmerly, 87 Cal. 117, 25 Pac. Rep. 286; Com. v. Haney, 127 Mass. 455; Turner v. State, 89 Tenn. 547, 15 S. W. Rep. 838; Jones v. State, 71 Ind. 66; State v. Kindle, 47 Ohio St. 353, 24 N. E. Rep. 485. The circumstances under which the declarations were made, the fact that they were the result of questions propounded by Mr. Simon, the absence of all cross-examination, the use of an interpreter, the fact that Mr. Lafferty saw proper to change interpreters, the presence only of friends and prosecuting officers, and of defendant being unrepresented by counsel, were all matters affecting the credibility and weight, and not the competency, of the evidence, and were for the consideration of the jury. 1 Greenl. Ev. §§ 159, 160; Kerr. Hom. 415. The competency of dying declarations is a matter for the

court to determine, but after they have been admitted their weight and credibility become questions of fact for the jury, and they are entitled to such weight only as the jury may, under all the circumstances of the case, think proper to give them.

The next assignment of error is that one Gritzmacher, a policeman, being called as a witness, produced a pistol, two chambers of which were empty, which he testified he found upstairs in the building in which the shooting occurred, a short time after the shooting. Objection was made to the admission of the pistol in evidence, because it had in no way been connected with the defendant, but the court seems to have admitted it, but at a subsequent stage of the trial withdrew it from the jury, because of a failure to so connect it with the defendant, and refused to allow it to be considered or used as evidence on the trial. No exception was taken to the ruling of the court in admitting the pistol in evidence, and it may be doubted whether the question as to its competency is properly before us, but, however that may be, it seems only to have been admitted with the understanding on the part of the court that the state would, at some subsequent stage of the trial, connect it with the defendant, and, having failed to do so, it was withdrawn; so that no error prejudicial to the defendant was committed by the trial court. *Smith v. Whitman*, 6 Allen, 564; *Pavey v. Burch*, 3 Mo. 447; *Com. v. Shepherd*, 6 Bin. 283; *Beck v. Cole*, 16 Wis. 39.

It is also urged that the admission of proof by the state of statements made by its witness Quong Toy out of court, inconsistent with his testimony as given on the trial, was error, but it nowhere appears in the record that any objection was made or exception taken, either to the admission of the testimony, or to that of the witnesses who were called to contradict him. On the contrary, counsel for the defense cross-examined the witness Quong Toy at great length, as well as the witnesses called to impeach him. We had supposed that, if any one question was settled in this state, it is that this is an appellate tribunal, constituted for the purpose of revising and correcting errors of law committed by the trial court, when that court has acted, and the act claimed to be error is disclosed by the record, (*Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. Rep. 309; *State v. Tamler*, 19 Or. 528, 25 Pac. Rep. 71;) and this we still think to be the law. If a party desires to raise a question in this court as to the competency of evidence offered in the trial court, or of any other supposed irregularity of that court, either of omission or commission, he must at the time make his objection, and thereby obtain a ruling of the court, and, if adverse, save an exception, and bring it here by a proper bill of exceptions. "It is very important," says Mr. Chief Justice Shaw, "that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that, if it had been brought to the attention of the judge and adverse counsel, it

might have been avoided by an amendment, or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matters of law, if well founded, either by a ruling in his favor or by an allowance of the exception, and the rights of both parties be secure." There is no difference in this regard between the rule in criminal and civil cases. In either case we can only revise and correct errors in the rulings and proceedings of the trial court, legally excepted to, and, as says Mr. Thompson, "it is incumbent on the defendant in a criminal case, as it is on a party in a civil case, if he would avail himself, on error or appeal, of any irregularities committed on the trial of the case, to make his objection and to save his exception at the time when the irregularity was committed." *Thomp. Tr.* § 700. As was very pertinently said by Chief Justice Williams, in the capital case *O'Kelly v. Territory*, 1 Or. 59: "Prisoners in our courts are provided with counsel; confronted with the witnesses against them; allowed to except to all the court says or does upon trial. And it is no hardship to say that, if they have any objection to the acts of the tribunal before which they are tried, they shall make these objections known to such tribunal, or forever after hold their peace." And in *State v. Abrams*, 11 Or. 172, 8 Pac. Rep. 327, which was an appeal from a conviction of murder in the second degree, Mr. Chief Justice Watson, speaking for the court, says: "Several objections were made and exceptions saved at the trial, by appellant's counsel, on the ground of remarks made by counsel for the prosecution to the jury upon matters not in evidence. Some of these remarks, attributed to Mr. Dorris, were undoubtedly improper, and can hardly be condemned with too much severity. But however reprehensible, there is one insuperable obstacle to their being considered here as ground for reversal. They involve no error of the court below. We have announced this principle before, (*State v. Anderson*, 10 Or. 448.) and we now lay it down as a rule to which there can be no exceptions, that no objection to proceedings in the court below can be heard in this court which is not based on alleged error in judicial action on the part of the lower court." In *McKinney v. People*, 2 Gilman, 540, which was also a capital case, the court says: "A prisoner on trial, under our law, has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error, on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and, if he neglect in proper time to insist on his rights, he waives them." This case was cited with approval in *Graham v. People*, 115 Ill. 566, 4 N. E. Rep. 790. And in *People v. Guidici*, 100 N. Y. 503, 3 N. E. Rep. 493, and *People v. Buddensleck*, 103 N. Y. 487, 9 N. E. Rep. 44, —one of which was a capital case,—it was ruled by the court of appeals of New York that errors upon criminal trials can be made available only by exceptions duly

taken at the trial. In the latter of these cases Mr. Justice Danforth uses this very appropriate language: "An exception is not alone for the benefit of the litigant, but it is required for the sake of justice and fair dealing, and in order, among other things, that, the attention of the trial judge being called to the supposed error, he may, if he thinks proper, correct it before the jury are called upon to consider their verdict." Any other rule than the one indicated would not only be extremely inconvenient, but subversive of the soundest principles of justice, often resulting in reversals and new trials on grounds which have no connection with the merits, and which would not have been presented had the attention of the trial court been called to the matter at the proper time, and a ruling obtained. The defendant in our courts is always represented by counsel, presumably skilled in the law, active and vigilant in behalf of his client, and upon whom devolves the duty, under his oath, to see that the law is complied with in the conduct of the trial, so that his client may have a fair and impartial trial; and, to guard against any failure in this respect, ample provisions are made by which he may point out and reserve, by objection and exception, for consideration by this court, any action of the trial court supposed to be prejudicial to his client. The fact that the whole of the record of the trial is before us, on some particular assignment of error, does not authorize or empower us to examine the record to see whether any other error or irregularity in the conduct of the trial can be found, which, if properly excepted to, would justify a reversal. "It is not error simply," says Chief Justice Waldo, "but error legally excepted to, that constitutes ground for reversal." *Kearney v. Snodgrass*, 12 Or. 316, 7 Pac. Rep. 309. We have not overlooked the case of *State v. Cody*, 18 Or. 506, 23 Pac. Rep. 891, and 24 Pac. Rep. 895, in which it was held by a majority of the court that a failure of the trial court to instruct the jury, in a criminal prosecution, where the offense charged necessarily included a lesser offense, that they could find the defendant guilty of the latter, was error which the accused could take advantage of on an appeal without any objection or exception being made or taken in the trial court. But the rule announced in that case is so at variance with the constant practice of this court, from *O'Kelly v. Territory*, supra, to the present time, that it can no longer be regarded as authority, and must be considered as overruled.

The next assignment of error is in overruling the defendant's motion for a new trial, on the ground of insufficiency of the evidence to justify the verdict. It has been the constant and uninterrupted practice of this court, from *Bowen v. State*, 1 Or. 271, which was a capital case, to the present time,—with one exception, hereafter to be noted,—to hold that a motion to set aside a verdict, or for a new trial, for insufficiency of the evidence, in either a criminal or a civil case, was addressed to the sound discretion of the trial court, and

that its ruling thereon cannot be assigned as error in this court on appeal. *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 429; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396, 4 Pac. Rep. 1204; *State v. Mackey*, 12 Or. 154, 6 Pac. Rep. 648; *State v. Becker*, 12 Or. 318, 7 Pac. Rep. 329; *State v. Clements*, 15 Or. 237, 14 Pac. Rep. 410; *Hallock v. Portland*, 8 Or. 29; *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. Rep. 309. In *State v. Mackey*, supra, which was an appeal from a conviction of murder in the first degree, Lord, J., says: "The bill of exceptions purports to contain, in substance, the whole testimony, and the first point suggested is the insufficiency of the evidence to justify the verdict. The alleged error applies to the denial of the defendants' motion for a new trial. There are cases in which it has been held that a motion for a new trial is addressed to the sound discretion of the court below, and that the overruling of such a motion will not be reviewed unless there is a plain abuse of such discretion. This is conceded, but it is earnestly and strenuously insisted that the evidence is so manifestly insufficient, and particularly as against the son, to sustain the verdict, that it falls within the rule laid down in those cases which would authorize the court to review and set aside the verdict. But a different doctrine seems to have been held by this court in *Hallock v. City of Portland*, 8 Or. 29. Prim, J., in delivering the opinion of the court, said: 'As the motion for a new trial was based wholly upon the insufficiency of the evidence to justify the finding of fact, the granting of the motion was a matter resting wholly in the discretion of the court below, and cannot be reviewed on appeal.' *State v. Wilson*, 6 Or. 429; *State v. Fitzhugh*, 2 Or. 227; *Hil. New Trials*, 7; *Pomeroy's Lessee v. Bank*, 1 Wall. 597; *Mining Co. v. Brady*, 14 Mich. 260; *Boykin v. Perry*, 4 Jones, (N.C.) 325. It is true the evidence against the defendants is wholly circumstantial; and there can be no doubt but what that portion of it which relates to the son is extremely slight upon which to found a verdict. But the authorities cited indicate that such matter is not reviewable on appeal." And in *State v. Clements*, supra, it is said by Thayer, J., that "this court long ago held that a matter of that character" (motion to set aside the verdict) "is not reviewable. Counsel, however, continue, from time to time, to persist in urging such questions upon the consideration of this court, and seem to think that, unless they are able to raise them, judgments are liable to be given without sufficient evidence in law to sustain them. But such results are not liable to follow if counsel will properly present them. This court will not uphold a judgment where the evidence is not sufficient in law to justify its rendition, if the question is properly made, which can be done by a motion at the trial to discharge the defendant upon that particular ground, and including all evidence in the bill of exceptions tending to establish his guilt. So, also, a question regarding the sufficiency of the proof of a particular fact in the case may be reviewed here, but it must be raised by an exception

at the trial. Should the trial court say to the jury that if they found such and such facts, and there was no sufficient evidence in law to authorize such finding of all or any one of the facts thus submitted, an exception in either case could be saved, and made available. All the evidence, however, would have to be certified to this court, bearing upon the same, in the statement of the exception; and the statement in such case must purport to contain all the evidence upon the point. This court has nothing to do with the rulings of the lower court upon a motion for a new trial, or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such." The only doubt ever cast upon the soundness of this rule is the implication from the remarks of Chief Justice Thayer in *State v. Olds*, 19 Or. 397, 24 Pac. Rep. 394, in which he expresses his individual opinion that the overruling of a motion for a new trial, in a capital case, for insufficiency of the evidence, is assignable error on appeal. That case was, however, reversed on other grounds, and we think it can hardly be assumed that a majority of the court intended to overrule all the previous adjudications upon the subject, without even noticing or referring to them. The case has never been regarded as authority on this point. At the argument of *State v. Zorn*, 22 Or. 591, 30 Pac. Rep. 317, when the right to appeal from an order denying a motion for a new trial was raised, and the case of *State v. Olds* cited as authority, counsel was interrupted by the then chief justice, who stated that he took that occasion to say that he did not concur in the intimation in that case that overruling a motion for a new trial was assignable error, but that he concurred in the result on other grounds, and counsel was requested to pass to other points in his case, and the court in its decision disregarded that question. The same point has been raised since in this court, and attended with the same result, the court adhering to the rule that its powers are appellate, and it can deal only with questions of law squarely presented as such. The granting of a new trial for the insufficiency of the evidence is not a matter of absolute right, but rests in the sound discretion of the trial court, who hears the witnesses, notes their appearance upon the stand and manner of testifying, is familiar with all the proceedings of the trial and the circumstances surrounding it, and is therefore better able to determine the question as to whether substantial justice will be done by either granting or denying a motion for a new trial than an appellate tribunal can possibly be from merely reading the record.

But if, in view of the rule announced in *State v. Olds*, it is thought that counsel had a right to rely upon that case until overruled, we still think there is ample evidence in the record to sustain the verdict. Hem Long, a witness for the state, testified that in company with the deceased he went into the "tan" room, where the defendant and two other Chinamen were running the game, and the deceased requested the defendant to pay him a sum

of money which he claimed was due on a lottery ticket, but the defendant refused to do so, whereupon some words passed between them, in the course of which deceased said he would have the defendant arrested, or the house "pulled," if the money was not paid. The witness then turned to go out, followed by the deceased, and just as he reached the street he heard two shots fired, and, on suddenly opening the door, saw the deceased fall, and the defendant running into the back room. Chin Chuck, another witness, testified that he was standing watching the game, when the deceased and the witness Hem Long came in and the deceased asked for money, which was refused by the defendant, when the witness left the room, and went into the front room of the saloon, where he was at the time of the shooting; that soon after he left the "tan" room, Hem Long and the deceased came out, and started for the street, when the defendant, who was following, shot the deceased in the back. The evidence of these two witnesses is corroborated by the dying declaration of the deceased, which, in substance, is that he went into the saloon to demand money on a lottery ticket belonging to a friend, which being refused, he started to leave the building, but was followed, and shot in the back, by a man whom he identified as the defendant. This evidence, if believed by the jury, and of which they were the exclusive judges, was certainly sufficient to warrant the verdict, and, while it was directly and positively contradicted by the witnesses for the defense, this court will not disturb a verdict on what might appear to be the mere weight of evidence. *Skaggs v. State*, 108 Ind. 53, 8 N. E. Rep. 695; *Ritter v. State*, 111 Ind. 324, 12 N. E. Rep. 501; *Hudson v. State*, 107 Ind. 371, 8 N. E. Rep. 273; *Clayton v. State*, 100 Ind. 201; *State v. Glahn*, 97 Mo. 679; <sup>1</sup>*Sanders v. People*, 124 Ill. 218, 16 N. E. Rep. 81. The credibility of the witnesses and the weight to be given to the testimony are all proper matters for the consideration of the jury, and when the verdict has met with the approval of the trial court, as in this case, it will not be disturbed, even if the question was properly here, on what we might suppose to be the mere weight of the testimony. As said by that eminent jurist, Mr. Justice Dillon: "We must assume that all the evidence in the case is true, and that the witnesses are all credible, for if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses, or upon the proper deductions to be drawn from the evidence,—these are questions, not for the court, but for the jury, under the direction of the court." And further on, in the same opinion, after referring to several decisions of the supreme court of the United States, holding the same doctrine, he says: "Where in any case it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from even undisputed facts; where different men equally sensible and equally impartial would make different inferences,—such cases the law

<sup>1</sup>11 S. W. Rep. 260.

commits to the decision of the jury, under instructions from the court." U. S. v. Babcock, 3 Dill. 577. The judgment of the court below is therefore affirmed.

(23 Or. 604)

**TOLMIE v. WATSON.**

(Supreme Court of Oregon. April 27, 1893.)

**ACTION FOR RENT—PLEADING.**

In an action for rent, the complaint alleged the renting to defendant on April 1st, at a monthly rent, and the failure of defendant to pay the rent for October and November. The answer alleged that plaintiff had leased the premises to defendant only until October, and payment of rent up to that time. Plaintiff replied, denying payment of the rent agreed, or any rent, for the premises for October and November, which he alleged defendant had occupied under the lease of April 1st. *Held*, that plaintiff was, notwithstanding defective pleadings, entitled to judgment.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by J. Tolmie against J. E. Watson. Judgment for plaintiff. Defendant appeals. Affirmed.

Robert Morrow and Emmons & Emmons, for appellant. O. P. Mason, for respondent.

**PER CURIAM.** This was an action brought in a justice's court to recover the sum of \$100 for rent. The plaintiff alleges the renting of the premises to the defendant on April 1, 1889, at the monthly rental of \$50, and the failure and refusal to pay the rent for occupation of the premises for the months of October and November, 1889. The answer alleges that the plaintiff only leased the premises until the 1st day of October, 1889, and the payment of the rent up to that date. The reply denies that defendant has paid the rent agreed, or any rent at all, for the occupation of the premises for the months of October and November, which he alleges he used and occupied under the lease of April 1, 1889. It is conceded that the complaint is not as well stated as it might be, but it is sufficient to support a judgment. The answer does not deny the occupation of the premises during the time alleged, but the pleadings and record show that the defendant remained in possession, if the lease did expire at the time defendant alleges. While the pleadings are defective, we think, upon the record, the plaintiff was clearly entitled to judgment, and it is therefore affirmed.

(24 Or. 60)

**JOSHUA HENDY MACHINE WORKS v. PORTLAND SAV. BANK.**

(Supreme Court of Oregon. April 19, 1893.)

**APPEAL—TIME OF TAKING—JUDGMENT AFTER RULING ON DEMURRER.**

An appeal by defendant may be taken any time within six months from a judgment rendered against him on his failure to plead further after a demurrer to the complaint has been overruled.

Appeal from circuit court, Multnomah county.

Action by the Joshua Hendy Machine Works against the Portland Savings Bank. From a judgment for plaintiff, defendant appealed, and the latter moves to dismiss the appeal. Motion overruled.

Thos. N. Strong, for appellant. Milton W. Smith, for respondent.

**PER CURIAM.** Held, that where a demurrer to a complaint is overruled, and the defendant, standing on his demurrer, refuses to answer or plead further, and judgment is entered against him at a subsequent day of the term, an appeal may be taken from such judgment at any time within six months after its rendition.

(24 Or. 76)

**GARROW v. NICOLAI.**

(Supreme Court of Oregon. April 19, 1893.)

**PARTNERSHIP ACCOUNTING—AWARD ON ARBITRATION.**

1. Where two partners submitted to arbitration issues as to the profits and losses of the firm, and the share of each in the partnership property and other profits, if any, such issues to be decided from the partnership books, so that either partner might purchase the interest of the other by paying him its value, an award undertaking to state an account between them, and deciding that the business was conducted at a loss,—a conclusion derived from stating the account,—is not consonant with the submission, and is no bar to an action by one partner against the other for a dissolution and accounting.

2. After such action was commenced the arbitration was agreed on, but before the award was made the partnership property was sold under execution; and plaintiff, after the award, filed a supplemental complaint, alleging that at the sale defendant had fraudulently procured the property to be bought in with his money, and for his use, by a third person, who afterwards, without consideration, conveyed it to defendant. *Held* that, even if the award had followed the submission, it would have been no bar to the action, since another issue had arisen, not contemplated in the submission, nor included in the award.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by Eugene Garrow against Adolph Nicolai. There was judgment for plaintiff, and defendant appeals. Modified.

The other facts fully appear in the following statement by LORD, C. J.:

This is a suit between partners for an accounting. The complaint alleges that in March, 1887, plaintiff and defendant entered into a copartnership, by the firm name of Nicolai & Garrow, for the purpose of purchasing and erecting a saw-mill in Columbia county, purchasing timber, and running and operating said mill in manufacturing lumber, for the benefit of the copartnership. The complaint further alleges that the firm proceeded immediately to carry on said business, purchased machinery, and manufactured lumber, from about August 1, 1887, until about the 1st of May, 1889, and that such lumber was shipped to said Nicolai at Portland, Or., and sold by him for the benefit of said firm; that the accounts, when correctly stated, show that large

profits were made in said business, inasmuch that after paying in full for said mill and plant, the cost of procuring timber, and of manufacturing it into lumber, and all expenses connected therewith, out of the proceeds of the sale of lumber so shipped to Nicolai, there remains a balance of assets belonging to the said firm of about \$5,178.49, besides the said mill and plant, valued at about \$7,500; that the firm owes about \$2,047.69, leaving as the net profits of the business about \$10,630.80. The plaintiff afterwards, by leave of the court, filed a supplemental complaint, wherein he alleged that on the 6th day of June, 1889, the mill and plant were sold by the sheriff of Columbia county under executions issued upon two judgments of the circuit court of said county against the said firm for sums aggregating \$840.95; that at said sale Nicolai procured one W. H. Conyers to buy in the mill and plant for him, and furnished him with money for that purpose, and that afterwards he had the apparent title transferred to defendant James J. Allord, who paid no consideration for it, but took and held it in trust for Nicolai, who afterwards removed said mill from the state, sold it, and converted the proceeds thereof to his own use. The answer denies that the business yielded a profit, that the amount received for lumber by Nicolai was any greater than \$29,967.24, and denies that the mill was worth more than \$4,000, and also denies the allegations of the supplemental complaint, except that the mill and plant were sold. The answer then sets up the following separate defense: That upon the 6th day of May, 1889, plaintiff and this defendant, Nicolai, mutually agreed, in writing, to submit their differences arising out of said copartnership, as set forth in the pleadings herein, to arbitration, which agreement was, in substance, as follows: That the plaintiff and defendant, "as copartners by the firm name of Nicolai & Garrow, have been engaged in purchasing, erecting, and operating a steam sawmill and plant in Columbia county, Or., and in purchasing timber and manufacturing lumber at said mill, and selling said lumber, upon equal terms of division of profits and losses between us in said venture and business, and are unable to agree between ourselves as to what, if any, profit has been realized, or what, if any, losses have been suffered, by said copartnership, as shown by the books, bills, accounts, and writings pertaining to said business; said Nicolai claiming that the general result of said business has been attended with loss, and said Garrow claiming that not only the mill, and plant connected therewith, have been paid for by profit from said business, but that other and further profits have been made therein by said firm. Now, therefore, in consideration of one dollar by each of us paid to the other, the receipt whereof is hereby acknowledged, and of the agreement of each with the other to stand to and abide by such statement, \* \* \* It is hereby contracted and agreed between the said parties hereto that Mr. Chas. H. Richards and Chas. H. Jewett, accountants, of Portland, Oregon,

shall, as arbitrators, inspect and examine said books, bills, contracts, accounts, and writings belonging to said copartnership, and in any wise connected therewith, or relating to the said business, and said Jewett and Richards shall ascertain, determine, and state therefrom the profits or losses of said firm of Nicolai & Garrow in said business, and shall also determine the share now owned by each of said partners in said mill and plant, and other profits, if any, of said business; and, if the said Richards and Jewett shall be unable to agree between themselves as to a correct and true statement thereof, that then they two shall select another, or third, competent accountant and arbitrator, to be chosen and agreed upon by themselves, and that such account, showing, award, and statement as may be agreed upon by said three arbitrators, or any two of them, shall be final and conclusive between, and binding upon, the parties hereto, as a correct and true statement and showing of the profits or losses, as the case may be, of said copartnership of Nicolai & Garrow in said business, and of the share and interest now owned by each of said copartners in said mill and plant, and in any money or further profit, if any, belonging to said firm. \* \* \* It is further agreed that either partner desiring to purchase such interest of the other in said mill and plant, and remaining property and assets of said firm, as so shown, shall be at liberty to do so by paying to the selling partner the value of his said interest, as so ascertained and determined by said arbitration; or if each partner should desire to purchase, rather than sell, then each shall have the privilege of bidding such amount over and above the valuation of the interest of the other, as fixed by said arbitrators, as the party bidding shall be willing to pay therefor, and the party bidding the greater amount over such fixed valuation shall be the purchaser, and the other party is hereby bound to sell to him at such offer." That upon the 22d day of May, 1889, the arbitrators in said submission called to their assistance T. T. Struble as the third arbitrator, and that on or about the 1st day of August, 1889, the arbitrators made their award, which, in substance, finds that "on June 5, 1889, the property belonging to Nicolai & Garrow in Columbia county, Or., was sold to satisfy judgments against the said firm, and that the property so disposed of is represented in the ledger accounts under the heads of 'Machinery,' 'Fixtures,' and 'Live Stock,' and that the cost of said property, the amount received for the same, and the loss thereon, are as follows: Machinery, \$3,234.14; fixtures, \$1,086.71; live stock, \$1,267.00; total, \$5,587.85; net total from the sale of same, as returned by the county clerk of Columbia county, Or., \$1,037, leaving a loss of \$4,550.85." The arbitrators found that the firm has an interest in a skid road, and that the value of said road to either of the partners using it would be \$100 for the unexpired term of the lease, and that the firm had an interest in a plank road, leading from the mill to the wharf, and that the value of it



to either of the parties using it would be \$100, and that the value of the firm's interest in a certain mess house, sleeping quarters, etc., is \$50. Then follows a summary of the cash received during the years 1887 and 1888, amounting in total to \$29,971.64, and cash disbursed for the same years, amounting to \$32,757.44; showing that the amount disbursed by A. Nicolai in excess of the amount received for those years was \$2,785.80. The award charges one half of this excess to Garrow; and, after taking into account some other items of debit and credit, the arbitrators found that the plaintiff is indebted to A. Nicolai in the sum of \$1,356.64. Plaintiff demurred to the defense, setting up the arbitration and award, and the demurrer was sustained, and that defense excluded, and plaintiff filed a reply to the remaining new matter in the answer.

A. H. Tanner, for appellant. J. F. Watson, for respondent.

LORD, C. J., (after stating the facts.) It is claimed that the court erred in sustaining the demurrer to the plea of arbitration and award, because the award is a conclusive defense to the suit. This is challenged on the ground that the award does not follow the submission, and that, if it did, it would not cover the issues in this suit. The facts show that the suit was brought originally to obtain a dissolution of the copartnership, and an accounting of its affairs; that the partners disagreed,—the plaintiff claiming that the business had been profitable, and the defendant claiming that it had been unprofitable, and attended with loss; that, for the purpose of settling their differences in this regard, they entered into the agreement to arbitrate set out as a defense; that thereafter the mill and its appurtenances were sold under execution, and bought by one Conyers, under the circumstances of fraud alleged in the supplemental complaint, and denied in the answer, thus forming an additional issue.

To sustain the contention of the defendant, it is essential to the validity of the award that it should be consonant with the terms of the submission, and that it should be coextensive with the issues involved, to operate as a bar to the suit. It is a fundamental principle that the award must be consistent with the submission, and that it must not extend to persons or things which are not embraced within its terms. Mr. Caldwell says, "It is one of the requisites of a valid award that it be consonant to the submission," and it "must not extend to persons or things beyond the scope of the submission." Cald. Arb. 226, 227. The power of the arbitrators is derived entirely from the submission, and any award which they may render in excess of the power conferred upon them will be void. The submission is the measure of their authority, and necessarily they must confine their judgment to the matters submitted by it, and not extend it to those not comprehended within its scope. In *Carnochan v. Christie*, 11 Wheat. 446, it was held that an award must decide the whole matter

submitted to the arbitrators, and that it must not extend to matters not embraced in the submission. In commenting upon the requisites of a valid award, Gilchrist, C. J., said: "It is that the award shall embrace all the matters of dispute submitted, or, in other words, shall follow the terms of the submission, so that the parties may have accomplished all the substantial purposes they may be supposed to have had in entering upon the reference." *Tudor v. Scovell*, 20 N. H. 173. It would seem plain, upon sound principles of law and justice, that, whenever two persons submit any particular matter or matters in dispute or controversy between them to the determination of a third person, whom they have mutually selected, his power to act as a judge is limited to the particular matter or matters specified, and that any exercise of his judgment upon any other question is a usurpation. The award must be within the authority conferred by the submission under which it is made, and if it exceeds that authority it is void, at least for the excess. But an award will be construed favorably, so as to uphold it, if possible. No intendments will be indulged to overturn it, but on the contrary every intendment will be made to uphold it. If the award be good in part, and bad in part, that which is good may be separated from that which is bad, and the one is in no wise dependent on the other. Under the rule that all reasonable presumptions and intendments are to be indulged in favor of the validity of awards, the court will uphold the award as to that part which is good, and reject that part which is bad, in order to give effect to the action of the arbitrators as far as it is possible to do so, consistently with the agreement of the parties. 1 Amer. & Eng. Enc. Law, p. 710. But this principle can have no application where, upon the face of the award, the arbitrators have undertaken to decide other or different questions than those which are submitted to them. When the parties have specified the particular matters in dispute upon which the arbitrators are authorized to make an award, it cannot be presumed that they are empowered to make an award upon other and different matters. To so hold would bind the parties by an award upon matters to which they never consented that the arbitrators should consider or decide. Such an award is not binding upon either party, because it is founded upon matters which the arbitrators had no authority to decide, and consequently it is of no legal validity.

It remains to apply these principles to the case at bar. By the terms of the submission the plaintiff and defendant agree that the persons named therein as arbitrators shall examine the books, accounts, and writings relating to the copartnership business, and ascertain and determine therefrom the profits or losses of the firm, the share now owned by each of the partners in the mill and plant, and other profits, if any, of the business, and that the award made by them shall be binding upon the plaintiff and defendant, as a "correct statement of the profits, or losses, as the case may be, of the copartnership

in the business, and of the share and interest now owned by each partner in the mill and plant, and in any money or further profits, if any, belonging to the firm." It will be seen, therefore, that the particular matters which are submitted to the judgment of the arbitrators, and which they are to ascertain from the books and writings of the partnership, are (1) the profits or losses of the firm; (2) the share of each partner in the mill and plant; and (3) other profits, if any, of the business. It was upon these specified matters that the arbitrators were authorized to make an award. They were not invested with authority to pass judgment upon any other matters than those designated. As these, and especially the first, were the particular matters about which the partners were unable to agree, and which were the cause of their controversy, they were the only matters that they included in the submission, or upon which they desired the judgment of the arbitrators. As an award must be consonant to the submission, it is plain, tested by the principles announced, that the award cannot be sustained. There is no attempt to decide specifically a single one of the matters submitted. The award, on its face, undertakes to state an account between the parties, which is a matter outside of the scope of the submission. The particular matters were specified which the arbitrators were to decide, and to enable them to make their findings upon them the agreement required that they should examine the books and accounts of the partnership, and ascertain and state therefrom each of such matters, so that either party desiring to purchase the interest of the other should be at liberty to do so by paying to the selling partner the value of his interest as so ascertained, determined, and stated, or if each partner should desire to purchase, rather than sell, then each should have the privilege of bidding such amount over and above the valuation, as so ascertained and determined, etc., as provided in the contract. The award of the arbitrators defeats the operation of this provision, and renders it nugatory. It is true that the award states generally that the business was conducted at a loss, but this conclusion is derived from stating an account between the partners, in order to show the indebtedness of the one to the other, by which it appears that the defendant gets the benefit of the sale of the property under execution at a loss to the firm of \$1,550. In other words, the arbitrators charge the firm with \$5,587 as the value of the mill, fixtures, and live stock, and credited the firm with the sum of \$1,037 as the surplus derived under the execution sale of the same upon the judgments aforesaid for about \$800 and costs, showing a loss of \$4,550. The injustice of this result illustrates the wisdom of the rule that the award should follow the submission. The arbitrators had nothing to do with the appraisal or estimate of the value of the mill property, but they could not state an account between the partners, and find out what one was indebted to the other, without doing so. It was the

consequence of undertaking to do what they were not authorized to do under the submission. The submission does not authorize the arbitrators to state an account between the partners. The award is not consonant to the submission. It omits to decide the particular matters which were submitted, and undertakes to decide another matter not submitted. But conceding, for the purposes of the case, that the award pursues the submission, it must cover the issues involved, to operate as a bar to the suit. An award which puts an end to the original controversy is a conclusive bar to an action on the original matter. It has the same effect as a judgment, and concludes the parties to the controversy effectually from litigating the same matters anew. It is in the nature of a judgment, and ought to be decisive; for, if it does not determine the matter, it becomes the cause of a new controversy. *Bac. Abr.* 331; *Colcord v. Fletcher*, 50 Me. 398. "The decision, if valid," says Foster, J., "is a judgment, or in the nature of a judicial decision rendered by agreement of the parties; and it is to be enforced as if the parties had agreed, without arbitration, that their rights are what the arbitrators have decided." *Truesdale v. Straw*, 58 N. H. 218. There is, and ought to be, no difference in the effect of an adjudication, as a bar to a subsequent suit for the same cause, whether it is pronounced by judges selected by the parties, or appointed by the state. "In either case," *Gardiner, C. J.*, said, "every consideration of public policy requires that, after the parties have been once fully and fairly heard, further litigation as to the same matter should cease; and no satisfactory reason can be assigned why a judgment, as an act by the law, should estop the parties, and an award, which is another name for a judgment, which the parties have expressly stipulated should be final as to the subject submitted, should not be equally conclusive." *Brazill v. Isham*, 12 N. Y. 15.

As the award may be relied upon when it is properly set up in the answer, (*Martin v. Rexroad*, 15 W. Va. 512,) it must cover the issues of the controversy, in order to operate as an estoppel. The facts alleged show that after the suit was begun for a dissolution and accounting of the partnership affairs the agreement to arbitrate was entered into, but that before the award was made the mill and plant were sold under execution, and purchased by one Conyers, and that after the award was made the plaintiff filed his supplemental complaint, in which, among other things, he alleged, in effect, that at said sheriff's sale the defendant, intending to cheat and defraud the plaintiff out of his interest in the mill property, confederated with one Conyers, and procured him to buy said property in his own name, but for the use of the defendant; that Conyers purchased the same with the money of the defendant, and held it for his use and benefit; and that thereafter Conyers, at the request of the defendant, and without any consideration, transferred the title and possession of the property to Allord, etc. The defendant, after denying all the

material allegations, set up the award, to which the demurrer was sustained, claiming that it was conclusive of the suit. It will be seen, therefore, if it be conceded that the award did follow the submission, and was intended to put an end to the original controversy, that the additional matter set up in the supplemental complaint exhibits a state of facts—presents an issue—not contemplated by the submission, nor included in the award, nor to which the award has any relevancy. The award does not meet the matters in issue between the plaintiff and defendant, even if we give it a construction not warranted by its terms, and assume that it was intended to settle the controversy out of which arose the suit, as originally brought. To give it the conclusive effect claimed, we should have to ignore the issue of fraud alleged, and render a decree for the amount found due the defendant in the award, which was ascertained in disregard of the submission. In any view, we are unable to see that any error was committed by the court below in sustaining the demurrer.

Upon the merits it is difficult, as the referee says, to arrive at a true state of the facts, owing to the incomplete manner in which the books were kept. Holding, as we think we ought, the defendant as trustee of the mill property, the question which has given us the greatest difficulty is its value. At the sheriff's sale the live stock was sold first, and then the mill and fixtures, for the price already stated. The money received for the live stock and the mill fixtures, after paying the judgment and costs, was paid over to the defendant. If the defendant be given credit for the amount for which the mill sold, and the mill and plant be considered as held by him, the question then arises, what is its value? The referee and court below valued it at \$3,500. The books show that the mill and plant cost considerable more than that sum, but the mill has been used for some time, and the live stock was perhaps not so valuable as when purchased. There is a very great disagreement among the witnesses as to the value of the mill property. It is not possible to arrive at an exact conclusion, but we think, taking all matters into consideration, that \$2,500 would be its proper valuation, and the sum with which the defendant should be charged, instead of \$3,500. The judgment will be modified accordingly.

MOORE, J., did not sit in this case.

(24 Or. 121)

#### THE VICTORIAN.

SMITH et al. v. OREGON SHORT LINE & U. N. RY. CO.

(Supreme Court of Oregon. April 27, 1893.)

NOTICE OF APPEAL—LIENS FOR BUILDING VESSELS  
—JURISDICTION OF STATE COURT—LIMITATIONS  
—RUNNING ACCOUNT.

1. In an action to enforce a lien against a vessel, where claimant, to obtain its release, files an undertaking with sureties, and judgment is rendered against claimant, notice of

claimant's appeal need not be served on the sureties, as their interests are identical with claimant's.

2. The state courts have jurisdiction to enforce, by a proceeding in rem, liens given by its laws for materials furnished in constructing domestic vessels, notwithstanding Judicial Act 1789, § 9, giving the United States district courts exclusive jurisdiction of all maritime causes of action, though such materials are furnished after the vessel is launched.

3. Under Hill's Code, § 3706, providing that such action shall be commenced within a year after the cause of action accrued, where plaintiff furnished material from time to time, as needed, and received several payments on account, all the items relate to one transaction, and constitute a continuous account, regardless of intervening balances.

4. The proper mode to test the sufficiency of a defense is by demurrer, and not by motion to strike it out as frivolous.

5. Hill's Code, § 3690, provides that every domestic vessel shall be liable to a lien for all debts due to material men for materials used in the building thereof. Held, that the material men were entitled to a lien, though the owner had paid the contractor.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by W. K. Smith, A. T. Smith, W. V. Smith, and P. C. Smith, doing business under the firm name of Smith Bros. & Co., against the boat Victorian, the Oregon Short Line & Utah Northern Railway Company, claimant, to enforce a material man's lien. From a judgment for plaintiffs, claimant appeals. Affirmed.

W. W. Cotton and Zera Snow, for appellant. E. C. Hrounagh and W. D. Fenton, for respondents.

LORD, C. J. This is an action brought by the plaintiffs against the defendant boat Victorian, under the provisions of the boat lien law, (section 3690 et seq.), to enforce a lien for materials alleged to have been furnished by the plaintiffs to one J. F. Steffen, and to have been used by him as a contractor in the construction of the defendant boat. The record discloses that the sheriff of Multnomah county seized the boat, whereupon the Oregon Short Line & Utah Northern Railway Company, as defendant and claimant, filed its undertaking as provided by section 3698 of Hill's Code, with D. P. Thompson and J. W. Troupe as sureties, and obtained its release, and thereafter appeared in the action as such defendant and claimant. After trial the court rendered a judgment against the boat Victorian, and also, under section 3701 of Hill's Code, against the defendant company and its sureties in the undertaking. From this judgment the defendant company has appealed, but neither D. P. Thompson nor J. W. Troupe have joined in the appeal, nor has it served notice of such appeal upon them, or either of them. Upon this state of the case plaintiffs have moved to dismiss the appeal, upon the ground that Thompson and Troupe are so connected in the judgment, and would be so affected by its modification or reversal, that they are as to the plaintiffs or defendants an "adverse party," within the meaning of the statute in relation to appeals, and therefore necessary parties to

give the appellate court jurisdiction to reverse or reverse it. Our Code provides that "any party to a judgment or decree . . . may appeal," and that "the party appealing is known as the 'appellant,' and the adverse party as the 'respondent.'" Section 536. "Any party" evidently refers to any person who is a party to the action. To take an appeal it is required that "the appellant shall cause a notice to be served on the adverse party, and file the original, with proof of service indorsed thereon, with the clerk." Section 537. Who, then, is "an adverse party," within the meaning of these provisions of the Code, upon whom the notice of appeal must be served? Evidently, every party whose interests in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal. Such has been declared to be the meaning of the words "adverse party," as used in the statutes of other states. *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Cotes v. Carroll*, 28 How. Pr. 436; *Hiscock v. Phelps*, 2 Lans. 106; *Wheeler v. Hartshorn*, 40 Wis. 96; *Senter v. De Bernal*, 38 Cal. 640; *Lillenthal v. Caravita*, 15 Or. 341, 15 Pac. Rep. 280. The notice must be served on all parties whose interests are adverse to the party appealing. The question, then, is whether Thompson and Troupe, who have not appealed from the judgment, are to be deemed adverse parties, so as to require them to be served with notice of the appeal. They certainly have no interests in the case which are adverse to, or in conflict with, those of the appellant. The judgment is against them and the appellant, as well as the boat, for a specific sum of money. Its modification or reversal would affect them precisely as the appellant, indicating that its and their interests are identical, and not adverse. The party interested in sustaining the judgment or decree is an adverse party to the appellant, and, as such, is entitled to notice of the appeal. Thompson and Troupe are not interested in sustaining, but in defeating, the judgment, and are not parties whose interests are in conflict with or adverse to the party appealing. "Our Code," says Sanderson, J., "allows any and every party who is aggrieved to appeal without joining any one else, no matter what may be the character of the judgment against him, whether joint or several, and in this respect works a change from the former practice; but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also." *Senter v. De Bernal*, 38 Cal. 642. Thompson and Troupe are not parties "who are interested in opposing the relief which the appellant seeks by his appeal," and therefore it is not required to notify them. When, of parties who are interested in opposing the relief sought by the appeal, some are, and others are not, served, the appeal will prove ineffectual

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when the relief sought is of such character that it cannot be granted to those served without being granted as to those not served. As Thompson and Troupe were not interested in sustaining the judgment from which the appeal is brought, they are not "an adverse party," within the meaning of the statute, and consequently are not entitled to notice of appeal.

The next objection involves the right of the court to enforce the lien by a proceeding in rem. It is founded upon the assumption that the lien sought to be enforced arose out of a maritime contract, and constituted, therefore, a maritime cause of action. By the ninth section of the judicial act of 1789 the district courts of the United States are invested with the exclusive jurisdiction of all maritime causes of action, saving to suitors in all cases the right of the common-law remedy where the common law is competent to give it. The contention is that the common-law remedy thus saved to suitors does not extend to the enforcement of liens by a proceeding in rem, and consequently that a cause of action arising out of a maritime contract belongs exclusively to the admiralty jurisdiction. The action was brought under section 3690, to enforce a lien on the boat *Victorian* for materials alleged to have been furnished and used by the contractor in the construction of such boat. The findings show that the boat was launched before it was completed, and some of such materials were furnished and used after it was launched, but before it was completed. When the action was commenced, the boat had not been enrolled or licensed, though application had been made to the proper authorities to have it enrolled and licensed under the name "*Victorian*." The lien given under our subdivision 2 of section 3690 is almost identical with that given under section 14 of the Massachusetts statute, and under either statute such lien may be enforced by a proceeding in rem. In *Atlantic Works v. The Glide*, (Mass.) 33 N. E. Rep. 163, (recently decided,) the jurisdiction of the courts of a state to enforce liens by a proceeding in rem for labor and materials furnished in repairing domestic vessels was thoroughly examined and upheld. As the court was divided, the case is especially valuable in presenting the authorities, and the reasons for and against the exercise of such jurisdiction by state courts. But we are not concerned with the validity of the jurisdiction where it is exercised to enforce a lien for labor or materials furnished in repairing domestic vessels. As Field, J., said: "We do not find it necessary to determine whether, under the existing decisions of the supreme court of the United States, and the existing admiralty rules, this court has jurisdiction to enforce a lien created by the statutes of the state for materials used or labor performed in repairing a domestic vessel." *McDonald v. The Nimbus*, 137 Mass. 363. It may be conceded that the weight of judicial authority is opposed to the exercise of such jurisdiction by the state courts in cases of that kind, without affecting the validity of its exercise in cases of this kind, unless the provisions in relation to them,

contained in the statute, are so inseparably connected that one cannot stand without the other. But this is not so. The lien given for materials furnished or labor done in repairing vessels is distinct and separate from those given for the building or construction of vessels, and a denial of the power of the court to enforce a lien in the first case in no way involves or affects the power of the court to enforce the lien in the latter. In *Sheppard v. Steele*, 43 N. Y. 56, the lien, and its enforcement in the state courts, for materials furnished in the construction of a boat, was upheld, notwithstanding previously in *The Josephine*, 39 N. Y. 19, the enforcement of a lien for supplies furnished a domestic vessel at her home port was denied, and the same statute in that regard declared to be void, upon the ground that these different matters, although contained in the same statute, were not so blended, or one so dependent on the other, as to render the whole statute inoperative or void. Nor will we assume that a statute is void in part in order to defeat a right involved under another part. We regard the act and its amendment as one statute. We test the right claimed under it by viewing the statute as a whole. We construe them together as one statute. That a statute which gives a lien upon vessels and furnishes a means of enforcing it, in cases of contracts not maritime, is valid, is not now open to question; and that contracts for the building of vessels or ships, or for labor performed or materials furnished in their construction, are not maritime contracts, and not cognizable in admiralty, is affirmed by the whole current of judicial authority, both federal and state. In *Roach v. Chapman*, 22 How. 129, the suit was brought to enforce a claim for a part of the price of machinery furnished in the construction of a steamboat, and it was held that the contract out of which the claim arose was not maritime. Mr. Justice Grier, in delivering the unanimous opinion of the court, said: "A contract for building a ship, or supplying engines, timber, or other material for her construction, is clearly not a maritime contract. Any former dicta or decisions which seem to favor a contrary doctrine were overruled by this court in *People's Ferry Co. v. Beers*, 20 How. 393." *The Belfast*, 7 Wall. 624; *Edwards v. Elliott*, 21 Wall. 553; *The Orpheus*, 2 Cliff. 29; *The Norway*, 3 Ben. 165; *Smith v. The Royal George*, 1 Woods, 293. In *The Busted*, 100 Mass. 409, under a statute like our own, Foster, J., said: "The statutes of this commonwealth, giving a lien on a ship or vessel for labor performed and materials furnished in its construction, are regarded by this court as constitutional and valid enactments, and have been recognized to be so in numerous decisions." *Sinton v. The Roberts*, 34 Ind. 448; *Sheppard v. Steele*, 43 N. Y. 52; *Thorsen v. The Martin*, 26 Wis. 488; *Scully v. Shakespear*, 75 Pa. St. 305; *Edwards v. Elliott*, 34 N. J. Law, 99. So that we reach the question which we are required to decide, holding, at least, that the statute is valid and operative in so far as it gives a lien for labor performed or materials furnished in the construction of ships or ves-

sels, and provides for its enforcement by a proceeding in rem.

The inquiry then is whether, upon the facts, the contract is maritime. If it is, the cause of action arising out of it falls within the exclusive jurisdiction of the admiralty courts. On the other hand, if the contract out of which the cause of action arose is not a maritime contract, the cause is one of which the admiralty courts have no jurisdiction. The fact that some of the materials were furnished after the boat was launched and afloat is the only circumstance that can be relied upon to class the contract as maritime. This is upon the hypothesis that the materials furnished after a boat or vessel is afloat, though for its completion, make the contract maritime, and consequently that the contract is not to be performed on land. It is true that contracts relating to commerce and navigation are classed as maritime contracts; but the simple fact that an incomplete or unfinished vessel has been launched into the water when a contract relating to her completion is made, in no way fixes or determines its character. In such case the work performed or the materials furnished is in constructing the boat or vessel, and to bring her into existence as a complete entity. There is a marked difference between furnishing materials to a vessel already in existence, or to furnish them to bring one into existence. The latter are for her construction, and the contract is not maritime. The idea is that the vessel, when completed, will be used for maritime purposes, but until then she is in the process of construction,—a structure under state control,—and a claim for materials furnished, though she may be afloat, is not maritime, but a land contract. The fact, therefore, that the work was done, or the materials were furnished, after the vessel was launched, does not per se, as the cases show, render the contract maritime. In *Willson v. Lawrence*, 82 N. Y. 411, the vessel was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as a part of and to complete the work of construction. The question was whether the furnishing of sails after launching was a land contract or purely maritime. The court held that it was a land contract, and that the lien attached. Finch, J., said: "It is doubtless true that, before launching, the contracts for construction are more easily and strongly shown to be land contracts, but no case holds that the work of building or constructing a vessel cannot proceed after the launch. Indeed, no case could hold that, for it is purely a question of fact. A vessel may be unfinished when launched, and the work of building may continue while she is in the water. \* \* \* In *Roach v. Chapman*, supra, the court held that 'a contract for building a ship, or supplying engines, timber, or other material for her construction, is clearly not a maritime contract.' If an engine is an essential part of the construction of a vessel propelled by steam, why are not the sails an essential part of the construction of a sailing vessel. Is the ship, without these necessary aids, any more built or con-

structed in the one case than the other? \* \* \* We are satisfied that the contract in this case was a land contract, and that the lien attached." In *McDonald v. Nimbus*, 137 Mass. 360, Field, J., said: "The facts show that the materials furnished in this case were furnished in the construction of the vessel. She was not so far constructed as to be fitted for sea, and used as a commercial vessel after her arrival in Gloucester." *Balsley v. The Odorilla*, 121 Pa. St. 233, 15 Atl. Rep. 521. In *The Iosco*, 1 Brown, Adm. 495, a hull completed at the place of launching received a small cargo of flour as ballast, was towed, with her spars on deck, to another port, where her masts were stepped and the vessel put in condition for navigation; and it was held that the work was done in the building of a vessel, and that admiralty has no jurisdiction. Mr. Justice Longyear said: "What libelants did and furnished was clearly by way of completing the construction of the vessel, and constituted in no sense, within the meaning of the maritime law, repairs and materials, and for which, by that law, an action in rem will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. Neither is there anything in the position of libelants' advocate that the schooner had to all intents and purposes assumed the position and liabilities of a vessel, by taking in and transporting freight on her trip from Alabaster to Bay City, and that therefore what was done and furnished to and for her at the latter place by libelants must be deemed as repairs, etc. The undisputed testimony is that the flour, etc., were taken as ballast. But, even if this were otherwise, the position could not be maintained, because it clearly appears that the vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended, and that the sole purpose of the trip was to avail her owners of the greater facilities of Bay City to complete her construction, and that the taking on of the flour, etc., was a barely incidental matter." In *The Count De Lesseps*, 17 Fed. Rep. 461, the claim was for materials, consisting of a derrick, buckets, and other dredging machinery furnished at Philadelphia, after the vessel had been towed from New Jersey, where she had been built, and to fit out the vessel for an intended voyage to Panama; and it was held that they were furnished in the original construction of the boat. *The Pacific*, 9 Fed. Rep. 124; *Collis v. Coernine*, 7 Amer. Law Reg. 5; *Smith v. The Royal George*, 1 Woods, 293; *The Norway*, 3 Ben. 163. These cases show that a claim for work done or materials furnished in the building or original construction of a vessel is not a maritime contract, and that admiralty has no jurisdiction. The claims are not maritime when they are for original construction or equipment, whether or not the boat has been launched. It is the usual mode, in the building of steamers, to build the hull, and to place the engines, boilers, and machinery in it after the launching, so as to

avoid the additional weight of the machinery in the process of launching. When the work done or the materials furnished are used in the construction of the vessel, and to bring her into existence as an entity, the claim does not arise out of a maritime contract, and it is competent for the state courts to enforce it by a proceeding in rem.

The next objection involves the statute of limitations. Section 3706 provides that "all actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action accrued." The record discloses that the defendant reserved exceptions to all evidence relating to materials furnished and used in the vessel more than a year prior to the commencement of the action. The contention is, as to such items, the cause of action accrued more than one year prior to its commencement, and therefore, within section 3706, supra, the plaintiff had no lien as to such items, or a cause of action upon them. The facts show that the plaintiff furnished the material, from time to time, as it was needed for use in the construction of the boat, and that there were several payments made on the account during the interim. The mode of dealing between the parties indicates a running account during the process of the building of the boat. Each item was added to the account at intervals, according as it was ordered and furnished, and the aggregate of items so furnished constitutes the claim, less the credits, for the materials furnished in the construction of the boat. The claim was a running account for materials which passed into the vessel permanently during the progress of its construction. All the items in the account relate to one transaction,—the building of the boat,—and constitute it a continuous account, regardless of intervening balances. In such case it seems to us that the furnishing of the materials should be deemed a continuous account, rather than as independent transactions. It is different when the various transactions are separate and independent, and there are payments of some one or more of them without regard to the others. To sustain the contention of the defendant, we must consider each item in the account as a separate and distinct transaction, constituting an independent cause of action, and necessitating its commencement against the boat, in order to save the lien, within one year after the sale of each item, notwithstanding the items in the account were for materials furnished for the same general purpose, namely, the construction of the boat, and stand related to it as one transaction. Nor do we think there is anything in *The City of Salem*, 81 Fed. Rep. 616, in conflict with this doctrine. The language of Mr. Justice Deady that "whenever a check or order of the owners was paid, under the statute giving a lien, such payment constituted a cause of action, and, unless asserted or enforced within a year, the lien is lost," indicates that he regarded such payment as a separate and distinct transaction. The statement of facts is meager, and this in-

ference is more reasonable than the other. This result is decisive of other objections that were raised under section 3706, *supra*, and eliminates their consideration from the case.

The next objection relates to errors assigned in striking out on motion portions of the second amended answer. So far as the motion went to matters already in issue by the denials in the answer, there was no error. The grounds of the motion were that the answer, in the particular specified, was sham, frivolous, and irrelevant. The provisions of the Code in reference to such motions are found in sections 75 and 85 of Hill's Compilation. Of two separate defenses contained in the answer, one is alleged as a defense, and the other as a partial defense, to the cause of action. The first was struck out, as appears from the motion, on the ground that "the matters and things therein alleged are sham, frivolous, irrelevant, and immaterial, and do not constitute a defense or counterclaim to the cause of action;" and the second was struck out for like reasons. The error complained of is that the motion was used to test the sufficiency of these defenses instead of a demurrer. Counsel for the plaintiffs concede that, if the defenses named had been separately pleaded, and had been complete in themselves, the better practice would have been to reach the objection by a demurrer. It is insisted, however, that if the defenses stricken out in the answer failed to state facts constituting a defense, partial or otherwise, the defendant claimant has sustained no prejudice, and that the proof of them could not make a defense. There can be no doubt that the object of a motion to strike out is not to perform the office of a demurrer. There are many decisions to the effect that an answer may be insufficient in form or substance without being frivolous. To be frivolous it must appear so incontrovertibly from the mere reading or bare statement. If an argument is required to show that the pleading is bad, it is not frivolous. Ryan, C. J., said: "When it needs argument to prove that an answer is frivolous, it is not frivolous, and should not be stricken out. To warrant this summary mode of disposing of the defense, the mere reading of the pleading should be sufficient to disclose, without debate and beyond doubt, that the defense is sham and irrelevant. Cottrill v. Cramer, 40 Wis. 555. So, too, it is held that, where there is a semblance of a cause of action or defense set up in the pleading, its sufficiency cannot be determined on motion to strike it out as redundant or irrelevant. In *Walter v. Fowler*, 85 N. Y. 621, it is said: "There is a semblance of a cause of action stated in the answer. Whether it was a valid counterclaim, within the Code, is a question which should be determined either by demurrer or by motion on the trial, and not by a summary motion to strike it out as redundant or irrelevant. The two remedies are not concurrent." And again: "It may very well be that this constitutes in law no defense, but the sufficiency of a defense cannot be determined on a mo-

tion to strike out a pleading. To reach such a defect is the appropriate office of a demurrer." It must be conceded, then, that the proper mode to test the sufficiency of a cause of action or defense is by demurrer. Nor is there any doubt but that the rule should be enforced, unless it is manifest that the defense, upon its face, is clearly insufficient in law, and can serve no other purpose than to delay the litigation. We are unwilling to say that the bare inspection of these defenses in the answer warrants us in declaring them to be frivolous, but we are satisfied that they are untenable, and plainly so. The motion has been treated as a demurrer, and so argued to us, and it will only unnecessarily prolong the litigation for us to delay our decision. In view of these considerations, we have concluded it is better to treat the motion as a demurrer, and pass upon the defenses with the hope that our decision may not lead to any relaxation of the proper practice in such cases.

Our statute<sup>1</sup> provides that "every boat or vessel \* \* \* constructed in this state \* \* \* shall be liable and subject to a lien \* \* \* for all debts due to persons by virtue of a contract, express or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct \* \* \* such boat or vessel, on account of labor due or materials furnished by mechanics, tradesmen, or others, in the building \* \* \* such boat or vessel." The contract of the owner with the contractor necessarily authorizes the contractor to procure materials to construct the boat. This being so, he was authorized to contract with the plaintiffs to furnish the material necessary to be used in the construction of the boat. The plaintiffs allege that they furnished materials at the instance of the contractor, which were used in the construction of the boat, and thereby acquired a lien thereon for the amount specified. The defendant seeks to defeat the lien by alleging that it was agreed between the company and Steffen by the contract that it should pay to him a certain sum therein named for all the work done and materials furnished in the construction of the hull of the steamboat, and that "such amount should be in full of all claims, of any kind whatsoever, against the hull of the said boat." It is also alleged that payments were made to the contractor as provided in the contract, and that there was nothing due him at the time of the commencement of the action. It is claimed that the allegation that it was a part of the contract that the payments so made should be in full of all claims of any kind whatsoever is fatal to the lien of the plaintiffs. The statute gives the lien upon furnishing the materials, as a means of securing payment therefor. The language is that the "boat shall be liable and subject to a lien" for a debt due the material man by virtue of a contract, express or implied, with the

<sup>1</sup>Hill's Code, § 3690.



contractor on account of materials furnished in the building of such boat. The intent of the legislature that the material man shall have a lien on the boat or vessel is plainly and definitely declared; nor is there any suggestion of implied conditions or limitations to the right of lien as thus given. Hence, as Barclay, J., well said, "We have no right to assume, without more, that the statute thereby meant to say that such a lien should only exist when the owner had not fully paid the contractor, and in no wise for more than the original contract price." *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. Rep. 868. The lien is an incident which the law attaches to the transaction, and can only be waived or discharged by an agreement or understanding to that effect on the part of the person entitled to it. In *The City of Salem*, 7 Sawy. 481, 10 Fed. Rep. 843, Mr. Justice Deady, in construing this identical statute, said: "It matters not, so far as the claims of the libelants are concerned, what controversy exists between Steffen and his contractors, or how the respondent is involved in it, whether as garnishee or otherwise. If they performed the work on the respondent's boat, as they allege they did, they have a lien thereon for its value, irrespective of the state of the accounts between him and Steffen, and are entitled to maintain this suit to establish their claim, and enforce such lien by the sale of the boat." The statute makes the boat liable to the lien of the laborer or material man, if he complies with the statute, notwithstanding the owner has paid the contractor. In *Atwood v. Williams*, 40 Me. 409, the laborer's lien was enforced, though the contractor had been previously paid. "The aim of the law," as Barclay J., said, "is to protect those whose material or labor has enhanced the value of property, against the business misfortunes or possible frauds of any middleman, at whose instance they furnished the same. It is made the interest of the owner, for the protection of his property from liens, to see that all valid debts of that nature are discharged by those who incur them. The lawmakers considered that, with the exercise of ordinary prudence, the owner would be in a better position to guard against loss under this law than subcontractors would be without the law. The owner may stipulate with the contractor to defer his payment until the time has passed for filing other liens, or to pay the subcontractors himself, or he may take security, or any other suitable steps that circumstances may require, for the protection of himself, and of those whose labor and materials enter into the building, upon its credit." *Ainslie v. Kohn*, 18 Or. 371, 19 Pac. Rep. 97; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. Rep. 354; *Lonkey v. Cook*, 15 Nev. 58; *Albright v. Smith*, (S. D.) 51 N. W. Rep. 590; *Bardwell v. Mann*, (Minn.) 48 N. W. Rep. 1120; *Lumber Co. v. McChesney*, (Wash.) 21 Pac. Rep. 198. These authorities lead to the conclusion that laborers or material men are not affected by the state of the account between the owner and contractor.

The judgment is affirmed.

(24 Or. 110)

# EXON v. DANCKE et al.

(Supreme Court of Oregon. April 27, 1898.)

BONA FIDE PURCHASERS—DEED ABSOLUTE IN FORM—RECORDING DEFEASANCE.

Hill's Ann. Laws, § 3029, provides that when a deed purports to be an absolute conveyance, but is made defeasible by a deed of defeasance, the original conveyance shall not be defeated, as against any person other than the maker of the defeasance, or his heirs, without actual notice thereof, unless such instrument shall have been recorded. Held, that the continued possession by the grantor of land was not notice of an unrecorded defeasance held by him.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Suit by Hannah C. Exon against Michael Dancke and another to declare a deed a mortgage, and for leave to redeem. From a judgment for defendants, complainant appeals. Affirmed.

Caples & Allen, for appellant. Killin & Thomas and R. S. Strahan, for respondents.

BEAN, J. This is a suit to declare a deed absolute in form a mortgage, and for leave to redeem. The facts are that on April 30, 1885, H. C. Carmack, John Kenworthy, C. C. Hall, and John S. Simmons, at the request of John Exon, the husband of plaintiff, borrowed of the First National Bank of East Portland, on their individual note, the sum of \$1,050, and delivered the same to Exon, to enable him to pay off and discharge certain indebtedness of his, then due and owing. In order to secure and save them harmless from any loss by reason of having given this note, the plaintiff and her husband made, executed, and delivered to them a warranty deed for the premises in controversy, belonging to plaintiff, and upon which there was at the time a mortgage for about \$1,200 in favor of one Percy, which deed was duly recorded in the records of the proper county. At the time of the execution and delivery of the deed, Carmack, Kenworthy, Hall, and Simmons executed and delivered to John Exon, the husband of plaintiff, a defeasance, or instrument in writing, by the terms of which they agreed that in the event of Exon's paying, or causing to be paid, their said note and interest according to its terms, all taxes assessed on the land, and in all things save them harmless by reason of making the note, they would reconvey the premises to Exon or his assigns, but this defeasance was not recorded. The plaintiff remained in the open, exclusive, and notorious possession of the premises from the date of the deed until the 27th of September, 1886, when the note to the bank not having been paid, Kenworthy and his associates sold and conveyed the property to the defendant Michael Dancke for the sum of \$2,700 in cash,—that being the best sum obtainable therefor,—and which they applied in payment of the note to the bank, the first mortgage on the property, and delivered the surplus to the plaintiff's son, for her use and benefit; and, on the 26th of the following month, Dancke took possession of the property, and has continued

to live upon and occupy the same ever since.

Assuming, but without deciding, that the conveyance from plaintiff and her husband to Kenworthy and his associates, as between themselves, was a mortgage, and not a conditional deed, we shall proceed to examine the only question we deem material in the case, and that is whether Dancke, at the time of his purchase, had notice of plaintiff's equity. By section 3029, Hill's Ann. Laws, it is provided that "when a deed purports to be an absolute conveyance, in terms, but is made or intended to be made defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected, as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded in the office for the recording of deeds and mortgages of the county where the lands lie." This statute is, in substance, found in many of the states of the Union, and the construction of the term "actual notice," as used therein, has been the subject of much judicial controversy and conflict of opinion; but we do not deem it necessary at this time to indicate our views thereon, but shall assume the true rule to be that notice, within the meaning of the statute, must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would "put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase." *Brinkman v. Jones*, 44 Wis. 499, which contains an exhaustive and able examination of the question.

From the evidence it appears that at the time Dancke purchased he had actual knowledge that plaintiff was in the open, notorious, and exclusive possession of the property; but a careful examination of the record fails to disclose that he had any knowledge or notice of her claim thereto, unless he is chargeable with notice from her possession. He made his contract for the purchase of the property in good faith, with Kenworthy, in whom he had confidence, and who represented to him that the title was good, and that he was authorized to make the sale, but did not disclose the manner in which he and his associates became the owners of the property, or that Mrs. Exon or any other person had any interest therein, or claim thereto, but assured him that the title was good, and that a deed from him and his associates would convey a perfect title. The important question in this case, then, is whether the possession by plaintiff at the time of the purchase by Dancke was sufficient to put him upon inquiry as to her equitable title, or charge him with notice of her claim to the property. As a general rule the authorities declare that open, notorious, and exclusive possession and occupation of real estate by a stranger to the title is sufficient to put a purchaser from a vendor out of possession upon inquiry as to the legal and equitable rights of

the party in possession. *Stannis v. Nicholson*, 2 Or. 332; *Bohlman v. Coffin*, 4 Or. 313; *Petrain v. Kiernan*, (Or.) 32 Pac. Rep. 158. But whether this rule applies to a purchaser from a vendee whose vendor remains in possession after having put upon record a deed conveying the title, properly executed, acknowledged, and recorded, the authorities are in conflict. In *Pell v. McElroy*, 36 Cal. 268, which is a leading case upon the subject, the court discusses the question at length, and arrives at the conclusion that the continued possession of the vendor after the conveyance of the title is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to subject the purchaser to the general rule as to the effect of notice given by possession. As a reason for this conclusion the court says: "An absolute deed divests the grantor, not only of his legal title, but right of possession, and, when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice, sound reasoning, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious, prominent, antagonistic fact of exclusive possession in the original grantor. He cannot be regarded as a purchaser in good faith who negligently or willfully closes his eyes to visible, pertinent facts, indicating adverse interest or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case." And there are other authorities which maintain this to be the correct doctrine. *Brinkman v. Jones*, 44 Wis. 499; *New v. Wheaton*, 24 Minn. 406; *Hopkins v. Garrard*, 7 B. Mon. 312; *Grimstone v. Carter*, 3 Paige, 420; *Railroad Co. v. McCullough*, 59 Ill. 166; 2 Devl. Deeds, §§ 764, 765.

But we are of the opinion that the reason, as well as the decided preponderance, of the authorities, is to the effect that a purchaser from a vendee, whose vendor remains in possession, is not bound to inquire further as to the title when he finds on record a deed from such vendor, properly conveying the title to the person from whom he is about to purchase. Any inquiry suggested by such possession is fully answered by the record, and is prosecuted sufficiently far when the examination of the record discloses a deed from the person in possession to the person who offers to sell, and who is claiming and asserting title under such deed. In Massachusetts, under a statute similar to that of this state, the supreme court has repeatedly held that the open and notorious possession by the grantor will not be sufficient to impart notice to the purchaser, of an unrecorded defeasance. *Pomroy v. Stevens*, 11 Metc. (Mass.) 244; *Hennessey v. Andrews*, 6 Cush. 170; *Newhall v. Pierce*,

5 Pick. 450; *Parker v. Osgood*, 3 Allen, 487; *Lamb v. Pierce*, 113 Mass. 72. In *Bloomer v. Henderson*, 8 Mich. 404, Mr. Justice Christianity, after adverting to the fact that open and peaceable possession by a stranger to the title is notice to the world of the possessor's legal and equitable rights, says: "But the object of the law in holding such possession constructive notice, where it has been so held, is to protect the possessor from the acts of others, who do not derive their title from him; not to protect him against his own acts; and especially against his own deed. If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world, 'Whatever right I have, or may have claimed to have, in this land, I have conveyed to my grantee; and, though I am yet in possession, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance to my grantee.' This is the natural inference to be drawn from the recorded deed, and, in the minds of all men, would be calculated to dispense with the necessity of further inquiry upon the point. All presumption of right, or claim of right, is rebutted by his own act and deed. One of the main objects of the registry law would be defeated by any other rule." So in *Van Keuren v. Railroad Co.*, 38 N. J. Law, 167, *Van Syckel, J.*, while admitting the full force of the general rule of notice by possession, declares that "this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive upon that subject. Having declared, by his conveyance, that he makes no reservation, he is estopped from setting up any secret arrangement by which his grant is impaired. The well-settled rule applies to this case,—that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey." And in *Crasen v. Swoveland*, 22 Ind. 434, under a statute identical with ours, in discussing the question now before us, the court said: "But it is claimed that, as it was found that Swoveland was in possession of the land at the time that Whitney purchased it, this was constructive notice. As a general proposition the doctrine that possession of real estate is constructive notice to all the world of the rights of the parties in possession is conceded. But the doctrine has no application to the case before us. \* \* \* Our statute on the subject of registry \* \* \* requires actual notice to defeat a purchaser, where the defeasance has not been duly recorded. Possession has never been held anything more than constructive notice. Such constructive notice does not come within the statute. This is in accordance with the authorities. Says an elementary writer: 'Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him, which is not recorded.' 1 Washb. Real Prop. p. 495, § 22." In *McCulloch v. Cowher*, 5 Watts

& S. 427, it is held that possession of land is notice of every title under which the occupant claims it, unless he has put upon record a title inconsistent with this possession. Mr. Bigelow, in his excellent work on the Law of Fraud, (page 393,) says that "the rule of notice by possession does not apply in favor of a vendor remaining in possession after an absolute conveyance, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive. Having declared by his deed that he makes no reservation, he cannot afterwards set up any secret arrangement by which his grant is impaired." In *Eylar v. Eylar*, 60 Tex. 815, the court declares that the sole office which possession performs in the matter of notice is to put a person desiring to purchase upon inquiry, and that it has no effect in determining what the inquiry shall be, or of whom it shall be made; and "if the inquiry is prosecuted to the highest source which the law of the land declares shall exist for the determination of title, and to the source which the parties have created as the highest evidence of their respective rights, can it be true that it is further necessary to examine sources inferior, and make inquiry as to whether or not there are claims, or even rights, in others, not evidenced as the law requires, or otherwise the purchaser be charged with constructive notice of secret vices in the title which he buys? To so hold, we are of the opinion, would be to strike at the very foundation of the policy upon which the registration laws rest." As bearing upon the discussion of this question, and, in effect, declaring the same rule as the authorities heretofore cited, see 16 Amer. & Eng. Enc. Law, 803; *Humphrey v. Hurd*, 29 Mich. 44; *Tuttle v. Churchman*, 74 Ind. 311; *Brophy M. Co. v. Brophy, etc.*, M. Co., 15 Nev. 101; *Scott v. Gallagher*, 14 Serg. & R. 332; *Bank v. Batty*, 30 N. J. Eq. 126; *Blugham v. Kirkland*, 34 N. J. Eq. 230; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243; *Cook v. Travis*, 20 N. Y. 400.

Upon a review of the whole case, in the light of the authorities, we are of the opinion that Dancke, in the absence of actual notice of plaintiff's equity, had a right to rely upon her deed of record to Kenworthy and his associates, and to assume that she continued in possession of the premises in subordination to the title of her vendees. He is therefore entitled to the protection of a bona fide purchaser for value, and the decree must be affirmed.

(98 Cal. 206)

PEOPLE v. SELMA IRRIGATION DIST.  
(No. 18,031.)

(Supreme Court of California. May 4, 1893.)  
IRRIGATION DISTRICT—DISSOLUTION OF CORPORATION—NONUSER.

Since St. 1887, p. 29, providing for the organization and government of irrigation districts, and for the acquisition of water and other property, makes no provision for a judicial sentence dissolving a corporation formed thereunder because of a nonuser, an action cannot be maintained to dissolve such corpora-

tion, since, in the absence of a law specially conferring it, courts are without power to dissolve a public corporation on such grounds.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Proceedings instituted by the people for the dissolution of the Selma Irrigation District, a public corporation. From an order sustaining a demurrer to the complaint, and from a judgment for defendant, the people appeal. Affirmed.

W. H. N. Hart, J. B. Campbell, and C. C. Merriam, for the People. C. C. Wright, for respondent.

DE HAVEN, J. The defendant, the Selma Irrigation District, is a corporation organized under an act of the legislature of this state entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property," etc., approved March 7, 1887, (St. 1887, p. 29;) and this action is brought by the people of the state to obtain a judgment dissolving said corporation, and excluding it from all corporate rights and franchises. The complaint alleges that since the organization of the Selma Irrigation District as a corporation three elections have been held in the district, in accordance with the provisions of the law under which it was created, for the purpose of determining whether bonds should be issued to construct necessary irrigation canals, at each of which elections a majority of the votes cast was against the issuance of bonds. It is further alleged that said corporation did not commence the transaction of its business or the construction of its works within one year from the date of its incorporation, and never has done so; but, on the contrary, has willfully failed and omitted to use the rights, privileges, powers, and franchises for which it was organized; and that, notwithstanding the failure of residents within such district to vote for the issuance of bonds, and the failure of said corporation to commence the construction of irrigation works, the salaries of the officers of such corporation and other employees still continue, and that "the money to pay such salaries and compensation has been and is being raised by assessment and levy upon the lands in said district." The superior court sustained a demurrer to this complaint, and thereupon gave judgment for the defendant, and the plaintiffs appeal.

The demurrer was properly sustained. The defendant is a public corporation, organized under a general law of the state enacted by the legislature for the purpose of promoting the general welfare. *Irrigation Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379; *Irrigation Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *Crall v. Irrigation Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *People v. Turnbull*, 93 Cal. 630, 29 Pac. Rep. 224; *In re Madera Irrigation Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 675. In the latter case this court fully considered the nature of corporations like the defendant, and we there said: "That an

irrigation district organized under the act in question becomes a public corporation is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the state. Its organization can be effected only upon the vote of the qualified electors within its boundaries. Its officers are chosen under the sanction and with the formalities required at all public elections in the state, \* \* \* and the officers, when elected, being required to execute official bonds to the state of California, approved by a judge of the superior court. \* \* \* The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is evidently the good of the public, and to promote the prosperity and welfare of the public." While it is true that irrigation districts do not possess all the municipal powers conferred upon cities and towns, still, under the law of their creation, they are vested only with public duties, and are mere agencies or auxiliaries of the state in the discharge of its sovereign power and duty of providing for the common welfare; and we see no reason why the rule in regard to the general power of the courts to decree a dissolution of such corporations should be any different from that which is applied to municipal corporations proper; and, in relation to these, Judge Dillon, in his work on *Municipal Corporations*, says: "The doctrine of a forfeiture of the right to be a corporation has also, it is believed by the author, no just or proper application to our municipal corporations. \* \* \* In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended for want of officers or of inhabitants; but dissolved, when created by an act of the legislature and once in existence, they cannot be by reason of any default or abuse of the powers conferred either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent, or pursuant to legislative provision." *Dill. Mun. Corp.* (4th Ed.) § 168. See, also, upon this point, *Welch v. Ste. Genevieve*, 1 Dill. 130. The law under which the defendant was created makes no provision for a judicial sentence dissolving a corporation formed thereunder because of a misuse of its franchise, or for a failure to accomplish the purpose of its organization, nor has our attention been called to any statute authorizing such a decree; and as, in the absence of a law

specially conferring it, the courts are without power to dissolve a public corporation for a misuser or a nonuser of corporate powers, this action cannot be maintained. Judgment affirmed.

We concur: FITZGERALD, J.; McFARLAND, J.

CLARKE v. JENNINGS. (No. 15,050.)  
(Supreme Court of California. April 28, 1893.)  
PRESUMPTION ON APPEAL—PROTEST AGAINST PUBLIC IMPROVEMENT—APPROVAL OF MAYOR.

1. The street law of 1883, (section 3,) as amended by St. 1889, p. 153, provides that a protest against a proposed street improvement by a majority of the owners in frontage on such street shall bar further proceedings, except where, among other things, the proposed work is to be done in a block lying between blocks which have already been graded, when the work shall not be stayed, unless the city council deem proper. *Held*, on appeal from a judgment declaring valid an assessment for work protested against by the majority of the frontage owners, that the supreme court would assume that the block in question was between graded blocks, in the absence of any evidence in the record to the contrary. *McDonald v. Dodge*, 31 Pac. Rep. 909, 97 Cal. —, followed.

2. Though the mayor of the city and county of San Francisco is vested with the veto power, he is not a part of the legislative department of the city government, within the meaning of the street law of 1883, (section 34,) which declares the city council to be such department; and hence, under the provision of such street law which requires a resolution of intention to make a public improvement to be approved by the mayor "or" a three-fourths vote of the council, a resolution passed by a three-fourths vote of the board of supervisors, which is the legislative department for the city, does not need the approval of the mayor. *McDonald v. Dodge*, 31 Pac. Rep. 909, 97 Cal. —, followed.

Department 1. Appeal from superior court, city and county of San Francisco; E. R. Garber, Judge.

Action by Thomas Clarke against Barbara Jennings. Judgment for plaintiff. Defendant appeals. Affirmed.

J. M. Wood, for appellant. J. C. Bates and Edward R. Taylor, for respondent.

PER CURIAM. The judgment herein is affirmed, on the authority of *McDonald v. Dodge*, 97 Cal. —, 31 Pac. Rep. 909.

(6 Wash. 166)

LOTZ v. MASON COUNTY.  
(Supreme Court of Washington. March 28, 1893.)

APPEAL—JURISDICTIONAL AMOUNT.

Where an action is brought for the recovery of a sum less than \$200, the fact that the determination of the questions presented to the court by the submitted case gives plaintiff the right to recover other claims, amounting in all to more than \$200, does not take the case out of the operation of Const. art. 4, § 4, limiting the appellate jurisdiction of the supreme court to \$200 in actions for the recovery of money or personal property.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by W. R. Lots against the county of Mason, submitted on an agreed statement of facts. From a judgment in plaintiff's favor, defendant appeals. Appeal dismissed.

The agreed statement is substantially as follows: (1) That the county attorney of Mason county, under the direction of the treasurer, brought 168 tax suits against various owners of real estate in Mason county, for the purpose of foreclosing the liens caused by the delinquency of said owners. (2) The summonses in all of said causes or suits were delivered to the sheriff of Mason county for service. (3) That said sheriff, in pursuance of the statutes, caused the publication of 108 of said summonses in the Shelton Sentinel, a weekly newspaper of general circulation, published in the town of Shelton by the plaintiff therein, the said plaintiff agreeing with the said sheriff to publish the said summonses at the rate of \$2.40 for each summons. (4) That the said plaintiff published in his said newspaper, up to and including the 24th day of September, A. D. 1892, 45 of said summonses, which, at the rate aforesaid, amounted in the aggregate to the sum of \$108. (5) That said plaintiff made proof of said publication of said summonses, and handed the same to the said sheriff, and that the said sheriff directed the said plaintiff to present his bill or claim for said publication to the commissioners of the county of Mason, (the defendant herein.) (6) That the plaintiff presented his said bill or claim for the said sum of \$108 for publishing the said number of summonses at the said rate. (7) That the said commissioners of Mason county (the defendant herein) refused to pay the said bill or claim of the plaintiff, for the reason said summonses should have been published in the official paper of Mason county, the Mason County Journal, owned and published by G. C. Angle. It is further agreed, by the parties hereto, that in pursuance of chapter 2, tit. 65, 1 Hill's Code, bids for the county printing were duly received and considered by the board of commissioners of Mason county, and the contract for said printing was awarded to the Mason County Journal; that among the bids considered and rejected was the bid of the plaintiff herein. (8) The plaintiff herein contends that the said sheriff of said county of Mason, while making service of summonses, was an officer of this court; that as said officer he was subject to the orders of this court only; that he was governed by said orders, and the statutes in such case made and provided; that said service by publication in the said Shelton Sentinel newspaper was in all respects a compliance with said orders and said statutes; that the said county commissioners had no authority or control over the said sheriff while in the execution of his duty as an officer of this court; and that the contract made by the said commissioners of said county of Mason could not bind the said sheriff while he was acting as an officer of, and in execution of the orders of, this court; and that the said county of Mason should pay the said costs of the publications of said summonses. (9) The said defendant contends

that under section 2938, 1 Hill's Code, it was the duty of the sheriff to publish said summonses in the official paper designated by the board of commissioners, to wit, the Mason County Journal, and that the plaintiff, by reason of having been a bidder for said county printing, published said summonses with full knowledge of said sheriff's duties in that regard.

C. W. Hartman, for appellant. J. E. Sligh, for respondent.

DUNBAR, C. J. Respondent moves to dismiss the appeal herein, assigning, among other reasons, the original amount in controversy, which does not exceed the sum of \$200. Section 4, art. 4, of the constitution of the state of Washington provides that the supreme court shall have appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of \$200, unless the action involves the legality of the tax, impost, assessment, toll, municipal fine, or the validity of a statute. The original amount in controversy here is less than \$200, being \$108. The action in no way involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. It is true that the determination of the questions presented to the court by the submitted case determines the right of plaintiff to recover other claims, amounting in all to more than \$200; but this action was brought for the recovery of \$108, and no judgment could have been obtained in this action for more than that sum. It seems plain, therefore, that the case falls within the constitutional limitation, and hence the appeal will be dismissed for want of jurisdiction in this court.

HOYT and SCOTT, J.J., concur.

STILES, J. I concur in the disposition of this case made by the majority of the court, but I do not desire to be understood as in any wise agreeing that the plaintiff below, at the time the agreed case was submitted, had any cause of action whatever against the county. The case recites that he had made a contract with the sheriff to publish summonses in 108 delinquent tax cases at \$2.40 each, and that he had completed the publication of but 45 of them. Not having completed his contract, he was, *prima facie*, not entitled to anything, and his claim for \$108 was properly rejected. A party cannot split a demand, and have judgment for part of it, or recover upon an entire contract for the fulfilled portion of it. Especially should no such proceeding be permitted when the effect is to deprive the other party of an appeal. But in this case the county, by its stipulation, has made it to appear that the contract was severable, and, if it has lost its appeal, no one is to blame but itself.

ANDERS, J., not sitting.

(6 Wash. 163)

PETERSON v. SMITH et al.

(Supreme Court of Washington. March 28, 1893.)

CONSTITUTIONAL LAW—CONDEMNATION FOR COUNTY ROAD—JURY TRIAL.

Laws 1890, c. 19, requiring damages to landowners from the opening of a county road to be assessed by three disinterested freeholders appointed by the board of county commissioners, is in conflict with Const. art. 1, § 16, which prohibits the taking of private property for a right of way until full compensation be first made in money, or ascertained and paid "into court" for the owner, "which compensation shall be ascertained by a jury." *Weber v. Board*, 59 Cal. 265, followed.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Petition by Harvey S. Smith and others for a change in a county road. The proposed route was declared a public highway by the county commissioners, and Peter Peterson, a landowner, appealed to the superior court from an award of \$50 damages assessed in his favor by the board of viewers. From a judgment confirming the order of the county commissioners, Peterson again appeals. Reversed.

Moore & Turner, (Jas. A. Haight, of counsel,) for appellant. Geo. A. Joiner, Pros. Atty., for respondents.

DUNBAR, C. J. This case involves the regularity of the proceedings of the county commissioners in changing a county road under the provisions of chapter 19, Laws 1890,<sup>1</sup> and also involves the constitutionality of said act, or a part thereof. The question for our consideration is, is the power to condemn land, conferred by said law above cited, consistent with the provisions of the state constitution? Section 16, art. 1, of the constitution provides in positive terms that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law." The constitution also provides that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. Under the constitutional guaranty, the owner of the

<sup>1</sup>Section 6 of this act requires the county commissioners to appoint three disinterested freeholders to assess damages accruing to landowners by the opening of a county road. Section 36 et seq. provide for appeals to the superior court, and a trial before a jury, who are required to assess damages to the landowners.

land appropriated in this case by the county could not be compelled to present a claim for damages. He can remain quiet, and be assured that, before his property is condemned, the county must ascertain his damage, and either pay it to him, or pay it into court for his benefit; and the amount of his damages must be ascertained in a court, in a proceeding instituted for that purpose, and in which the defendant can appear and make his showing, if he so desire. There is, in our judgment, no authority under the constitution for submitting the question of damages to the road viewers, to be arbitrarily passed upon by them. This question has been passed upon by the supreme court of California in *Weber v. Board*, 59 Cal. 265, under substantially the same statutes and the same constitutional provisions, and it was there held that the constitutional provision was in conflict with the statutory provision, and therefore abrogated it; the constitutional provision having been adopted after the enactment of the statute. We think that decision was right, and therefore follow it. As this view of the constitutional question involved will result in the final determination of the case, it is not necessary to pass upon the alleged informalities of the proceedings. The judgment of the lower court will be reversed, and the case remanded, with instructions to dismiss the action, with costs to appellant.

HOYT, SCOTT, STILES, and ANDERS, JJ., concur.

(6 Wash. 64)

**FIRST NAT. BANK OF ABERDEEN v. CHEHALIS COUNTY et al.**

(Supreme Court of Washington. March 8, 1893.)

**NATIONAL BANKS—TAXATION.**

1. Under Rev. St. U. S. § 5219, which authorizes the taxation of national bank shares to the owner or holder, but which empowers the legislature of each state to determine the manner and place of taxing such shares, the state has a right to resort to the bank as a garnishee for the collection of its claims against the stockholders for taxes, and the legislature may require the assessment of the stock to be made to the bank in solido.

2. Rev. St. U. S. § 5219, which prohibits the legislature of each state from taxing national bank stock at a greater rate than assessed upon the "moneyed capital" in the hands of individual citizens of the state, is intended merely to prevent moneyed capital invested in national banks from being placed at a disadvantage as compared with moneyed capital in the hands of citizens of the state, used for practically an identical purpose with that invested in the stock of national banks; and the nontaxation of credits owing to individual citizens, such as accounts, promissory notes, and mortgages, is not an unlawful discrimination against national banks whose capital is taxed.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action by the First National Bank of Aberdeen, Wash., against the county of Chehalis and James M. Carter, treasurer, to restrain the collection of taxes levied on plaintiff's capital stock. From a judg-

ment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Preston, Carr & Preston, James B. Howe, and M. J. Cochran, for appellant. James A. Haight, Asst. Atty. Gen., for respondents.

STILES, J. The appellant bank complains that the county treasurer of Chehalis county is about to levy upon the property of the bank for taxes for the year 1891 which were assessed to the bank upon its capital stock in the sum of \$50,000. The complaint shows that, although its cashier delivered to the county assessor a list of its stockholders, giving their residence, together with a statement of the amount of the capital stock of the bank held by each of its stockholders on the 1st day of April, 1891, the assessor refused to assess the stock to the holders thereof, and assessed the whole of it to the corporation in solido. The tax was levied under the revenue act of 1891, and the first point made by appellant is that an assessment of the capital stock of a national bank, made to the bank in solido, is forbidden by the provisions of Rev. St. U. S. § 5219. It seems to us, however, that this contention must be resolved against the appellant upon the authority of *National Bank v. Com.*, 9 Wall. 353. Section 5219, Rev. St. U. S., is as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed." This section, so far as the point in issue goes, is in substance the same as the forty-first section of the act of congress establishing national banks, (13 Stat. 111.) In the case cited, the state of Kentucky, many years before national banks were thought of, had the following provisions among its laws: First. That on bank stock or stock in any moneyed corporation of loan or discount there should be paid an annual tax of 50 cents on each share thereof equal to \$100, or on each \$100 of stock therelp owned by individuals, corporations, or societies. Second. The cashier of a bank and the treasurer of any other institution whose stock is taxed should, on the 1st day of July in each year, pay into the treasury the amount of tax due. If such tax were not paid, the cashier and his sureties



should be liable for the same and 20 per cent. upon the amount, and the said bank or corporation should thereby forfeit the privileges of its charter. 2 Rev. St. Ky. 1860, pp. 239, 266. Under these provisions it was held, in the case above cited, that the bank was subject to an action for the amount of the tax assessed upon the stock; the theory being that the state had the right to resort to the bank as a garnishee for the collection of its claims against the stockholders for taxes which it might otherwise be unable to collect by any means within its power. That case is unreversed, and must be taken to be conclusive authority upon the argument of the question before us. *Bank v. Fisher*, (Kan.) 26 Pac. Rep. 482, and *Miller v. Bank*, (Ohio,) 21 N. E. Rep. 860, are late cases, where, from a superficial reading of the opinions, it might be gathered that a different holding had been adopted in the supreme courts of Kansas and Ohio, but a closer reading shows that in both of those states the statute expressly provides for the assessment of the shares of stock to the owner, and contains no provision regarding payment of the tax by the bank itself. Sections 21 and 23 of our revenue law of 1891 contain substantially the same provisions as the Kentucky statute above quoted, in so far as the assessment and collection are concerned, (*Paul v. McGraw*, 3 Wash. St. 256, 28 Pac. Rep. 532;) and upon the first point, therefore, the decision must be against the appellant.

The further, and perhaps the principal, ground of appellant's action is found in the following paragraphs of its complaint: "(13) That on the 1st day of April, 1891, there existed in the county of Chehalis, state of Washington, taxable moneyed capital (other than and beyond that invested in shares of stock of national banks and banking business) owned by citizens of said state, resident in said county, and there invested in loans and securities, to them payable and owing by other citizens of said state residing in said county, of vast amount, to wit, exceeding the sum of two hundred and thirty-seven thousand four hundred dollars. (14) That on said 1st day of April, 1891, there existed in the state of Washington, in counties other than the county of Chehalis, aforesaid, other taxable capital in money and moneyed capital, (aside from the moneyed capital referred to in the paragraph immediately preceding, and aside from the capital invested in banks and banking business,) owned by citizens of the state of Washington, resident in said state, (in counties other than the county of Chehalis,) and there invested in loans and securities to them payable, and owing by other resident citizens of said state, in counties other than the county of Chehalis, of vast amount, to wit, exceeding the sum, as complainant is informed and believes, of fourteen million dollars. (15) That on the said 1st day of April, 1891, the total capitalization of national banks located in the state of Washington was the sum of seven million dollars; that the total capitalization of banks there located, but incorporated under the laws of the state of Washington, was the sum of

four million dollars; and that at the same time large amounts of moneyed capital were invested in the state of Washington by residents of said state, in the stocks and bonds of insurance, wharf, and gas companies; and, in addition to the foregoing, there then existed in said state other moneyed capital amounting to at least twenty-six million dollars, being the other moneyed capital hereinbefore referred to; that in no case, as complainant is informed and believes, and so charges the fact to be, is the stock of any national bank, or the shares of the stock of any national bank located in the state of Washington, valued for assessment for taxation in said state at a less sum or assessed upon a valuation of less than eighty-five per cent. of the par value thereof; and, further, that the total assessment and total valuation in the assessment for taxation throughout the state of Washington for the year 1891 of and upon the bonds and shares of banks, banking corporations, insurance, gas, wharf, and other corporations, was the sum of eight million two hundred and five thousand five hundred and three dollars. (16) That the facts alleged in the preceding paragraphs hereof numbered 13, 14, and 15 were then, and during all of the times intervening between the 1st day of April, 1891, and the time of the return of the several assessment rolls throughout the state of Washington by the county assessors to the county auditors, well known to the assessor of the county of Chehalis, and all other county assessors throughout the state of Washington, and during all of said times, and until the 1st day of March, 1892, were well known to the several county and state officers hereinbefore referred to, and also to the boards of equalization and boards of county commissioners and the auditor of each of the counties in said state, and since the 1st day of March, 1892, have been and now are well known to the defendant the treasurer of Chehalis county. (17) That on said 1st day of April, 1891, the entire capital, surplus, and undivided profits of complainant were invested as follows, to wit, \$12,500 in bonds of the United States, and the remainder in loans to residents of the state of Washington, furniture and fixtures. (18) That all of said other moneyed capital referred to in the foregoing paragraphs hereof numbered 13 and 14 was purposely omitted from the assessment and from taxation whatsoever by each and every of the county assessors and other taxing officers throughout the state of Washington, and the same and the whole thereof has escaped taxation throughout the state of Washington. (19) That the omission by the several county assessors and taxing officers of the several counties in said state to either assess or tax other moneyed property or capital last aforesaid was made through, under, and by reason and in pursuance of an agreement entered into prior to the 1st day of April, 1891, between the several county assessors of the several counties in said state, whereby it was agreed upon between them that such omission should be made by them and all of them; and said omission and

agreement to omit was in pursuance of an opinion rendered by the attorney general of the state of Washington to the said several county assessors at their request, advising such omission; the said attorney general being, by virtue of his office, required by the laws of the state of Washington to render such opinion upon the request of said assessors. (20) That such omission necessarily operated as a discrimination in favor of other moneyed capital in the hands of individual citizens of said state, and against shares of stock of national banking corporations located within this state, including complainant, and necessarily resulting in the taxation of the shares of such national banks, including complainant, at a greater rate than other moneyed capital in the hands of the individual citizens of said state, all of which was well known to and most wrongfully intended by said several county assessors and taxing officers, and all of which is in direct violation of and forbidden by the provisions of the Revised Statutes hereinabove specifically referred to." The substance of these allegations is: First, that there was taxable moneyed capital in Chehalis county, which escaped the assessment, amounting to \$237,400; second, that there was like unassessed moneyed capital in other portions of the state exceeding \$14,000,000; third, that the moneyed capital invested in banks, national and state, was \$11,000,000; fourth, that there was invested in the stocks and bonds of insurance, wharf, and gas companies, and other moneyed institutions, moneyed capital amounting to at least \$26,000,000.

Standing by themselves, the allegations of paragraphs 13, 14, and 15 are not sufficiently definite to enable us to ascertain therefrom the character of the institutions in which the moneyed capital which is said to be unassessed, so that we might say from a reading of the allegations there contained that this, that, or the other moneyed capital therein described was or was not assessable, or, if not assessed, that the failure to assess was a discrimination against the national banks; but it is said in the following sections that the facts stated were well known to the county assessors of the several counties in the state, and that their failure to either assess or tax the omitted moneyed property or capital was the purposed action of the assessors, brought about by an agreement made between the several county assessors in the state, whereby it was agreed between them that such omission should be made by them, and all of them, and that their agreement was caused by an opinion rendered by the attorney general of the state, advising such omission. It might be expected, therefore, that a reference to the published opinions of the attorney general would afford some description of the property by him advised to be omitted from the assessment rolls. While it is outside of the record in this case, it is altogether probable that the opinion of the attorney general of February 5, 1891, addressed to Hon. T. M. Reed, state auditor, (Op. Attys. Gen. 1891, p. 59,) contains the

advice referred to. The question answered by the attorney general was, "Are credits or mortgages taxable under the law of March 9, 1891?" and the answer is in the negative. Mortgages are easily enough understood, but when the term "credits" is used a much larger class of property is meant. In this opinion, however, the writer evidently refers to mere debts due from one person to another, and the example which he gives and refers to most frequently is a promissory note secured by a real or chattel mortgage, or solvent signers, and there was no reference to the credits of banks, bankers, brokers, or stock jobbers, or bonds or stock other than bank stock, or shares of bank stock, or shares of banking, wharfage, gas, water, or insurance companies. Accounts, promissory notes, and mortgages constitute the subject-matter of the opinion. If, therefore, the action of the assessors was based upon this decision of the law officer of the state, and went no further, the allegations of the complaint would certainly turn out to be unsupported. The requirement of the federal statute that the taxation of national banks was not to be at a greater rate than is assessed to other moneyed capital in the hands of individual citizens of such state, has received frequent attention of the supreme court of the United States, and its construction seems to be at last reasonably settled. The paramount question has been, what is moneyed capital, within the meaning of the statute? Every person who uses money in the prosecution of any business must necessarily be said to have a moneyed capital. But it is not every such capital that is within the terms of this statute. The purpose of congress in making the provision referred to, as defined by the supreme court of the United States, was merely that the moneyed capital invested in national banks should not be placed at a disadvantage as compared with moneyed capital in the hands of individual citizens of the state, and which is used for practically an identical purpose with that invested in the shares of national banks.

The latest case, in which the subject in discussion was treated with great elaboration, is that of *Mercantile Bank v. City of New York*, 121 U. S. 133, 7 Sup. Ct. Rep. 826, and from that case we quote the following as showing the view taken by the federal court as to what is to be understood by the term "other moneyed capital." The court said: "The main purpose of congress in fixing limits to state taxation on investments in the shares of national banks was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy. Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' re-

quires that. If bank shares were not moneyed capital, the word 'other,' in this connection, would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation; but the property of the corporation, which constitutes its invested capital, may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling 'moneyed capital,' and its business may not consist in any kind of dealing in money or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the states may choose to tax such corporations as those just mentioned or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that congress intended, in respect to these matters, to interfere with the power and policy of the states. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it, in the eyes of this statute, 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of congress. That the words of the law must be so limited appears from another consideration: they do not embrace any moneyed capital, in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individual moneyed capital in their hands, as in the

case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital. The terms of the act of congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as 'personal property.' \* \* \* This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy." In *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324, the court said: "We have also held that because a state statute does not provide for the taxation of shares in corporations other than banks it does not follow that the tax on moneyed capital invested in bank shares is at a greater rate than that of the moneyed capital on individual citizens invested in other corporations; nor are the shareholders in national banks discriminated against because the taxation of such other corporations is arrived at under a separate system;" citing *Mercantile Bank v. City of New York*, supra. And in *Talbott v. Silver Bow Co.*, 139 U. S. 438, 11 Sup. Ct. Rep. 594, where the question was whether, because the capital stock of certain mining and other corporations in the territory of Montana were not taxed, the shares of a national bank could be assessed to the owner thereof, the court quoted from its opinion in *Mercantile Bank v. City of New York* as follows: "The term 'moneyed capital,' as used in the Revised Statutes, (§ 5219,) respecting state taxation of shares in national banks, embraces capital employed in national banks and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money,—as in banking, as that business is defined in the opinion of the court."

The allegations of this complaint nowhere show that any moneyed capital of the character defined by the federal supreme court was omitted or intended to be omitted by the assessors; or, if the intention of the complaint be to cover any such existing cases, the allegations are so general and indefinite that they could not be made the basis of individual ac-

tion. In order to make out a case for the interference of the courts it must appear that, either by reason of the law or through the action of the assessors, some considerable moneyed capital, which is employed by individuals in the business of making profit by the use of their moneyed capital as money, is permitted to escape taxation. The nontaxation of what are termed "credits" in the opinion of the attorney general alluded to would not suffice. Judgment affirmed.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur.

(6 Wash. 98)

KLOSTERMAN v. VADER et al.

(Supreme Court of Washington. March 10, 1893.)

FRAUDULENT CONVEYANCES—ASSIGNMENT OF LEASE.

As against a lessee's creditors, a small consideration is sufficient to support the assignment of a lease of wild and unimproved land with an annual rent reserved, in the absence of any showing that the use of the leased premises is of any greater value than the rent.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by John Klosterman against Charles Vader, R. C. Hull, and E. A. Terrell to set aside an assignment of a lease made by defendant Vader to his codefendants, alleged to have been in fraud of plaintiff's rights as a creditor of Vader. From a judgment in defendants' favor, plaintiff appeals. Affirmed.

The consideration for the assignment was alleged to be a pre-existing debt of Vader to E. A. Terrell, who was his sister, and a previous oral promise by Vader to Hull to assign him a half interest in the leased premises if he would go on the land and work it.

Allen & Powell, for appellant. Sherwood F. Gorham, for respondents.

HOYT, J. This action was brought to set aside an assignment of a lease on the ground that the same was made in fraud of the rights of the plaintiff as a creditor of the assignor. The lease assigned was for land in a wild state, with an annual rent reserved. There was no proof tending in any manner to show that the use of the leased premises was of any greater value than the rent to be paid therefor from year to year; in other words, the proofs did not show that the lease which was assigned was of any value whatever. Such being the fact, it is doubtful whether the court would aid plaintiff in reducing it to his possession. It would seem that, before a creditor could ask the interposition of a court of equity, he must show that by its aid he can obtain something which will be of some value in his hands. Whether or not this be so as a matter of law, it is clear that, until it was shown that the lease was of some value, a small consideration would support its assignment. Upon the trial the court below found, as a matter of fact, that the assign-

ment was made upon a valuable consideration sufficient to support it. We have examined the proofs, and are satisfied that this finding of the court was warranted. There are some features of such proofs which are open to criticism, but taking them all together, and considering the fact that the lease was made by a sister to a brother, and was of wild land which, until it had been improved by the labor of the lessee, would have little or no rental value, we think that they can all be harmonized and made consistent with the fact that the assignment was executed in the best of faith, and for a consideration not disproportionate to the value of the lease.

The judgment must be affirmed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

(6 Wash. 96)

WOOD v. NICHOLS et al.

(Supreme Court of Washington. March 10, 1893.)

VENDOR AND PURCHASER—RESCISSION—RECONVEYANCE—TENDER.

A vendor who seeks to obtain a reconveyance of land on the ground of misrepresentation or mistake must tender the full consideration received by him, and the fact that he paid a commission to his agent for negotiating the sale does not entitle him to deduct the amount of such commission from the sum tendered.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by Joseph B. Wood against H. P. Nichols and Spiro Bisazza to obtain a reconveyance of land sold. From a judgment for defendants, plaintiff appeals. Affirmed.

C. W. Hartman, for appellant. Geo. D. Blake, for respondents.

SCOTT, J. The plaintiff and appellant was the owner of certain land in Mason county, and he employed the respondent Nichols, a real-estate agent, to negotiate a sale thereof for him. Some time thereafter Nichols, as is claimed by appellant, informed him that Bisazza, one of the respondents, owned four lots in Galligher's addition to Olympia which he would give, with \$300 in money, for appellant's land, and appellant claims a trade was negotiated upon that basis. It does not appear that either of the respondents had seen said lots, or knew anything definitely as to their value or their situation. A deed from respondent Bisazza of four lots was submitted to appellant, and the same were therein described as being in Galligher's addition to Brighton Park. The appellant found some fault with the deed in this particular, and also for the further reason that, according to a map which was inspected at the time, it appeared that there were two additions, platted at different times, and known, respectively, as Galligher's First and Second additions to Olympia. Galligher's addition to Brighton Park was a separate plat, without the city limits, and was not shown upon the map inspected. Some

conference was had at that time between appellant and respondents and other parties with reference to the location of said lots, and appellant claimed it was represented to him that said lots were in Gallagher's first addition to Olympia, and the trade was consummated. Some time thereafter, appellant undertook to locate said lots, and found them, as he claimed, situated in a lake about 100 rods long and 75 or 80 rods wide, said lots being about 200 feet from the shore of said lake, and covered with water from 10 to 20 feet deep, and that, in consequence thereof, the same were worthless; and he brought this action to obtain a reconveyance of the lands that he had deeded to the respondent Bisazza therefor. No tender was made, before the action was commenced, of the moneys which appellant had received from said Bisazza, nor was any deed tendered to him of the lots in question. After the institution of the suit, at the commencement of the trial, appellant made a tender of a deed to said lots and the sum of \$200 in money. It appears, and is conceded, that Bisazza paid \$300 in money,—\$200 of it to appellant personally, and \$100 to Nichols, who was authorized to receive the same by appellant. Nichols retained this \$100 as his commission, but appellant claimed that he (appellant) was entitled to \$50 of said \$100. At the conclusion of his case, upon a motion therefor by respondents, the court dismissed the action.

It appears from the testimony introduced that the location of said lots was misrepresented to appellant at the time of said sale; and he claims that such misrepresentations were fraudulent, and that in any event he is entitled to recover, whether fraudulent or not, the parties having been mistaken as to the location of said lots. The lower court found that appellant had not made out a case in this particular, and it also found that he could not recover in consequence of his not having tendered the sum of \$300, with a deed to the lots, to the respondent Bisazza. Upon this last ground, at least, the decision of the lower court must be sustained. At no time did appellant offer to pay to Bisazza the sum of \$300, but he proceeded upon the theory that, as \$200 was the only money he had received individually, it was all he was called upon to refund. It is conceded, however, that Nichols was his agent in the premises, and that the commission for negotiating said sale was due from him to Nichols. Under the circumstances, appellant was in no position to maintain the suit, and the court properly dismissed it. Affirmed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

(6 Wash. 109)

#### DIETZ v. WINEHILL.

(Supreme Court of Washington. March 10, 1893.)

#### RECOVERY OF MONEY PAID BY TENANT—COMMUNITY PROPERTY.

1. A joint lessee of land, who has advanced money to the landlord on account of

the lease, cannot recover such money in an action against the landlord, based on his breach of the conditions in the lease, without joining his cotenant, since the landlord is entitled to have the rights of all the parties to the contract litigated in one suit.

2. Failure of a wife to join her husband in a lease of community land does not render the lease void, so as to enable the lessee to disregard it, and recover from the husband moneys paid on account of such lease, though the lessee never took possession of the premises. *Isaacs v. Holland*, (Wash.) 29 Pac. Rep. 976, followed.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Charles Dietz against Gustave Winehill to recover money paid to defendant on account of a lease made by defendant to plaintiff and one H. F. Heuss jointly. From a judgment in plaintiff's favor, defendant appeals. Reversed.

Burleigh, Gamble & Burleigh, for appellant. P. C. Ellsworth, (Vince H. Faben, of counsel,) for respondent.

DUNBAR, C. J. The respondent and H. F. Heuss jointly entered into a written indenture of agreement with the appellant, by which they leased of appellant certain premises in the city of Seattle. The lease, by its terms, was to commence in the future. The contract was made June 16, 1890, and the lease was to begin October 1, 1890. In part performance of the conditions of the lease, respondent gave to appellant a check for \$500, payable on demand, and respondent and Heuss jointly executed a duebill for the remaining \$625, payable on demand. Under our view of the law, it is not necessary to discuss or state the reasons which led to the breaking of the contract upon either side. Respondent brought his individual action for the recovery of the money paid, ignoring the lease, and not making Heuss a party to the action. When plaintiff rested his case, the defendant moved for a nonsuit, which the court refused to grant. The evidence of the plaintiff plainly shows that the respondent and Heuss jointly executed the lease, and made themselves jointly responsible for the payment of the lease money. It may be true, as claimed by the respondent, that Heuss has no interest in the \$500 which had been paid by respondent; but the action being brought on their joint contract, and for a breach of the same, Heuss becomes a party interested, and the appellant has a right to have the rights of all the parties to the contract litigated in one suit. If the complaint cannot be construed to be an action for a breach of the contract, but is, as asserted by respondent, simply for the recovery of the money paid, ignoring and disregarding the contract of lease, then there is a fatal variance between the allegations and the proof, and the case falls squarely within the rule laid down by this court in *Distler v. Dabney*, 3 Wash. St. 200.<sup>1</sup> It is contended by the respondent that the suit could not have been brought on the lease contract, for the reason that the lessor who made and executed the lease was, at the

time of its execution, married, and that the wife was not made a party to the lease, did not execute the same, and it was therefore void, and would not sustain an action. Even if it were true that the action cannot be based upon a contract for the lease or sale of community real estate where the wife did not join, it does not follow that it would relieve the respondent from the obligation imposed by the statute to state the facts constituting his cause of action. This court, however, in the case of *Isaacs v. Holland*, (Wash.) 29 Pac. Rep. 976, where a lease was executed of community land by the husband only, held that the lease was not void, and that the lessees could not avoid the performance of the lease upon their part, and abandon the premises, and resist the payment of rent, without first giving the lessors an opportunity to execute to them a valid lease. The same principle was followed by us in *Colcord v. Leddy*, 4 Wash. 791, 31 Pac. Rep. 320, and in *Hunt v. Stearns*, 5 Wash. —, 31 Pac. Rep. 468. The judgment will be reversed, and the cause remanded, with instructions to grant the motion for a nonsuit asked by appellant.

ANDERS, STILES, and HOYT, JJ., concur.

(6 Wash. 114)

ROCHESTER et al. v. YESLER'S ESTATE et al.

(Supreme Court of Washington. March 14, 1893.)

SPECIFIC PERFORMANCE—INDEFINITE CONTRACT.

Where a written contract to convey 10 acres of land, conditioned upon the construction of a cable road by the vendee, fails to specify any particular land, specific performance will not be decreed, in the absence of evidence that the vendee, before the death of the vendor, took possession of the land intended to be conveyed.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action for specific performance by Junius Rochester and Carrie A. Rochester against the estate of Sarah B. Yesler, Freeman P. Kirkendall, and others. From a judgment for petitioners, Freeman P. Kirkendall and others appeal. Reversed.

Greene & Turner, for appellants. Thompson, Edsen & Humphries, for respondents.

DUNBAR, C. J. This action is based on the following contract: "Seattle, W. T., July 30, 1887. Whereas, J. B. Metcalfe and his associates propose to construct a cable road along through the line of Mill, Main, or Jackson streets, in Seattle, W. T., and to run cars thereon, and to otherwise equip and operate said road, which shall run from, at, or near the Elliott bay to Lake Washington, along the line of one of said streets: Now, therefore, we, the undersigned property holders, hereby subscribe and donate to said enterprise property as set opposite our names; contracts to convey said property to be given, conditioned upon the construction of the

road; and deeds to same, whenever the said road shall be completed. H. L. Yesler, ten acres on Lake Washington. S. B. Yesler, ten acres, (10.) J. B. Metcalfe,"—and is brought against the estate of Sarah B. Yesler, deceased, by the grantees of J. B. Metcalfe and his associates, to compel the execution of a deed to the petitioner Carrie A. Rochester by the administrator of the estate of Sarah B. Yesler, deceased, and praying that her title be quieted as against the estate and the heirs of the said Sarah B. Yesler, deceased. On the trial of the cause the court decreed that Carrie A. Rochester was entitled to a deed of conveyance, to be executed in due form by defendant J. D. Lowman, administrator of the estate of Sarah B. Yesler, deceased, for the lands described in the complaint, and that Lowman, as such administrator, execute such deed. It is contended by the appellants (1) that no jurisdiction existed in the superior court, on such a petition, to render the decree it did upon the evidence, for the reason that the powers of the court upon such a petition were statutory, special, and limited, and confined to the case and procedure specified in the statute; (2) that, even if the court did have jurisdiction under the petition, the petitioners were not entitled to specific performance upon the evidence.

The view we take of the last proposition renders unnecessary a discussion of the first. It will be seen by reference to the alleged contract of July 30, 1887, that it does not constitute a written contract to convey any particular land. It is too indefinite to convey anything, and resort must be had to oral testimony to make any contract. The testimony as to what land Mrs. Yesler intended or promised to convey at that time is exclusively oral testimony. The map spoken of by Metcalfe is not in evidence. It is not referred to in any way in the written agreement, and all the testimony concerning it is oral. We think it will be conceded that this contract falls within the statute of frauds, and therefore cannot be enforced unless it is relieved by possession, and we have looked through the records in vain for any evidence of possession prior to the death of Mrs. Yesler. It is no doubt true that possession was taken of the land by Metcalfe and his associates, and that valuable improvements were placed thereon after Mrs. Yesler's death; but such possession is not sufficient to bind Mrs. Yesler, and therefore to bind her estate. There must have been possession before her death, and there must have been such a contract that under its conditions a court of equity could have decreed a specific performance against Mrs. Yesler. There was no such contract in existence at the time of her death, and none could grow into existence after her death, to bind her estate. The very terms of the memorandum show that, whatever undescribed land it was that she intended to convey, it was only to be conveyed upon conditions to be performed, and that no possession or any other right was granted at the time. There is no testimony whatever tending to show that there was any attempt to take possession of the land until after

Mrs. Yesler's death. On the subject of possession and improvement, Junius Rochester testified as follows: "Question. When was the railroad completed? Answer. In September, 1888. Q. You think the clearing was commenced some time in 1888? A. Yes; I think, towards the first of the year." Metcalfe, who was the man who made the alleged contract with Mrs. Yesler, who was the organizer of the company, and who was the principal witness in this case, testified as follows: "Question. What was done with reference to taking possession of this ten acres of ground, and improving it, if anything? Answer. Well, all that part of it, I am not as familiar with as a number of others; but I know that there was clearing of the land, soon after, commenced, about the time if I recollect right, or between the time of the beginning of the construction and the completion of the road." This is all the testimony there is as to the time when possession was taken, and improvement commenced. This testimony shows that such improvements were made, and possession taken for the purpose of making improvements, between the commencement and finishing of the road, and further shows that the road was not commenced until the early part of the year 1888. But Mrs. Yesler's death occurred August 28, 1887, so that it is plain that no possession was taken of the land in dispute, and no improvements made thereon, until several months subsequent to her death. The judgment will therefore be reversed, and the cause dismissed.

HOYT, STILES, and SCOTT, JJ., concur.

(6 Wash. 101)

**SEATTLE GAS & ELECTRIC LIGHT & MOTOR CO. v. CITY OF SEATTLE.**

(Supreme Court of Washington. March 10, 1893.)

**WEIGHT OF EVIDENCE—REVIEW ON APPEAL—INSTRUCTIONS.**

1. If instructions, considered as a whole, fairly state the law, they are not erroneous, though detached portions thereof are technically incorrect.

2. In an action against a city for damages occasioned by a change of grade, an instruction that the opinion of any witness as to plaintiff's damages was not binding on the jury appeared in the record, followed by a period, and the succeeding words: "If the evidence shows that the opinion of the witness is based upon speculative, remote, or contingent damages which may arise in the future by reason of some additional improvements placed upon said premises, or if the proof of said witnesses shows that their opinion is based, either wholly or in part, upon some imaginary loss that might occur in the future, or is based upon a state of facts which might or might not occur in the future." Held, that the words quoted qualified the prior part of the instruction.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by the Seattle Gas & Electric Light & Motor Company against the city of Seattle to recover damages done to plaintiff's gas plant by a change of grade

in certain streets of defendant. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Blaine & De Vries, (E. C. Hughes, of counsel.) for appellant. Geo. Donworth and James B. Howe, for respondent.

DUNBAR, C. J. In this case it is strenuously insisted that the verdict of the jury is against the evidence. A large claim for damages is made, and the jury found that no damages had been sustained. The testimony is exceedingly voluminous, but we have thoroughly examined it in detail, and from such examination, especially considering the fact that the jury examined the premises and the property alleged to be damaged, we do not think the testimony presents that undisputed proof of damages which would justify this court in disturbing the verdict of the jury. And after a careful examination of the authorities cited by both appellant and respondent, without particularizing or reviewing such authorities here, we are satisfied that, while detached expressions in the court's charge to the jury, if considered as independent expressions, might possibly be technically erroneous, yet the instructions as a whole, and considered together, fairly state the law, and we are satisfied that the jury were in no wise misled by such instructions.

The instructions are very lengthy, but it seems to us that every element of damage which the plaintiff was entitled to recover could have been properly considered by the jury under the instructions given. Stress is laid by the appellant upon the following alleged instruction: "You are further instructed that the mere opinion of any witness who has testified in this case that in his opinion the damages which plaintiff has or will suffer by reason of said change of grade consists of and was of a given or named amount, such opinion as to the amount of damages is not binding upon you in any wise as to the amount of damages which plaintiff has sustained, if any damage it has sustained whatever." And, of course, if the court had given any such instruction, some question might be raised as to its soundness. But no such instruction was given as an independent proposition, as made to appear by appellant's brief, but the language above quoted was followed by the following qualifying words, viz.: "If the evidence shows that the opinion of the witness or witnesses is based upon speculative, remote, or contingent damages which may arise in the future by reason of some additional improvements placed upon said premises, or if the proof of said witnesses shows that their opinion is based either wholly or in part upon some imaginary loss that might occur in the future, or is based upon a state of facts which might or might not occur in the future." It is true that a period occurs after the word "whatever," the last word quoted by appellant, instead of a comma, as there should be; but the latter part of the paragraph would be entirely meaningless and senseless except as a condition to the first



part, and a glance at the record so plainly shows that the latter part of the paragraph qualifies the first part that the criticism scarcely merits a notice. Believing that there was no error by the court, either in giving or refusing instructions, and that the case was fairly submitted to the jury, who are the sole judges of the credibility of the witnesses and the weight of the testimony, the verdict must stand.

The judgment is therefore affirmed.

ANDERS, HOYT, SCOTT, and STILES, JJ., concur.

(6 Wash. 118)

BOWMAN v. MCGREGOR et al.

(Supreme Court of Washington. March 16, 1893.)

JUDGMENT IN REPLEVIN—ENJOINING ENFORCEMENT—REMEDY BY APPEAL.

1. Where judgment is rendered for defendant in replevin for a return of the property or the value thereof, the facts that the property belonged to a firm of which plaintiff was a partner, and that plaintiff cannot return the property because he has appropriated it to the use of the firm, furnish no ground for enjoining the enforcement of the judgment.

2. The facts that defendant had only a special property in the goods taken from him, and that the amount thereof was not shown in the replevin suit, do not justify granting the injunction, since plaintiff's remedy was by appeal.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by C. C. Bowman against H. J. McGregor, W. B. Gould, as the sheriff of Clallam county, and the Puget Mill Company. From a judgment for plaintiff, W. B. Gould and the Puget Mill Company appeal. Reversed.

Struve & McMicken. L. M. Lane, and James Klefer, for appellants. Benton Embree, for respondent.

HOYT, J. By this action plaintiff sought to enjoin the enforcement of a judgment rendered against him in an action of replevin in which he, as plaintiff, had been defeated after a trial upon the merits. There was no allegation in the complaint that such judgment was rendered by reason of any fraudulent representations on the part of the defendant therein, nor of any mistake of facts on the part of the plaintiff. There was an allegation that the property taken by the plaintiff in such replevin suit was not the property of the defendant, but was the property of a certain partnership of which the plaintiff was a member, which had been levied upon by the defendant under an execution issued upon a judgment against the other partner in said firm. Said complaint further alleged that such partnership was insolvent at the time of such levy, and that the plaintiff was unable to return the property taken from the defendant in said replevin suit, for the reason that he had appropriated it to the uses of said partnership. These were substantially all the allegations tending to show any reason why the judgment at law should not be

enforced. In our opinion they were insufficient for that purpose. It is a well-settled principle relating to the action of replevin that the fact that the property taken is that of a person not a party to the action is no sufficient reason why there should not be a judgment in favor of the defendant for the return thereof, or for its value, if a return cannot be had. This being the established rule as to such actions, it follows that, under the allegations in this complaint, the judgment for the defendant for a return of the property or its value was properly entered; and, as there was no allegation of any such change of circumstances since such entry as would warrant the interference of a court of equity, we are unable to see any reason why it should be allowed to interfere to prevent the enforcement of such judgment.

There is a suggestion in the brief of respondent that the proof in the replevin suit showed that the defendant had only a special property in the goods taken, and that the amount thereof was not shown, and that for that reason the judgment in replevin was erroneous. However true this suggestion might be, it could afford no ground for the interference of a court of equity. If such judgment was erroneous, plaintiff should have sought relief against the same by appeal, and, having failed to do so, he cannot obtain such relief by a bill in equity.

So far as we can see, the facts alleged in this complaint simply show an ordinary case of the failure of the plaintiff to maintain the right to the possession of property which he has taken in replevin, and that, as a result of such failure, a judgment has been properly entered against him for the value of the property. The complication as between the plaintiff and the other member of the partnership, while in some sense tending to show the existence of facts involving other principles than those above stated, does not, in our opinion, when carefully considered, take the case out of the general rule. The defendant, as sheriff, is responsible to the partnership for the property, and not to the individual partner who brings this action, and the plaintiff, as an individual member of such partnership, cannot, in the indirect method which he has sought, assert the rights of the partnership to the property against the claims of such defendant. If he were allowed thus to do, it would force the defendant to participate in the adjudication of the partnership affairs at the instance of a single partner, without the intervention of the other, or of the creditors of the firm, who, under the allegations of the complaint, would be more interested in the result than any one else. The plaintiff wrongfully sued out the writ of replevin, and, having done so, he must answer to the defendant for the property thus wrongfully taken possession of. As to what the rights of the firm are as against such defendant, we are not now called upon to adjudicate. We are unable to see any reason why equity should interfere with the enforcement of the judgment in the replevin suit. It follows that the judgment rendered in the court below must be reversed, and the

cause remanded, with instructions to sustain the demurrer to the complaint.

DUNBAR, C. J., and STILES, J., concur.

(6 Wash. 297)

**KIRBY v. COLLINS.**

(Supreme Court of Washington. March 18, 1893.)

**RECORD ON APPEAL—JUDGE'S CERTIFICATE—DISMISSAL OF APPEAL.**

Where the court's certificate to a statement of facts on appeal does not show that the statement contains all the material facts, the statement will be stricken out, and the appeal dismissed.

Appeal from superior court, Jefferson county; Morris B. Sachs, Judge.

Action by Brandon Kirby against Emma N. Collins. From the judgment, plaintiff appeals. Appeal dismissed.

Geo. W. Tyler, for appellant. Smith & Felger, for respondent.

**PER CURIAM.** Respondent moves to strike the statement of facts from the files and record herein, and to dismiss the appeal, for the reason that the said statement of facts was not properly certified by the trial court. It does not appear from the certificate to the statement of facts in this case that the said statement contains all the material facts in the said cause. On the authority of *Enos v. Wilcox*, 8 Wash. St. 44, 28 Pac. Rep. 364, *Cadwell v. Bank*, 3 Wash. St. 188, 28 Pac. Rep. 365, and an unbroken line of decisions of this court, the motion will be sustained, the statement stricken, and the appeal dismissed.

(6 Wash. 296)

**FIRST NAT. BANK OF MT. VERNON v. McLEAN et al.**

(Supreme Court of Washington. March 18, 1893.)

**NOTICE OF APPEAL—DISMISSAL.**

Where the appellant gives the respondent no notice of appeal, oral or written, the appeal will be dismissed.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action on a promissory note by the First National Bank of Mt. Vernon against John McLean and J. B. Wiley. From a judgment for plaintiff, defendant Wiley appeals. Appeal dismissed.

Million & Houser, for appellant. H. A. McLean and Fishback, Elder & Hardin, for respondent.

**PER CURIAM.** Respondent moves to dismiss the appeal in this case for the reason that no notice of appeal was given according to law, or at all; and it appearing from the record that no notice of appeal, either oral or written, was given to respondent by appellant in this action, the motion must prevail, and the appeal be dismissed, with costs to respondent.

(6 Wash. 131)

**BELLES v. CARROLL et al.**

(Supreme Court of Washington. March 23, 1893.)

**APPEAL—REVIEW—JUDGMENT BY DEFAULT.**

On appeal the supreme court will not consider the question whether a default judgment was in fact irregularly entered, in the absence of a motion in the court below to set it aside.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Peter Belles against William Carroll and others to foreclose a mortgage. Judgment by default was entered against defendants, and they appeal. Appeal dismissed.

J. F. Ramage, for appellants. H. G. Rowland, for respondent.

**HOYT, J.** Appellants by this appeal seek to reverse a judgment alleged to have been irregularly entered against them as upon their default. The record shows that no motion was made in the court below to set aside the judgment, and, such being the case, this court will not enter into an investigation of the merits of the question as to whether or not such judgment was in fact irregularly entered, as in our opinion the appellants should have sought a remedy against such judgment, by motion or otherwise, in the court below, before coming here. As we refuse to enter into an investigation of the merits, we shall not affirm the judgment of the court below, but will simply dismiss the appeal, so that the rights of the appellants to move against the judgment in the lower court shall not be interfered with.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

(6 Wash. 156)

**ROBERTSON v. WOOLLEY et al.**

(Supreme Court of Washington. March 25, 1893.)

**CONTINUANCE—ABSENCE OF PARTY FROM STATE.**

Where defendants are guilty of no unreasonable delay in filing their answers, their motion, made before the cause is set for trial, for a continuance to the next term of court, will be granted, upon affidavits showing that the principal defendant—the manager of the business out of which the suit grew, and the person with whom all the transactions were had—is necessarily, but only temporarily, absent from the state.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by W. B. Robertson against P. A. Woolley and another. From a judgment for plaintiff, defendants appeal. Reversed.

Metcalfe, Little & Jurey, for appellants. Sinclair & Smith, for respondent.

**STILES, J.** We are wholly unable to see why the appellants should not have had a continuance of this case. Their answers were placed on file, without any un-

reasonable delay, about May 25, 1892, and thereupon the respondent demurred to them, and the demurrer was, on June 7th, sustained as to the second affirmative defense only. Leave was given to plead further upon payment of all accrued costs, and on June 15th an amended answer was filed, to which respondents replied the next day. Appellants then immediately, and before the cause was set for trial, moved for a continuance of the cause to the next regular session of the court, upon affidavits showing that the principal defendant—the manager of the business out of which the suit grew, and the person with whom all of the transactions were had—was necessarily, but only temporarily, absent in another state; but the court denied the motion, and, without any cause being shown for the unusual proceeding, ordered the trial to begin immediately. Necessarily, therefore, the appellants did not have a fair trial. It is not necessary that a party to an action should be in court with his witnesses, ready for trial, on the instant that the cause is at issue. Until the issues are determined, he cannot know what proof will be needed; and in every case such reasonable time after the pleadings are on file should be given the parties as will enable them to make proper preparation. It is useless to appeal to the rule that this court does not interfere with the exercise of the discretion of the superior courts. Time to prepare for trial is a matter of right as much as time to plead, and cannot be taken away under any principle of justice. Reference is made to a rule of the superior courts which would have postponed the trial of this cause without any motion; but the rule is not in the record, and we do not base our action, to any extent, upon it.

DUNBAR, C. J., and HOYT, J., concur.

(6 Wash. 154)

SCHWABACHER BROS. & CO. v. VAN REYPEN et al.

(Supreme Court of Washington. March 25, 1893.)

COMMUNITY PROPERTY — MORTGAGE BY HUSBAND.

1. A mortgage on community property, executed by a man living separate from his wife, and holding himself out as unmarried, is valid, unless the mortgagee knew that the mortgagor was a married man, or had such knowledge as would lead a man of ordinary prudence to further investigation. *Sadler v. Niesz*, (Wash.) 31 Pac. Rep. 630, and *Nuhn v. Miller*, Id. 1031, followed.

2. Where the mortgage recites that the mortgagor is an unmarried man, knowledge by the mortgagee that he was in fact married is not established by the mortgagor's evidence, in a general way, that it must have been understood that he was married, or by the fact that his final proof on procuring a patent of the land from the federal government contained a statement that he was married, in the absence of any showing that the mortgagee knew of such statement.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Schwabacher Bros. & Co. against H. G. Van Reypen and Carmi

Dibble to foreclose a mortgage executed by Van Reypen on land subsequently sold to Dibble. From a judgment in defendants' favor, plaintiff appeals. Reversed.

Metcalfe, Little & Jurey, for appellant. Black & Leaming, for respondents.

HOYT, J. The rulings of this court in the cases of *Sadler v. Niesz*, 31 Pac. Rep. 630, and *Nuhn v. Miller*, Id. 1031, are decisive of this case, unless we find from the proofs that the appellant had notice of the fact that the respondent Van Reypen was a married man at the time the mortgage was made, or had such knowledge upon the subject as would lead a man of ordinary prudence to further investigation in regard to the matter. We have examined the proofs offered by the respective parties upon this question, and are satisfied that the fact of such knowledge or information is not established thereby. To begin with, there is the solemn declaration in the mortgage itself that the maker thereof was an unmarried man. And there is little or no testimony that was actually given at the trial to show any knowledge on the part of the appellant that he was in fact married. Such respondent himself testified, in a general way, that it must have been understood that he was married, but he failed to enter into details, or give any particular conversations when, or by means of which, such knowledge was brought home to the appellant. This testimony on the part of such respondent is all there is in the record tending to show such knowledge, excepting the fact that there is an admission that a man by the name of Jones would testify that at one time Mr. Goldsmith, then acting for the appellant as its agent, was informed that such marriage existed; but in opposition to this admission is the further one that said Goldsmith would, if present, testify that he never received such information, and that he in no way understood, or had any reason to believe, that such respondent was a married man. Respondents have in their brief attempted to make something out of the admission contained in the record that, in the final proof submitted at the time the title to the land covered by the mortgage was obtained, said Van Reypen stated that he was a married man, but we are unable to see how the fact that such a statement was contained in such proof in any way tended to bring the matter home to the appellant. It is true, the testimony shows that an examination of the records was made by its attorneys before it took the mortgage, but there is nothing to show that they ever saw this final proof, or in any manner were informed of the fact of such marriage. As this case so clearly falls within the rulings in the two cases above cited upon the other questions involved, it is not necessary that we should say more than that this case, and the apparent deliberate attempt on the part of the respondent Van Reypen to defraud those with whom he had dealt as an unmarried man, well illustrate the necessity for the rule promulgated in those cases. The judgment must be reversed, and the cause remanded,

with instructions to enter a decree in favor of appellant for the foreclosure of the mortgage.

SCOTT and STILES, JJ., concur.

(6 Wash. 161)

SMALLEY v. SNELL.

(Supreme Court of Washington. March 25, 1893.)

COUNTY OFFICERS—ELIGIBILITY FOR SUCCESSIVE TERMS—CONSTITUTIONAL LAW.

The time of holding an office under Const. Schedule, art. 27, § 6, which continues in office all territorial officers until suspended by authority of the state, is not a "term," within the meaning of Const. art. 11, § 7, which provides that no county officer shall be eligible to his office more than two terms in succession.

Appeal from superior court, Pierce county; Frank Allyn, Judge.

Action by Frank A. Smalley against William H. Snell to contest defendant's right to the office of prosecuting attorney for Pierce county. From a judgment in defendant's favor, plaintiff appeals. Affirmed.

L. C. Bronson, Ben Sheeks, and H. W. Lueders, for appellant. Charles Richardson, Claypool, Haight & Cushman, and Charles Bedford, for respondent.

HOYT, J. The discussion of this case has extended over a wide range, but in our view of the law a decision of the controversy in question involves but a single point, which must be determined entirely by a construction of the provisions of our constitution. Such being the fact, very little light can be gathered from the large array of authorities which the industry of counsel has brought to our attention. The controlling question in the case is as to whether or not the term of a county officer—of which he is prohibited from holding more than two in succession, by the provisions of section 7, art. 11<sup>1</sup>—includes the term which such officer held under the provisions of section 6, art. 27.<sup>2</sup> If the time of holding under this section constitutes a term, within the meaning of said section 7, it would follow that such officer could only hold for that time and one full term, under the state constitution; and under the conceded facts in this case the respondent would be ineligible to hold the office to which he was elected for the term commencing the second Monday in January, 1893.

It is argued on the part of appellant that the time an officer served under the provisions of said section 6 was as much a holding under the constitution as though he had been elected to such office by virtue of the provisions thereof. With this contention we fully agree, but it does not at all follow that an officer holding by virtue

<sup>1</sup>Const. art. 11, § 7, provides: "No county officer shall be eligible to hold his office more than two terms in succession."

<sup>2</sup>Const. Schedule, art. 27, § 6, provides that territorial officers shall continue to hold their offices until suspended by authority of the state.

of such section is filling such a term as is contemplated by said section 7. Said section 6 is contained in the schedule to the constitution, and though, for some purposes, such schedule may be held to be a part of the constitution, yet a provision therein contained will frequently receive an entirely different construction from what it would if contained in the body of the constitution. The purpose of the schedule is not to provide a permanent rule of action to control the future government of the state. The main purpose which it is designed to accomplish is to bridge over what would otherwise be a chaotic interregnum between the termination of the organization of the territory and the completion of the organization of the state under the provisions of the constitution. In our opinion, therefore, the term of office provided for in said section 6 was not, in the ordinary and strict sense of the term, a part of the machinery for the permanent government of the state, but was rather a temporary arrangement until such permanent provision could be made. Such being the nature of the office, it follows that an incumbent thereunder, though undoubtedly holding under the constitution, in a certain sense, would not, in the ordinary sense, be holding an office of any particular class under the permanent organization of the state.

This brings us to an inquiry as to the nature of the term which is referred to in said section 7. Section 5 in the same article makes it the duty of the legislature to provide for the election of county officers, and to prescribe their duties, and fix their terms of office. This section, being in the same article, must be construed with section 7; and when the two sections are construed together it seems to us clear that the term referred to in section 7 is the term which the legislature is authorized to provide for in section 5, and that said section 7 has no reference whatever to the terms, if such they may be called, of officers holding under the provisions of section 6 of said article 27. It follows that the term of office of the respondent, commencing on the second Monday in January, 1893, was but his second successive term, within the meaning of said section 7, art. 11. The judgment of the court below must be affirmed.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur.

(6 Wash. 168)

BARTLETT v. REICHENECKER et al.,  
(ROTHSCHILD et al., Interveners.)

(Supreme Court of Washington. March 28, 1893.)

APPEAL—STATEMENT OF FACTS.

Since equity causes are tried de novo in the supreme court, there must be an affirmative showing that all the necessary facts are before the court; and a statement of facts on appeal, settled and certified before the rendition of the judgment in the court below, will be stricken from the record as insufficient.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Action by N. J. Bartlett against W. C. Reichenacker and others to foreclose a chattel mortgage. L. Rothschild and others, creditors of the mortgagors, intervened. From a judgment in plaintiff's favor, the interveners appeal. Statement of facts stricken from record.

Finch, Snook, and Finch, for appellants. Fishback & Hardin, Hughes, Hastings & Stedman, and Emmons & Emmons, for respondents.

DUNBAR, C. J. Respondents move to strike the statement of facts embraced in the transcript in this case, for the reason that it appears from the transcript that the judgment in said cause was not rendered until after the said pretended statement of facts was settled, and that therefore the certificate of the judge that said statement contains all the material facts in the said cause is incorrect and insufficient. The transcript shows that the statement of facts was settled in this cause on the 7th day of April, 1892, and that the judgment was rendered on the 17th day of June, 1892. It therefore appears that the statement of facts was settled and certified by the judge before the rendering of the judgment in the cause. We have universally held that, inasmuch as an equity cause is tried de novo in this court, it has no jurisdiction to try the cause without all the facts that were before the trial court being before this court; and, the statement of facts having been settled and certified before the rendering of the judgment, there is no affirmative showing that all the facts which were necessary to the complete determination of the cause are before this court.

The motion will therefore be sustained.

HOYT, SCOTT, and STILES, JJ., concur. ANDERS, J., not sitting.

(6 Wash. 23)

#### STEINER v. NERTON.

(Supreme Court of Washington. March 1, 1893.)

HABEAS CORPUS—QUESTIONS DETERMINED—JURISDICTION.

1. The question of former jeopardy cannot be passed on by the supreme court in habeas corpus proceedings, but is a proper plea in bar, to be tried by the lower court.

2. Jurisdiction cannot be conferred on the supreme court, in habeas corpus, by stipulation accompanying the petition.

Application by John Steiner for a writ of habeas corpus. Writ denied.

Metcalf & Metcalf, for petitioner. C. D. Bowles, for defendant.

DUNBAR, C. J. The petitioner was indicted, and pleaded not guilty. A jury was impaneled, and the case went to trial. During the examination of the first witness for the state, on his examination in chief, and before the defendant was permitted to cross-examine him, and before any other witness had been introduced, offered, sworn, or examined, the state moved the court to quash and dismiss the

indictment, and to permit it to file an information against the defendant, for the purpose of making what was deemed by the prosecuting attorney a material allegation in the information, which had been omitted in the indictment under which the state was then proceeding. The defendant, petitioner herein, opposed said motion. The court, however, sustained the motion, and the jury was discharged. Upon the filing of the information the court held the petitioner to bail in the sum of \$3,000, and ordered that in default thereof he be committed to the county jail. The contention of the petitioner is that his restraint under said order is illegal, because he had been put in jeopardy by the proceedings under the first indictment, and because, under the law, he cannot twice be put in jeopardy for the same offense. This court, however, cannot pass upon the question of the former jeopardy upon a petition for a writ of habeas corpus, and the legality of the proceedings under which he is restrained of his liberty is not called in question by the petition. The information is not assailed, and the subsequent proceedings seem to be regular. If the petitioner has been before in jeopardy for the same offense, that is a proper plea in bar, to be tried by the court, and from the decision of which an appeal would lie to this court. A stipulation accompanying the petition cannot confer jurisdiction on this court in a habeas corpus case.

The petition is therefore denied.

ANDERS, SCOTT, and STILES, JJ., concur.

(6 Wash. 1)

#### HATCH et ux. v. TACOMA, O. & G. H. R. CO.

(Supreme Court of Washington. March 1, 1893.)

RAILROAD COMPANIES—CONSTRUCTION OF ROAD ON STREET—AUTHORITY FROM CITY—LIABILITY TO ABUTTING PROPERTY OWNERS—ACTION FOR DAMAGES—PARTIES—INSUFFICIENT ANSWER—REMEDY—MOTION TO STRIKE—DEMURRER.

1. The fact that a city authorizes the construction of a railroad on its streets in accordance with its charter, the injury to property abutting on such streets to be first ascertained, and compensated for in the manner provided for compensating injuries arising from regrade of streets, does not relieve the railroad company from liability for such injury, and impose it on such city. Hoyt, J., dissenting.

2. In an action by an abutting property owner against such railroad company to recover damages, it is not error to refuse to strike out, as immaterial, that part of the answer setting up the grant of authority by such city to defendant, since the remedy for questioning the legal sufficiency of such answer is by demurrer.

3. It is error to require plaintiff to make such city a party defendant, and dismiss the action for failure to do so. Hoyt, J., dissenting.

Appeal from superior court, Thurston county; J. W. Robinson, Judge.

Action by Zephaniah J. Hatch and wife against the Tacoma, Olympia & Gray's Harbor Railroad Company to recover damages to plaintiffs' lots, abutting on a certain street in the city of Olympia, on

which defendant has constructed its road by authority of such city. From a judgment dismissing the action, plaintiffs appeal. Reversed.

Allen & Ayer, for appellants. Mitchell, Ashton & Chapman, for respondent.

ANDERS, J. The appellants sued the respondent to recover damages alleged to have been occasioned to their property by the building and operating of a railroad along Seventh street, in the city of Olympia. The complaint alleges: "(3) That on said date plaintiffs became the owners in fee, and obtained possession, and are now such owners, and have possession, and at all times hereinafter mentioned were such owners, and had possession, of that certain tract of land situate at the northeast corner of Franklin street and Seventh street, in the city of Olympia, county of Thurston, and state of Washington, known, designated, and numbered on the original plat of the town (now said city) of Olympia as lots numbered, respectively, eight (8) and seven, (7,) in block numbered thirty-six, (36,) which plat is, and for many years has been, on file in the auditor's office of said county; said lots being the southwest quarter of said block. (4) That each of said lots fronts, and is sixty (60) feet wide, on said Seventh street, and extends northward, at right angles with said street, one hundred and twenty (120) feet; the west line of said lot numbered eight (8) being on Franklin street aforesaid. (5) That plaintiffs are the owners in fee of so much of the land on which Seventh street aforesaid is located as lies on the front of, and adjacent to, said lots, and extends to the middle line of said street, and they are the owners in fee of so much of the land on which said Franklin street is located as lies on the west of, and adjacent to, lot numbered eight, (8,) and extends to the middle line of said Franklin street. Each of said streets is sixty (60) feet wide. (6) Plaintiffs say that heretofore, to wit, on the — day of May, 1891, and on divers and sundry days thereafter, the defendant, the Tacoma, Olympia & Gray's Harbor Railroad Company, aforesaid, its officers, agents, servants, and employees, without the consent of these plaintiffs, or of either of them, and wrongfully and unlawfully, entered upon the land of plaintiffs on Seventh street, described in the fifth paragraph of this complaint, and without the consent of plaintiffs, or either of them, and wrongfully and unlawfully, did dig up and carry away the soil thereof, and did cut a deep tunnel along and across said land, to the full extent of the width and length of said Seventh street, in front of said lots, and greatly to plaintiffs' damage. (7) That plaintiffs' said land, described in paragraphs 3 and 4 herein, is improved property, and has thereon a valuable dwelling house, in which plaintiffs reside, and have for several years resided, and other valuable buildings, fruit trees, and other improvements. (8) That the said defendant, its officers, agents, servants, and employees, have constructed a railway along said tunnel, and have covered said tunnel with

timbers and plank for the purpose of making a roadway over said tunnel and along said Seventh street, for public travel and passage, and have wrongfully and unlawfully changed and raised the grade of said street five (5) feet above the grade that had been established theretofore on said street by the city of Olympia, and that existed at the time said tunnel was cut and made as aforesaid. (9) That said defendant, its officers, agents, servants, and employees, have wrongfully and unlawfully changed and raised the grade of Franklin street, making the approach on said street to said covered way five (5) feet at the point said street intersects with said covered way, and have wrongfully and unlawfully extended said altered grade along said Franklin street, in front of said plaintiffs' said land, buildings, and improvements. (10) That said defendant, its officers, agents, servants, and employees, by doing the acts and things alleged in paragraphs 8 and 9 herein, have put and left plaintiffs' aforesaid lots, buildings, and improvements at a depth of five (5) feet below the top of said covered way on Seventh street, and at the intersection of Seventh and Franklin streets, and along Franklin street, have destroyed ingress and egress to and from said property on Seventh street, and for one-half the length thereof on Franklin street, and have thereby greatly impaired and lessened the value of said lots, buildings, and improvements. (11) That said defendant is actively engaged, through its officers, agents, employees, and servants, in operating its railroad, and in running passenger and freight trains, drawn by steam engines, along and through said tunnel daily, and that in so doing the smoke and sparks from said engines are thrown off in said tunnel in great quantities, and the rumble and noise produced by said trains are very great, and that plaintiffs' residence and buildings aforesaid are daily endangered and rendered unsafe and uncomfortable thereby, and the value thereof materially and greatly impaired and lessened. (12) That said defendant, its officers, agents, servants, and employees, by reason of the acts and things alleged herein, have damaged plaintiffs in the sum of five thousand (\$5,000) dollars." The respondent filed an answer admitting the construction and operating of the railroad as set forth in the complaint, but denying any knowledge or information sufficient to form a belief as to the ownership of the property described in the complaint; denying that plaintiffs are the owners of the fee to the middle line of the streets adjoining said premises; that defendant raised the grade of said streets to any extent whatever, or that it destroyed ingress or egress to and from said property on said streets, or that it thereby, or at all, has lessened or impaired the value of said lots, buildings, or improvements, or either of them; that, in running its trains along and through said tunnel, the smoke and sparks from said engines are thrown off from said tunnel, or that the rumble and noise produced by said trains are very great, or great at all, or that plaintiffs' residence or buildings are injured or rea-

dered unsafe or uncomfortable thereby, or that any of the acts complained of were wrongfully or unlawfully done, or that plaintiffs have been damaged by any acts of defendant in any sum whatever. And, as a further answer, defendant alleged: (1) That at all the times herein mentioned it was a railroad corporation, duly incorporated under and by virtue of the laws of the state of Washington, and that the uses and purposes of said corporation, for which it was so incorporated, and in which it is, and at all the times in said complaint mentioned was, engaged, constitute and are a public use. (2) That Seventh and Franklin streets, of the city of Olympia, are, and at all the times in said complaint mentioned were, and for upwards of twenty years immediately preceding any of the times mentioned in said complaint had been, public streets and highways of said city, and at a time many years prior to the plaintiffs', or either of them, acquiring any right or interest in and to the lots, or either of them, mentioned in said complaint, had been designated and laid down upon the original plat of said city, and donated and granted to the public forever upon said plat, designated and laid off as such, and which said plat had theretofore, to wit, at a time more than twenty years prior to any of the times mentioned in said complaint, been recorded in the office of the auditor of said Thurston county, in which said city of Olympia is and was situated. (3) That, at all the times mentioned in said complaint and herein, said city of Olympia was duly incorporated as a municipal corporation under and by virtue of the laws of the then Territory of Washington. (4) That on the 10th day of June, 1890, pursuant to the powers and authority by law invested in it, and under and by virtue of the express power and authority conferred by an act of the legislature of the Territory of Washington passed and approved on the 28th day of November, 1883, entitled, 'An act to incorporate the city of Olympia,' the mayor and city council of said city of Olympia did, by an ordinance, No. 399, of said city, entitled 'An ordinance granting a right of way to the Tacoma, Olympia & Gray's Harbor Railroad Co. over certain streets, and alleys, and authority to construct a railroad and lay out depot grounds within the city of Olympia,' authorize and grant the defendant the right and privilege of constructing, equipping, maintaining, and operating its line of railway over, along, through, across, and under certain streets and alleys of the city of Olympia, and, among others, Seventh and Franklin streets aforesaid, which said grant, so conferred, was accepted by the company. (5) That under and by virtue of said ordinance, so passed, this defendant, through its proper officers and agents, did construct its line of railroad along and under Seventh street aforesaid at or about the time mentioned in said complaint, and has since the construction thereof, and pursuant to the powers in said ordinance conferred, operated, and still continues to operate and maintain, its line of railroad, which constitute the acts and things mentioned and set forth in

plaintiffs' complaint, and not otherwise, and that all of said acts and doings were had and done by and with the express permission of mayor and city council of said city of Olympia, as hereinbefore set forth, and not otherwise, and that said city had and has full power and authority of law to so ordain and grant permission to this defendant so to do."

The plaintiffs moved the court to strike out all of the affirmative matter set up in the answer, for the alleged reason that the same is immaterial and irrelevant. The motion was denied, and plaintiffs excepted. Plaintiffs then demurred to the same on the ground that it did not constitute a defense to the action. The court overruled the demurrer, and plaintiffs saved an exception. The defendant thereupon moved that the city of Olympia be made a party defendant, which motion the court sustained, and subsequently made an order requiring the plaintiffs to make the city a party defendant within three days. The plaintiffs declined to comply with said order, whereupon a judgment of nonsuit was entered against them, and the action dismissed at their costs. The plaintiffs seek a reversal of this judgment on the ground that the several rulings above mentioned were erroneous.

The first objection, that the court erred in denying appellants' motion to strike out the portion of the answer therein referred to, is not well taken. The statute provides that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any party aggrieved thereby; and matter is irrelevant which has no bearing upon the question in controversy. If an answer alleges matter as a defense which is clearly impertinent to the cause of action, it may be stricken out as irrelevant. But if there be a doubt as to the sufficiency, in law, of the pleading, or if the alleged irrelevancy requires argument to establish it, the question should not be raised by motion, but by demurrer, which is the recognized mode of questioning the legal sufficiency of pleadings. The primary object of such a motion is to eliminate irrelevant and redundant matter from a pleading, and it is always supposed that something substantial will still remain. See Bliss, Code Pl. §§ 423, 424. And if an answer, as a whole, sets up a semblance of a defense to the action, its sufficiency cannot be determined on a motion to strike it out as irrelevant. *Walter v. Fowler*, 85 N. Y. 621. In this case, the part of the answer which appellants seek to strike out is, in effect, a plea of license from the city of Olympia, and is relied on by the respondent as a complete defense to the action. It is therefore neither irrelevant nor immaterial, and consequently not open to the objection urged against it. But its sufficiency was properly called in question by the appellants' demurrer, which was interposed on the alleged ground that the plea constitutes no defense to this action. It is claimed by the learned counsel for the respondent that the railroad was constructed in accordance with the ordinance of the city, and that, inasmuch as the city was empowered by its charter to authorize the build-



ing and operation of railroads in and upon its streets, such construction and operation of the road were and are lawful, and respondent is not liable to the appellants for any injury thereby done to their property. It is further insisted that, if appellants are entitled to any damages whatever, the city is liable therefor, and not the respondent. It is conceded that the city had the power to authorize the construction of the railroad on Seventh street, upon proper conditions, and it is not disputed that the railroad was constructed under authority given by the city; but it is claimed by the appellants (1) that the power vested in the city by the legislature was exceeded in the ordinance under and by virtue of which the right to build the railroad in the street in front of appellants' premises was granted; and (2) that the authorization of the city was necessarily subject to, and limited by, section 16 of article 1 of the constitution of the state of Washington, which provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner," etc.

In order to determine the validity of the ordinance set forth in the answer as a defense to the action, it becomes necessary to ascertain what power was conferred upon the city of Olympia by its charter in regard to the construction of railroads upon the streets and public places, as well as the provisions of the city ordinance itself. In section 10 of the charter it is provided that "the city of Olympia shall have power \* \* \* to authorize or prevent the location or laying down of railway tracks and street railways on all streets, alleys, and public places; and no railway track can thus be laid down until the injury to property abutting upon the street, alley, or public place upon which such track is proposed to be located and laid down has been ascertained and compensated in the manner provided for compensation of injuries arising from regrade of streets in section 113 of this act." Laws 1883, p. 109. From this provision it appears that while the legislature empowered the city to authorize the location and laying down of railway tracks on the streets, in its discretion, it did not thereby undertake or assume that such authorization should operate as a shield against liability on the part of the grantee of such franchise to any lot owner upon the street for damages caused by the location of a railway thereon. This is manifest from the language used, and no other interpretation can be given to it. Indeed, when the legislature declared that no railroad track can thus be laid down until the injury to property abutting upon the street upon which such track is proposed to be located has been ascertained and compensated in a certain prescribed manner, it virtually made it the duty of the city to withhold the privilege of laying down railways in the streets until compensation is made for injuries thereby sustained by abutting owners. The city, under its charter, had not itself the right to change the grade of streets without paying the damages resulting therefrom to owners of

abutting property who had made improvements thereon with reference to the established grade, and therefore could not legally authorize the railroad company to do so. Nor did it undertake to confer such right in this instance, except at street crossings and approaches thereto. The ordinance in question provided that the railway company should construct its railroad in a cut or tunnel between certain specified streets, at its own expense, and not more than 40 feet in width at any one point, and should wall in or timber up the sides thereof in a safe and secure manner, and for the entire distance thereof, up to the grade of Seventh street, or to any grade that might be adopted by the city council, and that said company should cover said cut, and maintain the same in good condition for public travel, in such a manner as to interfere with the use of said street in the least possible degree, and that the bridge or cover over the same at Franklin street should not be more than three feet above the established grade at said point. The respondent contends that under the issue raised by the demurrer it must be assumed that the grade of the streets was changed, if at all, only to the extent and in the manner prescribed by the ordinance, and, further, that, if the railroad was constructed as authorized by the ordinance, then the appellants' property, in legal contemplation, was not damaged, and they are entitled to no compensation, at least from the railroad company. But we are unable to accept these propositions as conclusive. Even if it be admitted, for the purposes of the demurrer, that the fee of the street is in the city, as claimed by respondent, it does not follow that the appellants have not sustained direct and immediate damage by the building of the railroad in front of their premises. In any event, if the appellants' property has been damaged in a manner different from that of the public generally by the appropriation of the street for railroad purposes, they are entitled to compensation; and damages, to be recoverable, are not confined to the land itself, but may only affect that which is incident thereto, and necessary to the use thereof. The owner of a lot on a street in a city has a right to the use of the adjoining street which is distinct from that of the public, and such right is as much property as the lot itself. (*Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. Rep. 257; *Burkham v. Railway Co.*, [Ind. Sup.] 23 N. E. Rep. 799,) and cannot be taken away, or injuriously affected, without compensation. It is alleged, in substance, as we have seen, in the complaint, that the respondent raised the established grade of the street in front of appellants' land five feet, and thereby destroyed access to the same, without the consent of appellants. That allegation shows a cause of action in favor of appellants, and we think that the affirmative matter demurred to in no wise constitutes a defense thereto. The grant of the city transferred no rights of the appellants to the respondent. It simply granted such rights as the city had power to confer; and it had no power, as we have already intimated, to authorize

any interference with the proprietary rights of the appellants. It follows, therefore, that the demurrer should have been sustained.

But it is urged on behalf of the respondent that, if any recovery can be had in this action, the city is the party liable, and not the railroad company. This contention cannot be sustained. It is not shown or alleged that the city did any of the acts or things of which appellants complain. It only enacted the ordinance granting the privilege to the respondent to use the street in the manner therein specified, and for that act no private action will lie. *Elliott, Roads & S. 532; Burkham v. Railway Co., supra.* And, the city not being liable to be sued for its action in permitting the respondent to construct its railroad in the streets in the manner it did, it follows that the court erred in dismissing the action for failure to make the city a party defendant.

Some other questions were raised by counsel in their briefs, which we have not deemed it necessary to consider in passing upon the issues raised by the pleadings. The judgment is reversed, and the cause remanded to the court below, with directions to sustain the demurrer to defendant's special answer.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., (dissenting.) I am unable to concur in the foregoing opinion. I think that, under the peculiar provisions of its charter, the city of Olympia is alone responsible to adjoining owners for damages to their property caused by the construction and operation of a railroad in the street in front thereof. Section 10 of said charter provides that no railroad shall be laid down in any of the streets of the city until such damages have been ascertained and paid, and contains an express provision that such damages shall be ascertained in the manner provided for in section 113. The provisions of said section 113 are applicable to the ascertainment of damages as between the city and the property owner, but are entirely inapplicable as between a private corporation and such owner. It follows that, if the provisions of said sections are to be given force, there was no way provided by law by which the railroad could have proceeded to have the damages ascertained and paid before its construction, while the power of the city in that regard was ample. I see no reason whatever why these two sections cannot be given full force, and, if they can, the well-settled rule of construction makes it the duty of the courts so to do. The provisions of said sections are plain and unequivocal, and thereunder it is made the duty of the city not to allow a railroad to be constructed on any of the streets of the city until the damages have been first ascertained, and the machinery for the ascertainment of such damages is fully provided, as between the city and the adjoining owner. In view of these facts, I think it should be held that the city, in legal effect, so far as the rights of adjoining

proprietors are concerned, is the agency which affects their property; that their rights must be adjusted with the city. It does not follow that the city will necessarily bear the burden of the damages which may be assessed. It has power to fully protect itself at the time it grants the right to the railroad to occupy the street. The numerous authorities cited in the opinion of the majority of the court do not seem to me to be at all applicable to the case at bar. In none of them was the question of the construction of a charter at all like this one involved. This case, to my mind, turns entirely upon the construction of the two sections of the charter above referred to; and I see no escape from the conclusion that, whenever the city passes an ordinance authorizing the use of any of its streets for railroad purposes, it becomes responsible to those owning property adjoining such streets for all damages growing out of an occupation by a private corporation in pursuance of the provisions of the ordinance granting such rights, and that under such provisions there could be no liability on the part of the corporation occupying the street, so long as it kept within the terms of the ordinance authorizing it so to do. The ordinance granting rights to the defendant in this case was therefore material; and if the pleading on the part of the defendant showed that it was acting thereunder, and in pursuance of the rights thereby granted, such pleading set up a good defense to the action. Under the circumstances of the case the city of Olympia might not have been a necessary party to the action; but no harm could result to the plaintiffs by having the whole matter adjudicated in one suit, rather than to have the question of the liability of the railroad company first determined, and then, if it was found that it was not liable, have the question of the liability of the city determined in a separate action. In my opinion the demurrer to the separate defense was rightfully overruled; no error prejudicial to the plaintiff appears in the record; and the judgment ought to be affirmed.

(6 Wash. 285)

SILSBY et al. v. TACOMA, O. & G. H. R. CO.

(Supreme Court of Washington. March 1, 1893.)

Appeal from superior court, Thurston county; J. W. Robinson, Judge.

Action by John A. Silsby and others against the Tacoma, Olympia & Gray's Harbor Railroad Company to recover damages to plaintiffs' lots, abutting on a certain street in the city of Olympia, on which defendant has constructed its road by authority of such city. From a judgment dismissing the action, plaintiffs appeal. Reversed.

Allen & Ayer, for appellants. Mitchell, Ashton & Chapman, for respondent.

ANDERS, J. The questions presented in the record in this case are identical with those in the case of *Hatch v. Railroad Co.*, 32 Pac. Rep. 1063, (just decided;) and, by stipulation of counsel, both causes were heard together, one

brief only being filed. For the reasons stated in the opinion in that case, the judgment of the court below is reversed, and the cause remanded, with directions to sustain the demurrer to defendant's special answer.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

(6 Wash. 103)

WADHAMS v. PAGE et al.

(Supreme Court of Washington. March 10, 1893.)

APPEAL—TIME OF TAKING—NOVATION.

1. A case is no more terminated by a verdict for defendant than by one for plaintiff, and the time for perfecting an appeal begins to run from the entry of judgment, and not from the rendition of the verdict.

2. Knowledge by a creditor of the dissolution of a firm, and of the assumption of the firm indebtedness by the continuing partner, together with a delay of two years before making a demand on the retiring partner for the debt, does not establish such a consent or acquiescence by the creditor in the arrangement between the partners as will constitute a novation.

3. Neither does the acceptance of payment from the continuing partner establish the creditor's consent to his assumption of the firm debts, when such payments were applied on the creditor's claim against the partnership, and not on any personal indebtedness of the continuing partner.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by William Wadhams against Alfred Page and Joseph Green, partners, etc. Summons was served only on defendant Green, and judgment was rendered in his favor. Plaintiff appeals. Reversed.

The trial of this action took place before the Honorable T. J. Humes and a jury upon May 9, 1892. A verdict was rendered for the defendant. On May 10, 1892, notice of intention to move and motion for a new trial were duly served upon the attorneys for the defendant Joseph Green, in this action, and on the following day, May 11, 1892, the said notice and motion were duly filed in the office of the clerk of the superior court. The hearing upon this motion was duly adjourned from time to time until June 4, 1892, when the motion was argued and denied. Nothing was done by the defendant Green towards filing an order denying the motion for a new trial or a judgment in this action. After several requests of the attorneys for the defendant Green to prepare and file such a motion and judgment, the appellant prepared the necessary order denying a motion for a new trial, and the necessary judgment, which the court signed and entered on August 27, 1892. On August 30, 1892, notice of appeal to this court, and an appeal bond, were duly served and filed in this action. On September 26, 1892, and within 30 days from the rendition and entry of the judgment in this action, the statement of facts was duly filed in the office of the clerk of the superior court of King county, and a notice of filing the same and of settlement of the facts was duly served upon the at-

torneys for the defendant Green, and duly filed in the office of said clerk on said day. On October 15, 1892, the statement of facts was duly settled and signed by the Honorable T. J. Humes, the judge before whom this action was tried. October 15, 1892, was the day named in the notice of the settlement of the statement of facts, and sufficient and legal notice of this settlement was given therein to the respondent. On November 23, 1892, and within 30 days from the filing of the transcript of the case in the office of the clerk of this court, the brief of the appellant was duly served and filed in this court.

Respondents submitted the following motion on appeal: "(1) To strike the statement of facts from the files herein, because the said alleged statement of facts was never filed, or prepared and filed, ready for signing, within the time required by law, nor within thirty days from the date of the verdict herein complained of. (2) That because the said statement of facts was duly objected to in writing, as required by law, and no settlement of the said statement of facts has ever been made, as required by law, and the said statement of facts was settled wholly without any jurisdiction of the court in the premises, and said statement of facts is without authority of law, in this: that the same was neither filed within the time required by law, was not signed or certified within the time required by law,—that the court had no jurisdiction in assuming to sign the same, nor said alleged statement of facts has ever been duly signed or certified at all." "To dismiss the appeal of appellant herein, and to affirm the judgment herein, for that (1) no notice of appeal as required by law was ever given in the said cause; (2) no due notice of appeal was ever given and served upon all the parties in the cause as required by law; (3) no appeal has ever been taken in the supreme court of the state in the said cause. Respondent further moves to dismiss the said appeal for that (1) no brief was filed by appellant at any time within the time required by law since the taking of the alleged appeal; (2) no brief was ever filed by appellant whatsoever within thirty days from the alleged settlement of the statement of facts as required by law; (3) no brief was filed by appellant at any time within the time required by law in the supreme court of the state of Washington. And respondent moves the court to affirm the judgment herein for that there is nothing upon which to base a review of judgment in this court."

Burke, Shepard & Woods, for appellant. Stratton, Lewis & Gilman, (Ernest S. Lyons, of counsel,) for respondents.

HOYT, J. In our opinion, a case is no more terminated by a verdict for the defendant than by one for the plaintiff. In either case it is the judgment rendered upon such verdict that finally adjudicates the rights of the parties, and, as it is conceded that the necessary steps were taken within 30 days after the rendition of the judgment upon the verdict, it follows that the motion to dismiss for the reason that

they were not taken in time must be denied. Plaintiff brought the action to recover of the firm of Page & Green an amount alleged to be due as a balance of account for goods sold and delivered. The defendant Green, in his answer, admitted the indebtedness as set out in the complaint, and set up two defenses to such claim: First, that the same had been fully paid; second, that the said firm had been discharged by reason of a novation, by which it was agreed by the said plaintiff and the said firm of Page & Green and Alfred Page, one of the members of said firm, that the plaintiff would look only to the said Page for the payment of said account, and would and did discharge the said firm of Page & Green from all liability on account thereof. The indebtedness alleged in the complaint having been admitted, the defendant was adjudged by the court to have the affirmative of the issue made by his said answer. Upon the trial such defendant not only failed to make out his defense of payment by affirmative proof showing that the amount had been paid, but, on the contrary, by his own proof showed beyond any possible question that the amount in controversy never had been paid by anybody. As to the second defense set up in the answer, the proof on the part of the defendant showed only that in March, 1884, the firm of Page & Green had been dissolved; that, as between the members thereof, it was agreed that Page should be entitled to the credits due said firm, and should assume the indebtedness thereof; that knowledge of the dissolution of the said firm, and of the fact that, as between the partners, Page was to pay the indebtedness, was communicated to the plaintiff some time during that month, or the early part of the April following. He introduced absolutely no proof tending in the least degree to show any consent on the part of the plaintiff to such arrangement, or any agreement by him that he would in any manner discharge the firm of Page & Green from liability, and look only to said Page. The only circumstance proven which could in the most remote degree tend to establish such consent or promise on the part of the plaintiff was the fact, testified to by the defendant, that two years or more elapsed after such dissolution before any demand was made upon him by the plaintiff for the payment of the amount. Even this fact is not very satisfactorily established by the testimony of the defendant, for the reason that he practically admits that at an earlier date he was asked, by a person representing himself as the agent of the plaintiff, to make a note to cover the amount of said indebtedness. But, assuming that the fact of this delay was established beyond any question, it would not in itself establish a consent or acquiescence on the part of the plaintiff in the arrangement between the members of the said firm of Page & Green. That there could be no change of the contract relations as between the firm of Page & Green and the plaintiff without his consent or acquiescence is too clear for argument. It follows that there was an entire failure on the part of the defendant to prove one of

the facts necessary to constitute a novation which would bind the plaintiff.

If it appeared from the record that the plaintiff had continued for a long time to deal with Page, and had received money from him, and applied the same upon his personal indebtedness, there might be some ground for contending that such acts on his part, coupled with a long delay in attempting to assert the claim as against the defendant Green, would tend to prove a consent or acquiescence on the part of the plaintiff to the arrangement under which the firm of Page & Green had dissolved, and to in some measure at least warrant a claim that the money so paid by Page and applied by plaintiff on his personal account should have been applied upon the account of Page & Green. But that such facts did not exist in this case is made very clear. It is an absolutely undisputed fact upon the whole record that every dollar of money paid by said Page or by Page & Green has been applied upon the account of the firm, and that the amount for which this suit was brought remains unpaid after such application. Counsel for defendant attempted in his argument to make something out of the circumstance that at the time an account was opened with said Page a remittance of \$200 by him was credited to his account, instead of to the account of Page & Green. But the proof clearly shows that this same \$200 was very soon thereafter credited to the account of the firm of Page & Green, and the personal account of Page charged therewith. So that the situation is just the same as though said \$200 had been in the first instance credited to the firm of Page & Green.

There was, then, no proof introduced by the defendant tending to show the existence of all the facts necessary to sustain the defense of novation, as pleaded in the answer. Under the circumstances of this case, as made by the pleadings, the plaintiff was entitled to a judgment for the amount claimed by him, unless one or the other of the defenses pleaded in the answer were established, and, as the undisputed proofs show a failure on the part of the defendant to establish either of them, there was nothing which should have been submitted to the jury. The defense was an affirmative one, and was subject to the same rules as the case of a plaintiff who has the affirmative of an issue, and, upon a total failure to prove the facts necessary to sustain it, should have been taken from the consideration of the jury. The motion of the plaintiff, made at the close of the case of the defendant, that the jury be instructed to find a verdict for the amount claimed by the plaintiff in his complaint, should have been granted, as, under the facts established by undisputed proofs, the plaintiff was entitled to recover. The judgment must be reversed, and the cause remanded, with instructions to the court below to enter a judgment in favor of the plaintiff for the amount sued for, with interest thereon to date of the entry of such judgment.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

(6 Wash. 17)

## CALHOUN v. LEARY et al.

(Supreme Court of Washington. March 1, 1893.)

## HUSBAND AND WIFE—COMMUNITY PROPERTY—EFFECT OF ANTENUPTIAL AGREEMENT—EQUITABLE INTEREST—LIABILITY TO EXECUTION.

1. Where there is an oral agreement between husband and wife to allow property acquired by either to remain the property of the one so acquiring it, a conveyance for value, by the husband alone, of an equitable interest acquired by him, is good as against a subsequent transfer of such interest by both husband and wife to one taking with notice of such agreement.

2. Every debt created by a husband during marriage is prima facie a community debt.

3. 2 Hill's Code, § 479, providing that "all property, real or personal, of the judgment debtor, not exempt by law, shall be liable to execution," includes equitable as well as legal interests.

Appeal from superior court, King county; J. J. Lichtenberg, Judge.

Action by William M. Calhoun against John Leary, Jacob Furth, the Leary-Collins Land Company, M. V. B. Stacy, Elizabeth A. Stacy, John H. McGraw, May L. McGraw, John Collins, Angie B. Collins and Angus Mackintosh, to have the interests of the parties in certain land determined. Decree, from which the three first, named defendants appeal. Affirmed.

Preston, Albertson & Donworth and Bausman, Kelleher & Emory, for appellants. James Kiefer and Blaine & DeVries, for respondent.

HOYT, J. In January, 1884, M. V. B. Stacy, John Leary, and A. Mackintosh desired to jointly purchase the land the title to which is in controversy in this action. The first named had the money with which to make the purchase, and was willing to make it on the joint account of the three. It was therefore agreed between them that the purchase should be made, and the entire consideration paid by said Stacy. Under this arrangement the property was purchased by said Stacy, and the legal title thereto placed in said Mackintosh, and a memorandum made between them by which it was agreed that each of said parties should have a one-third interest in the same, the said Leary and Mackintosh each to pay said Stacy the sum of \$2,666.67 within six months, with interest thereon from the date of the agreement at 1 per cent. per month. Upon such payment by said Leary and Mackintosh, each of the parties was to be entitled to a deed of an undivided one-third interest in the property. While the legal title yet remained in said Mackintosh, the said Leary paid his share of the purchase price. The said Mackintosh never paid for his share, and at this time disclaims all interest growing out of said agreement; and, so far as his equitable interest is concerned, it can cut no figure in the case, as upon such disclaimer by him his interest therein, if he ever had any, was in equity vested in said Stacy. The said Mackintosh, as the holder of the legal title, issued to said Stacy a certificate showing that he

was the owner of an undivided one-third interest in the land. Soon after such certificate was issued, Stacy, for a valuable consideration, assigned and transferred it and his interest thereunder to one Mathias, who, by like assignment, and also by quitclaim deed, conveyed said interest to Fred E. Sander, who thereafter received a deed from Mackintosh, the holder of the legal title, conveying to him the same interest. Sander and wife then conveyed to William M. Calhoun, the plaintiff in this action. After the payment of his share of the purchase price by Leary, and long after the time when the interest of said Mackintosh should have been paid for under the terms of said agreement, the property was levied upon and sold under an execution issued upon a judgment in favor of one George D. Hill, and against said Stacy and Leary, at which sale the property was bid in by said George D. Hill, who thereafter received a sheriff's deed therefor. The title, if any, thus acquired by said Hill, was afterwards conveyed to and vested in the respondent John H. McGraw. Such title was questioned by certain parties, who instituted a suit in equity relating thereto, and such proceedings were had that the matter was finally compromised by the payment of the claim of those attempting to assert equities as against said title by said McGraw in the interest of the title derived from said Hill. Before the interest of said Hill was purchased by said McGraw he had, in the interest of the several claimants, been vested with the legal title to an undivided two-thirds interest in said land as the trustee for said claimants. At this time, and before said purchase by said McGraw, negotiations were had between him and said Leary, by which it was arranged between them that the title derived by said Hill under said execution sale should be purchased by said McGraw in the interest of himself and the said Leary. This arrangement was carried out, and the title of said Hill purchased by said McGraw, and the sum of \$3,000 paid therefor. In further pursuance of the arrangement between said Leary and McGraw, the interest of those attempting to assert equities as against the Hill title was purchased in their interest by said McGraw, and the sum of \$4,000 paid therefor. It was understood between said McGraw and Leary that they each had an equal interest in these transactions. It was understood between them that the entire interest held by both of them was a two-thirds interest in the property in question. At the request of said Leary, and in pursuance of this understanding, the said McGraw conveyed to one Jacob Furth, as trustee for said Leary, an undivided one-third interest in said property. During all this time the said M. V. B. Stacy and said John Leary were married men, living with their wives in the city of Seattle, where the property was situated. Some time after the transactions herebefore set out the said Stacy and his wife conveyed their interest in the entire property to John Collins, and he, his wife joining him, conveyed the same to the Leary-Collins Land Company, one of the appellants here. At the time these last conveyances were made it

is clear that the grantees in such conveyances had full knowledge of all the facts above set forth. They also had full knowledge of the fact that there was an oral agreement existing between the said Stacy and his wife that each of them should have the sole management of their own property, and that all property acquired by either of the spouses before or during marriage should, as between them, be the property of the spouse thus acquiring.

Under this state of facts the question presented is as to the respective interests in said property of the parties to the action. The appellant the Leary-Collins Land Company claims that it is the owner of the entire title, for the reason that the land, when acquired by said Stacy, became at once community property, and could only be conveyed by the joint action of the two spouses. We are unable to agree with this contention, for the reason that the legal title was never vested in said Stacy, either as separate or community property. All that he had was an interest, the right to which he could assert in a court of equity. If that was all the title that he had, it was all that the community could have. It would follow that neither the community as a whole nor the spouse who had taken no part in the transactions could assert any right to the land which it would not be equitable thus to assert. Now, whatever effect this oral agreement between said Stacy and his wife might have had upon property acquired after marriage, where the legal title had been conveyed, it is clear that in a court of equity neither of the spouses could assert any right to property thus acquired in the hands of a purchaser for value, who had obtained it solely from the other spouse. We know of no reason why the members of a community as a whole or separately should not be bound by the same rules of good conscience as those not occupying such a relation; and, as an individual who held another out to the world as having full authority to deal with and make title to any property, real or personal, would be estopped from attacking the title thus conveyed in the hands of a purchaser for value, we see no reason why a member of the community should not upon the same principle be estopped from asserting rights to a title conveyed by the other, whom she had, not only at the time of the conveyance, but for a long time both before and after it, held out to the world as being entitled to thus deal with the property. Besides, even if the interest which said Stacy acquired in the property should be held to have been a community interest, we think that such interest would have been divested by the sale on execution. It is clear that such would have been the effect of the sale had it appeared that the debt for which the judgment was rendered was a community debt. But it is claimed that, in the absence of any showing of this kind, it will be presumed that it was the separate debt of the spouse against whom the judgment was rendered. In our opinion, every debt created by the husband during the existence of the marriage is

prima facie a community debt. All the property acquired by him is prima facie community property, and we think that justice and good conscience demand that the other presumption should also prevail. In the absence of any proof as to the nature of the debt this presumption obtained, and, for the purposes of this case, the debt upon which this judgment was rendered must be held to have been a community debt, and for that reason the entire property of the community divested by the sale made thereunder; and as this appellant is charged with full notice, it can assert no right which the community could not have asserted if it had not conveyed. It follows that it has no interest whatever in the property.

The appellants Leary and Furth, who, for all practical purposes, may be considered as Leary alone, as Furth has only been made a party by reason of the fact that Leary's title is held by him as trustee, do not assert anything as against the title of the respondent William M. Calhoun. Their contention is that they are entitled to the remaining two-thirds interest in the property, and that the respondent John H. McGraw is entitled to no interest whatever. It is claimed by them that the one-third interest which Leary obtained by reason of the original arrangement at the time of the purchase of the property has never been divested, and that by reason of the conveyance from McGraw they obtained another one-third interest. In our opinion, this contention cannot be sustained, for two reasons: First, because the original interest of Leary in the property was divested by the sale on execution; second, whether or not his interest was in fact conveyed by the execution sale, it clearly appears from the proofs that this was a question taken into consideration at the time of the arrangement for the purchase of the Hill interest by said McGraw in the interest of himself and said Leary, and it was at that time understood between them that upon such purchase said Leary's original one-third interest, together with the other one-third which it was supposed Hill had title to, would pass to said McGraw for their joint benefit. Under this state of facts, equity and good conscience will not allow either to assert as against the other an adverse title to said two-thirds interest, or any part thereof; and, as said Leary did not at any time have the legal title to any interest in said property, it follows that the community, or the wife as a member thereof, obtained no such interest therein as could be asserted against one having superior equities. In what we have said we have not overlooked the point made in the interest of the appellant the Leary-Collins Land Company that an equitable interest in land could not be sold on execution. In our opinion, our statute<sup>1</sup> settles this question adversely to such contention. The decree of the court below properly adjudicated the title as between

<sup>1</sup>2 Hill's Code, § 479, is as follows: "All property, real or personal, of the judgment debtor, not exempt by law, shall be liable to execution."

the several parties to the action, and must therefore be affirmed.

STILES and ANDERS, JJ., concur.  
SCOTT, J., concurs in the result.

(6 Wash 112)

STATE ex rel. McDONALD et al. v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. March 13, 1893.)

WRIT OF PROHIBITION—WHEN GRANTED.

When the requisites for an appeal have been complied with, and a supersedeas bond has been given, the right to appeal must be decided by the appellate court, and a writ of prohibition will issue to prevent the trial court from proceeding to enforce the judgment on the ground that an appeal does not lie.

Petition by the state, on the relation of J. R. McDonald, Randall F. Smith, and W. A. Butler, against the superior court of King county and Hon. Richard Osborn, a judge of said court, for a writ of prohibition to prevent respondent from proceeding to enforce certain judgments. Writ granted.

Chas. Lovejoy, for relators. Richard Winsor, for respondents.

SCOTT, J. This is an application for a writ of prohibition against the respondent, directing him to desist from further proceedings in a case commenced in said superior court, wherein Louise Thompson is plaintiff, and said J. R. McDonald defendant. It appears that on the 9th day of April, 1891, judgment was rendered in favor of the plaintiff in said action. Thereafter, on the 12th day of May, 1891, said defendant executed a bond, with the relators Randall F. Smith and W. A. Butler as sureties, for a stay of execution. On the 5th day of October, 1891, said defendant gave a notice of appeal of said action to this court, and filed a supersedeas bond. On the 21st day of October, 1891, said court, upon the application of the plaintiff, entered judgment against the relators Smith and Butler, upon said stay bond; and on the further application of the plaintiff, on the 3d day of November, 1891, said court entered an order commanding Butler to appear on the 5th day of November following, and answer on oath concerning his property. On the 3d day of said month of November, said court entered an order fixing the appeal bond of said Smith and Butler at the sum of \$6,000, and on the next day said McDonald, principal defendant, and said Smith and Butler, filed a notice of appeal from the judgment upon the stay bond, and executed a supersedeas bond in said sum of \$6,000, and on the 5th day of November said sureties moved to quash the proceedings against Butler, which motion was denied on the 30th day of said month. Prior thereto, on the 21st day of said month, on application of the plaintiff, said court entered an order for and issued execution in said suit; and on the

21st day of January, 1893, upon application therefor by the plaintiff, said court issued a bench warrant in said cause, commanding the sheriff to arrest said Butler, and bring him before the court on the 23d day of said month of January; and thereupon said sheriff did arrest said Butler, who gave bail for his future appearance. And it further appears that said court is pursuing said supplementary proceedings, and undertaking to enforce the collection of said judgments rendered against said principal defendant and his said sureties, from all of which appeals have been taken as aforesaid, and are now pending in this court.

The regularity of the proceedings upon said appeals is not questioned, but the respondent insists that there can be no appeal from said judgments; that, by giving a stay bond, defendant McDonald waived his right to an appeal; and that no appeal lies upon the part of the sureties from the judgment on the stay bond. However this may be, these are questions which can only be passed upon by this court. The effect of giving the notices of appeals and supersedeas bonds as aforesaid was to remove said matters to this court, and to deprive the superior court of any jurisdiction to proceed in the premises, otherwise than as to the preparation thereof for a hearing in this court in pursuance of said appeals. Said sureties have a right to contest the validity of the action of the court upon the stay bond, and we are not called upon, in this proceeding, to determine what effect the giving of such stay bond had upon the right of the principal defendant to prosecute an appeal in the action. Such questions will be heard upon the appeal. It is sufficient now to say that said matters have been regularly appealed, and the same are now pending in this court. Consequently the peremptory writ must issue, and the relators will recover their costs herein of said Louise Thompson, the plaintiff in said action.

DUNBAR, C. J., and HOYT and STILES, JJ., concur.

(6 Wash. 236)

BENTLEY v. PORT TOWNSEND HOTEL & IMP. CO. et al.

(Supreme Court of Washington. March 13, 1893.)

APPEAL—STATEMENT.

The statement on appeal in an equitable case must contain all the evidence given on the trial. *Enos v. Wilcox*, 28 Pac. Rep. 364, 3 Wash. St. 44, followed.

Appeal from superior court, Jefferson county; Morris B. Sachs, Judge.

Action by William R. Bentley against the Port Townsend Hotel & Improvement Company and others to foreclose a mechanic's lien. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Jas. J. Easley, (A. W. Buddress, of counsel,) for appellant. Parsons & Corell, for respondents.



**PER CURIAM.** Motion is made in this case to dismiss the appeal, and to strike the pretended statement of facts from the record, for the reason that it was not filed or settled in time; that it was not certified as required by law; that it does not contain the evidence given on the trial; and that notice of its settlement was not sufficient, nor in time, to give the court jurisdiction to settle it. This case falls within the rule laid down by this court in *Stenger v. Roeder*, 3 Wash. St. 412, 28 Pac. Rep. 748, and 29 Pac. Rep. 211; also, *Enos v. Wilcox*, 3 Wash. St. 44, 28 Pac. Rep. 364; *Snyder v. Kelson*, 3 Wash. St. 181, 28 Pac. Rep. 335. The motion will be sustained, the statement of facts stricken, the appeal dismissed, and the judgment of the lower court affirmed.

(6 Wash. 295)

**SMITH et al. v. SEATTLE & M. RY. CO.**  
(Supreme Court of Washington. March 18, 1893.)

**APPEAL—RULING ON DEMURRER—FINAL ORDER.**

Where no final order or judgment is rendered in a case, an appeal will not lie from an order overruling a demurrer to the complaint. *Tripp v. Magnus*, 23 Pac. Rep. 805, 1 Wash. St. 22, followed.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by W. H. Smith and Charles Smith by J. W. Frame, guardian ad litem, against the Seattle & Montana Railway Company, to recover damages for the death of Arrista Smith, wife of W. H. Smith, and mother of Charles Smith, caused by the negligence of defendant's servants. From an order overruling a demurrer to the complaint, defendant appeals. Dismissed.

Burke, Shepard & Woods, for appellant. Whitney & Frame, for respondents.

**PER CURIAM.** Respondent moves to dismiss this appeal, for the reason that it appears from the record that the appeal was taken from an order of the trial court overruling the demurrer to the amended complaint filed in the action. It appearing from the record that the appeal is taken from such order, and that no final order or judgment has ever been made in said cause, the case falls within the decision of this court in *Tripp v. Magnus*, 1 Wash. St. 22, 23 Pac. Rep. 805, and the motion will therefore be sustained, and the appeal dismissed.

(6 Wash. 132)

In re **EYRES' ESTATE.**

**BAKER et al. v. EYRES.**

(Supreme Court of Washington. March 23, 1893.)

**NOTICE OF APPEAL—TIME OF FILING.**

Notice of appeal from a judgment of the superior court must be filed with the clerk of such court within a reasonable time after service thereof on respondent, and, where appellant retains the notice two months after such service, it is not so filed.

v.32p.no.15—68

Appeal from superior court, Lewis county; Edward F. Hunter, Judge.

In the matter of the estate of Lewis H. Eyres and others. From a decree in favor of Jennie H. Eyres, Mary M. Baker and others appeal. Appeal dismissed.

Leroy A. Palmer, for appellants. H. Julius Miller, for respondent.

**STILES, J.** This is a motion to dismiss upon short record. In response to the motion to dismiss, the appellants showed that the judgment of the superior court was entered September 28, 1892; that they filed a bond on appeal October 22d, and notice of appeal November 2d, of the same year. The notice of appeal, after service upon the opposite party, was retained by the attorney for appellants until January 11, 1893. On February 20th, no transcript having been filed in this court, the respondent filed a short record, and on the 2d day of March gave notice of motion to dismiss by mail, returnable March 17th. On the 7th day of March the transcript was filed without any showing justifying the delay, except that the filing in this court occurred within 60 days after January 11th. It is claimed by the appellants that inasmuch as the statute does not prescribe any time at which a notice of appeal shall be filed in the office of the clerk of the superior court, after having been served upon respondent, it was his discretion to retain it as long as he saw fit, provided that it be filed within six months from the date of the entry of the judgment. We cannot concede this proposition to be correct. The notice should be filed with the clerk within a reasonable time, and we find that in this instance upwards of two months was not a reasonable time. It is evident that the filing of the transcript on the 7th of March was due to the prompting of the notice to dismiss, and we think the motion should prevail. So ordered.

**DUNBAR, C. J., and SCOTT and HOYT, JJ., concur. ANDERS, J., did not sit.**

(6 Wash. 122)

**MECHANICS' MILL & LUMBER CO. v. DENNY HOTEL CO. OF SEATTLE. WESTERN MILL CO. v. COOPER, CLARK-HARRIS CO. et al. HALLFIELD v. DENNY HOTEL CO. OF SEATTLE et al. HUTTIG BROS. MANUF'G CO. et al. v. SAME. SPRING HILL WATER CO. v. SAME. HUTTIG BROS. MANUF'G CO. v. POTVIN et al. MARSH et al. v. SAME. DINES v. McDUGAL et al.**  
(Supreme Court of Washington. March 23, 1893.)

**MECHANIC'S LIEN—FOR WHAT OBTAINED—NOTICE OF LIEN—FOREIGN CORPORATION—VERIFICATION—PRIORITIES—MORTGAGES—ATTORNEYS' FEES.**

1. Subcontractors, who furnish materials specially designed and made for a building, and necessary for its completion, are entitled to a lien therefor, though such material has not been used, in consequence of the suspension of work by the contractor.

2. 1 Hill's Code, § 1524, authorizes any foreign corporation to sue and be sued, acquire

and hold property, and do business in the state, in the same manner and to the same extent as domestic corporations. Sections 1525, 1526, provide that such corporation shall file in the office of the secretary of state a certified copy of its articles of incorporation, and a written appointment of a resident agent. *Held*, that it is a sufficient compliance with the statute, where a foreign corporation furnishing materials for the erection of a building within the state files its articles and its appointment of an agent before the commencement of suit to foreclose its lien, though after the filing of its lien notice.

3. The premature filing of a lien notice does not deprive the lien claimant of the right to file another notice after all the material has been delivered.

4. The lien of a material man does not attach at the date that he commenced preparation of the material in another state, but at the time when he delivered it at the building as required by his contract.

5. Under 1 Hill's Code, § 1667, which provides that a lien claim may be verified by the claimant or some other person, the verification may be made by an attorney for a foreign corporation, though not specially authorized so to do by his appointment.

6. Under 1 Hill's Code, § 1663, which gives a lien to every person performing labor or furnishing material to be used in the construction of any building for the work done or material furnished by each, respectively, a material man can claim a lien only from the time he commenced to furnish material for the building; and, if such time is subsequent to the creation of a mortgage lien, of which he has notice, his claim for material is subject thereto, though the building was in process of construction when the mortgage was executed, and though the contractor's lien may, perhaps, be prior to the mortgage, under section 1666, which provides that the liens authorized in that chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building was commenced, work done, or material commenced to be furnished.

7. A mortgagee is not estopped to assert the priority of its mortgage over mechanics' lien claims by the fact that it sought to protect itself against such liens by reserving the right to pay the same from the amount of the mortgage loan.

8. The supreme court will reduce an amount allowed as attorneys' fees below the lowest estimate placed at the trial on the value of such services, where it is satisfied that such sum is excessive.

Appeal from superior court, King county; I. J. Lichtenberg, Judge.

Actions by Huttig Bros. Manufacturing Company, the Bridge & Beach Manufacturing Company, and others, against the Denny Hotel Company, the Cornell University, and others, to foreclose a mechanic's lien. The causes were consolidated. From the judgment rendered the Huttig Bros. Manufacturing Company, the Bridge & Beach Manufacturing Company, and the Denny Hotel Company appeal. Affirmed, except as to attorneys' fees.

Burke, Shepard & Woods, for appellant Denny Hotel Co. of Seattle. Hawley & Prouty, for appellant Bridge & Beach Manuf'g Co. Wiley, Scott & Bostwick, W. W. Wiltshire, and G. E. De Stelguier, for appellant Huttig Manuf'g Co.

The lien of the material man is prior to any mortgage attaching subsequent to the commencement of the building.

State v. Drew, 43 Mo. App. 362; Insurance Co. v. Slye, 45 Iowa, 615-618; Getchell v. Allen, 34 Iowa, 559; Davis v. Billsland, 18 Wall. 659; Neilson v. Railroad Co., 44 Iowa, 71; Bassett v. Swarte, (R.I.) 21 Atl. Rep. 352; McAdow v. Sturtevant, 41 Mo. App. 220; Dubois' Adm'r v. Wilson's Trustee, 21 Mo. 214; Insurance Co. v. Pringle, 2 Serg. & R. 138.

Fremont Cole, for appellee Cornell University.

The material man's lien relates back to the time when the material man first began to furnish materials. Phil. Mech. Liens, § 232; Pride v. Viles, 3 Sneed, 125; Bridwell v. Clark, 39 Mo. 170; Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680; Mellor v. Valentine, 3 Colo. 259; Folsom v. Cragen, 11 Colo. 205, 17 Pac. Rep. 515; Preston v. Lodge, 39 Cal. 116; Barber v. Reynolds, 44 Cal. 519, 533; Parker v. Mining Co., 61 Cal. 348, 354; Avery v. Clark, (Cal.) 25 Pac. Rep. 919, 920; Crowell v. Gilmore, 18 Cal. 372; Ansley v. Pasabro, 22 Neb. 662, 35 N. W. Rep. 885; McLagan v. Brown, 11 Ill. 526; Gaty v. Casey, 15 Ill. 192; Williams v. Chapman, 17 Ill. 423, 425, 65 Amer. Dec. 669, 671; Chadbourn v. Williams, 71 N. C. 444, 448; McCullough v. Caldwell's Ex'r, 8 Ark. 232; Choteau v. Thompson, 2 Ohio St. 115. See, also, Bank v. Winslow, 3 Minn. 86, (Gil. 43); Phil. Mech. Liens, § 228.

SCOTT, J. Several actions were brought in the superior court of King county to foreclose liens against a hotel building, and the ground upon which the same is situated, for materials furnished therefor; the Denny Hotel Company being the owner, and Fabian S. Potvin the contractor for the erection of said building. The causes were consolidated and tried together by virtue of an order of the superior court, and three appeals have been taken from the decrees therein rendered. The Denny Hotel Company appeals from the decree establishing the lien of the Huttig Bros. Manufacturing Company; and the Huttig Bros. Manufacturing Company and the Bridge & Beach Manufacturing Company appeal from the provisions of said decree establishing the mortgage lien of the Cornell University as prior to their said liens. The appeal of the Denny Hotel Company as against the Huttig Bros. Manufacturing Company will be first discussed.

Said plaintiffs claimed a lien for materials furnished for said hotel to said Potvin, as contractor, amounting to \$21,000, and it appears that of this amount only \$2,300 was used in the construction of the building, said building never having been completed, and said contractor having abandoned work thereon. It is contended by the appellant the Denny Hotel Company that there can be no lien for materials furnished which were not used in the construction of the building, and it is further contended that the right to a lien for the materials that were used was lost in consequence of the respondent having intermingled said claim with the claim for materials not used. It is conceded that said materials were all furnished under a con-

tract between said respondent and said contractor, and that the same were specially designed and made for said building, and are necessary to the completion of the building; that they have been delivered, and are now upon the premises at the building. It further appears that the only reason why the same have not been used is in consequence of the contractor having suspended work. Under such circumstances, we think the right to a lien for all of said materials exists.

A further point is made by the appellant to the effect that there can be no lien, for the reason that the contract between the hotel company and Potvin released the hotel company from liability for liens; and that the subcontractors were bound to take notice of this provision in the original contract. Whether or not such claim be well founded as a matter of law, we find no such provision in the contract in question. On the contrary, it contemplates that there may be liens upon said building, and provides, in case of an indebtedness created by said contractor at any time exceeding \$20,000 for labor on or materials used in or about said building, which would be or might become a lien thereon, that the hotel company, at its option, may apply any balance due or to become due said contractor to the payment of said indebtedness.

The further point is made that said respondent, being a foreign corporation, has no right to a lien, because of not having complied with the laws of this state relating to foreign corporations doing business within the state.<sup>1</sup> It appears that copies of the articles of incorporation were filed, and the appointment of an agent made, before the suit was commenced, but after the filing of the lien notice. We think this was a sufficient compliance with the law in this respect.

It is contended that the materials had not all been furnished when the claim of lien was filed, and that a party can have no lien for materials which have not been furnished at or prior to the filing of the lien notice. It appears that two lien notices were filed,—one on March 7, 1891, which was ruled out by the court at the trial on the ground that it was prematurely filed; but a subsequent notice, filed May 13, 1891, after the delivery of all the materials, was admitted. The last portion of the materials had been shipped and were on their way here when the first notice was filed, but had not yet arrived. If, in consequence of this, the first notice was prematurely filed, it would not deprive the respondent of the right to file another notice after all the materials had been delivered.

It is contended that an attorney for a foreign corporation cannot verify a mechanic's lien notice for such corporation

unless he is specially authorized by appointment, which must be filed in the secretary of state's office. Section 1667, vol. 1, Code, provides that such a claim may be verified by the claimant or some other person. We see no reason why a claim could not be verified by an attorney of the corporation, as was done in this instance.

It is contended that there can be no lien in this case, because the materials were not furnished from the commencement on the credit of the building and premises, but were furnished solely on the credit of the contractor. This claim is not well founded. After an examination of the proofs, we do not find anything to indicate an intention upon the part of the respondent to waive the right to a lien, or to furnish said materials solely upon the credit of the contractor, or that the same were so furnished. We think the contrary fairly appears.

It is contended that a portion of these materials were furnished after the contractor had abandoned said contract, and that there can be no lien for such materials for that reason. It does not appear that the contractor permanently severed his relations as contractor with the hotel company until about March, 1891. Some work was done along at various times up till about that time, and the contractor had charge of the building. The most that can be claimed is that there was a partial cessation of the work at that time on account of differences between the hotel company and said contractor, but said suspension was not complete, and it was not known that it would be permanent until about March, 1891; and it appears that the materials in question were all shipped before said time, and in pursuance of a contract made by the respondent with said contractor, prior thereto, and when he was prosecuting the work; and this point is untenable.

The court allowed an attorney's fee of \$2,000, and the appellant alleges that this is excessive. There was proof to show that such services were worth from \$1,500 to \$2,500, none of the witnesses placing the value thereof below \$1,500. However, we are satisfied that the sum allowed was much too large. It is not the policy of the law to allow large or exorbitant attorneys' fees.

As to the appeal of the Huttig Bros. Manufacturing Company against the Cornell University, it appears that the contract between the hotel company and Potvin was entered into July 22, 1889, and the construction of the building was commenced thereunder in August following. The Huttig Bros. Manufacturing Company, a foreign corporation, contracted with Potvin to furnish certain materials for said building, and commenced the preparation of said materials at its place of business in the state of Iowa, in January, 1890, and commenced to deliver the same in September, 1890. On the 28th day of December, 1889, the Denny Hotel Company executed and delivered to the Cornell University, a corporation, its three promissory notes,—two for \$25,000 each, and one for \$50,000,—and secured the same by

<sup>1</sup> Hill's Code, § 1524, authorizes any foreign corporation to sue and be sued, acquire and hold property, and do business in the state, in the same manner and to the same extent as domestic corporations. Sections 1525, 1526, provide that such corporation shall file in the office of the secretary of state a certified copy of its articles of incorporation, and a written appointment of a resident agent.

mortgage of the lands upon which the hotel in question was being constructed. Prior to the time the Huttig Bros. Manufacturing Company commenced to furnish materials for said building they had actual notice of the execution and delivery of this mortgage, and they commenced to furnish materials thereafter. Fifty thousand dollars of the money secured by this mortgage was paid January 4, and the remainder March 1, 1890. The whole of it was paid before appellant furnished any materials for the building. The lower court rendered a decree establishing the lien of appellant, but found and decreed that the same was subsequent and subject to the lien of said mortgage, and an appeal was taken therefrom. The hotel building in question was in process of construction at the time of the execution of this mortgage, and the money was borrowed with the understanding that it was to be used in putting up the building; and it is contended by appellant that its claim for materials furnished should be held prior to the mortgage lien for these reasons. Section 1666, vol. 1. Code, provides that the liens authorized in that chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequently to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished, etc. It is contended in this case that, as the principal contractor had entered into the contract for the construction of the hotel, and had commenced work thereunder, prior to the execution of the mortgage, he would have had a lien paramount to the mortgage lien, which might have included appellant's claim, and that, consequently, appellant's lien should relate back to the time of the making of the original contract. Section 1663 provides that every person performing labor upon or furnishing materials to be used in the construction of any building, etc., has a lien upon the same for the work or labor done or materials furnished by each respectively, etc., and this seems to contemplate that each lien shall stand upon its own footing. Consequently appellant is not in a position to claim the right to be subrogated to the rights of the contractor in this particular, even if he could have enforced a lien including a claim for the materials furnished by appellant as paramount to the mortgage lien, without having paid said claim, or making such material man a party to the suit, if the time within which he could claim a lien for materials had not expired,—which we do not decide. See *Crowell v. Gilmore*, 18 Cal. 370. It may be well to say, however, that, for aught that appears, the contractor has no lien. It does not appear that he is attempting to enforce any, and it does appear that the building has not been completed, and that work thereon has been suspended. In any event, the contractor could only foreclose for the balance due him upon the contract price, while, if appellant's claim is to be maintained, and the rights of subcontractors and material men are to relate back to the time of the execution of the original contract and

the commencement of work thereunder, liens might be enforced against the premises, and made prior to the mortgage claim, for a much greater amount than the original contract price. Under the provisions of our statutes, a material man can only claim a lien from the time he commenced to furnish materials for the building, and, if such time is subsequent to the creation of the mortgage lien, of which he has had notice, his claim for materials is subject thereto. A great many cases have been cited by the appellant, and also by the respondent, from different states, construing the lien laws there in force, many of which are utterly worthless in undertaking to arrive at a correct interpretation or construction of our own laws upon that subject, as the statutory provisions involved are so essentially different. Some of them, however, contain provisions very much like our own, and under the weight of authority we think that appellant's claim in this particular cannot be maintained.

Appellant contends that it commenced to furnish materials from the time that it began to prepare the same for shipment in the state of Iowa, and, in consequence of its having commenced the preparation thereof before the execution of the mortgage, its lien is superior to the mortgage lien. But the lien can hardly date from the time appellant commenced the preparation of the materials in another state. It was to furnish the materials delivered at the building in the city of Seattle, and its claim cannot be held to have attached before the delivery thereof. *Williams v. Chapman*, 65 Amer. Dec. 669, 17 Ill. 423.

It is also urged by the appellant that by reason of the testimony given, to the effect that the Denny Hotel Company borrowed this money for the purpose of building the hotel, and that the Cornell University had notice of that fact, and sought to protect itself in the mortgage against any liens that might be created against the property by reserving the right to pay the same from the amount of the mortgage loan, it is estopped from disputing the claims of the lienors. The authorities are against this proposition, however. The respondent had a right to consider and contemplate the making of improvements upon the property as a basis for making the loan in question; and by seeking to protect itself in the mortgage against liens which might be enforced against the property it cannot be held to have become a party thereto, or to have assumed any liability as to such liens. The provisions were inserted merely for its own protection. *Platt v. Griffith*, 27 N. J. Eq. 207; *Moroney's Appeal*, 24 Pa. St. 372; *Monroe v. West*, 12 Iowa, 119; 1 Jones, *Mortg.* § 370.

The only questions raised in the appeal of the Bridge & Beach Manufacturing Company are disposed of in the discussion of the appeal of the Huttig Bros. Manufacturing Company, and it is unnecessary to review them.

The decree of the lower court will be affirmed, except as to the attorney's fee allowed the Huttig Bros. Manufacturing Company, which will be reduced to \$1,000.

In placing it at this amount we have been governed by the attorney's fee of \$1,000 allowed the Bridge & Beach Manufacturing Company in foreclosing its lien for a much less sum, from which there was no appeal. As all parties interested seem to have acquiesced in this allowance, we have followed it. If it had been appealed from, we would have reduced both sums much lower. In consequence of the modification of the decree the Deuny Hotel Company will recover its costs in this appeal against the Huttig Bros. Manufacturing Company. The Cornell University will recover its costs in the appeals of the Huttig Bros. Manufacturing Company and the Bridge & Beach Manufacturing Company.

STILES and ANDERS, JJ., concur. HOYT, J., did not sit at the hearing, he being interested.

(6 Wash. 138)

SEYMOUR v. CITY OF TACOMA et al.

(Supreme Court of Washington. March 24, 1893.)

MUNICIPAL CORPORATIONS — WATERWORKS AND LIGHT PLANTS—TITLES OF ACTS — ELECTIONS—REGISTRATION.

1. Act March 26, 1890, entitled "An act authorizing cities to construct waterworks and light plants," sufficiently expresses the purpose of the act, though the act confers, also, the power to purchase such works and plants as have already been constructed by private enterprise.

2. An ordinance providing for submitting to the electors the proposition of purchasing the plant of a water and light company, and of extending the same, under Act March 26, 1890, need not contain a schedule of the territory covered, the size of the pipes, the sources of water supply, or the character and situation of the pumping stations, but a designation of the property as that of the company which owns it is sufficient.

3. Laws 1891, (amending said act,) p. 326, § 2, provides that the city authorities may submit two propositions to the voters at the same election, viz.: "(1) Will you adopt this system or plan, and pay therefor out of the current revenue? (2) Will you adopt it, and pay for it with the proceeds of bonds?" *Held*, that either proposition might be submitted alone, but that the adoption of the system and the incurring of indebtedness need not be submitted as separate questions.

4. The charter requiring all ordinances to be published for three days consecutively, a notice of election, required to be published for 30 days, need not contain the ordinance, but only a fair statement of its contents.

5. Under Gen. St. § 467, providing that the registration law shall apply to all elections for municipal and other officers, the registration law does not apply to elections to vote upon an ordinance proposing the purchase of waterworks and a light plant, and the extension thereof.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Action by Edmund Seymour against the city of Tacoma and others to enjoin an election. From a judgment for defendants, plaintiff appeals. Affirmed.

Alfred E. Buell, for appellant. F. H. Murray and Galusha Parsons, for respondents.

STILES, J. The appellant sought to enjoin the holding of an election in the city of Tacoma looking to carrying out the scheme which is set forth in the following ordinance: "Ordinance No. 790. An ordinance to provide for the purchase of the waterworks and electric light plant, and all such water supplies, riparian rights, rights of way, lands, lots, personal property, and franchises as are now owned or operated by the Tacoma Light and Water Company as part of such water and electric light plants, excepting their distributing system in the town of Puyallup; and for extending said waterworks and making additions thereto by the adoption of a gravity system of waterworks; to declare the estimated cost of said additions and extensions; to provide for borrowing money to be used in payment therefor by issuing the negotiable coupon bonds of said city for the sum of two million one hundred and fifty thousand dollars; and to provide for calling a special election for submitting such questions to the qualified voters of said city for their ratification or rejection. Be it ordained by the city of Tacoma: Section 1. That the offer of the Tacoma Light and Water Company to sell the waterworks and electric light plant, and all such sources of water supplies, riparian rights, and rights of way, lands, lots, personal property and franchises as are now owned or operated by the Tacoma Light and Water Company, as part of such water and electric light plants, excepting their distributing system in the town of Puyallup, for the sum of one million seven hundred and fifty thousand dollars, be and the same is hereby submitted to the qualified voters of the city of Tacoma upon the terms and subject to the conditions hereinafter particularly specified. Sec. 2. If said city shall become the owner of said waterworks and electric light plant, and sources of supply, it will extend said waterworks, by additions thereto by a gravity system, so that the same shall be sufficient to adequately supply the said city and its inhabitants with pure, fresh water, sufficient for all their necessary uses, which extensions shall be substantially as follows: Thirty-eight inch conduit pipe from Patterson and Thomas springs to the reservoir of the Tacoma Light and Water Company in the city of Tacoma, distant from said Patterson springs about sixteen miles, and distant about thirteen miles from said Thomas springs; connections from reservoir site to station B of the Tacoma Light and Water Company near the intersection of Hood and O streets in said city; the erection of a hydraulic pump at a suitable junction of the waters of said springs,—the estimated cost of which extensions is four hundred thousand dollars. Sec. 3. For the purpose of borrowing money to be used in payment for said waterworks, electric light plant, and sources of supply, and for the construction of said extension to said waterworks, the city of Tacoma shall issue its negotiable coupon bonds for the sum of two million one hundred and fifty thousand dollars, payable to bearer twenty years from the date thereof, with interest at the rate of five per centum per

annum, payable semiannually. Both principal and interest shall be payable in gold coin of the United States of America, of the present standard of weight and fineness, at such banking house or trust company in the city of New York as shall be designated in said bonds. Sec. 4. The mayor is hereby authorized and directed, in case of the ratification by the qualified voters of said city at an election for the submission of said proposition as hereinafter provided, to issue in the name of said city, signed by himself as mayor, attested by the city clerk under the seal of said city, and countersigned by the city controller, two thousand one hundred and fifty negotiable coupon bonds of one thousand dollars each, to be designated upon the face thereof 'Water and Light Bonds of the City of Tacoma,' with interest thereon as provided in the third section hereof, which bonds shall be numbered, respectively, from one to two thousand one hundred and fifty, and shall, when so signed, attested, and countersigned, be delivered by the mayor to the sinking fund commission of said city for sale and negotiation, as hereinafter provided. Sec. 5. The said sinking fund commission shall negotiate the sale of said bonds, after having duly advertised the same for sale at least thirty days preceding the day of sale: provided, that said bonds shall not be sold for less than par and accrued interest. Said sinking fund commission shall, immediately upon the receipt of the moneys received for said bonds, pay all moneys so received into the city treasury. Sec. 6. In case of the ratification of the said proposition by the qualified voters of said city at the special election herein provided for, the said sinking fund commission is authorized and instructed, upon the execution and delivery by the said Tacoma Light and Water Company of a good and sufficient deed, with covenants of warranty, to vest in said city a perfect title to said waterworks, electric light plant, and sources of supply,—said deed to be approved by the city council,—to pay, out of the money received for the sale of said bonds, to the said Tacoma Light and Water Company, the sum of one million seven hundred and fifty thousand dollars, the same to be accepted by said company in full payment therefor. Sec. 7. That a special election be held in and for said city upon the eleventh day of April, A. D. 1893, for the purpose of submitting to the qualified voters thereof the question whether said city shall purchase the waterworks and electric light plant and the sources of supply owned by said Tacoma Light and Water Company, for the sum of one million seven hundred and fifty thousand dollars, and construct additions and extensions thereto at an estimated cost of four hundred thousand dollars, and whether said city shall borrow the sum of two million one hundred and fifty thousand dollars, to be used for the payment thereof, and issue its negotiable coupon bonds for said sum. Sec. 8. The form of ballot to be used at said election shall be: 'Shall the city of Tacoma purchase the waterworks and electric light plant and sources of supply of the Tacoma Light and Water

Company for the sum of one million seven hundred and fifty thousand dollars, and construct extensions to said waterworks at an estimated cost of four hundred thousand dollars, and borrow the sum of two million one hundred and fifty thousand dollars, to be used for said purpose, and issue its negotiable coupon bonds therefor.' All persons in favor of said proposition shall vote as follows: 'For the purchase of the waterworks, electric light plant, and sources of supply of the Tacoma Light and Water Company, and the construction of extensions to said waterworks, and the issuing of negotiable coupon bonds of the city therefor.' Those voting against said proposition shall vote as follows: 'Against the purchase of the waterworks, electric light plant, and sources of supply of the Tacoma Light and Water Company, and construction of extensions to said waterworks, and the issuing of the negotiable coupon bonds of the city therefor.' Sec. 9. Said election shall be held at such voting places in the several precincts of said city, and shall be conducted by such judges and inspectors of elections, as may be hereafter designated and appointed, and shall be conducted in all respects as provided by the charter of said city and the general laws of the state of Washington. The city clerk shall give at least thirty days' notice of the time, place, and purpose of said election, and of the proposition to be submitted thereat, together with the form of ballot to be used, which notice shall be published in the city official newspaper for thirty days next preceding said election, and shall be posted for the like period, at all of the places designated therein for holding said election. Sec. 10. This ordinance shall, immediately after its passage and approval by the mayor, be published in the official newspaper of said city for three days, consecutively, and shall take effect upon the expiration of such publication."

The following are the points raised as objections to the validity of the ordinance as the basis for the popular vote on the proposition to be submitted: (1) The action sought to be taken by the city is under authority of, and in accordance with the provisions of, the act relating to internal improvements in cities and towns, approved March 26, 1890, (Laws Wash. 1889-90, p. 520,) as amended March 9, 1891, (Laws Wash. 1891, p. 326;) and it is contended that this act, in so far as it is a grant of power to "purchase," is void, for the reason that it is not mentioned in the title of the act, which relates merely to "construction." (2) The ordinance fails to specify the works and plant with sufficient detail to enable the taxpayers to determine, without going to other sources of information, the expediency of purchasing the property offered, and at the price named. (3) The act provides that the ratification of the system or plan proposed, and the assent to the incurring of indebtedness, shall be submitted to the voters as separate questions. (4) The ordinance provides, by its terms, that the proposition therein contained shall be submitted to the voters, while the act requires that the ordinance itself shall be

submitted. (5) The amendments to the registration law enacted in 1893 having become a law March 7th, there could be no election April 11th, because the terms of the law and certain provisions of the city charter would not give sufficient time for a fair or effective registration of voters.

The city of Tacoma is a city of the first class, organized under a freeholders' charter in 1890; and its position is that, as a city of that class, it is not dependent upon the act of 1890, above referred to, either for its authority to purchase water or light plants, or for its power to issue bonds therefor, nor is it bound by the requirements of that act when it proceeds to acquire property of the character here in question. In support of this position our attention is called to the fact that the original legislative charters of the same city all had more or less in them in the way of authority to provide and maintain waterworks. Laws 1875, p. 167; Laws 1881, p. 86; Laws 1883, p. 310; Laws 1886, p. 197. In some of them the maintenance of lighting systems was included, and purchase was more than once specified as the means by which such institutions might be acquired. And again it is pointed out that two days before the act of March 26, 1890, was approved, another act, known as the "Enabling Act," for cities of the first class, was approved, with the following as powers expressly enumerated in section 5: "Par. 14. To provide for erecting, purchasing, or otherwise acquiring waterworks within or without the corporate limits of said city, to supply said city and its inhabitants with water, or to authorize the construction of the same by others, when deemed for the best interest of said city and its inhabitants, and to regulate and control the use of the water so supplied. Par. 15. To provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights, and to erect or otherwise acquire and to maintain the same, or to authorize the erection and maintenance of said works, as may be necessary or convenient therefor, and to regulate and control the use thereof." The fourth paragraph of the same section authorized the borrowing of money for corporate purposes, and the issuance of negotiable bonds therefor, in such manner as should be prescribed in its charter, and this provision was somewhat amplified in the charter adopted. Unquestionably, if the act of March 26, 1890, had never been passed, the provisions of the act of March 24th must have been held to empower the city of Tacoma to acquire water and lighting plants, and to issue negotiable bonds to pay the cost of the same; and if her charter prescribed the manner and conditions of issuing the bonds, in compliance with the constitutional requirements, she could now proceed without hindrance from this appellant on the grounds here alleged. This inferentially appears from the language of paragraph 4, above mentioned, which limits the indebtedness possible to 10 per cent. of the city assessment roll, whereas, under the constitution, all above

5 per cent. would be void unless procured for water, light, or sewers. Whether the charter does prescribe any manner or conditions of issuing bonds, we shall not now examine, however, for reasons which we think are found in the law, and which obviate the necessity of it.

Prior to the acts of 1890, so often mentioned, cities did not have the right to create indebtedness by the issuance of negotiable bonds. The act of February 26th (page 225) extended to every incorporated town then existing the right to borrow money and fund its debts in aid of municipal purposes. The enabling act of March 24th continued these rights to such cities of the first class as chose to come under its provisions; but the general municipal incorporation act of March 27th withheld these powers from cities of the lower classes until 1891, when the oversight was corrected by the act of March 7th of that year, (Laws, p. 261,) and all cities in the state, whether old or new, were placed upon the same footing. All cities, however, were empowered by the act of March 26, 1890, to construct internal improvements, and to issue bonds to pay therefor. At that time the city of Tacoma was existing under its charter of 1886; for although on March 24th the "Enabling Act" had been approved, with an emergency section, it was a mere dormant statute until each city to which it was applicable should elect to adopt a charter in accordance with its requirements. In the mean time the act of March 26th was the source of its power, the measure of its authority, and the law of its proceedings, in the construction of internal improvements by the issuance of bonds to pay therefor. But with this law thus impressed upon her, and under the proviso of the constitution that, in framing her freeholders' charter, she must make it consistent with, and take it subject to, the laws of the state, it is suggested that, because of the powers enumerated in the "Enabling Act," the general law existing at the time she adopted her new charter (the act of March 26th) should be held to be no longer of any binding force as to her. The answer to this proposition, it seems to us, is found in the further expression of the constitution, (article 11, § 10,) that the new charter should "supersede any existing charter, [of 1886,] including amendments thereto, and all special laws inconsistent with such charter." General laws were not to be affected, and cannot have been affected, unless there be found in the enabling act such positive expressions as would amount to a repeal of the general law, pro tanto, under the rules for interpreting statutes. But the mere fact that the power to provide waterworks, light plants, and sewers, and to pay for them with money raised by bonds, is conferred over again would not suffice to construe a repeal therefrom. All that is necessary to harmonize the two laws is to construe the authority to borrow money and issue bonds contained in paragraph 4 of the fifth section as subordinate to the provisions of the other act, which was passed at a later day, although in the same ses-



alone; and we believe that when this is done the true intent of the legislature will be carried out.

Now, to consider appellant's points in their order:

1. The subject of the act of March 26, 1890, included the purchase of waterworks and light plants, which had theretofore been erected by private enterprise. The first section proves it to a verbal demonstration. The title, however, is: "An act authorizing cities and towns to construct internal improvements, and to issue bonds, and pay therefor, and declaring an emergency." Ordinarily the meaning of the word "construct," in the sense here meant, would be to build or make; but, to give the law any effect whatever, it must have been known to the legislature that more than the mere cost of construction, involving the labor necessary, would have to be implied. In making every such improvement the machinery and piping must be purchased, and these constitute a very large proportion of the cost. But that is not all. In building systems of waterworks, especially, two other things must be looked after, unless the cities for which they are provided lie immediately upon the lake or stream which furnishes the source of supply. These are the right to take water, and the necessary land for rights of way, reservoirs, and buildings for machinery. If one should contract with another for the construction of a house, no one would suppose for a moment that the agreement to construct implied an agreement to furnish the land whereon the house must stand; but a gross contract to construct a system of waterworks for the city of Tacoma, with Green river as a source of supply, and turn it over ready for operation, would certainly imply that when the works were finished the perpetual right to have them remain where they were, with the waters of Green river flowing into them, should be secured to the city. Thus, under this power to construct, all but the mere labor would be accomplished by purchase, in most cases, and there would seem to be no good reason why water rights, land, pipes, and machinery should not be purchased, although they be already in use for a like purpose. The labor, only, is therefore left unprovided for. Moreover, at the time this law was passed, it was supposed by the legislature, as the body of the act shows, that some of the cities of the state already had, or would have, both water and lighting systems, the property of private persons or corporations, which it would be desirable to acquire; and probably the expression of the authority to purchase or condemn such existing plants was due to the economical reason that, wherever such private works are of anything like adequate capacity to supply the requirements of the cities in which they exist, the successful operation of rival works by those cities would be more than doubtful, since all such businesses are in their nature monopolies, and not subject to the ordinary laws of supply and demand. It might be that in some cases an existing water company would be in possession of the only prac-

ticable supply, with a complete system of machinery, reservoirs, and distributing pipes, and it might, even in such an instance, be desirable that the city should own and operate its own waterworks. But it would be oppression of the most tyrannical kind to take away from the water company its source of supply without at the same time taking the rest of its plant; and yet that city, according to the argument of the appellant, would be shut out from the benefit of this law. As showing how the legislature which passed this act regarded the matter, we may refer to the emergency section. After having provided in the first section for constructing, purchasing, condemning, adding to, and maintaining these works, the seventh section recited that, whereas there was no law in this state authorizing cities and towns to construct internal improvements, and to issue bonds to pay therefor, an emergency existed which justified its immediately taking effect. Now, an emergency clause in our legislation is the last thing passed upon, after the bill itself has received a constitutional majority in both houses; so there could have been no misunderstanding, and the word "construct" was supposed to be sufficient to cover all that was granted in the first section. The object of the requirement that the subject of an act shall be expressed in its title is that no person may be deceived as to what matters are being legislated upon. The real purpose of this act would have been better expressed had the word "provide" been used, but we think the word "construct," under all the circumstances, may be accorded a similar meaning, rather than to defeat the operation of what is probably the most important feature of this law, upon the technical significance of a word, where it can hardly be contended that any one was likely to be deceived. As the constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391.

2. As to the second point, we think the ordinance was sufficient. What was said by this court in *Metcalf v. City of Seattle*, 1 Wash. St., on page 300, 25 Pac. Rep. 1010, as to the necessity of disclosing to the voters the system or plan of works proposed, is invoked to support the proposition that the ordinance should contain a schedule showing the extent of territory covered; the miles of pipe laid, and of what sizes; the sources of water supply, and the extent of the rights of the seller therein; the quantity of water available, and how brought to the city, and, if in an aqueduct or flume, of what capacity; the capacity of the pumping stations, and their character; the amount of land, and where situate. The statute does not require any such thing, nor do we think it

would be reasonable, in any case, to require it. If it were proposed to construct anew all of the works intended to be purchased in this case, no such particular inventory could be expected, and it would not be necessary to have it in order that the entire scheme might be made known to the voters. The system or plan here is to be—First, the existing plant of the Tacoma Light & Water Company, embracing its waterworks and electric light plant, excepting its distributing system in the town of Puyallup; secondly, an extension of the waterworks by a gravity system from the Patterson and Thomas springs, 16 and 13 miles distant, respectively. If any person who has been a resident of the city of Tacoma long enough to vote upon the question cannot understand this as a system or plan, he would never do so upon reading a schedule of pipes, pumps, etc. It might as well be demanded that both chemical and microscopical analysis of the water from each source of supply be made part of the ordinance. The quality of the water would be a very important item of consideration in connection with any scheme of this kind, but the statute was not intended to prescribe details. Something must be intrusted to the mayor and council, and it is to be presumed that they will see after titles, size of pipes, capacity of pumps, permanency and purity of supply, and all such matters of detail, and that general information will naturally be diffused through the community upon all these subjects during the period of notice.

3. Under the amendment to section 2 of the act, made in 1891, (Laws, p. 326,) if the city authorities desire, they may submit two propositions to the voters at the same election, viz.: "(1) Will you adopt this system or plan, and pay therefor out of the current revenue? (2) Will you adopt it, and pay for it with the proceeds of bonds?" On the other hand, either proposition may be submitted alone, as is intended in this case. The mere adoption of the system or plan would not amount to anything, in any case, unless a means of payment went with it; and this is especially so where an expensive plant is to be purchased. The change in the language of the statute has not bettered it. It is still awkward. But in our judgment it either means just what it did before, or it means nothing, so far as providing these works without going into debt is concerned. We will not convict the lawmakers of an absurdity by holding that they meant that a system or plan might be adopted without regard to realization or payment. But it is said the voters in this case might be willing to adopt the system proposed, but not at the price named; to which it is enough to say that the statute does not contemplate trial or half-way elections. It must be presumed, in any such case, that the city authorities have done their part, and that the proposal submitted is, in their judgment, wise, after which the voters must say whether they are satisfied to have the round proposition adopted or rejected.

4. It is conceded by appellant that the electors are not called upon to vote for or against the ordinance, but he contends

that the election notice should contain the ordinance in full, in order that the voters may be apprised of the exact propositions submitted. By section 47 of the charter, every ordinance is required to be published in the official newspaper for 3 days, consecutively, within 10 days after its passage. After this a 30-days publication of a notice of election, containing a fair statement of the matters to be voted upon, ought to satisfy all reasonable requirements. The city is not called upon to thrust information upon the electors, but to give them fair notice of what is proposed, and an opportunity to express their will. If they take any interest in the subject of the election, it is not unreasonable that they should themselves be at the trouble to become fully informed, and there is little danger that they will fail in that respect.

5. We have but one registration law in this state, which is found in chapter 8, Gen. St. Section 467 declares that the provisions of the law shall apply to all elections for municipal and other officers, but we fail to find any application of it to elections of this kind. Section 9 of the charter requires registration "as provided by the general laws of the state;" and section 13 declares that no person shall be entitled to vote unless he is a qualified elector under the state laws, and has registered "as provided by law." But, there being no state law requiring registration at elections of this character, these provisions of the charter are inoperative, and any elector can vote. The amendments to the registration law passed in 1893 do not affect this matter. The points of objection having all been resolved in favor of the respondents, it follows that the judgment should be affirmed, and it is so ordered.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur. ANDERS, J., not sitting at the hearing.

(6 Wash. 165)

BELLINGHAM BAY LAND CO. v. DIBBLE.

(Supreme Court of Washington. March 28, 1893.)

COSTS ON APPEAL—BRIEF—UNNECESSARY MATTER.

No costs will be allowed a party for 120 pages of testimony unnecessarily included in his brief.

Motion to retax costs.

For former report, see 31 Pac. Rep. 30.

DUNBAR, C. J. The appellant moves to retax the costs adjudged the respondent in this action in so far as the same applies to the costs taxed for the brief filed by respondent, in that the same are too large, and not in accordance with the rules of this court. Costs were allowed respondent for the brief in the sum of \$175. An examination of respondent's brief, which is a brief containing 174 pages, shows that 120 pages are devoted exclusively to a recital of the testimony given on the trial of the case. The testimony

is before the court in the statement of facts, and it is not necessary that it should be again presented in the form of a brief. At all events, the losing party should not be called upon to pay for the same. The brief in this case contains about 54 pages of proper matter. We think, under the circumstances, that \$60 is an ample allowance to respondent for the costs of their brief, and the judgment will be modified to that extent.

HOYT, SCOTT, STILES, and ANDERS, JJ., concur.

(6 Wash. 157)

WAY v. WOOLERY, Sheriff.

(Supreme Court of Washington. March 25, 1893.)

ORGANIZATION OF STATES — JURISDICTION OF COURTS OVER TERRITORIAL CASES — COMMITMENT — INDICTMENT.

1. When the supreme court of Washington was created under its constitution and the organic act, and took possession of cases pending in the territorial supreme court, it acquired the power to remand criminal cases to the superior courts, the successors of the former territorial district courts, for execution of its judgments.

2. Under Code Proc. § 2, providing that the supreme court should have all power necessary to execute its judgments within its jurisdiction, the court had power to remand a criminal case to the superior court, the successor of the territorial district court, for commitment under a former sentence.

3. A commitment directing a sheriff to commit a defendant in the county jail in the county of King and "territory" of Washington is not invalid where the caption shows that the commitment was intended for the sheriff of King county in the "state" of Washington, and the direction is that the confinement be in "said" county.

4. An objection that the title of an indictment is in the name of the territory, and not of the state, if not made at the trial, cannot be raised for the first time on appeal in habeas corpus proceedings.

Appeal from superior court, King county; T. J. Humes, Judge.

Eugene W. Way was convicted of permitting the gambling game of faro to be dealt on his premises, and was committed to the county jail until the fine should be paid. A writ of habeas corpus was applied for by defendant, and was quashed. Defendant appeals. Affirmed.

Winsor & Farwell, for appellant. John F. Miller, Pros. Atty., and A. G. McBride, Dep. Pros. Atty., for respondent.

STILES, J. After the decision of this court in *Way v. Territory*, 1 Wash. St. 415, 25 Pac. Rep. 461, the cause having been remanded to the superior court of King county, that court, on the 17th day of June, 1892, issued its commitment to the sheriff, commanding him to imprison appellant until he pay a fine of \$500, theretofore assessed against him, and costs in the sum of \$20. This case arose upon a writ of habeas corpus, issued by one of the judges of the superior court of King county, to examine into the authority of the sheriff to hold the appellant further under his commitment. The court below quashed

the writ, on motion of the prosecuting attorney, in pursuance of Code Proc. § 722, without hearing the grounds claimed by the appellant to warrant his discharge. Technically, perhaps, the court erred in refusing to hear the case, since the points raised by appellant were intended to test the question whether or not the superior court of King county was a court of competent jurisdiction to issue the commitment upon which the appellant is confined. But if the procedure of the court was wrong, we do not find that its judgment was so. The gist of the appellant's argument is that, inasmuch as there was nothing in either the enabling act which authorized the organization of the state of Washington, nor in the constitution of the state, which in express language authorized this court to remand territorial criminal cases to the superior courts of the state for further proceedings, the superior court had no jurisdiction in this instance, but that, if any commitment could be issued by any court, it must have been issued by this court. We shall not enter upon any review or discussion of the several portions of the enabling act and the constitution which operated to transfer causes pending in the supreme court of the territory of Washington to the supreme court of the state of Washington. They are clear and unmistakable in their language, and the appellant makes no contention that they did not have the effect to give this court jurisdiction to try and determine the former case. The mistake which appellant makes in this matter is found, we think, in this: He overlooks the fact that when this court came into existence and took possession of cases pending in the territorial supreme court it also acquired all the powers of the former territorial court under the statutes of the territory, one of which was to remand cases to the successors of the former territorial district courts, namely, the superior courts, for execution of its judgments. Therefore no express language was necessary, either in the enabling act or the constitution, to effect that object. But, if this were not enough, almost the first thing which the first legislature of the state did was to enact what is contained in section 2 of the Code of Procedure, viz.: "Sec. 2. The supreme court shall be a court of record, and shall be vested with all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the constitution and laws of this state." Under the laws of this state, which at that time were the former territorial laws, the prescribed method by which the supreme court carried out its determination in a criminal case was by remanding it to the successor of the territorial court, either for a new trial or for commitment under the former sentence. Cases cited by counsel all go to the matter of transfer of jurisdiction, not to the disposal of cases under jurisdiction acquired by transfer.

A verbal criticism is made of the commitment, in that the direction to the sher-

iff is that he commit the appellant to the county jail in the county of King and territory of Washington. But the caption of the commitment shows it to have been intended for the sheriff of King county in the state of Washington, and the absolute direction is that the confinement be in the said county. We read the paper as if it were written, "King county, Washington," rejecting the words "territory of," as at that date they had no meaning.

Again, it is claimed that the prosecution of the case transferred to this court should have been in the name of the state, rather than in the name of the territory. The title of the case, it is true, remains "Territory of Washington v. Eugene Way," but, if any objection could have been made upon that account, it should have been made when that cause was heard, and it is now too late to raise the objection.

It is also said that the judgment for costs was in favor of the territory, and not in favor of the state. The judgment was for \$22.25, and that execution issue therefor. The commitment, however, does not require that those costs should be paid as a prerequisite of appellant's discharge. Only the costs of the superior court are mentioned therein.

The judgment will therefore be affirmed.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur.

#### FOSTER v. WOOLERY, Sheriff.

(Supreme Court of Washington. March 25, 1893.)

Appeal from superior court, King county; T. J. Humes, Judge.

Application of the state at the relation of J. H. Foster for writ of habeas corpus. Writ denied. Petitioner appeals. Affirmed.

Winsor & Farwell, for appellant. John F. Miller, Pros. Att., and A. G. McBride, Dep. Pros. Att., for respondent.

STILES, J. For the reasons given in the Way Case, 32 Pac. Rep. 1082, (just decided,) the judgment is affirmed.

DUNBAR C. J., and HOYT and SCOTT, JJ., concur.

(51 Kan. 408)

#### CHICAGO, K. & W. R. CO. v. PARSONS.

(Supreme Court of Kansas. May 6, 1893.)

EMINENT DOMAIN—MEASURE OF COMPENSATION—EVIDENCE—VIEW BY JURY—INSTRUCTIONS—HARMLESS ERROR.

1. In a proceeding to recover damages for the right of way appropriated to the use of a railroad company the actual cash market value (at the time of the appropriation) for the property actually taken must be allowed.

2. Where damages are claimed by the landowner for lots or land wholly taken for the right of way of a railroad, and the court instructs the jury "that it is the fair market price of the land in question that is to be ascertained in estimating the damage;" that "in considering the market value the jury will take into consideration the actual state of the market at the time of the taking;" that "in determining the value the same considerations are to be regarded as in the sale of property

between private parties at the time of the taking;" and that "the market value must be the actual, and not the conjectural or imaginary value,"—such instruction is not erroneous or misleading.

3. The evidence which the jury may acquire from making a view of the premises is not to be elevated to the character of exclusive or predominating evidence. *City of Topeka v. Martineau*, 22 Pac. Rep. 418, 42 Kan. 387.

4. Where instructions are given which, under some conditions, might be misleading, they become wholly immaterial if it conclusively appears from the special findings of the jury that the verdict rendered is not influenced or controlled thereby.

(Syllabus by the Court.)

Error from district court, Scott county; V. H. Grinstead, Judge.

Condemnation proceedings by the Chicago, Kansas & Western Railroad Company against Mary S. Parsons. Defendant appealed to the district court, and on a trial she had judgment. Plaintiff brings error. Affirmed.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error. Morse & Hubbell, for defendant in error.

HORTON, C. J. This was an appeal in the court below by Mary S. Parsons from condemnation proceedings instituted by the Chicago, Kansas & Western Railroad Company to lay off its route, side tracks, depot grounds, etc. In her petition filed in the court below she claimed damages in the sum of \$17,650, with interest from May 7, 1887. Mrs. Parsons owned 25 to 30 acres of land lying north of Eastman's addition to Scott City, in Scott county, which was separated from the original site of Scott City by one tier of blocks of that addition. In 1886 she had this tract surveyed and platted into blocks, half blocks, fractional blocks, and lots, as an addition to the city. The lots were 25 by 100 feet, and fronted east and west. Her plat was filed for record in the office of register of deeds in Scott county on March 29, 1887. The railroad ran through this (Parsons') addition to Scott City, and appropriated 120 entire lots and portions of 21 other lots. Notice of condemnation proceedings was given March 24, 1887, but the report of the commissioners was not filed until May 7, 1887. The commissioners appraised the value of the property taken, and assessed the damages at \$3,087. Upon the trial the jury returned a verdict for Mrs. Parsons, assessing her damages at \$3,184, and \$401.71 as interest, aggregating \$3,585.71. The railroad company complains of the rulings of the trial court, and the judgment rendered upon the verdict.

It is contended that the court below erred in not confining the jury to a consideration of the real, actual cash market value of the property. It is claimed that there was an unusual excitement or "boom" in the spring of 1887 at Scott City, as in other portions of Kansas, and that speculative and inflated prices were prevalent for a short time only; that under the instructions of the court, as the property was condemned during this period of

unnatural inflation, the actual cash market value of the lots taken was not fully considered by the jury. This court has time and again ruled in proceedings to recover damages for the right of way appropriated to the use of a railroad company that "a fair way of determining the injury is to determine the fair market value of the premises before the right is set apart and then again just after, and the difference will be the true measure of damages." *Railway Co. v. Haines*, 10 Kan. 439; *Railway Co. v. Blackshire*, Id. 477; *Railway Co. v. Wilder*, 17 Kan. 239; *Railroad Co. v. Ross*, 40 Kan. 598, 20 Pac. Rep. 197. "Evidence of the value of lots or land condemned for railroad purposes before and after the location of the railroad is competent." *Railway Co. v. Allen*, 24 Kan. 33. Of course the damages assessed must be only such as are direct, special, and approximate. *Railway Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322, and authorities there cited. But within all these rules we cannot say that the instructions given were misleading or erroneous, or that the instructions refused ought to have been given, considering those actually given. Among other things, the court instructed the jury "that it is the fair market price of the land in question that is to be ascertained in estimating the damage. The market value of a thing is the value,—the rate at which the thing is sold when placed upon the market. To make a market, there must be buying and selling,—a purchase and sale; and if you are satisfied from the evidence that there was, on the 7th day of May, 1887, a market value for the land in and near the land in question, you must be governed by it; and, if the evidence is doubtful or conflicting as to the market price, and witnesses vary as to their statements, you should adopt that which best accords with the proof in the case; and in considering the market value of said real estate the jury will take into consideration the actual state of the market at the time of the appropriation." In this instruction "value" and "price" are treated as equal equivalents. The phrase "market value" is the best, however, and it is used most frequently in the instructions. The primary meaning of "value" is "worth," and "price" is not really a synonym of "value," but frequently "market value" and "market price" are used alike. Again, the court instructed the jury "that, in case they should find with reference to any of such half blocks that the same or a portion thereof owned by plaintiff at the date of the appropriation constituted one entire tract or parcel, which was used and was suitable to be profitably used for a single purpose, and that only a part thereof was actually taken, the proper measure of damages would be the difference between the fair market value of such entire tract or parcel just before taking by defendant and the fair market value of the residue not taken of such entire parcel just after such taking." Further, the court instructed the jury that "if they found the residue not taken, or any part of such residue constituted a distinct piece or parcel of property, then the proper measure of damages would

be the fair market value at the time of such appropriation of the portion of said half block which was actually included in the appropriation, and in that case they were not to consider any injury done by such taking to any contiguous property outside of the limits of such appropriation. \* \* \* When the whole of a lot or parcel of land is taken and appropriated by condemnation proceedings, the fair market value of the land at the time of the taking is the true measure of damages. In determining the value of land appropriated the same considerations are to be regarded as in the sale of property between private parties at the time of the appropriation." The court also instructed the jury as follows: "That the building of railroads by corporations is a legitimate enterprise for the purposes of commerce and trade, and that the law gives to such corporations the right to take private property for the use and right of way of the railroad; but when private property is thus taken the owners of such property must be fairly compensated for the loss of the use of such property so taken, and in estimating the compensation the estimates of values must be made on the fair market value of such property at the time the same is appropriated, and these market values must be the actual, and not the conjectural or imaginary, but the fair prices for which such property actually is selling at the time."

It is unfortunate, perhaps, for the railroad company, if payment for its right of way only is considered, that its exigencies demanded the construction of its road at the time the property in controversy was condemned in April and May, 1887; but if at that time, on account of the proposed construction of railroads to Scott City, the real estate in and around that city greatly advanced in value, Mrs. Parsons was entitled to the benefits thereof. Private parties who invested in real estate, or who were compelled from public necessity to purchase real estate, in the towns or cities during the "boom period" in this state, were required to pay much higher values than if they had waited six months or a year for the feverish excitement to be abated. The writer of this vividly remembers that as an investment he purchased nine lots for \$3,000 in an addition to the city of Topeka about that time. He congratulated himself on his great bargain, and expectantly supposed that in the near future his lots would greatly advance in value. Unfortunately, the reverse was the result. The investment is permanent to the amount of one-half or two-thirds of the purchase price, as the lots will probably never sell for more than one-third paid for them. The probability even of a future sale for one-third is far distant. But at the time the writer supposed, with others, that he was only paying the real, actual cash market value of the property. He really thought he was fortunate in his investment. Yet the owner of that addition sold very many lots at similar prices for cash, or for part cash, the balance secured by mortgage. The lots in that addition could not have been taken under the rule of eminent domain at less value than they were actu-

ally selling for in cash in the market, although in a few months afterwards the "boom period" passed, and the lots were "stale, flat, and unprofitable" at any price. Mrs. Parsons was only entitled to recover for the property taken its fair cash market value if sold in the market by her under ordinary circumstances for cash, and not on time, and she were willing to sell and a purchaser were willing to buy. "The market value means the fair value of the property as between one who wants to purchase and one who wants to sell; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy." Railroad Co. v. Fisher, 49 Kan. 17, 80 Pac. Rep. 111. In the case of Kounts v. Kirkpatrick, 72 Pa. St. 378, the article sold as petroleum. After the contract of sale, but before the date of delivery, "a stimulated market price was created by artificial and fraudulent practices of a 'combine' to keep petroleum out of the market, and thereby create a scarcity, and consequently to enhance the price." The price or value in such a case is quite different from the facts disclosed in this case, even if Scott City was afflicted with a "boom" in the spring of 1887. In this case the court confined the jury "to the fair market value of the property at the time it was taken," and the court expressly instructed the jury that the market value "must be the actual, and not the conjectural or imaginary, value." The court also stated that "the market value of property is the value,—the rate at which the property is sold when placed upon the market."

It is next contended that the court erred in refusing to instruct the jury that they might take into consideration their own view of the lots and blocks appropriated, and the result of their own information and knowledge. It appears from the record that the jury were permitted to view the lots and blocks condemned for the railroad. Some of the courts have held "that the jury are not bound by the testimony of the witnesses, but may rest their verdict solely on what is learned at the view." This court has not adopted that rule. Other courts have said "that it is error to instruct the jury to take into consideration in any degree the knowledge acquired at the view, as it is not evidence at all." City of Topeka v. Martineau, 42 Kan. 387, 22 Pac. Rep. 419. This court has adopted a medium rule; that is, one falling between the two extremes. The evidence which the jury may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence. The verdict should be supported by other evidence than the view, and, unless it is supported by substantial evidence given by sworn witnesses, the reviewing court may set aside the verdict. City of Topeka v. Martineau, supra. The instructions re-

fused in the present case were objectionable because they permitted the jury to make their view of the premises exclusive or predominating evidence. If the railroad company had requested an instruction "that the jury might, in considering their verdict, take into consideration the view of the lots and blocks appropriated, the result of their observation therefrom in connection with the evidence produced before them," it would probably have been given. The condemnation proceedings were in April and May, 1887. The trial in this case was in June, 1889, two years after the appropriation. The jury could not, merely from a view of the lots and blocks in 1889, determine the actual market value of the same in 1887. Their view, however, might have assisted them in ascertaining how many entire lots and how many portions of other lots were taken, the various sized fragments of lots or blocks left, the manner in which the tracks were laid, the cuts, fills, etc., made; and the view of these things might and should have been taken into consideration, in connection with the evidence produced, in considering the verdict.

Finally, it is contended that the court erred in not confining the jury to giving damages simply for the value of the lots taken or partly taken. It appears that the case was presented at the trial by Mrs. Parsons upon the theory that each half block was an entire tract, or that the jury might find from the evidence that each half block was one tract, and therefore that its entire depreciation as one piece or parcel might be considered and measured. The railroad company adhered to the theory that each lot was a separate tract, and that the taking of one or two lots, or more lots, would not materially lessen the value of the other lots in the block or half block not taken. The error alleged, if any, concerning the instruction on account of the depreciation of lots not actually appropriated, is not material, under the special findings of the jury. It appears that the damages allowed were only for the lots actually taken, and nothing for half blocks and lots not taken. The general verdict, exclusive of interest, was \$3,184. The amounts, under the special findings of the jury, for lots or parts of lots actually taken, added together, were \$3,184.50. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 442)

#### MANNEN, Sheriff, v. BAILEY.

(Supreme Court of Kansas. May 6, 1893.)

CHATTEL MORTGAGES—ATTACHMENT BY MORTGAGOR'S CREDITOR—RIGHTS OF MORTGAGEE—INSTRUCTIONS—HARMLESS ERROR.

1. In an action brought by a mortgagee of a stock of merchandise against a sheriff who had levied on a portion thereof under an attachment, where it appears that the plaintiff has taken possession and disposed of all of the balance of the stock, except that attached by the sheriff, it is incumbent on the plaintiff to account for the property sold by him before he can recover.

2. Where it is admitted that the plaintiff, as such mortgagee, took possession of and sold

a portion of the mortgaged property, and where it is also claimed by the defendant that the property so sold was sufficient in value to discharge the mortgage debt, it becomes a question of fact, for the jury to determine from the evidence, whether or not the debt has been paid, and how much, if anything, is due thereon; and it is error for the court to assume that there is a balance due the plaintiff, exceeding the value of the goods attached by the sheriff.

3. A statement made by the trial judge to the jury, in his charge, which goes too far, and which might in some cases be erroneous, will not be ground for reversal of the judgment where it clearly appears that it has not affected the main contention of the parties, and has not prejudiced the rights of the unsuccessful party. Allen, J., dissenting.

(Syllabus by the Court.)

**Error from district court, Wilson county; L. Stillwell, Judge.**

**Action by M. Bailey against A. J. Mannen, sheriff. Plaintiff had judgment, and defendant brings error. Affirmed.**

**J. B. Ziegler, for plaintiff in error. A. S. Lapham, for defendant in error.**

ALLEN, J. This action was brought by Bailey against Mannen to recover the value of certain goods which had been levied on by Mannen, as sheriff, and which Bailey claimed as mortgagee of the firm of C. A. Dunakin & Co., which was a partnership composed of C. A. Dunakin and A. N. Dunakin. The business of the firm was carried on at Fredonia under the personal supervision of A. N. Dunakin, under an agreement, by the terms of which C. A. Dunakin was to furnish the capital, and A. N. Dunakin was to have what is denominated a "working interest," to bear half the expenses of conducting it, and to receive half the profits. The chattel mortgage under which the plaintiff claims was given to secure a note for \$3,000 executed by C. A. Dunakin alone. The evidence shows that C. A. Dunakin had borrowed largely from the plaintiff, and been indebted to him for many years; that, when the business was first started at Fredonia, many goods were supplied by C. A. Dunakin, who also had a store at Chanute. Remittances from sales made at Fredonia were made to C. A. Dunakin, at Chanute, from time to time. The evidence fails to show definitely the state of accounts between C. A. Dunakin and the firm of A. N. Dunakin & Co., but C. A. Dunakin estimates a balance due him of about \$3,000. The chattel mortgage was dated December 19, 1887, and was given to secure a note executed by C. A. Dunakin to Bailey dated November 28, 1887, payable on demand, with 12 per cent. interest. Bailey immediately took possession of the goods under his chattel mortgage, and proceeded to dispose of the same. On the next day after the mortgage was executed, C. A. Dunakin & Co. made an assignment of all their property. All of the goods described in the chattel mortgage, except those levied on by the sheriff, were disposed of by Bailey's agents. The only testimony with reference to the amount received from the disposal of these goods, and the expenses of selling them, is Bailey's statement as to the net

amount received by him, and credited on the note. There is evidence tending to show that the goods were fairly worth enough to pay Bailey's claim, after taking out the goods attached by the sheriff.

The principal question in the case arises on the instructions. The court, among other things, instructed the jury as follows: "You are instructed, in the first place, that the mortgage of Bailey, which has been read in evidence, is regular upon its face, and that the firm of Dunakin & Co. had the legal right to execute this mortgage to secure the payment of the indebtedness mentioned therein." "The extent of the interest of the plaintiff in these goods is the amount of the mortgage debt which is yet unpaid, and evidence has been introduced which will indicate to you the amount; but it has been agreed among counsel that, in the event you should find for the plaintiff, that in no event shall the verdict of the jury be for a greater sum than \$820.55, which the parties have agreed shall be taken as the value of the goods that the sheriff took, and I take it for granted that the balance of the debt of the plaintiff exceeds that sum."

The first claim of the plaintiff in error, to which our attention is called is that an insolvent partnership cannot legally appropriate the firm property by mortgage to the payment of the antecedent debt of one of the members. In support of this proposition our attention is called to the following cases: *Bank v. Sprague*, 20 N. J. Eq. 18; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 N. Y. 146; *State v. Day*, (Ind. App.) 29 N. E. Rep. 436; *Burtus v. Tisdall*, 4 Barb. 571; *In re Cook*, 3 Bliss. 122; *Ransom v. Van Deventer*, 41 Barb. 307; *Collins v. Hood*, 4 McLean, 186. We have carefully examined these cases, and find that some of them, particularly the New York cases, go to the length of holding that the appropriation by an insolvent firm of partnership property to the payment of the individual debt of one partner is a fraud on the partnership creditors. On the other hand, our attention is called to *Sigler v. Bank*, 8 Ohio St. 511; *Huiskamp v. Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. Rep. 899; *Jewett v. Meech*, 101 Ind. 289; *George v. Wamsley*, 64 Iowa, 175, 20 N. W. Rep. 1; *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. Rep. 306; *Goudy v. Werbe*, 117 Ind. 164, 19 N. E. Rep. 764; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. Rep. 543; and also to the following cases decided by this court: *Woodmanse v. Holcomb*, 34 Kan. 35, 7 Pac. Rep. 603; *Berkley v. Tootle*, 46 Kan. 335, 26 Pac. Rep. 730. We do not deem it necessary to now decide the question whether an insolvent partnership may, with the assent of all the partners, lawfully appropriate the partnership property to the payment of a debt of an individual member of the firm. In this case it appears that A. Dunakin was to furnish all the capital, and did in fact furnish the same, so far as it was obtained on the part of the firm; and it also appears from the evidence, though not in a satisfactory manner, that at the time this chattel mortgage was executed,



had been obtained from Bailey. Within the authority of *Berkley v. Tootle*, above cited, we think it not inequitable that the firm should be permitted to secure this indebtedness with the partnership property. If the jury find the transaction free from actual fraud, we think the mortgage should be upheld. While the instruction given goes further than we think was necessary in this case, we are not prepared to say that it is erroneous.

The other instruction quoted is more difficult to uphold. The plaintiff had taken possession of this stock of goods, and had disposed of all of it, except that part attached by the sheriff. Before he can recover in this action, he must show that he has been injured by the action of the sheriff. If the goods which were left in his possession were sufficient to satisfy his debt, he has no ground of complaint. It appears that all these goods were sold. The facts as to the amount realized from sales, and as to the expenses incurred in disposing of the goods, were peculiarly within the knowledge of the plaintiff, and we think it incumbent upon him to satisfactorily account for them. The plaintiff testified, as follows: "Question. Do you know how much money was received from the sale of goods in Fredonia? Answer. No, I can't state exactly. Q. Do you know what was the value of the stock of goods on which you held the mortgage in Fredonia? A. No, I do not. Q. You do not know, do you, whether you got all the money that was received from those goods, or not? A. I do, unless I was swindled by somebody. Q. All you know about it is what you received? A. That is all I know. Q. And what you credited upon that note? A. That is all I have actual knowledge of individually, alone. I know what my instructions were. Q. Do you know what amount of expenses are charged up in the collecting of \$2,000? A. I cannot tell. It is in the bank book of the Wilson county bank. I can tell from the memorandum. Q. Then, in placing the credit upon the note, you simply credited the note for such amount as came to your hands? A. Yes, sir; the two credits are all. Q. The \$2,000 and \$81.25? A. That is the total amount I got. Q. What other moneys were received, you don't know? A. No, I cannot tell from memory. It is a matter of record in the bank book." The goods were disposed of by agents of the plaintiff, and none of them made any more definite statement than the plaintiff himself. A. N. Dunakin was sworn on behalf of the defendant, and testified that he had been in charge of the business at Fredonia to the time it was closed, and that in his judgment, on the 10th day of December, there were five or six thousand dollars' worth of goods in the stock. In view of the issues presented, and of all of the evidence in this case, I think the expression used by the trial court, "I take it for granted that the balance of the debt of the plaintiff exceeds that sum," in the last instruction quoted, was misleading. The question as to whether any balance was due on the plaintiff's note was one peculiarly within the province of the jury to determine. While the value of the goods taken

by the sheriff was agreed upon, there was no agreement that any balance was due, nor was it conceded that the plaintiff was acting in good faith in the matter, or had any valid claim whatever, which he ought to enforce, as against the creditors of the firm of A. N. Dunakin & Co. The statement of the court implied that the claim of the plaintiff was valid, and that it had not been satisfied. It implied that the plaintiff had fairly disposed of the goods taken by him under his chattel mortgage, and had accounted for the net amount received by him, applicable to the discharge of his note. All these matters should have been left to the jury, unhampered by any assumption or expression of opinion on the part of the court. It seems to me that there is material error in this portion of the charge. The question of fraud, aside from the expression contained in this portion of the instructions, seems to have been fairly submitted to the jury. We deem it unnecessary to consider separately the other assignments of error, but find no other material error in the case.

JOHNSTON, J. I fail to find anything prejudicial in the statement made by the trial judge to the jury, that "I take it for granted that the balance of the debt of the plaintiff exceeds that sum." The main contention in the trial was the honesty and good faith of the parties in giving and taking the chattel mortgage. The debt of Bailey secured by the mortgage was shown to be bona fide. He had a right to obtain security, and a preference over other creditors. The mortgage was regular and valid upon its face, and the jury has found, upon sufficient evidence, that it was honestly obtained, without any intent to hinder and delay the creditors of the Dunakins. As stated, the greater part of the evidence, and the efforts of counsel on both sides, were directed to this issue, rather than to the disposition that had been made of the property since possession had been taken under the mortgage. The property taken under the mortgage, excepting that which was attached, appears to have been sold in a business-like way, and the proceeds of the sale applied on payment of the debt. The debt amounted to more than \$3,000. The sum realized on the sale of the mortgaged property was \$2,081.25. While a detailed statement of the gross sales, and the expenses in making the same, was not produced, the testimony of Bailey is that the business was conducted in a business-like way, and all that was realized upon the goods was credited upon the debt. If there had been any serious question as to the truth of his testimony, the detailed statement was near at hand, and could have been produced. The property was sold in the manner authorized by the mortgage, and in the absence of testimony that the property was sacrificed, or that excessive charges were made in the sale, the jury was warranted in its conclusion that the mortgagee had satisfactorily accounted for the property taken under the mortgage. In assuming that the balance of the debt due to Bailey exceeded the value of the goods attached, the court may have

gone too far, but it does not seem to me that it can be regarded as prejudicial error. As the testimony stood, there was about \$1,000 debt remaining due, and it was agreed that the value of the goods attached was \$820.55. As I view the record, there is not sufficient controversy upon this point to make the assumption of the fact that the balance of the debt exceeded the latter sum a material error, and nothing less is sufficient ground for reversal. With the exception of the comments made upon this statement or assumption, I fully concur in all that is said in the foregoing opinion of Mr. Justice ALLEN. The judgment will be affirmed, upon the opinion of the majority of the court.

HORTON, C. J., concurring in the opinion of JOHNSTON, J.

(51 Kan. 425)

### ROUSE v. BARTHOLOMEW.

(Supreme Court of Kansas. May 6, 1893.)

ASSUMPTION OF MORTGAGE — RELEASE BY MORTGAGEE — WHAT IS — APPRAISEMENT OF PREMISES — CONSTRUCTION OF — APPEAL — QUESTIONS NOT RAISED BELOW.

1. R. assumed the payment of one half of certain mortgages on the property described in the deed to him from V. In the copy of the deed in the record the lots are described as in English's addition to the city of Wichita, while in the mortgage they are described as in English's Third addition. There being nothing in the record to indicate that there was a substantial controversy as to the identity of the property in the deed with that in the mortgage, and as it does not appear that the attention of the trial court was called to the discrepancy in the descriptions, *held*, that this court cannot say from the record presented that the property described in the two instruments was not identical.

2. A grantee of real estate, who has assumed the payment of a mortgage thereon, is not discharged from liability to the mortgagee merely because the mortgagee has foreclosed his mortgage as against the mortgagor and a subsequent grantee of the mortgaged property, and has sold the mortgaged property thereunder, and other property of the mortgagor attached in the foreclosure suit, but such mortgagee may still pursue his remedy against the grantee, who has assumed the payment of the mortgage debt.

3. The mortgaged property was appraised on October 13, 1888, as follows: "We find and estimate the same to be of the total value and appraisement of \$8,000.00," the said property being described and separately appraised as follows, to wit: "Lots seventy-eight, (78,) eighty, (80,) eighty-two, (82,) and eighty-four, (84,) on Fourth avenue, in English's Third addition to the city of Wichita, Sedgwick county, Kansas, subject to a mortgage for \$7,000.00, with interest at 8 per cent. from Jan'y 20, 1887." The sheriff sold the same for \$100, and the sale was confirmed by the court. *Held*, that such appraisement must be construed to mean that the total value of all the lots was \$8,000, and not \$8,000 over and above the amount of the mortgage, and that \$100, the amount for which the lots sold, was more than two thirds of the appraisement of the debtor's interest therein.

(Syllabus by the Court.)

Error from district court, Sedgwick county; Jacob M. Balderson, Judge.

Action by George W. Bartholomew against George L. Rouse, Jr. Plaintiff had judgment, and defendant brings error. Affirmed.

Stanley & Hume, for plaintiff in error. Campbell & Dyer, for defendant in error.

ALLEN, J. Bartholomew, as plaintiff below, sued Rouse to recover \$2,750, with interest, claiming that on February 5, 1887, one J. E. Vandeventer executed two promissory notes to Smith and Brooks for the sum of \$2,700 each, with 8 per cent. interest, to be paid at maturity, but 12 per cent. if not paid at maturity, and secured the same by a mortgage on lots 78, 80, 82, and 84 on Fourth avenue, in English's Third addition to the city of Wichita; that on the 7th day of February, Vandeventer conveyed an undivided half interest in said lots to defendant Rouse; that in the deed to said lots it was provided that said Rouse should assume the payment of one half of said mortgage, and that Rouse accepted the deed, and assumed such payment; that Smith and Brooks, in due course of business, sold said notes to the plaintiff; that afterwards plaintiff brought suit on said notes and mortgage in the district court of Sedgwick county against Vandeventer for the amount of the notes and foreclosure of the mortgage; that on August 4, 1888, plaintiff pledged said judgment to Morton Woolman to secure a loan of \$1,600; that the whole of said sum is still due and unpaid. The defendant Rouse, in his answer, among other things, alleges that by said judgment of foreclosure mentioned in the plaintiff's petition, the property described in the mortgage was ordered to be sold; that one T. B. Lee, a party defendant in said action, was the owner of said lots; that an order of sale was issued on said judgment by direction of said plaintiff, commanding the sheriff of said county to appraise, advertise, and sell said lots; that said lots, which were subject to a prior mortgage of \$7,000, were appraised at the sum of \$8,000; that the sheriff sold them for \$100; that a return of such sale was made by the sheriff, and confirmed by the court, and a deed executed to the purchaser; that T. B. Lee afterwards commenced an action in the district court of Sedgwick county to recover from the sheriff the sum of \$5,233.83, being the difference between two thirds the appraised value of said lots and the sum for which they were sold by the sheriff; that by reason of said suit Lee ratified the sale, and confirmed the purchaser's title. It is also alleged in the answer that certain property belonging to Vandeventer was attached in the foreclosure suit, and sold under the order of the court, from which the sum of \$1,470 was realized. Defendant claimed that by reason of these facts the debt was paid. The answer also contains a general denial. The case was tried by the court without a jury, and special findings of fact were made. Various errors are alleged, and strongly urged upon our consideration. Our attention is first called to the proposition that the petition alleges that the deed made by Vandeventer

ter to Rouse conveyed lots 78, 80, 82, and 84, on Fourth avenue, in English's Third addition to the city of Wichita, while the copy of the deed attached to the petition shows the lots to be in English's addition. It is contended that for this reason it does not appear that the defendant assumed the payment of the mortgage which the plaintiff held. There is nothing in the record indicating that the attention of the court was called to this discrepancy, nor is there anything to show that there were any such lots on Fourth avenue in English's addition. It seems to us probable that this is a mere clerical error in copying the deed, but, even if it be not so, we are not able to say that the description is not a complete identification of the lots, and as it was evidently so treated by the trial court, we cannot for that reason reverse the judgment. There is no showing here that there was any real dispute as to the identity of the lots covered by the mortgage with those included in the deed to defendant, Rouse. It is contended also that Bartholomew, having brought suit against Vandever to foreclose the mortgage, and having attached and sold Vandever's property, thereby elected to pursue his remedies solely against Vandever, and must be held to have released Rouse; that he must promptly elect which remedy he will pursue, and that his claim in this action is inconsistent with that made in the foreclosure suit against Vandever. It has already been decided by this court that "an action can be maintained upon a promise made by a defendant, upon valid consideration, to a third party, for the benefit of the plaintiff, although the plaintiff was not privy to the consideration." *Anthony v. Herman*, 14 Kan. 494; *Manufacturing Co. v. Burrows*, 40 Kan. 361, 19 Pac. Rep. 809; *Railway Co. v. Hopkins*, 18 Kan. 495. The case of *Searing v. Henton*, 41 Kan. 758, 21 Pac. Rep. 800, is cited as being to the opposite effect by counsel for the plaintiff in error. There is, however, no conflict between this case and the others cited. The case last named is to the effect that, where the purchaser of lands agrees to pay the debt of his grantor as part of the purchase price, but the creditor does not accept the contract, the vendee does not become the debtor of the mortgagee; in other words, that an election by the mortgagee to treat the grantee as his debtor is necessary to create that relation. When Rouse assumed the payment of one half of this mortgage debt by accepting the deed from Vandever, with a clause providing for such assumption as between himself and Vandever, he became the principal debtor on the mortgage. The holder of the mortgage was under no obligation to accept the promise made for his benefit, but under the decisions cited here was at liberty to do so. By accepting Rouse as his principal debtor he did not necessarily release Vandever from his obligation on the note. The plaintiff was at liberty to pursue his remedy against either or both. See, particularly, *Manufacturing Co. v. Burrows*, above cited. We do not see how the defendant was injured in any manner by the

dismissal of the foreclosure case as to him, and the prosecution thereof to final judgment against Vandever, or by the plaintiff's having exhausted his remedy against the mortgaged property and attached property belonging to Vandever. The plaintiff, having a cause of action which is several against various defendants, can pursue his remedy against either without forfeiting his rights against the others.

The next question presented arises on the appraisalment, the material part of which reads as follows: "Do return that upon actual view of said premises, and after having been on said premises, we find and estimate the same to be of the total value and appraisalment of \$8,000.00;" the said property being described and separately appraised as follows, to wit: "Lots seventy-eight, (78,) eighty, (80,) eighty-two, (82,) and eighty-four, (84,) on Fourth avenue, in English's Third addition to the city of Wichita, Sedgwick county, Kansas, subject to a mortgage for \$7,000.00, with interest at 8 per cent. from Jan'y 20, 1887." It is strenuously contended that this is an appraisalment of the defendant's interest in the mortgaged property at \$8,000; that the sheriff had no right to sell for less than two thirds that sum; and that under the authority of *De Jarnette v. Verner*, 40 Kan. 224, 19 Pac. Rep. 666, the plaintiff's judgment was paid by such sale to the extent of \$5,333.33, and that this sum, when added to the \$1,470 realized from the property belonging to Vandever, attached and sold in the same case, more than paid the judgment; that, no matter what right Lee, the holder of the legal title at the time of the sale, might have had to set aside the sale, by bringing his action against the sheriff to recover damages for selling at less than two thirds the appraisalment, he waived all question as to the validity of the sale, and confirmed the purchaser's title. Several questions are suggested on this appraisalment, which we do not deem it necessary to decide, viz.: Whether it is the duty of the appraisers to merely appraise the interest of the judgment debtor, or whether the total value of the property should be stated; and also the question whether the sale must be for two thirds of the appraised value of the debtor's interest in the property, or whether it may be made for two thirds of the total valuation of the property, and the amount of the prior incumbrance be deducted from the sum to be paid to the sheriff by the purchaser. In the view we take of this case, these questions are not presented for our consideration, and we refrain from expressing any opinion upon them, until properly called on so to do. This appraisalment was construed by the sheriff to mean that the full value of the lots was \$8,000; that they were subject to a mortgage for \$7,000 and interest, leaving the interest of the debtor at the time the appraisalment was made less than \$100. This construction was ratified by the trial court. While the language used is not clear, and while it would doubtless be much better for appraisers to state distinctly what they mean, we are not able

to say that this construction of their language is wrong; nor can we say that they were bound to make a more clear statement. The lots were sold for more than the whole difference between the amount of the mortgage and the appraisal, and the sale, having been confirmed by the court, cannot be treated collaterally in this action as erroneous. The judgment will be affirmed. All the justices concurring.

(51 Kan. 418)

KELLOGG et al. v. BISSANTZ et al.

(Supreme Court of Kansas. May 6, 1893.)

APPEAL—RECORD—CONTENTS.

In an action for the recovery of money and to determine the validity and priority of several mechanics' and other liens, findings of fact and of law were requested and made. The findings and judgment were brought to the supreme court without the evidence, or any statement of what it proved. It was alleged as error that matters material to the validity of the liens were not stated in the special findings. Upon some material matters no findings were made, and upon others the findings were general and indefinite. No request was made for other or more specific findings, and none of those made are inconsistent with the judgment. *Held* that, in the absence of the evidence or any request for other or more specific findings, no substantial error is shown.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action to enforce a mechanic's lien by Bissantz & Matthews against Frances E. Kellogg, owner, Smedley Darlington and S. W. Cooper, mortgagees, and others as holders of mechanics' liens. On the judgment entered determining the priority of the liens, the owner and mortgagees bring error. Affirmed.

Stanley & Hume, for plaintiffs in error. Sankey & Campbell and John D. Davis, for defendants in error.

JOHNSTON, J. Frances E. Kellogg, who was the owner of real estate in the city of Wichita, began the erection of a dwelling house thereon on July 1, 1888. Through her husband, who acted as her agent, she contracted with and employed Thomas Peters, Andrew Ball, William H. Ball, and Lemuel W. Watt as carpenters to assist in the construction of the building, and under this agreement each of them performed labor upon the building until February 4, 1888. They were not paid for their labor, and on July 13, 1888, each filed in the office of the clerk of the district court a statement for mechanic's lien. Bissantz & Matthews furnished hardware, which was purchased by the Kelloggs and used in the erection of the house, and on June 21, 1888, the bill for hardware not being paid, they filed a statement in the district court, claiming a lien on the property of the Kelloggs. On November 1, 1888, Frances E. Kellogg and her husband executed and delivered to Smedley Darlington a promissory note for the sum of \$1,700, secured by a mortgage on the

real estate whereon the house was built, and on the same day another mortgage was executed by them to S. W. Cooper, to secure the sum of \$218.80. Bissantz & Matthews brought this action to recover from the Kelloggs the amount of their claim, and to foreclose their mechanic's lien. All of the persons who claimed liens upon the premises were made parties defendant. Each one who had furnished material and labor, as well as the mortgagees, set forth his claim and right to a lien on the premises in appropriate pleadings, but the record does not show that any defense was made by the Kelloggs. In the trial, which was had without a jury, it appears that the only controversy was as to the existence and priority of liens. Findings of fact and of law were made by the court, in which it was determined that the defendants in error had valid mechanics' liens upon the property, and that Darlington and Cooper had valid mortgages, but that the mortgage liens were inferior and subsequent to the mechanics' liens. Darlington and Cooper complain of the rulings made, and the case made which they have presented to this court includes only the pleadings, the conclusions of fact and of law, together with the final judgment of the court. They insist that the findings do not sustain the judgment which was rendered. It is contended that the findings fail to show that the bill of hardware sold by Bissantz & Matthews was furnished under contract, and with the intention and understanding that the same should be used in the erection of the Kellogg dwelling house. It is specifically found that "the bill of hardware was bought by C. W. Kellogg, acting as the husband of said defendant Frances E. Kellogg, and that said bill of hardware was used in the erection of a dwelling house on the property described in the second conclusion of fact." The mechanic's lien which was filed by Bissantz & Matthews, and is attached to their petition, is sufficient in this respect, and shows that the material was sold with the intention and understanding that it should be used in the erection of the dwelling house to be erected on Kellogg's premises. It is also found that this mechanic's lien statement sets forth that Frances E. Kellogg was the owner and Bissantz & Matthews were the contractors, who, under a contract with the owner, furnished the material the account of which was attached, and that the material was used in the erection of the dwelling.

Among what are termed "conclusions of law" it is found that the mechanic's lien of Bissantz & Matthews is a valid and subsisting one upon the property, and that plaintiffs are entitled to a foreclosure of the same. No more specific findings with reference to the contract of Bissantz & Matthews were requested by the plaintiffs in error, nor was the attention of the court called to the indefiniteness of the findings in this respect. The objection that the judgment is without support cannot be sustained. To constitute a lien it is true that the material must have been furnished under a contract, and with the purpose that it was to be used in the

building; and, further, that it has actually been so used. But the evidence which was offered upon the trial is not embraced in the record, and there is nothing showing that other and more specific findings were requested by the plaintiffs in error. While there is no finding which specifically states that the material was sold and furnished with the intention and understanding that it was to be used in the construction of the building, there is nothing to the contrary. If a special finding is inconsistent with the verdict or judgment, the former must control; and if the findings in this case affirmatively showed that there was no such purpose and understanding, the judgment could not be upheld. That the material was sold and furnished with such intention may have been a conceded fact, and therefore neither the parties nor the court deemed a specific finding upon that subject important or necessary. In what are designated as "conclusions of law" there is a complex finding of fact and of law, which tends to support the judgment. It is found that Bissants & Matthews have a valid lien, which they are entitled to foreclose. If there was in fact a controversy as to the intention with which the material was furnished, and parties desired to raise the question on the findings alone, they should have asked for more specific findings on that question. If the attention of the court had been called to the omission, a finding would have been made which would have enabled this court to say whether substantial error had been committed; but, in the absence of any finding upon this subject, or a request for one, and in the absence of the evidence and other proceedings of the trial, we cannot say that an injustice has been done to the defendants in error. In *Briggs v. Eggan*, 17 Kan. 591, it was held that, "where the court attempts to make special findings, as requested by a party, and inadvertently fails to make a special finding upon some particular matter in controversy, or makes such finding in too general terms, the court does not thereby commit substantial error, unless its attention is first called to the omission to find, or to the defective finding, and it then fails or refuses to correct the same."

It is also contended that the record fails to show that the statements for mechanics' liens were properly verified, but what has already been said disposes of this objection. It is found that the statements for mechanics' liens were filed, and presumably they were such as are sufficient under the statute. No specific finding as to the verification was requested or made. The rule which has been stated disposes of the objection made to the liens declared in favor of the other defendants in error. There is no complaint of inconsistency between the special findings and the judgment, but only of incompleteness in fully setting out the contents of the statements filed by them for mechanics' liens. Error must be affirmatively shown, and no such showing has been made here as will justify a reversal of the judgment of the district court. It will be affirmed. All the justices concurring.

(50 Kan. 598)

## HOLCOMB v. THOMPSON et ux.

(Supreme Court of Kansas. May 6, 1893.)

## ASSUMPTION OF MORTGAGE—PLEADINGS.

To create a personal liability on the part of a grantee in a deed to pay a prior mortgage or lien on the premises conveyed, the covenant or words used therein must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee. Where a grantee of land takes the same subject to a certain mortgage, he does not thereby assume any personal liability, but simply takes the land charged with the payment of the mortgage debt.

(Syllabus by the Court.)

On motion for rehearing. Motion granted.

For former report, see 31 Pac. Rep. 1061.

G. M. Martin, for plaintiff in error. I. O. Pickering, for defendant in error.

HORTON, C. J. Our attention has again been called, in a motion for a rehearing, to the contents of the record in this case; and a careful examination of the same convinces us that the opinion heretofore handed down by STRANG, C., does not declare the law upon the written covenant in the deed referred to. The name of the party who was to assume the payment of the Holcomb mortgage is omitted. It is attempted to make Thompson liable to pay \$2,000, with interest thereon, on account of the written covenant in a deed of the 22d of April, 1887, executed to him by Money G. Miller and wife. The covenant reads as follows: "Excepting note for \$2,000, dated April 21st, 1887, to M. C. Holcomb, with 8 per cent. interest from date, and with said mortgage for \$2,000, the said ——— assumes and ——— agrees to pay." To create a personal liability for the payment of any prior mortgage or lien on the part of a grantee in a deed, the covenant or words used therein must clearly import that the mortgage or lien was intended to be stated by the one party, and knowingly assumed by the other party. In brief, to create a personal liability, the deed must, in terms, provide that the grantee assumes the mortgage or lien; otherwise, there is no personal liability. 15 Amer. & Eng. Enc. Law, 832, and authorities cited in note 1; Lewis v. Day, 53 Iowa, 575, 5 N. W. Rep. 753; Patton v. Atkins, 42 Ark. 197; Schmucker v. Sibert, 18 Kan. 104. The plaintiff below declared alone upon the written covenant or contract in the deed. There is no allegation of a parol contract or agreement on the part of Thompson to assume and pay the mortgage, or that the mortgage was any part of the purchase money. Hence his liability is to be determined by the terms of the written covenant or contract. The plaintiff states the covenant of assumption was in writing. "In words and figures following," then quotes the alleged covenant, and follows it up by the further allegation "that by reason of said covenant and agreement [not by reason of that and some other parol agreement] the said Enoch F. Thompson became and is li-

ble." The plaintiff does not allege that the parties to the deed made any mistake, mutual or otherwise, or that they intended to insert any other or different covenant than the one actually set out in the deed, to make it conform to some other agreement or understanding of the parties. Thompson's name is not mentioned or referred to in said covenant or contract. We might assume from the covenant, as it appears in the deed, that Miller's name ought to have been inserted in the blank which is left in the covenant, as well as to assume that Thompson's name should have been written therein. The deed reads that the consideration thereof was \$4,000 duly paid to the parties of the first part; that is, Money G. Miller and wife. There is no statement or recitation in the deed that Thompson was to pay an additional sum of \$2,000. It is true that in a deed from Thompson and wife to John J. Hoos, of October 29, 1887, Hoos assumed and agreed to pay Holcomb his mortgage of \$2,000, with interest. But this is no assumption or promise by Thompson. We therefore think that it is not shown by the deed of April 22, 1887, that Thompson assumed, agreed, or in any way promised to pay the mortgage to Holcomb of \$2,000, or any part thereof. The judgment heretofore rendered in this court upon the opinion of STRANG, C., will be vacated, and the judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 402)

**WHITE et al. v. DOUGLAS.**

(Supreme Court of Kansas. May 6, 1893.)

APPEAL—RECORD—REVIEW—QUESTIONS NOT  
RAISED BELOW.

Where the only errors assigned are such as should be brought to the attention of the trial court by a motion for a new trial, and where the record merely shows that a motion for a new trial was made and overruled, but the motion is not preserved, nor the grounds therefor stated, no review can be had.

(Syllabus by the Court.)

Error from district court, Jefferson county; Robert Cruzier, Judge.

Ejectment by Willard R. Douglas against John M. White and another. Plaintiff had judgment, and defendant White brings error. Affirmed.

W. F. Gilluly and Marshall Gephart, for plaintiff in error. John C. Douglas, for defendant in error.

JOHNSTON, J. This was an action of ejectment, brought by Willard R. Douglas against J. M. White and John Bunker, in which the title and right of possession of 80 acres of land were found and adjudged to be in Douglas. It was also decided that the value of the rents and profits of the land while White held possession exceeded the value of the improvements made by him in the sum of \$64, and judgment for that amount was given to Douglas. There was a further finding that White had a lien on the land for taxes and interest amounting to \$67.53, and the judgment provided that Douglas should not be

let into possession of the land until this amount was paid. A motion for a new trial was made and overruled, but neither the motion nor the grounds therefor, if any were stated, are shown by the record which has been brought to this court.

White complains that several rulings made upon the admission and effect of the evidence are erroneous. It appears that every ruling upon which error is assigned is such as must be brought to the attention of the trial court upon a motion for a new trial before a review can be had in the supreme court. It devolves upon the party who asserts that error is committed to affirmatively show it, and we cannot say that the district court erred in denying the motion for a new trial, unless the grounds upon which it was based are shown. Neither can we inquire into any error alleged to have been committed during the trial, either in the admission or exclusion of testimony; nor as to the sufficiency of the testimony to sustain the findings or the judgment. *Tyler v. Sooy*, 19 Kan. 583; *Moore v. Emmert*, 21 Kan. 2; *Ervin v. Morris*, 26 Kan. 664; *Dyal v. City of Topeka*, 35 Kan. 62, 10 Pac. Rep. 161; *Illingsworth v. Stanley*, 40 Kan. 61, 19 Pac. Rep. 352. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 451)

**WILLARD v. OSTRANDER.**

(Supreme Court of Kansas. May 6, 1893.)

APPEAL—EFFECT OF ON JUDGMENT—CONVERSION  
—EVIDENCE—INSTRUCTIONS.

1. The filing of a petition in error in this court, and the execution and filing of a stay bond, while they stay execution of the judgment sought to be reversed, do not destroy nor suspend the effect of the judgment as evidence, nor as a determination of the rights of the parties, while the case is pending in this court.

2. In an action charging the defendant with the unlawful taking and conversion of a flock of sheep, where the defendant justifies the taking under a claim of right to do so, based on a chattel mortgage given by the plaintiff to him, which mortgage the plaintiff charges the defendant with having altered in a material part after its execution, it is error for the trial court to submit, as an important and material question in the case, the issue as to the alteration of such mortgage, when no evidence whatever tending to show such alteration by the defendant, or by his agent, has been introduced.

(Syllabus by the Court.)

Error from district court, Rice county; Ansel R. Clark, Judge.

Action by John M. Ostrander against Frank G. Willard for conversion. Plaintiff had judgment, and defendant brings error. Reversed.

Bailey & Foley and J. Warner Mills, for plaintiff in error. A. M. Lasley, John E. Hessin, and Sam Jones, for defendant in error.

ALLEN, J. This action was brought by the defendant in error, as plaintiff below, to recover the value of 1,500 merino sheep which he alleges he owned, and the defendant took and converted to his own use. The defendant admitted the

taking of the sheep, but justified the act as having been done by virtue of a chattel mortgage given by the plaintiff to him on the 2d day of September, 1885, on the sheep in controversy, to secure the sum of \$3,850.50, according to the terms of four promissory notes. To this answer the plaintiff replied, denying the execution of the mortgage as set out in defendant's answer, but admitting that he executed a chattel mortgage on the same sheep, and alleging that a material change had been made therein by the defendant, without the consent of the plaintiff by inserting the word "wool;" also alleging that the sheep mortgaged were purchased from the defendant and the mortgage given to secure the purchase price; that said sheep were warranted to be sound and healthy, and free from disease; that they were in fact diseased, having a contagious disease commonly known as "mange," "scab," or "itch;" that various damages had been sustained by the plaintiff by reason of such disease; that the consideration of such notes had failed. The reply also alleged that an action was then pending in the district court of Trego county, between the same parties, on one of said notes, which had been sued on by the defendant in this case in that county, and that the matters in controversy in this action were also in controversy in that. This action was commenced on March 15, 1888. On December 18th of that year the plaintiff filed a supplemental reply, alleging that after the filing of his former reply the Trego county case had been determined by a verdict of a jury, and judgment thereon, in favor of Ostrander against Willard, for \$2,191.66, less the amount of said note, and claims such former adjudication as a bar to defendant's claim under the chattel mortgage.

The assignments of error are multitudinous. Two principal questions, however, are discussed in the briefs and on the oral argument of the case, which we will proceed to consider. On the trial, copies of the pleadings and judgment in the Trego county case were received in evidence. The defendant offered in evidence a supersedeas bond filed in that case, and offered to show that an appeal had been taken in that case to this court, and was here pending, undetermined. The court refused to receive the bond in evidence, and held that the judgment was in full force as an adjudication of the rights of the parties therein determined, notwithstanding the proceedings in error in this court, and the filing of a supersedeas bond. One of the important questions we are called on to decide is as to the correctness of this ruling.

The effect of appeals and proceedings in error, where the execution of the judgment is stayed, upon the judgment, as evidence in another action between the same parties, has been frequently considered by the courts, and the decisions are by no means harmonious. In Freeman on Judgments, (section 323,) the author says: "When an appeal is taken from a judgment it is evident that the appellant cannot have the full benefit of his appeal if, during the time necessary to procure a

decision in the appellate court, the judgment may be used against him to the same extent as if no appeal had been taken. The mere issuing and enforcement of the execution may be stayed by the giving of an appropriate bond, but there is no provision in the statutes whereby the force of a judgment as evidence, or as an estoppel, may be avoided by the giving of any bond or other security. In perhaps a majority of the states the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties. The chief objection to this line of decisions is that it enables one against whom a judgment is entered to avoid its force for a considerable period of time merely by taking an appeal. During that time he may carry on other controversies with the same parties, involving the same issues, and obtain decisions contrary to that from which the appeal was taken, and which could not have been obtained had the former judgment been admissible as evidence against him; and, when it is finally determined that such judgment was free from error, there may be no mode of retrieving the loss resulting from its suspension by the appeal. Probably this consideration has been the most potent in procuring the numerous decisions maintaining that the effect of an appeal, with proper bond to stay proceedings, is merely that it suspends the right to execution, but leaves the judgment, until annulled or reversed, binding upon the parties as to every question directly decided. The evil resulting from this rule is that, though the judgment is erroneous, and for that reason is reversed, yet before the reversal it may be used as evidence, and thereby lead to another judgment, which cannot in turn be reversed, because the action of the trial court in receiving and giving effect to the former judgment was correct, and does not become erroneous when such judgment is subsequently reversed." This case strongly illustrates the hardship in the case last mentioned by the author, as the judgment in the Trego county case was reversed by this court. Willard v. Ostrander, 46 Kan. 591, 26 Pac. Rep. 1017.

Yet if it was rightfully admitted in evidence, and if the proceedings in error did not stay its force as an estoppel, it affords no ground for a reversal of the judgment in this case. Viewed from either side, the question is not without difficulty. Numerous authorities maintain the doctrine that the whole effect of the judgment is stayed. See *Burton v. Burton*, 28 Ind. 342; *Paine v. Insurance Co.*, 11 R. I. 411; *Cloud v. Wiley*, 29 Ark. 80; *Sage v. Harpending*, 49 Barb. 166; *Souter v. Baymore*, 7 Pa. St. 415; *State v. McIntire*, 1 Jones, (N. C.) 1; *Sharon v. Hill*, 269 Fed. Rep. 337; *De Camp v. Miller*, 44 N. J. Law, 617; *Atkins v. Wyman*, 45 Me. 399; *Day v. De Jonge*, 66 Mich. 550, 33 N. W. Rep. 527. In order to understand the force of each of the cases bearing on this question, it is necessary to know the statutory provisions of the states where rendered, as to the effect of appeals and proceedings in error. It is also necessary to



discriminate between appeals at law and in equity under the old chancery practice, where, generally speaking, the trial was *de novo*, and final judgment rendered or directed by the appellate court. Most of the above cases appear to be either suits in equity, or appeals taken under some statute which provides that the taking of an appeal shall have the effect to vacate the judgment, or that the trial in the appellate court shall be *de novo*. On the other side of the question are the following cases: *Mill v. Comparet*, 16 Ind. 107; *Scheible v. Slagle*, 89 Ind. 328; *Padgett v. State*, 93 Ind. 397; *Faber v. Hovey*, 117 Mass. 107; *Thompson v. Griffin*, 69 Tex. 139, 6 S. W. Rep. 410; *Moore v. Williams*, 182 Ill. 589, 24 N. E. Rep. 619. In the latter case the third paragraph of the syllabus reads as follows: "An appeal from a decree does not destroy its operation as a former adjudication. It does not vacate the decree, but simply suspends its execution. It leaves the decree in full force as a merger of the cause of action, and a bar to further litigation." In *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. Rep. 123, it was held that a reversal of a judgment after it has been received as evidence in another action cannot bear retrospectively, so as to render its reception erroneous. The fact of "reversal cannot appear by the record in the second action, and the only remedy of the injured party, if any he have, is by motion for a new trial." See, also, *Bank v. Wheeler*, 28 Conn. 433; *Bank v. Calvit*, 3 Smedes & M. 143. While the attention of this court has never been directed to the precise question we are now considering, the conclusive force of a former adjudication has often been recognized, and in some of the cases language has been used broad enough to cover the question in this. See *Norton v. Graham*, 7 Kan. 166; *Challiss v. City of Atchison*, 45 Kan. 22, 25 Pac. Rep. 228; *Chicago, K. & W. R. Co. v. Commissioners of Anderson Co.*, 47 Kan. 766, 29 Pac. Rep. 96; *Bank of Santa Fe v. Haskell County Bank*, (Kan.) 32 Pac. Rep. 627.

It is provided by statute that on an appeal from a judgment of a justice of the peace a trial *de novo* shall be had in the district court. There is no question, in such a case, that the filing of the appeal bond has the effect to vacate the judgment, but, where proceedings in error are prosecuted in this court, there is no provision in the statutes authorizing a vacation of the judgment pending the proceedings here. The language of the Code is that "execution of the judgment may be stayed." A proceeding in error does not have even this effect unless a proper bond is filed. The statute provides that this court may reverse, vacate, or modify a judgment of the district court for errors appearing on the record. We are unable to find any language used by the legislature which seems to us to imply that a stay of execution has any other force or effect on the judgment than simply to prevent its enforcement by execution. On the contrary, as a determination of the rights of the parties, it remains in full force pending the proceedings here. It is apparent that this construction of the law may

work great hardship in some cases. The trial courts, however, have ample power, when it is apparent that injustice may be done, to grant continuances until a case pending in this court, sought to be used as a bar or estoppel, is determined; and it would seem to us that where an appeal to this court has been taken in good faith, and a sufficient bond to stay execution has been given, that if the introduction of a judgment in another case would have the effect, as in the case now before us, to permit the party holding the judgment, through the medium of another action, to collect that judgment, the trial court should always, on the proper showing being made, continue the trial until after the case pending here is determined. Only in this way can full justice be done.

It was claimed by the plaintiff that the chattel mortgage given by him to the defendant was altered by the defendant, after its execution and delivery, in a material part, *vis.* by inserting the word "wool" therein; that by reason of such alteration the mortgage was avoided. The court, in its charge to the jury, included the following: "The plaintiff claims that the mortgage was materially changed, without his consent, after he executed it, by inserting therein the word 'wool,' and, further, that there was nothing due this defendant upon the note sued on in Trego county, in the case in which this defendant was plaintiff, and this plaintiff was defendant, and that this defendant was not the owner of the note when the sheep were taken, and that for these reasons defendant had no right or authority, under the mortgage, to take the sheep; and these are material questions for the jury to determine in this case from the evidence introduced upon the trial, and I will instruct you further upon these matters." "No. 8. The jury are instructed that the validity of the mortgage when the sheep were taken by the defendant depends upon these two propositions: First. Did the defendant execute the mortgage? Second. Did any of the debt secured by the mortgage remain unpaid or unsatisfied or unextinguished? If the word 'wool' was inserted in the mortgage after it was executed by the plaintiff, and without his consent, it was a material change and alteration, and if it was so made by the defendant, or by his direction or authority, it would render the mortgage void, and of no effect; but if the word 'wool' was in the mortgage when it was executed by the plaintiff, or if he consented to its insertion therein at any time thereafter, or if it was inserted therein by any person besides the defendant, but without the direction or authority of the defendant, then the mortgage would not be void, but would be good, although, if the plaintiff did not execute it with the word 'wool' in it, and did not give his consent to insert the word 'wool' in it, it would not be a good mortgage on the wool after it had been clipped from the sheep." From these instructions it will be seen that the jury were told by the court that under the evidence it was an open question whether the mortgage had been materially altered by the defend-

ant or not. The only testimony which could possibly be construed as proof of the alteration of the mortgage by the defendant was a statement by the plaintiff, as follows: "I signed the chattel mortgage, but it was altered afterwards." No statement whatever was made by the plaintiff as to who made the alteration, or when it was made, but it is claimed by the plaintiff that the question was determined in his favor in the Trego county case. There appears in the record this statement, occurring after the offer by the defendant to read in evidence a portion of the deposition of Charles Weeks: "Plaintiff wishes to state, and have it introduced in the record, that we don't ask them to litigate that question, and don't propose to offer any evidence on the question,—any oral evidence on the question,—as to the execution of this mortgage with 'wool' inserted therein, for the reason it has been litigated between this plaintiff and defendant in this action in the district court of Trego county, Kan., wherein Frank G. Willard was plaintiff, and John M. Ostrander was defendant, and the same was found in favor of the defendant." A certified copy of the record in that case was read in evidence. The answer of the defendant, it is true, alleged that a chattel mortgage had been executed by the defendant to the plaintiff to secure the note sued on in that action, and others, and that said chattel mortgage was altered in a material part by the plaintiff or his agent, as follows, to wit, the words "and wool" were interlined between the words "their" and "increase;" and in conclusion the defendant in that case prayed that the plaintiff be ordered to bring each of said notes, of \$950 each, into court for cancellation; second, that said chattel mortgage be declared fraudulent and void; and then followed prayers for damages. The jury rendered a verdict in favor of the defendant, assessing his damages at \$2,191.66. No finding whatever was made, either by the court or jury, as to the alteration or validity of said mortgage, but the court rendered judgment as follows: "It is therefore considered, ordered, and adjudged by the court that said defendant have and recover from the plaintiff herein the sum of \$2,191.66 as his damages; also costs of suit, less \$1,318.86, being the amount of the note and interest herein sued on." There being no finding or judgment of the court upon the question of the alteration of the mortgage, and as the judgment was in no manner based on the mortgage, and no order whatever with reference to the security of the plaintiff thereunder was made by the court, we fail to see how the judgment in that action affords any evidence whatever in this, on the question of alteration of the mortgage. The evidence in this case shows that the defendant himself was not in possession of the mortgage until a long time after the word "wool" appeared therein, and the defendant's agent, Weeks, and his son, both swore positively that the word "wool" was inserted in the mortgage before its execution and delivery by Ostrander. There being no testimony to go to the jury on that point, the

instructions were erroneous and misleading, if material.

It will be observed that the trial court treated this question, not only as material, but as important. Was it really so? Willard justified the taking of the sheep under this mortgage, claiming that a balance of \$2,300 secured thereby was still due him on two of the notes. The jury was instructed by the court that, if anything was due the defendant on either of the notes, he had a right to take possession of the sheep. It was claimed by the plaintiff, Ostrander, that the note not sued on in Trego county had been sold by Willard to Ann C. Ostrander, and was not his property. Testimony was offered for the purpose of establishing that claim, and the jury were instructed in reference thereto. The thirteenth instruction is as follows: "The jury are instructed that if it appears from the copy of the judgment rendered in Trego county, in the suit brought by this defendant against this plaintiff upon one of the notes in question, that the judgment was against this defendant for a sum over and above the amount of the note sued on, that judgment cuts no figure with reference to the other note that was not sued on in that action; and if this defendant was the owner of the other note when he took the sheep, and if the mortgage was valid upon the sheep taken, or any of them, when taken, and if such other note had not been paid or satisfied or extinguished in any way before the sheep were taken by the defendant, and if the defendant took the sheep under said mortgage, such taking would not be wrongful, as to such sheep as were covered by the mortgage, if this other note was not canceled, paid, satisfied, or the debt evidenced thereby extinguished, by reason of that judgment, whatever effect it might have had upon the other note. The record shows that the jury returned into court with the following verdict: "We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find for the plaintiff in the sum of \$2,800.00, less the Ann C. Ostrander note, with interest thereon." This verdict the court refused to accept, and sent the jury out again. They then returned a second verdict, as follows: "We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find for the plaintiff, in the sum of \$1,790.60." There really seems to have been no substantial conflict as to defendant's ownership of both notes, and the jury, by their first verdict, found, in effect, that Willard owned the Ann C. Ostrander note. If so, under the instructions of the court, the jury should have found for the defendant, unless they found that the mortgage had been altered in a material part by the defendant, or under his direction, after its execution. If the jury were guided in their deliberations by the instructions of the court, as it was their duty to be, they then must have found that the mortgage was in fact so altered, and this finding is wholly unsupported and contradicted by the evidence.

Much is said in the briefs, and the point was vigorously pressed on the oral arguments, as to the materiality of the word

"wool" in the mortgage. Plaintiff in error contends that a mortgage of the sheep necessarily covers their wool. The question is not free from difficulty. See *Jones, Chat. Mortg.* §§ 149-151, and cases therein cited; *Bryant v. Pennell*, 61 Me. 108. Without attempting to carefully review all the authorities, we think, as between the parties to the action, a mortgage on the sheep would include the wool, but that after the wool was clipped, if sold to a purchaser for value without notice, he would get a title free from the lien of the mortgage. If this conclusion be correct, the insertion of the word "wool" would be a material alteration. If the mortgage was in fact altered after its execution, the alteration must have been made by the mortgagee, or by his direction, to impair its validity; and it will not be presumed that an agent intrusted with the possession of the security was directed by the mortgagee to make such an alteration, but that fact must be shown by proof. *Langenberger v. Kroeger*, 48 Cal. 147.

Some other questions are urged on our consideration, but, as they are not likely to arise on another trial, we do not feel called on to specially mention them. For the errors of the court in instructing the jury, the judgment must be reversed, and a new trial ordered.

**HORTON, C. J.**, (concurring.) While proceedings in error, supplemented with a supersedeas bond, only "stay the execution of the judgment," and while the trial courts in other subsequent actions may, to prevent injustice being done in the use of an alleged erroneous judgment as evidence or as an estoppel, continue from time to time the hearing of such an action until proceedings pending to reverse such a judgment are disposed of, the supreme court also has the inherent power, for the protection of its own jurisdiction, and for the enforcement and protection of its own orders and judgments, to prohibit and restrain, upon proper terms, the parties, in any proceeding pending in this court, from using a judgment brought here for review as evidence or as a bar or estoppel in any other case pending in this or any other court, so long as the proceedings to review the alleged erroneous judgment remain undisposed of. *Chicago, K. & W. R. Co. v. Commissioners of Chase County*, 42 Kan. 223, 21 Pac. Rep. 1071.

**JOHNSTON, J.**, (concurring.) I concur in what has been said in the principal opinion, and as an additional authority sustaining the position that the filing of a petition in error, and of the ordinary stay bond, goes no further than to stay the execution of the judgment, I cite *Railroad Co. v. Andrews*, 34 Kan. 563, 9 Pac. Rep. 213, where it was expressly held that "the institution of a proceeding in error in the supreme court does not of itself operate to suspend further proceedings in the case in the court below. Nor will the giving of the undertaking provided for in sections 551 and 552 of the Code suspend proceedings in the district court further than to stay execution of the judgment or final order sought to be reviewed." I also fully

concur with the chief justice that this court has ample power, when necessary, to stay and suspend the effect and use of the judgment for any purpose during the pendency of a proceeding brought for a reversal of such judgment.

(51 Kan. 379)

**OSAGE CITY BANK v. JONES et al.**

(Supreme Court of Kansas. May 6, 1893.)

**ACTION ON JUDGMENT—RES JUDICATA—LIABILITY OF PRINCIPAL TO SURETY.**

A judgment was obtained upon a time certificate of deposit against a bank issuing the same, and also against parties who indorsed the certificate as guarantors and sureties, and the relations and liabilities of all the parties were found and stated. Afterwards one of the guarantors and sureties was compelled to and did pay the judgment, and later brought an action against the bank, the primary debtor, to recover the amount paid upon the judgment. *Held*, that the consideration for the certificate, and the relations and liabilities of the parties to the same, were determined in the former action, and were not open to inquiry in the last action; and, further *held*, that the bank was liable to the guarantor and surety for the amount paid in its behalf.

(Syllabus by the Court.)

Error from district court, Osage county; William Thomsa, Judge.

Action on a judgment by C. S. Jones and another against the Osage City Bank, a corporation. Plaintiffs had judgment, and defendant brings error. Affirmed.

**H. B. Hughbanks**, for plaintiff in error.  
**C. S. Martin**, for defendants in error.

**JOHNSTON, J.** C. S. Jones & Bro. recovered a judgment for \$792.93 against the Osage City Bank at the April, 1889, term of the district court of Osage county. The action for recovery was based on a judgment obtained in 1883 by Julius Kuhn against the Osage City Bank as principal, and against C. S. Jones & Bro. and another as guarantors and sureties. In their petition they alleged that the Osage City Bank issued a certificate of deposit in favor of Julius Kuhn, and payable to his order one year after date, with interest at 7 per cent. per annum, and that, in order to give the bank credit, C. S. Jones & Bro. indorsed their names on the back of the certificate, by which they guarantied its payment; that afterwards the Osage City Bank failed to pay the certificate, and that Julius Kuhn brought an action against the principal, and also the guarantors and sureties, in which he recovered judgment against each and all of them for the sum of \$536.11, and that C. S. Jones & Bro. were compelled to and did pay this judgment. The petition contained another count, setting up a certificate of deposit issued by the bank, and which had been assigned to C. S. Jones & Bro., but, as the court found that the bank was not liable, and denied any judgment thereon, the rulings made respecting the same have become immaterial.

The plaintiff in error claims that this action should be treated as having been brought upon the certificate of deposit, and seeks to raise questions as to the

power of the officers of the bank to issue the certificate of deposit, and as to its liability as principal. These questions are not now open for investigation. Although the certificate of deposit is mentioned in the petition, it is manifestly set up as the basis of the judgment which was specifically pleaded, and it appears that this action was brought upon the judgment, rather than the certificate. That judgment, which was obtained in an action where all the present parties were before the court, determined the relations and liabilities of each to the other. In that action it was determined that the Osage City Bank was liable as the principal, and that C. S. Jones & Bro. were liable as guarantors and sureties, and upon a review in this court that judgment was affirmed. *Jones v. Kuhn*, 34 Kan. 414, 8 Pac. Rep. 777. It was shown that C. S. Jones & Bro. were compelled to and did pay this judgment. As the bank was primarily liable for the same, C. S. Jones & Bro. were entitled to recover the amount which they had been required to pay for the bank, together with the interest thereon. The questions so much argued by the plaintiff in error with respect to its want of authority to issue the certificate, and the consideration for the same, have all been settled in the former action, where all interested parties were before the court, and the controversy cannot be renewed in this action. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 404)

## FRANKHOUSER v. WORRALL.

(Supreme Court of Kansas. May 6, 1893.)

CHattel Mortgage on Interest of One Partner — REPLEVIN BY MORTGAGEE AGAINST RECEIVER OF FIRM.

1. A mortgagee of personal property belonging to a partnership, having a mortgage valid only as to the interest of one of the partners, cannot maintain replevin against a receiver in charge of the partnership property under appointment from a court of competent jurisdiction.

2. An unrecorded chattel mortgage is void as against a bona fide purchaser without notice of an interest in the mortgaged property.

(Syllabus by the Court.)

Error from district court, Osage county; Ellis Lewis, Judge pro tem.

Replevin by Orren Worrall against N. Frankhouser, receiver. Plaintiff had judgment, and defendant brings error. Reversed.

Robert C. Helzer, for plaintiff in error.  
H. B. Hugbanks, for defendant in error.

ALLEN, J. The court in this case made special findings of fact and conclusions of law, as follows:

"Findings of fact: (1) That prior to April 4, 1884, the plaintiff, Worrall, was the owner of, and in possession of, the property described in the petition. (2) At that time Orren Worrall sold and delivered said property to James S. Evans, and to secure the payment of a part of the consideration and purchase money—

\$900—for said property, a chattel mortgage on said property was at the time executed and delivered by said Evans to Worrall. (3) That said chattel mortgage was filed for record in register of deeds office of Osage county, February 24, A. D. 1885. (4) On January 30, A. D. 1885, W. E. Bailey, by his agent, H. J. Bailey, in good faith purchased an undivided one-half interest in said property, paying for the same a valuable consideration, for the purpose of forming a copartnership with said James S. Evans, in carrying on the livery business in Osage City, Osage county, Kansas; and on March 15, 1885, said parties entered into the transaction of said partnership business. (5) That W. E. Bailey, by his agent, H. J. Bailey, afterwards, on December 29, 1886, filed a petition in the district court of Osage county, Kansas, against said James S. Evans, his partner, and in said action N. Frankhouser, the defendant, was appointed by the court receiver in said action. (6) That some time afterwards said Frankhouser, defendant, as such receiver, took into his possession said property, and held the same, and had the same in his possession as such receiver on January 13, 1888, when this suit was brought. (7) That there was at the commencement of this suit due from said James S. Evans, on the debt secured by the chattel mortgage heretofore mentioned in finding No. 2, the sum of three hundred and twenty-nine (\$329) dollars and interest from August 1, 1887, at ten per cent. per annum; and the said plaintiff was at the commencement of this suit the bona fide holder and owner of said mortgage and claim secured thereby from said Evans. (8) That said plaintiff, before the commencement of this suit, demanded the possession of said property from the said Frankhouser, defendant, under said mortgage, and defendant refused to deliver the same, whereupon he commenced this action for the possession of said property."

"Conclusions of law: (1) That the said W. E. Bailey was the owner of said undivided one-half interest, as aforesaid, in said property, in good faith, and without notice of the rights of said Worrall. (2) That, as against the said James S. Evans, the lien of said chattel mortgage was valid and subsisting lien against the interest of said James S. Evans in said partnership property, and plaintiff was entitled at the commencement of this suit to the possession of said property. Judgment is therefore given that he have judgment for possession of said property and costs."

Do the findings of fact support the conclusions of law? It appears that Bailey bought an undivided half interest in the mortgaged property before the mortgage was recorded. The mortgage as to him would, therefore, be inoperative. This left Worrall with a mortgage on the half interest belonging to Evans at the time Frankhouser was appointed receiver. Bailey had a clear half interest; the other half interest belonging to Evans, subject to Worrall's mortgage. By the appointment of Frankhouser as receiver he obtained all the rights to the possession of

the property that both of the parties to the action in which the appointment was made had. Neither Evans nor Worral had any superior right to the possession of the property over Bailey at the time the receiver was appointed, and neither could maintain replevin against him for it. Neither can they maintain replevin against Frankhouser, the receiver. The rule that one partner cannot replevin partnership property from his copartner is elementary, and needs no citation of authorities to sustain it. The plaintiff below was not without remedy under his mortgage. On the proper application to the district court, by which the receiver was appointed, his rights against Evans could, and doubtless would, have been fully protected, and the receiver could have been directed to apply the proceeds of Evans' interest in the property to the satisfaction of his mortgage. The judgment of the district court will be reversed, with an order to render judgment in favor of the defendant below for costs. All the justices concurring.

(51 Kas. 385)

CHAMBERS et al. v. ANDERSON et al.

(Supreme Court of Kansas. May 6, 1893.)

VENDORS AND VENDEES—CONSTRUCTION OF CONTRACT—OPTION OF VENDORS.

Where, in a written agreement for the sale of land, the parties stipulate that, "in case the second party shall fail to make the payments aforesaid, and each of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of or derived from the first party shall utterly cease and determine, and the rights of possession, and all equitable and legal interests in the premises hereby contracted, shall revert to and revest in said first party without any declaration of forfeiture or act of re-entry, or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made,"—the meaning of such clauses are that such agreement is void only at the election of the vendor or seller, (the party of the first part,) who can avoid them or enforce them, at his own option.

(Syllabus by the Court.)

Error from district court, Reno county; L. Houk, Judge.

Action by Thomas Anderson and W. L. Woodnutt against Mary E. and C. C. Chambers to enforce a contract for the sale of land. Plaintiffs had judgment, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

Thomas J. Anderson and W. O. Woodnutt brought their action against Mary E. and C. C. Chambers to recover \$388.50, with interest, from Mrs. Chambers, as a balance due upon the following written contract: "This agreement, made this 23d day of August, in the year 1887, between Thomas J. Anderson and W. L. Woodnutt

of the first part, and Mrs. M. E. Chambers, of Hutchinson, county of Reno, state of Kansas, of the second part, witnesseth, that in consideration of the stipulations herein contained, and the payments to be made as hereinafter specified, the first party agrees to sell unto the second party lot one hundred thirty-eight, (138,) block eight, (8,) in Puterbaugh's addition to South Hutchinson, county of Reno, state of Kansas, as designated by the recorded map of said city, for the sum of five hundred (\$500.00) dollars, with interest at the rate of ten per cent. per annum. Payment has been made and received of one hundred and sixty-seven dollars, (\$167.00,) and the remaining principal, with the accruing interest, shall be paid at the office of the first party in two payments, at the times and in the manner following, to wit: 1st payment, September 18, 1887, \$166.66; interest, \$9.33; total, \$174.99. 2nd payment, March 18th, 1888, \$166.66; interest, \$16.66; total, \$183.20. And the said party, in consideration of the said premises, hereby agrees that she will make punctual payment of the above sums, as each of the same respectively becomes due, and that she will regularly and seasonably pay all such taxes and assessments as may hereinafter become due on said premises. In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually, and at the times above limited, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid after their true tenor and intent, strictly, then the first party will cause to be made and executed unto the said second party, her heirs and assigns, (upon request at the office of the first party, and the surrender of this contract,) a deed, conveying said premises in fee simple, with the ordinary covenants of warranty as to incumbrance existing against said premises at the date of this contract. And it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract. And, in case the second party shall fail to make the payments aforesaid, and each of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of or derived from the first party shall utterly cease and determine, and the rights of possession, and all equitable and legal interests in the premises hereby contracted, shall revert to and revest in said first party without any declaration of forfeiture, or act of re-entry, or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made. And said party of the first part shall have the right, immediately upon the failure of the party of the sec-

ond part to comply with the stipulations of this contract, to enter upon the land aforesaid, and take immediate possession thereof, together with the improvements and appurtenances thereunto belonging. And the said party of the second part covenants and agrees that she will surrender to the said party of the first part the said land and appurtenances, and no court shall relieve the party of the second part from a failure to comply strictly and literally with this contract. And it is further stipulated that no assignment of the premises shall be valid unless the same shall be indorsed hereon, and that no agreements or conditions or relations between the second party and her assignee or other person acquiring title or interest from or through herself preclude the first party from the right to convey the premises to said second party, or her assigns, on the surrender of this agreement, and the payment of the unpaid portion of the purchase money which may be due to the first party. In witness whereof said parties have hereunto set their hands the day and year above written. [Signed] Thos. J. Anderson. W. L. Woodnutt. M. E. Chambers." And in their petition Anderson and Woodnutt also prayed that the said contract be declared an equitable mortgage, and foreclosed; that the premises therein described be sold, and the proceeds thereof paid in satisfaction of the judgment, interest, and costs; and that plaintiffs have execution against Mrs. Chambers for any balance remaining unpaid. Before commencing the action, the plaintiffs executed and tendered to Mrs. Mary E. Chambers their warranty deed for the premises described in the written contract, and at that time demanded payment of the balance due by the terms thereof. This Mrs. Chambers refused. A demurrer was filed to the petition, alleging that it did not state facts sufficient to constitute a cause of action against the defendants, or either of them. This demurrer was overruled, and, as the defendants elected to stand thereon, and declined to plead further, the court rendered judgment for the plaintiffs and against the defendant Mrs. Mary E. Chambers for \$414 and \$8.10 costs. A decree was entered declaring the judgment to be a lien upon the premises described in the contract, and ordering a sale of the premises to pay the same, and, after the sale thereof, barring the defendants of all right, title, estate, or claim therein. The defendants objected to the judgment, and bring the case here.

McKinstry & Wise, for plaintiffs in error.  
G. A. Vandever, for defendants in error.

HORTON, C. J., (after stating the facts.) The contention upon the part of Mary E. Chambers is that, under the provisions of the written contract signed by her, she had the option to abandon the purchase at any time upon forfeiting all money paid by her thereon; that thereby the contract became wholly void, and all the parties were thereupon released therefrom. It is argued in her interest that the written contract should be so construed as to allow her to pay out and

take the land, if she desired so to do, according to the terms thereof; or, by refusing to pay, that the contract permitted her to be released therefrom upon the surrender of the property and forfeiting the payments made. It was decided in *Bohart v. Investment Co.*, 49 Kan. 94, 30 Pac. Rep. 180, upon a written contract containing a provision similar to these now under consideration, that "the provision in the contract making it null and void, if Bohart made default in the payment of his installments, or any installment, was for the benefit of the investment company. The company could have insisted upon this provision, and had the contract annulled. It also had the right or option to declare a forfeiture for the nonpayment of the installments, or any installment; but it also could waive that right. A waiver of the right to declare a forfeiture for nonpayment at a specified time is not a rescission of the contract. The investment company, as the vendor, is entitled to its money upon the contract, and the vendee to the lots therein described." *Barrett v. Dean*, 21 Iowa, 423, and *Sigler v. Wick*, 45 Iowa, 690. The law as declared in that case is challenged by the attorneys of Mary E. and C. C. Chambers, and we are asked to re-examine the question. We have patiently and laboriously complied with this request, but, after such examination, we must reiterate what was then said. The law upon the question presented is well settled. In *Wilcoxson v. Stitt*, (Cal. 1884,) 4 Pac. Rep. 629, it was held that "where, in an agreement for the sale of land, the parties stipulate that, 'in event of the failure to comply with the terms of the agreement, the vendor shall be released from all obligation to convey, and the vendee shall forfeit all right thereto, and the agreement shall be void,' the meaning of such clause is that such agreement is void only at the election of the vendor, who can avoid it or enforce it, at his option." In that case the vendor agreed to sell a tract of land for \$18,480. Of this sum the purchaser paid one-half, and agreed to pay the remaining one-half on or before the 21st of March, 1878, together with interest. The action was brought to recover the sum last mentioned in the contract, with interest, etc. *Canfield v. Westcott*, 5 Cow. 270, was an action of covenant on articles of agreement under seal to recover certain installments of the purchase money. In that case the following clause in the articles came under consideration: "The said Daniel [the defendant] hereby agrees that, should he fail in performing any part of the above covenants, that this contract shall become void and of no effect, and that the said party of the second part [the testator] shall and may re-enter and take possession of the said premises, without hindrance or molestation." The court said: "The provision that this agreement should be void was for the benefit of the vendor. On the vendee's default the vendor might, therefore, consider the agreement void at his own election, or affirm it, and bring his action on the covenants; and they said this had been often so held in much

stronger cases,—as, where the provision in the articles was general and positive, in the words of both parties, that, if the vendee failed to perform, the contract shall be void." *Church v. Ayres*, Id. 272, follows the last case cited, and the court in that case says: "It is a settled principle that a party in whose favor a provision is made by the contract may waive it, if he so pleases." See, also, *Cartwright v. Gardner*, 5 Cush. 281; *Mason v. Caldwell*, 5 Gilman, 196; *Smith v. Mohu*, 87 Cal. 489, 25 Pac. Rep. 696; 1 Poin. Eq. Jur. § 446, and cases cited; *Dooley v. Watson*, 1 Gray, 414; *Hooker v. Pynchon*, 8 Gray, 550; *Daily v. Litchfield*, 10 Mich. 29. The law is similar in reference to conditions contained in leases. *Clark v. Jones*, 1 Denio, 518. See *Dakin v. Cope*, 2 Russ. 170; *Dumpor's Case*, 1 Smith, Lead. Cas. 97, 98; *Smith v. Miller*, (N. J. Sup.) 13 Atl. Rep. 39; *Ray v. Gas Co.*, (Pa. Sup.) 20 Atl. Rep. 1065. In the opinion in this last case the court says: "No case has been brought to our notice in which the lessee was allowed to take advantage of his wrong, or to set up his own default, to work a forfeiture of his own contract." See, also, *Phillips v. Vandergrift*, (Pa. Sup.) 23 Atl. Rep. 347; *Agarter v. Vandergrift*, (Pa. Sup.) 21 Atl. Rep. 202; *Appeal of Wills*, (Pa. Sup.) 18 Atl. Rep. 721.

Under the authorities, it was the undoubted intention of all the parties to the written contract, when they inserted the clauses permitting the contract to be declared null and void upon default of Mary E. Chambers, to provide a penalty to insure the prompt performance of the contract by her. If the refusal of Mrs. Chambers to perform the terms of the contract prevents an action from being maintained thereon against her, the agreement leaves everything in her own hands. It allows her to defeat or make the contract operative, as may best subserve her interest, without any discretion on the part of the others. It makes it binding on the seller, but not on the buyer. But this is not the law. The provisions in the contract permitting it to be regarded null and void could only be taken advantage of at the election of the plaintiffs below, who can avoid it or enforce it, at their option. The case of *Bradford v. Limpus*, 10 Iowa, 35, to which we are referred, shows that the provisions of forfeiture were not for the benefit of the grantor or seller only. In that case *Bradford* sold certain land to *Limpus* for the consideration of \$4,600; \$1,700 cash, and the remainder was represented by three notes, payable as follows: Two of them, for \$1,000 each, payable in one and two years, and the other, for \$900, payable in three years; and upon the payment of these according to their tenor *Bradford* was to execute and deliver a good deed to lands. To secure the faithful performance of this on *Bradford's* part he gave a bond for \$1,200, conditioned as follows: "That, if *Limpus* failed or neglected to pay the notes, or either of them, and especially the first one, according to the tenor thereof, time being of the essence of the contract, then *Bradford* should have full power to enter upon said real estate, and take full possession

thereof; and, if the failure to pay was on the first note, then the contract should be void, and said *Bradford* shall take possession of the premises, and refund to *Limpus* or order the sum of \$1,200, without interest, out of the \$1,700 so paid in hand; \$500 thereof having been forfeited by reason of said failure on the part of *Limpus* to comply with the terms of the contract." As *Limpus* was to have returned to him \$1,200 if he failed or neglected to pay the note or notes described in the contract, it clearly appears that the forfeiture clause placed in that contract was for his benefit, not wholly for the benefit of *Bradford*. That case is different from this, because there is no provision in the contract under consideration requiring any money to be refunded to Mrs. Chambers. The forfeiture clauses placed in this contract were wholly for the benefit of the parties selling the real estate, and these clauses may be waived by them. A party to a contract is not permitted to avoid it by his own wrong. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 394)

#### ROCK ISLAND LUMBER & MANUF'G CO. v. FAIRMOUNT TOWN CO.

(Supreme Court of Kansas. May 6, 1893.)

VENDOR AND PURCHASER—REMEDIES OF VENDOR ON NONPAYMENT OF PURCHASE MONEY—SPECIFIC PERFORMANCE—PLEADINGS.

1. In all civil actions, allegations of the execution of written instruments, and of the existence of a corporation, or of any appointment or authority, are taken as true, unless a verified denial is filed. Section 108, Civil Code.

2. Every material allegation of the petition, not controverted by the answer, shall, for the purpose of the action, be taken as true. Section 128, Civil Code.

3. The cases of *Bohart v. Investment Co.*, 30 Pac. Rep. 180, 49 Kan. 94, and *Chambers v. Anderson*, 32 Pac. Rep. 1098, 50 Kan. —, (just decided,) followed.

4. A vendor of lands, seeking the payment of the purchase money, may maintain an action against the vendee for the specific performance of the written contract of sale upon the principle of mutuality of remedy.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by the Fairmount Town Company against the Rock Island Lumber & Manufacturing Company for a specific performance of a contract for the sale of lots. Plaintiff had judgment, and defendant brings error. Affirmed.

Sankey & Campbell, for plaintiff in error.  
J. V. Daugherty, for defendant in error.

HORTON, C. J. On January 15, 1887, the Fairmount Town Company agreed to sell to the Rock Island Lumber & Manufacturing Company six lots in Fairmount addition to the town of Iuka, in Pratt county, for a consideration of \$1,250, \$416.66 of which was paid on execution of the agreement, and the remainder was to be paid in two equal installments, in 6 and 12 months, respectively, with 10 per cent. in-



terest per annum. The agreement was in writing, dated January 15, 1887, and was signed as follows: "Fairmount Town Company. By S. H. Mallory, President. Rock Island Lumber Company, Party of the Second Part." It contained, among others, the following clauses: "And in case the party of the second part shall fail to make the payments aforesaid punctually, and in accordance with the strict terms of this contract, and at the times specified and limited, and to erect or cause to be erected a building as above described and contracted, and perform and complete all the stipulations and agreements herein contained, literally and strictly, without failure or default, then this contract, as far as it binds the party of the first part, shall be determined, and become utterly null and void, and the party of the second part shall forfeit all payments made by him on this contract, and all rights and interests hereby created in favor of the second party shall entirely cease; and the right of possession and all equitable and legal interests in the premises hereby created, together with all improvements made, shall revert and vest in said party of the first part, without any act of re-entry or other act to be performed by the party of the first part; the party of the second part forfeiting all rights to the above premises, or claims for improvements made, together with all moneys paid." The lumber and manufacturing company failed to pay the last installment in the agreement, falling due on January 13, 1888, and on July 5, 1888, the Fairmount Town Company brought its action to obtain a decree of specific performance of the written contract, and for judgment against the lumber and manufacturing company for \$416.66, with interest, being the unpaid balance due thereon. To this petition the defendant demurred upon the following grounds: "(1) There is a defect of party defendant; (2) the petition does not state facts sufficient to constitute a cause of action; (3) the petition shows no cause of action against the defendant; (4) the court has no jurisdiction of the subject of the action." The court sustained the demurrer as to the first ground, and overruled it as to the others. Thereupon the plaintiff amended his petition by interlineation, adding the following: "That the defendant executed the contract sued on in this action by signing thereto the Rock Island Lumber Company, and that the Rock Island Lumber Company, and the Rock Island Lumber & Manufacturing Company are identical." The defendant excepted to the overruling of its demurrer, except as to the first ground, and also to permitting plaintiff to amend its petition, and, electing to stand on its demurrer, judgment was, at the request of the plaintiff, rendered against the defendant, and it brings the case to this court for review, alleging various errors in the rulings of the court.

The trial court had the right to permit the plaintiff below to amend its petition. The defendant, having refused to plead after such amendment, and after its demurrer upon the other grounds stated therein had been overruled, thereby ad-

mitted the facts set forth in the petition as amended to be true. Sections 108, 128, Civil Code. But it is claimed that the mere name of the "Rock Island Lumber Company" as party of the second part was not the signing by the corporation, and that the corporation was not bound thereby. The petition alleged that the "Rock Island Lumber & Manufacturing Company" is "a corporation duly chartered, organized, and existing under and by virtue of the laws of the state of Illinois, and, as such, doing business in the city of Wichita, and other cities and towns in the state of Kansas, including the town of Iuka, Pratt county; that the "Rock Island Lumber Company" and the "Rock Island Lumber & Manufacturing Company" are identical, and that the "Rock Island Lumber & Manufacturing Company" signed the written agreement as the "Rock Island Lumber Company." Upon the allegations of the petition and the default made by the Lumber and Manufacturing Company judgment was properly rendered. Sections 108, 128, Civil Code. The face of the instrument shows that it had been executed by the "Rock Island Lumber Company," as party of the second part, and the petition alleged that the "Rock Island Lumber & Manufacturing Company" signed its name to the written agreement in that way. *Heffner v. Brownell*, (Iowa, 1887,) 21 N. W. Rep. 947. If a sufficient answer had been filed, some of the questions attempted to be raised in the brief concerning the signature to the written contract by the "Rock Island Lumber & Manufacturing Company," and the business that the company was authorized to carry on, might have been presented. In the absence of any answer, however, these matters deserve no further reference.

It is next contended that the contract at the time this suit was commenced had "become utterly null and void," because the "Rock Island Lumber & Manufacturing Company" failed to pay its last installment. It is argued that, as the lumber and manufacturing company was in default, both parties were thereupon released from all obligations of the contract, and that no action could be maintained on it; therefore, that a suit for specific performance could not be enforced at the instance of the town company. The law is well settled. The stipulations in the contract quoted were inserted for the benefit of the town company, the party of the first part, the seller of the lots described in the contract. The lumber and manufacturing company cannot take advantage of its own neglect in the nonpayment of the purchase money. Under the contract the town company had the option to avoid or enforce its terms; therefore it could, if it so elected, maintain this action to enforce the contract and recover the unpaid balance of the purchase money. *Bohart v. Investment Co.*, 49 Kan. 94, 30 Pac. Rep. 180; *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629. This question was carefully examined in the case of *Chambers v. Anderson*, 32 Pac. Rep. 1089, (just decided.) In that case the law was declared to be "that the forfeiture clauses placed in a contract similar to this were for the benefit of the

parties selling the real estate, but that these clauses might be waived by them; that a party to a contract cannot be permitted to avoid it by his own wrong." See authorities there cited. A vendor of lands seeking the payment of the purchase money may maintain an action against the vendee for the specific performance of the written contract of sale upon the principle of mutuality of remedy. Wat. Spec. Perf. §§ 14-16. Upon the allegations of the petition, the town company was entitled to a specific performance of the contract of sale upon the part of the Rock Island Lumber & Manufacturing Company. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 382)

**CODER v. STOTTS, Sheriff.**

(Supreme Court of Kansas. May 6, 1893.)

**CHATTEL MORTGAGES — REPLEVIN BY MORTGAGEE AGAINST ATTACHING OFFICER—EVIDENCE.**

1. In an action of replevin brought against a sheriff, who has levied on a portion of a stock of goods under an attachment, where the plaintiff claims under a mortgage given about six months previous to such levy, where it appears that the mortgagors have retained possession of the entire stock of mortgaged merchandise, have sold in the ordinary course of business therefrom, and have purchased large quantities of goods to replenish the stock, and all this has been with the knowledge of the mortgagee, and without objection from him, *held*, that the plaintiff must identify the goods attached by the sheriff as being those included in such chattel mortgage before he can recover the same in replevin.

2. Before secondary evidence of the contents of an invoice of a stock of goods which had been in plaintiff's possession can be received, he must, at least, account for the absence of the original.

(Syllabus by the Court.)

Error from district court, Graham county; Charles W. Smith, Judge.

Replevin by S. N. Coder against D. C. Stotts, sheriff. Defendant had judgment, and plaintiff brings error. Affirmed.

Harwi & Prewitt, for plaintiff in error. F. D. Turck and A. H. Ellis, for defendant in error.

ALLEN, J. This action was brought by S. N. Coder, as plaintiff, to recover certain merchandise which had been attached by the defendant, as sheriff, under an order of attachment issued in a suit brought by Patterson, Thomas & Co. vs. W. J. Bennett & Co. The petition alleges that the goods are of the value of \$8,000, and plaintiff claims them under a mortgage for \$8,000, dated August 15, 1887, but not filed in the register of deeds' office until February 17, 1888. The attachment was issued on the 17th day of February, 1888, and the sheriff's return shows that \$547 worth of goods were attached. A demurrer was interposed to the plaintiff's evidence, and sustained by the court. To this ruling the plaintiff excepted, and brings the case here for review.

The plaintiff's evidence shows that this

stock of goods was owned by him until the time this chattel mortgage was given; that he then sold to the firm of W. J. Bennett & Co., composed of W. J. Bennett and W. Coder, plaintiff's brother, and took the chattel mortgage under which he claims, to secure \$8,000 of the purchase price of the goods. Bennett & Co. took possession of the stock, sold goods in the usual course of business as retail dealers, and purchased others with which to replenish the stock from time to time. There is no evidence in the case from which it is possible to identify the particular goods attached by the sheriff as goods that were included in plaintiff's mortgage, and plaintiff's own testimony shows that the sales were made with his consent, and that he knew of purchases being made at various times. In fact, the very bill of goods for which Patterson, Thomas & Co. brought suit was first sold to the plaintiff himself before he sold out the stock to Bennett & Co., but under a subsequent arrangement the goods were turned over to Bennett & Co. It is claimed by counsel for the plaintiff that he was in possession of the entire stock at the time the attachment was levied, through his agent, Green. While the plaintiff used language in his testimony which might bear the construction claimed by his counsel, we are entirely satisfied from all his testimony that no change took place in the possession of the goods, and that Bennett & Co. were at that time still conducting the business in the same manner as heretofore. We think there was no identification of the property, and for that reason the plaintiff's proof was fatally deficient.

Exceptions were taken to the ruling of the court in excluding the testimony of the witness Green as to what a certain invoice showed as to the amount of goods in the stock. No proper foundation was laid for the introduction of secondary evidence as to the contents of the invoice; and we are unable to perceive, from the record presented, that the invoice itself would have been competent, as it was taken some time after the levy of the attachment. The witness Green was asked to state the amount of the invoice. Such a statement, if made, could have thrown no light on the question of identity.

Plaintiff complains of the admission in evidence of the attachment and summons in the case of Patterson, Thomas & Co. vs. Bennett & Co., in connection with the cross-examination of the defendant, who was called as a witness by the plaintiff. While it is true that these papers were received in evidence in advance of what would appear to be strictly the regular order, they were competent and proper evidence, and we cannot say that the court abused its discretion in permitting them to be read at that time. Questions as to the order of the introduction of testimony are largely within the discretion of the trial court. On the whole record, we are satisfied that the judgment of the trial court was right, and it will be affirmed. All the justices concurring.

(51 Kan. 381)

**LEOBOLD et al. v. OTTAWA COUNTY BANK.**

(Supreme Court of Kansas. May 6, 1893.)

RECORD ON APPEAL—REVIEW.

A party desiring this court to review errors based on the testimony on a case made must incorporate in the case itself a statement that it contains all the testimony introduced on the trial.

(Syllabus by the Court.)

Error from district court, Ottawa county; M. B. Nicholson, Judge.

Action by the Ottawa County Bank against C. H. Leobold and others. Judgment for plaintiff. Defendants bring error. Affirmed.

C. F. Mead, for plaintiffs in error. Rees & Tomlinson, for defendant in error.

ALLEN, J. The only errors claimed by plaintiffs in error which they seek to have this court consider are based on the testimony introduced on the trial of the action. A case made is attached to the petition in error, which contains no statement to the effect that it includes all the evidence, though the certificate of the trial judge who settled the case contains such a statement. Within the oft-repeated decisions of this court, this is insufficient to present the questions sought to be raised in this court. *State v. Board of Com'rs of Harper Co.*, 43 Kan. 195, 23 Pac. Rep. 101; *Hill v. Bank*, 42 Kan. 364, 22 Pac. Rep. 324; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. Rep. 641; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. Rep. 492. Judgment affirmed. All the justices concurring.

(51 Kan. 370)

**FRICK CO. v. WESTERN STAR MILLING CO.**

(Supreme Court of Kansas. May 6, 1893.)

SALE OF MORTGAGED PROPERTY—CONSENT OF MORTGAGEE—EVIDENCE.

1. A mortgagor of a chattel may make a valid sale of the mortgaged property with the mortgagee's oral consent. In such a case a sale by the mortgagor passes the title to a purchaser in good faith.

2. In an action concerning the sale of mortgaged personal property by the mortgagor, it is competent to introduce evidence, after a mortgage has been executed and delivered, that the mortgagee orally authorized the mortgagor to make sales of the mortgaged property. Such evidence does not contradict or vary the terms of the written mortgage with reference to the disposition of the property, but tends to show that after the mortgage was delivered the mortgagor had authority from the mortgagee to act as agent in making sales of the mortgaged property.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by the Frick Company, a corporation, against the Western Star Milling Company, for the conversion of a quantity of wheat. Defendant had judgment, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

This was an action brought by the

Frick Company against the Western Star Milling Company for the conversion, in September and October, 1888, of 570 bushels of wheat, valued at \$500, which the Frick Company claimed under a chattel mortgage dated the 9th of November, 1887, and executed to the Frick Company by Andrew Bachofer. The chattel mortgage embraced the two-thirds interest of 77 acres of growing wheat on the farm of S. P. Riuquest, in the county of Saline, in this state, which Bachofer had rented. The mortgage contained the following provision: "The wheat is to be placed in Garner subject to the order of Frick Company, of Waynesboro, Pa., and not to be disposed of without their consent, unless the past-due notes are first paid in full." Trial before the court, a jury having been waived. The court made the following findings of fact: "First. That immediately after the execution of the chattel mortgage described in the plaintiff's petition in the above-entitled action, it was agreed by and between the mortgagor, Andrew Bachofer, and the agent of the mortgagee, with whom the said mortgage was executed for the company, that the mortgagor should sell the wheat described in the mortgage at the place where he could do so at the best advantage, and, from the proceeds of such sale, he should pay the expenses of harvesting and threshing said wheat, and use what was necessary for the support of his family to the time of such sale. Second. That said mortgagor harvested said wheat and threshed the same during the month of August, 1888, and put the same in a bin upon the place where the wheat was raised, with the one-third of the crop which belonged to the owner of the land upon which it was raised, said wheat having been raised upon rented land. Third. That on or about the 1st day of August, 1888, the mortgagees sent said mortgage and the notes therein described to Garver & Bond, attorneys at law, located in the city of Salina, Saline county, Kansas, for collection. Fourth. That upon the day said wheat was threshed, Garver & Bond sent one James Chase to the place where said wheat was so being threshed, to look after the same; and said mortgagor then stated to Mr. Chase that he would turn over to the mortgagees said wheat, or pay the debt thereby secured, in a short time. Fifth. That within a few days after said wheat was threshed, the mortgagor called at the office of Garver & Bond, and Mr. Garver then stated to him that he thought said wheat had better be stored for a while, for the reason that the price, he thought, would be greater than it was at that time; but said mortgagor did not understand the statement so made to him. Sixth. That during the months of September and October, 1888, the said mortgagor sold to said defendant 434 bushels of wheat, then of the value of \$384. Seventh. That the wheat so purchased by defendant was immediately mixed with a large quantity of other wheat in its elevator, and soon after such sale said plaintiff demanded of defendant said wheat, or the value thereof, and defendant refused to pay for said wheat, or to turn the same over to plain-

tiff." And thereon the court made the following conclusions of law: "First. That the plaintiff is not entitled to recover of defendant the value of the wheat so purchased by it. Second. That the defendant should recover of and from the plaintiff its costs expended in this action." Judgment was entered for the milling company against the Frick Company. The Frick Company excepted, and brings the case here.

Garver & Bond, for plaintiff in error. C. A. Hiller and Hutchinson & Banks, for defendant in error.

HORTON, C. J., (after stating the facts.) This was an action in the court below to recover damages for the conversion of a certain quantity of wheat upon which the Frick Company held a mortgage from Andrew Bachofer. The mortgage was dated November 9, 1887, and covered Bachofer's two-thirds interest in 77 acres of growing wheat, in Saline county, to secure the payment of an indebtedness from Bachofer to the company. The mortgage was filed for record on November 12, 1887. In August, 1888, the wheat was threshed, and, in September and October following, Bachofer sold and delivered 434 bushels to the Western Milling Company. The wheat was of the value of \$384. On demand, the milling company refused to account to the Frick Company for the wheat, or any part of it. It appears from the evidence and findings of fact that the milling company bought the wheat of Bachofer, paid for it, and immediately mixed the same with other wheat of the company in its elevator at Salina. The contention of the Frick Company is that the sale of the wheat by Bachofer to the milling company was contrary to the provisions of the chattel mortgage, and without the knowledge or consent of the Frick Company. If, after the mortgage to the Frick Company was made, that company orally authorized Bachofer, the mortgagor, to sell the wheat, a sale of the latter would convey a good title to the purchaser, the milling company. Whether the Frick Company gave Bachofer, the mortgagor, authority to sell the wheat described in the mortgage was a question of fact for the trial court; and there was competent evidence in the case which would justify the findings of this fact in favor of the milling company. The authorities are that a mortgagor may make a valid sale of the mortgaged property with the mortgagee's oral consent. *Jones, Chat. Mortg.* § 456; *Pratt v. Maynard*, 116 Mass. 388; *Brandt v. Daniels*, 45 Ill. 453. In *Frankhouser v. Ellett*, 22 Kan. 127, *Brewer, J.*, speaking for the court, said: "We think the rule to be that where a mortgage is given upon a stock of goods, and, by agreement outside the mortgage, the mortgagor is permitted to continue the business, and dispose of the goods in the ordinary way, and use some portion of the proceeds in the support of his family, the transaction will be upheld or condemned according as it is entered into and carried out in good faith, or not. The mortgagor, if he may keep the possession,

may as well make the sales as a stranger. He acts in that respect as a quasi agent, at least, of the mortgagee."

The claim that the court should have sustained the objection to the introduction of the evidence with reference to the disposition of the wheat at the time the mortgage was executed is not tenable, because it clearly appears that the evidence relied upon by the trial court concerned the statements of the parties after the mortgage was executed. This oral evidence was not received to contradict the written mortgage, but to establish the authority of Bachofer from the Frick Company to sell the wheat. The other claim, that the oral authority from the Frick Company to Bachofer to sell the wheat was revoked prior to the purchase by the milling company, is founded upon conflicting evidence. The trial court settled this question of fact in favor of the milling company. When James Chase, as agent for the Frick Company, went where the wheat was being threshed, to look after it, he should have taken possession thereof, or made complete arrangements to have the wheat stored for his company. He should not have accepted the statement of Bachofer, the mortgagor, if he desired to protect his company, that he would turn over the wheat, or pay the debt in a short time. The judgment of the district court will be affirmed. All the justices concurring.

(61 Kan. 376)

#### CITY OF ESKRIDGE v. LEWIS.

(Supreme Court of Kansas. May 6, 1893.)

APPEAL—REVIEW—PRESUMPTIONS—ACTION FOR PERSONAL INJURIES—PLEADINGS—HARMLESS ERROR.

1. Where the record is silent as to the time of filing a motion for a new trial that has been overruled, and the reasons for overruling the same are not stated, the supreme court will presume, for the purpose of upholding the judgment of the trial court, that the motion was not made and filed in due time.

2. An action was brought by a married woman against a city to recover for personal injuries resulting from a defective sidewalk, and her husband was joined with her as plaintiff, who sought to recover for the loss of services of the wife. *Held*, that the wife suffered a loss from the injuries sustained which was personal to herself, and that a demurrer to the petition, because of misjoinder, was well taken; but *held*, further, that the dismissal of the husband from the case before its submission cured the error committed in overruling the demurrer.

3. The allegations of the petition examined, and *held* to be sufficient to constitute a cause of action.

(Syllabus by the Court.)

Error from district court, Wabauunsee county; Malcolm Nicolson, Judge.

Action for personal injuries by Betty Lewis against the city of Eskridge. Plaintiff had judgment, and defendant brings error. Affirmed.

J. J. Mitchell, for plaintiff in error. E. H. Sanford, for defendant in error.

JOHNSTON, J. This was an action for personal injuries resulting from a defective sidewalk, in which Betty Lewis recovered

from the city of Eskridge a judgment for \$600. The city asked for a new trial, and based its motion on numerous rulings said to be erroneous, which were made in the course of the trial, but the motion was denied. The defendant in error challenges our right to review these rulings, for the reason that the motion for a new trial was not made within the time prescribed by the Code. We find that the record fails to affirmatively show when the motion for a new trial was made, and no reasons for the refusal of the new trial are stated. It may have been refused because it was not made within the required time. Where the record is silent as to the time of filing a motion which is overruled, and the reasons for overruling the same are not stated, we must presume, for the purpose of upholding the judgment of the court, that it was not made and filed in due time. *Nesbit v. Hines*, 17 Kan. 316; *Lucas v. Sturr*, 21 Kan. 480; *Hover v. Tenney*, 27 Kan. 133; *Railway Co. v. Johnson*, 47 Kan. 351, 27 Pac. Rep. 980. The failure to file a motion for a new trial must be regarded as a waiver of any errors that may have been committed during the progress of the trial, and hence none of these are before us for consideration. The only matter presented for review is the sufficiency of the petition which was attacked by a demurrer.

It is first urged that the corporate existence of the plaintiff in error is not sufficiently set forth. In connection with a statement as to the existence of certain streets in the city of Eskridge, it is stated that they have been open and in public use "ever since the organization of said city, in August, A. D. 1887, as a city of the third class." In another portion of the petition it is alleged that the defective walk was "negligently suffered to remain ever since the organization of said city as aforesaid until the day before the last general election." In still other parts of said petition it is described as "said city," and it appears that the date of said organization was prior to the time when the defendant in error suffered the injury of which she complains. We think the petition sufficiently stated the organization and corporate existence of the plaintiff in error.

Another objection to the petition is that there was a misjoinder of parties and causes of action. It appears that Moses Lewis was joined with his wife in bringing the action, and in claiming damages for loss of services, etc., resulting from the injuries suffered by his wife. On this ground the demurrer was well taken, and, if it had not been cured by subsequent proceedings, would require a reversal. The wife suffered a loss from the injuries, which was personal to herself, and for which she alone could recover. *City of Wyandotte v. Agan*, 37 Kan. 528, 15 Pac. Rep. 529. The loss of the husband, if he suffered any, was separate and distinct from that sustained by the wife, and hence there was an improper joinder. This error was cured, however, in the early part of the trial, by the dismissal of the husband from the case. The inquiry thereafter related solely to the injuries suffered by Betty Lewis,

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and only for her injuries and loss were damages given.

The final objection to the petition is that it fails to state facts showing negligence on the part of the city. An examination of the averments satisfies us that they are sufficient to withstand a demurrer. In substance it is alleged that a piece of sidewalk on a public street of the city was built in such a negligent manner that, when a person stepped on the outside of the walk, it would tip up, and throw the pedestrian to the ground; and that, while the defendant in error was passing over the defective walk, without negligence on her part, she was thrown to the ground, and seriously injured. Enough is stated to show that the walk was dangerous, and that the injury resulted from the defect. It is said that the city must have notice or knowledge of the defect before a liability arises from resulting injuries. It is true that the petition should allege either that the city had notice of the defect which caused the injury, or allege facts from which knowledge or notice can be reasonably inferred. In the petition it was stated that the walk in question was negligently constructed, and that the city, well knowing the premises, had negligently permitted it to remain in a defective condition until after the injury occurred. Under these allegations the city was chargeable with notice of the improper condition of the walk from the time of its construction until after the injury was sustained. It was not necessary, as plaintiff in error contends, that the plaintiff should negative contributory negligence in her petition. She does state that the injury occurred without negligence on her part; and, if this statement had been omitted, it would not have been fatal, as contributory negligence is a matter of defense. *Railway Co. v. Pointer*, 14 Kan. 37; *Railway Co. v. Phillibert*, 25 Kan. 583. The record presents no error upon which to base a reversal, and hence the judgment of the court will be affirmed. All the justices concurring.

(51 Kan. 504)

#### KING v. HYATT.

(Supreme Court of Kansas. May 6, 1893.)

EJECTMENT—PLEADINGS—SUPPLEMENTAL PETITION  
—EVIDENCE—TENANCY IN COMMON—ACTION BY  
ONE COTENANT.

1. The district court has power to permit a supplemental petition to be filed on notice, and on such terms as to costs as the court may prescribe, and, where a plaintiff is permitted to file a supplemental petition during the trial without previous notice, if the defendant only objects to the filing on grounds other than want of notice, and proceeds with the trial without making any application for delay, he cannot afterwards complain of want of notice.

2. Where parents and their children unite in a deed conveying lands belonging to the estate of a deceased member of the family, a statement that the persons so joining in the deed are heirs of the decedent is admissible as evidence of the identity of a sister of the decedent joining in the conveyance as an heir under a surname different from her maiden name.

3. Where the owner of an undivided one-

fourth interest in a tract of land, acting solely for himself, sues to recover the whole tract from a person in possession under an adverse title, and where it appears that the plaintiff and the holder of the other three-fourths have no community of interest, and do not recognize each others' titles, *held*, that the plaintiff can only recover possession of his own share in an action of ejectment.

(Syllabus by the Court.)

Error from district court. Atchison county; Robert M. Eaton, Judge.

Ejectment by Thaddeus Hyatt against Samuel O. King. Plaintiff had judgment, and defendant brings error. Modified.

H. Elliston and Seneca Heath, for plaintiff in error. L. F. Bird, for defendant in error.

ALLEN, J. This was an action of ejectment, brought by defendant in error, Hyatt, to recover possession of 16½ acres of land near Atchison. The plaintiff was adjudged to be the owner of an undivided one-fourth interest in the land, and was given judgment for the possession of the whole tract. Very numerous assignments of error are made and discussed by the plaintiff in error. We shall notice only such as appear to us worthy of mention. Plaintiff in error was in possession of the land under a tax deed dated September 18, 1885, issued to R. L. Pease, and quitclaim deed from Pease to him; also a quitclaim deed from George T. Challis, dated November 20, 1892. Hyatt claimed title derived through a chain of conveyances from the heirs of William C. Nutt, who held the land under patent from the United States. William C. Nutt died, leaving four heirs, who conveyed the S. ¼ of the S. E. ¼, section 35, township 5, range 20, Atchison county, Kan., in which the tract in controversy is included, to James A. Headley and Joseph P. Carr, on the 28th day of April, 1858, but this deed was void as to the interest of Olivia D. Nutt, who at that time was a minor. The deed purports to have been executed by M. E. Nutt, as her guardian, and he is not shown to have had any authority to convey her interest in the land. A sheriff's deed founded on a void judgment against Headley and Carr, which was afterwards set aside by the court, was executed to L. C. Challis, and plaintiff's title was derived through intermediate conveyances from Challis. This title, however, was fortified by a quitclaim deed from the heirs of William C. Nutt to Albert G. Smith, dated August 28, 1871. This deed was executed by Harry Lee and Olivia D. Lee, together with the same persons who joined in the first deed as heirs of William C. Nutt, except Olivia D. Nutt, by her guardian, and this later deed designates the grantors as heirs of William C. Nutt. Whatever title was conveyed by this deed passed through intermediate conveyances, or by reason of the covenants of warranty contained in former deeds, to Hyatt, but the plaintiff it is not shown to have acquired the title which passed to Headley and Carr by virtue of the first deed executed by the Nutt heirs. So far as the record shows, three-sixteenths of that title was conveyed by Headley and Carr

to Samuel Lord, Jr., and the balance to James Headley.

Plaintiff in error contends that the court erred in permitting record copies of various deeds to be admitted in evidence, for the reason that there was not a sufficient showing that the originals were not in plaintiff's possession, or under his control. We think, however, there was sufficient testimony to warrant the court in receiving them. We think, also, that the records of the probate court, including the affidavit of Smith, were admissible, being records required to be kept by law.

Plaintiff in error criticizes at length the descriptions in the various deeds included in the plaintiff's chain of title, and contends that they are void for uncertainty. We think, however, when taken in connection with all the facts shown in the case, it is clear that they refer to the land in controversy, and are not void. It appears that on the trial plaintiff asked leave of court and was permitted to file a supplemental petition, setting up an after-acquired title. Defendant objected at the time, but made no point of the want of notice of the application. The defendant strenuously contended that it was error for the court to permit this to be done. Section 144 of the Code expressly authorizes this procedure, and no claim is made that the issues were so changed by the supplemental petition as to require a continuance. While it is true that in permitting a supplemental answer to be filed the court should see that no undue advantage is taken through an unexpected change of the issues in the case, the statute clearly authorizes the filing of such pleadings on such terms as to costs, and on such notice, as the court may prescribe. The case of *Smith v. Smith*, 22 Kan. 699, is cited as being in opposition to the ruling of the court in this case. That was an action to obtain a divorce, and it was held that the court did not err in refusing to permit the plaintiff to file a supplemental petition, setting up a cause of action accruing after the commencement of the suit. That case merely holds that the plaintiff could not file such supplemental petition as a matter of right, and that it was within the discretion of the court to refuse his application for leave to file it. In this case the court granted leave, and we think its action in that respect was not erroneous. See *Porter v. Wells*, 6 Kan. 453; *Simpson v. Vose*, 31 Kan. 227, 1 Pac. Rep. 601; *Williams v. Moorshead*, 33 Kan. 618, 7 Pac. Rep. 226; *Drelling v. Bank*, 43 Kan. 197, 23 Pac. Rep. 94. These and other cases decided by this court hold that the matter of permitting amended and supplemental pleadings to be filed rests largely within the sound discretion of the trial court, and we think there was no abuse of discretion in this case. No application for a delay of the trial was made by the defendant, nor was there any showing of surprise, or undue advantage being taken.

It is claimed that there is no evidence that Olivia D. Lee, who joined in the deed to A. G. Smith, is the same person as Olivia D. Nutt. The testimony of L. C. Challis shows that Olivia D. Nutt was un-

married at the time of the death of William C. Nutt, and that she afterwards married, but he does not state the name of her husband. The deed to Smith, which was joined in by the parents and sister of Olivia D. Nutt, gives the name of Olivia D. Lee as one of the heirs of William C. Nutt, deceased, and names four persons as all the heirs of William C. Nutt. We think the declarations of these relatives, contained in the deed, with reference to the fact that Olivia D. Lee was an heir of William C. Nutt, is evidence of that fact, being a declaration by them in a solemn instrument upon a matter of pedigree, and that, in the absence of opposing evidence the identity of Olivia D. Lee with Olivia D. Nutt is sufficiently shown. 1 Greenl. Ev. § 104.

The tax deed to Pense, not being attested by the seal of Atchison county, is void. *Reed v. Morse*, 50 Kan. —, 32 Pac. Rep. 900, (decided by this court in April.)

We think, notwithstanding the many objections urged by the plaintiff in error, that the uncontradicted evidence fairly sustains the finding that Hyatt was the owner of an undivided one-fourth of the land in controversy, and that the court was warranted in so instructing the jury. We are unable to perceive any disputed question of fact which they should have been required to pass on.

The record, however, presents a further question, which merits more extended notice, viz. can the plaintiff, having title only to one-fourth, recover the whole tract on the theory that such recovery is permitted for the benefit of his cotenants? This is a question on which there is great diversity and conflict in the authorities. In *Sedgwick & Waite on Trial of Title to Land*, (section 300,) it is said: "Each tenant can pursue his remedies independent of the others, and may maintain ejectment or trespass to try title alone, and in many states may recover the entire premises and estate from trespassers, strangers, wrongdoers, and all persons, other than his cotenants, and those claiming under them. Where this right is recognized he recovers for the benefit of all." This principle is expressly recognized in Oregon, Nebraska, Nevada, North Carolina, Colorado, and California, but this rule has been repudiated in Massachusetts, Pennsylvania, and Missouri. In *Freeman on Cotenancy and Partition*, (section 343,) it is said: "A tenant in common is, as against every person but his cotenants, entitled to possession of every part of the common lands. He may, therefore, in most of the states, recover possession of all such lands in an action of ejectment brought against a stranger to the common title." In the case of *Hardy v. Johnson*, 1 Wall. 371, it is held: "By the law of California, one tenant in common of real property can sue in ejectment, and recover the demanded premises entire as against all parties, except his cotenants, and persons holding under them. But the judgment for the plaintiff in such case will be in subordination to the rights of his cotenants." The following decisions of the supreme court of that state seem to uphold this

decision: *Newman v. Bank*, 22 Pac. Rep. 261; *Williams v. Sutton*, 43 Cal. 71; *Chapman v. Quinn*, 56 Cal. 266. In *Barrett v. French*, 1 Conn. 364, it is said: "Where one tenant in common brings an action of disseisin, and grounds his claim to recover on the common title, he recovers for the benefit of the whole; the possession of one tenant in common, recognizing the title of his cotenants, is, in legal consideration, the possession of all. Of course, if a tenant in common in such action obtains possession of the land, his cotenants become likewise possessed." In *Hibbard v. Foster*, 24 Vt. 542, it was held "that, in an action of trespass quare clausum fregit, the plaintiff, having title to one-half the premises, might recover the whole damages." In *Crook v. Vandervoort*, 13 Neb. 505, 14 Pac. Rep. 470, it is said: "As against a mere disseisor, one tenant in common of undivided real estate may recover the possession of the premises, as his recovery of possession will inure to the benefit of all the cotenants;" citing *Stark v. Barrett*, 15 Cal. 362; *Collier v. Corbett*, Id. 183; *Touchard v. Crow*, 20 Cal. 150; *Treat v. Reilley*, 35 Cal. 129; *Chesround v. Cunningham*, 3 Blackf. 82. "In such cases there would be a mere defect of parties plaintiff, which, if not objected to, would not defeat a recovery." The rule that one tenant in common may recover the whole tract was announced by the supreme court of Texas in numerous cases. *Croft v. Rains*, 10 Tex. 523; *Watrous v. McGrew*, 16 Tex. 510; *Grassmeyer v. Beeson*, 18 Tex. 766; *Hutchins v. Bacon*, 46 Tex. 414; *Read v. Allen*, 56 Tex. 176; *Sowers v. Peterson*, 59 Tex. 216. But in the case of *Cromwell v. Holliday*, 34 Tex. 463, the court says: "Proceeding upon the authority of *Croft v. Rains*, 10 Tex. 520; *Watrous v. McGrew*, 16 Tex. 506; and *Grassmeyer v. Beeson*, 18 Tex. 753,—claiming to be a tenant in common of certain parties whose very existence is doubted, he brings this suit against the defendants below, treating them as strangers and trespassers, and probably looking to the advantage of recovery, he would claim the whole two leagues. To say the least of it, this gives the action on the part of Holliday very much the appearance of a land speculation, although he does not pretend to sue for anybody but himself, and, therefore, upon the authority of *Stevens v. Ruggles*, 5 Mason, 221, if he recover at all, he can only recover for himself the interest to which he is justly entitled, whether by metes and bounds or undivided. This court would not, under the circumstances, in the application of any principle of equity, make him trustee of the title for his cotenants, if satisfied that the title of the defendants below was insufficient to defeat his action." In the early case of *Dewey v. Brown*, 2 Pick. 387, the supreme court of Massachusetts said: "As to the claim of the demandant for judgment for the whole, it is not supported by any of the authorities which have been cited, and no good reason can be given for such a judgment. The demandant, upon production of her title, shows that she is coheir with five others; she will therefore have entire justice done



to her if she is allowed to recover an undivided sixth part. The tenant, being in possession, ought not to be disturbed, except by those who have the right." In *Mobley v. Bruner*, 59 Pa. St. 483, it is said: "The plaintiff in ejectment must recover on the strength of his own title, and his recovery must consequently be in accordance with his title. Tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also. They are separately seised, and there is no privity of estate between them. If tenants in common are separately seised, and there is no privity of estate between them, if they must sue separately, or jointly, according to the circumstances of the case, the nature and the cause of the action, or the character of the injury to be redressed, it follows as a necessary corollary that one tenant in common cannot maintain ejectment or sue and recover in any form of action for the interest and benefit of the others." *Dawson v. Mills*, 32 Pa. St. 302. In *Gray v. Givens*, 26 Mo. 303, it is said: "It was formerly held that a plaintiff in ejectment could not recover an undivided part when he claimed an entirety, but this strictness no longer prevails; and though a plaintiff may recover less than he claims, it is apprehended that he cannot recover more than he shows title to. But it is said that, though this is the general rule, there is a difference when the defendant is a stranger to the plaintiff's title, and that as to him one tenant in common, though entitled to only a part, may recover the whole, and, when he is put into possession, will hold for the other tenants in common as well as for himself. At common law, tenants in common could not recover on a joint demise, and 'as the right of possession, which depends on title, is several, a recovery by one will restore him only a moiety of the possession against the disseisor, who will hold the other moiety with him in common.' Our statute permits tenants in common to join, but there is no use in this if one can recover for the others, and, if this is true, A. may recover for B., though B. could not recover for himself. It often happens that one tenant in common is barred by limitation, when the other is not, and a title may be acquired by adverse possession." While there is undoubtedly much conflict in the authorities, it is not so great as might appear from the language found in some of the cases. We think the rule quite well established that one tenant in common may maintain an action of trespass against a mere wrongdoer, and recover in his own name the whole damage, and generally that one cotenant may recover for any injury done by a mere trespasser or wrongdoer. Nor are we prepared to assert that cases may not arise in which one cotenant might recover possession of the whole property in his own name for the benefit of all. See *Coulson v. Wing*, 42 Kan. 507, 22 Pac. Rep. 570. But in this case there appears to be no community of interest between Hyatt and the owners of the other three-fourths of the land. Hyatt derived his title through a chain of conveyances from

the heirs of William C. Nutt, beginning with a deed to Albert G. Smith, while the other three-fourths interest would appear to be vested in James Headley, who derived his title through a much earlier conveyance made by those heirs to Headley and Carr, and the validity of Hyatt's title depends wholly on a defect in this conveyance to Headley and Carr, so that, in fact, there would appear to be as much antagonism between the claim of the plaintiff below and the owner of the other three-fourths interest as between the parties to this action. The case impresses us as quite different from one where, for example, a widow might sue in her own name, and seek to recover of the entire estate for the benefit of herself and children; yet, as to the necessity of joining all the heirs in such a case, we express no opinion. The Code provides "that every action must be prosecuted in the name of the real party in interest," subject to certain exceptions which do not affect this case. If the plaintiff be allowed to recover in this action the whole property, he will, on the strength of a title to one-fourth, have recovered possession of three-fourths, to which he has no title, and under the facts in this case, having so obtained possession of the entire property, he will not be estopped from denying the title of the owner of the other three-fourths. In bringing this action the plaintiff sought to recover the whole property. In his petition he gives no hint of any outstanding title in a cotenant. We think that under all the facts of the case, as they are claimed by the defendant in error to be, he could recover only the interest he has shown in the land, and the jury having rendered a verdict, under the instructions of the court, that the plaintiff is the owner of the undivided one-fourth part of the land in controversy, the judgment should be so modified as to give the plaintiff below judgment for the recovery of that one-fourth alone.

The plaintiff in error complains of the failure of the trial court to adjudge the payment of the amount of taxes paid under his tax deed before the plaintiff should be let into possession. We do not think this an error for which the judgment should be reversed, but that the court can still make such orders as the law requires with reference to the tax lien and the value of improvements made by the occupying claimant. The case will be remanded, with directions to modify the judgment in accordance with the views herein expressed. All the justices concurring.

(51 Kan. 516)

#### CARTER v. TALLANT et al.

(Supreme Court of Kansas. May 6, 1893.)

ACTION ON NOTES—PLEADINGS—APPEARANCE—WHAT IS.

1. Plaintiff brought suit on a promissory note, and to foreclose a mortgage securing the same, and another note, executed by the same parties. Defendant C. was sued as indorser. He appeared by filing a motion, which the court overruled. Afterwards plaintiff without notice obtained leave to file a supplemental petition,

alleging that, since the commencement of the suit, the second note had matured, and asking judgment thereon. Nearly six months after the filing of the supplemental petition, C. obtained leave of the court to answer the original petition, and filed an answer, which contained no reference to the supplemental petition. More than nine months thereafter the case came on for trial. Plaintiff demanded judgment by default on the second note. C. objected, because no notice of the application for leave to file or of the filing of the supplemental petition had been given, and also because the supplemental petition did not state facts sufficient to constitute a cause of action. Held that, by challenging the sufficiency of the supplemental petition, C. made a general appearance to it; and as no continuance nor leave to plead was asked, under the circumstances, the court did not err in rendering judgment on the second note.

2. The issues claimed by the defendant to be material having been fairly submitted to the jury by the court, and a verdict amply supported by evidence having been rendered in favor of the plaintiff, no further question is presented for our consideration.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by J. F. Tallant against J. V. Carter and others to recover on two promissory notes, and for the foreclosure of a mortgage. Plaintiff had judgment, and defendant Carter brings error. Affirmed.

Hopkins & Haskinson, for plaintiff in error. B. W. Lemert and Milton Brown, for defendants in error.

ALLEN, J. J. F. Tallant, as plaintiff, brought suit against plaintiff in error and others, on the 25th day of November, 1887, alleging in his petition that on the 4th day of April, 1887, the defendants Nelson Carpenter and Sarah A. Carpenter executed to defendant J. V. Carter two promissory notes for \$1,200 each, due respectively on the 4th day of October, 1887, and the 4th day of April, 1888; that Carter, for value before the maturity thereof, indorsed said notes to plaintiff, and in writing indorsed on said notes waived notice and protest of the same. The execution of the mortgage securing said notes by the Carters was also alleged, and personal judgment asked against them and Carter for the amount of the first note, and a foreclosure of the mortgage. On the 5th of January, 1888, defendant Carter filed a motion to require plaintiff to separately state and number his causes of action. On the 8th of February, this motion was overruled. The record then recites that on the 9th day of June, 1888, the court, upon verbal application of the plaintiff in open court, but without the appearance of the defendant J. V. Carter, and without any notice having been served upon the defendant J. V. Carter, made an order granting the plaintiff leave to file a supplemental petition. On the 25th day of June, 1888, a supplemental petition was filed, stating that the second note set up in the petition had become due since the commencement of the action, and praying judgment thereon. On December 17, 1888, the following order was made: "Now, on this 17th day of December, 1888, for good cause shown. It is ordered by the judge of said court in vacation that the

defendant J. V. Carter have leave to plead to the original petition in said cause, on or before the first day of next term of said court, on condition that the trial of said cause shall not thereby be delayed. Defendant Carter then filed a verified answer admitting the execution of the note, denying that he delivered it to plaintiff, but alleging that he delivered it to Francis M. Stover and A. R. McCartney, and that A. R. McCartney and Lloyd Selby transferred and delivered it to plaintiff; also, admitting that he indorsed a waiver of notice and protest, but denying that said indorsement was made before maturity of the note, or for any valuable consideration. On the 30th day of October, 1889, the cause came on for trial, and, after the trial was commenced, plaintiff moved for judgment by default on the supplemental petition, no answer having been filed thereto, nor any issue of law or fact raised thereon in any manner. The defendant J. V. Carter, being present, objected, for the reason that the court had no jurisdiction to render said judgment, and because no notice of the filing of said motion had ever been given to said defendant, or of the application for leave to file said supplemental petition, and for the further reason that said supplemental petition did not state facts sufficient to authorize a judgment to be rendered against said defendant Carter thereon. These objections were overruled by the court, and Carter excepted.

One of the principal contentions of the plaintiff in error is that this ruling of the court was erroneous. The statute requires that notice be given where leave is obtained to file supplemental pleadings, yet an appearance has often been held equivalent to notice. The facts of this case are such that we do not feel called on to give the statute a strained construction in favor of the plaintiff in error. He obtained leave to answer the original petition more than 10 months after the overruling of his motion to require plaintiff to separately state and number his causes of action, and nearly 6 months after plaintiff had filed his supplemental petition. It may well be doubted whether this application must not be deemed an appearance to the supplemental as well as to the original petition; and for anything that appears in the record, it may have been a full appearance for all purposes, but we need not necessarily so hold. Carter's counsel did not content himself with merely raising the jurisdictional question, but challenged the consideration of the court as to the sufficiency of the facts stated in the supplemental petition as constituting a cause of action. This certainly constituted a full appearance to the supplemental petition, and as no continuance of the cause was asked, and no application was made for leave to plead to the supplemental petition, the court correctly held that the supplemental petition, taken in connection with the original, stated a good cause of action against Carter on the second note. *King v. Hyatt*, 50 Kan. —, 32 Pac. Rep. 1105. The trial then proceeded, and testimony was offered on both sides. The answer seems to have been treated all around as raising substantial issues of fact. Whether

It does so or not, it is unnecessary to determine. The jury under instructions, which, to say the least, were fair to the defendant, found in favor of the plaintiff generally, and in a special verdict separately on each supposed issue presented, and the findings are abundantly supported by the evidence. Numerous matters are assigned as error. We perceive none prejudicial to the rights of plaintiff in error. The judgment will be affirmed. All the justices concurring.

(51 Kan. 355)

NAIRN v. EWALT et al.

(Supreme Court of Kansas. May 6, 1893.)

CANCELING DEEDS — FRAUDULENT REPRESENTATIONS — EVIDENCE.

1. Where a plaintiff, residing in this state, is induced by two defendants to convey real estate for a stock of boots and shoes in the east, which is to be transferred by a bill of invoice, and the parties claiming to own the stock are required to pay \$1,500 before they or their assignee can obtain the same, and they falsely and fraudulently represent themselves to be the owners of such stock, and that the stock is of the value of \$4,400, and also fraudulently conceal a contract which shows the terms under which they have obtained the invoice, and the owner of the real estate, without any notice or knowledge to the contrary, relying on the false statements and fraudulent representations of the parties claiming the stock, makes an exchange for the stock of boots and shoes, and accepts the bill of invoice as a transfer thereof, *held*, that the plaintiff is entitled to relief against the defendants on account of their false statements and fraudulent representations.

2. Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false.

(Syllabus by the Court.)

Error from district court, Barton county; J. H. Bailey, Judge.

Action by Mary C. Nairn against J. S. Ewalt and another to cancel and set aside a conveyance of real estate, on the ground of fraud. Defendants had judgment, and plaintiff brings error. Reversed.

Sturgis & Swartz, for plaintiff in error  
Difffenbacher & Banta, for defendants in error.

HORTON, C. J. On the 24th of October, 1888, Mrs. Mary C. Nairn was the owner of a quarter section of land in Barton county, in this state. She had appointed her husband, C. W. Nairn, as her agent to trade or sell this real estate for her. About that time, J. S. Ewalt and O. B. Wilson offered to trade for her land, through her husband, an assorted stock of boots and shoes, represented to be worth \$4,400. The stock was in New York, or some place outside of Kansas, but the parties had an invoice thereof. Soon after the trade was agreed upon, Mrs. Nairn with her husband, C. W. Nairn, executed a conveyance of her real estate to O. B. Wilson. This was filed for record in the office of the register of deeds of Barton county. The land so conveyed was subject to a mortgage of \$1,000 and other liens amounting to \$150, of which Ewalt and Wilson had full notice. At the time

Ewalt and Wilson sold to Mrs. Nairn the stock of boots and shoes, they transferred to her the bill of invoice. Subsequently Mrs. Nairn, upon investigation, became dissatisfied with the trade, and brought her action against J. S. Ewalt and O. B. Wilson to set aside and cancel the conveyance of her real estate executed on the 24th day of October, 1888, upon the ground of deceit and fraud. She alleged that she had been induced to make the trade, and accept the bill of invoice of the boots and shoes, through the false statements and fraudulent concealment of Ewalt and Wilson. Her petition was not attacked by motion or demurrer, but the defendants, upon the trial, objected to the introduction of any evidence. The court sustained the objection, and this is the ruling complained of.

It appears from the petition that the false statements and fraudulent concealment were that the defendants claimed to be the owners of the stock of boots and shoes which they agreed to turn over for the conveyance of the land, but that, in fact, they had only a contract of sale for the stock, and they owed \$1,500 thereon; that the stock was only worth \$1,500, and, therefore, that the interest of defendants therein was of no value; that it was worthless; that, in transferring the bill of invoice of the boots and shoes, they had attached thereto their contract of purchase, so sealed that the plaintiff's agent had no opportunity to discover or read the same. Before this action was commenced, Mrs. Nairn made a tender of the invoice, and the contract of sale attached to it, to the defendants, and demanded a reconveyance of the real estate.

The court below clearly erred in its refusal to proceed with the trial of this case. The representations that the defendants were the owners of the stock of boots and shoes in the bill of invoice, and then the concealment by them of the contract under which they had purchased the goods, which provided that, before the boots and shoes could be shipped from New York, \$1,500 were necessary to be paid, establish such fraud, if proved, as entitled Mrs. Nairn to the relief she prayed for. The concealment of the original contract for the sale of the goods, by sealing it with the invoice, was evidently for the sole purpose of cheating and defrauding the plaintiff. "Misrepresentation may consist as well in the concealment of what is true as in the assertion of what is false. If a man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated." *Kerr, Fraud & M. 94*. Neither the plaintiff nor her agent had any knowledge that \$1,500 were due on the stock, and therefore, under the allegations of her petition, she ought to have been permitted to show how she was deceived and misled. *Stevens v. Allen*, 50 Kan. —, 32 Pac. Rep. 922; *McKee v. Eaton*, 26 Kan. 226; *Wickham v. Grant*, 28 Kan. 517; *Mohler v. Carder*, (Iowa, 1887,) 35 N. W. Rep. 647; *Medbury v. Watson*, 6 Metc. (Mass.) 246. *Graffenstein*

v. Epstein, 23 Kan. 443, is not applicable in this case, because here the stock of boots and shoes was in New York. They were to be sold and transferred by a bill of invoice only. They were in no condition to be investigated or examined by Mrs. Nairn or her agent, and the contract of sale, which showed that the defendants were required to pay \$1,500 before they or their assignee could obtain the same, was fraudulently concealed from Mrs. Nairn's agent, with whom the trade was made. The judgment of the district court will be reversed, and cause remanded for further proceedings. All the justices concurring.

(51 Kan. 362)

HARRISON NAT. BANK OF CADIZ v.  
VOTAW et al.

(Supreme Court of Kansas. May 6, 1893.)  
CORPORATIONS—LIABILITY OF STOCKHOLDERS—  
EVIDENCE.

1. In order to charge persons as subscribers to the capital stock of a corporation, it must be shown that they subscribed to the stock of the particular corporation on account of which the liability is claimed, or that they have in some manner recognized their liability as such stockholders.

2. The defendants signed a paper reading as follows: "We, the undersigned, agree to take the number of shares set opposite our respective names in the Douglass Sugar Company, said shares to be in the sum of \$100.00 each,"—and placed opposite their respective names figures to represent the number of shares taken. Afterwards a corporation named the Douglass Sugar Manufacturing Company, incorporated for 30 years, with 15 directors, and a capital stock of \$100,000, divided into 1,000 shares, was formed. After the formation of this corporation, a new subscription list was made, and all purpose to organize under the original one abandoned. The second list was not signed by the defendants, and neither of them ever paid any assessment to this corporation, nor recognized his liability to it as a stockholder. *Held* that, by merely signing said first paper, the defendants did not render themselves liable to creditors of the corporation as stockholders.

(Syllabus by the Court.)

Error from district court, Butler county;  
C. A. Leland, Judge.

Action by the Harrison National Bank of Cadiz, Ohio, against the Douglass Sugar Company. Plaintiff had judgment, and from an order denying its motion for execution against J. M. Votaw and others as stockholders of defendant corporation, plaintiff brings error. Affirmed.

Redden & Schumacher, for plaintiff in error. W. A. Phipps and Shinn & Knowles, for defendants in error.

ALLEN, J. Plaintiff in error, as plaintiff below, obtained a judgment against the Douglass Sugar Company. Execution was issued on this judgment, and duly returned unsatisfied. Thereafter plaintiff filed a motion, and served proper notice on the defendants in error for the purpose of obtaining execution against them as stockholders in said corporation. The court, after hearing the evidence, made special findings of fact and conclusions of law, and overruled said motion. We are

called on to review this action of the court.

It appears from the findings that, in the fall of 1887, the people of Douglass and vicinity were desirous of establishing a sugar manufactory, and a subscription paper was circulated, the heading of which reads as follows: "We, the undersigned, agree to take the number of shares set opposite our respective names in the Douglass Sugar Company, said shares to be in the sum of \$100 each." The defendants, with others, subscribed for various numbers of shares respectively, amounting in all to 215 shares. Afterwards, on the 10th of October, 1887, the defendants L. E. Wright, D. P. Blood, and others executed, acknowledged, and filed a charter for the incorporation of the Douglass Sugar Manufacturing Company, with a capital stock of \$100,000 divided into 1,000 shares, and naming Wright and Blood, with 13 others, as directors. At a meeting participated in by the general public, defendant L. E. Wright was elected vice president, and defendant D. P. Blood, treasurer, but none of the persons elected at that time ever qualified, or assumed the duties of their respective offices, nor did L. E. Wright or D. P. Blood ever qualify as directors, or act as such. Wright, however, with two other subscribers, acted on a committee to select a site for the sugar company's mill, and examined the land that was afterwards purchased by the company. Nothing further of importance was done until some time in February, 1888, when another meeting of the citizens of Douglass and vicinity was held, at which the question as to the legality and advisability of the township of Douglass taking stock in the company was discussed. It being the sentiment that the township could not legally take stock in the enterprise, it was determined to take steps to reorganize the company on the basis of a revised membership, and a new subscription list was prepared and signed by various persons, most of whom were subscribers to the original list, but not in every case for the same number of shares. The heading of this list reads as follows: "We, the undersigned, do subscribe the following amounts set opposite our names to the capital stock of the Douglass Sugar Man'g Co., of Douglass, Kansas, which stock we agree to pay in assessments, not to exceed 20 per cent., each 30 days until said stock is fully paid up. Each share of stock amounting to \$100.00, cane subscriptions to be paid not less than 25 per cent. of crop raised in stock." The whole number of shares subscribed on this paper appears to be 56. Afterwards, on the 13th day of March, 1888, a meeting of the subscribers to the second subscription paper was held, and by a vote of such subscribers an amendment to the charter was authorized, changing the name from Douglass Sugar Manufacturing Company to the Douglass Sugar Company, and the number of directors from 15 to 9, and a proper certificate of the change was duly filed with the secretary of state. This meeting was not attended by any of the subscribers to the original subscription paper, except those who also were subscribers on the new, and no notice

of the meeting was given to them. It does not appear that any of the defendants ever participated any further in the transactions of the corporations, and none of them ever subscribed for stock therein after the filing of the charter, nor made any payment to the company on account of any subscription. Several questions were discussed by counsel for plaintiff in error in his oral argument, and also in the brief. We think, however, the only matter necessary to be noticed is the force and effect of the subscription paper, under which it is claimed the defendants are liable as stockholders. For the purposes of this case, it may be conceded that a valid subscription to the capital stock of a corporation can be made before the filing of the charter; but is this a subscription to the capital stock of a corporation to be known as the Douglass Sugar Manufacturing Company, to exist for 30 years, with 15 directors, as named in the charter afterwards filed, and with a capital stock of \$100,000, divided into a thousand shares? The paper signed names the Douglass Sugar Company, and fixes the amount of each share at \$100, but does not fix the amount of the capital stock, nor any other of the essential particulars necessary to be stated in the charter of a corporation. Had this indefinite subscription been followed up by payments from the subscribers to the Douglass Sugar Manufacturing Company of installments based on the number of shares of stock by them subscribed, and by a participation on the part of the subscribers in the operations of the company, showing the recognition on their part of their liability as stockholders, it might be well held that any informality in the manner of subscribing the stock would be cured, and the defendants be liable; but in this case it affirmatively appears that the organization of the company on the basis of this first subscription list was abandoned. Counsel complains that on the hearing the court admitted much incompetent evidence for the purpose of showing this abandonment; that witnesses were permitted to testify with reference to their understanding. It may be that in some instances the strict rules governing the admissibility of evidence were disregarded, but we are unable to see how the errors, if any, were materially prejudicial to the plaintiff. It was necessary for the plaintiff to do more than introduce this original subscription list. On the face of this paper no liability whatever on the part of the defendants to the Douglass Sugar Manufacturing Company is shown. There is nothing in the paper itself to identify the Douglass Sugar Company with the corporation designated as the Douglass Sugar Manufacturing Company, and the only way in which the defendants could possibly be charged thereunder would be by showing that, as a matter of fact, the subscription was intended to be to the corporation afterwards formed. The testimony received by the trial court not only fails to show that fact, but does affirmatively show an abandonment of the project, so far as these defendants were concerned. It cannot be doubted for a moment that parties contemplating the

organization of a corporation can abandon the project at any stage of the proceedings prior to the creation of any liability to outside parties, and in this case we think it clear that they did so abandon the project, and also that the fact of such abandonment was fully recognized and understood by those who became subscribers to the new list, and participated in the actual operations of the corporation. The defendants, never having become liable to the corporation as stockholders, are of course not liable to its creditors as such. The change of the corporate name, so as to make it identical with the name contained in the first subscription paper, could not, of course, affect the liability of the defendants, having been made without their knowledge or consent. While we agree with counsel for plaintiff in error on most of the legal propositions presented by him, we are unable to see that they are material in this case, for the reasons before stated.

Complaint is also made of the ruling of the court on plaintiff's motion to retax costs in said action. We find nothing in the record but plaintiff's motion, and the ruling of the court thereon. There is not even a copy of the fee docket, unless we assume that it is correctly copied in plaintiff's motion. This we think unwarranted. The overcharge claimed is but trifling, and we find nothing to challenge our investigation in that respect. The order of the district court will be affirmed. All the justices concurring.

(51 Kan. 336)

**ORAVEN et al. v. BRADLEY et al.**

(Supreme Court of Kansas. May 6, 1893.)

**MORTGAGE FORECLOSURE—PARTIES—LIMITATION—QUESTIONS NOT RAISED BELOW.**

1. Where a foreclosure suit is commenced after the death of the mortgagor against such mortgagor, and neither his heirs nor personal representatives are made parties thereto, the judgment and all proceedings are void as against the heirs of the mortgagor. *Richards v. Thompson*, 23 Pac. Rep. 106, 43 Kan. 209.

2. Where land is vacant and unoccupied until 10 years prior to the commencement of an action in the nature of ejectment against the parties in possession thereof, the 15-year statute of limitations has no application.

3. The supreme court will not pass upon the question whether a defendant, in an action in the nature of ejectment, is entitled to the possession of the land until there has been refunded to him the purchase money, under the provisions of section 613 of the Civil Code, before a request for relief under that section has been presented and acted upon by the trial court.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thompson, Judge.

Action by R. M. Bradley and others against G. W. and S. M. Craven to recover land. Plaintiffs had judgment, and defendants bring error. Affirmed.

D. V. Sprague and B. H. Tracy, for plaintiffs in error. W. F. Challis and Valentine, Harkness & Godard, for defendants in error.

HORTON, C. J. John L. Adams was the patentee of the land in controversy, and the plaintiffs below are his sole heirs. Neither he nor his heirs have ever made any conveyance of the land, or any part thereof. Adams was a married man, and occupied the land with his family as a homestead from March till November, 1859. September 17, 1859, Adams alone executed a trust deed upon the land, conveying the same in trust to D. R. Anthony, to secure the payment of a note for \$140.50 to one Joseph Bates. Mrs. Adams (now Mrs. R. M. Bradley) did not sign the trust deed, and did not know of it till afterwards. Adams died August 14, 1864. Suit was commenced to foreclose the trust deed November 29, 1865. Joseph Bates was plaintiff in this action, and the only defendants named were John L. Adams and D. R. Anthony. Summons was issued against John L. Adams, and returned "Not found," and service was attempted to be made upon him by publication. A decree for foreclosure of the trust deed was entered, and the land sold thereunder to D. R. Anthony, under whom the Cravens claim. The sheriff's deed to D. R. Anthony was dated March 16, 1867. On the 23d day of July, 1889, the heirs of John L. Adams, deceased, brought their action against G. W. and S. M. Craven—the parties in possession, and holding Anthony's title—to recover the possession of the land. Judgment was rendered in favor of them, and against the Cravens. Of this judgment they complain.

The statute in force at the time that the trust deed of September 17, 1859, was executed to Adams provided that such a deed "was not valid without the signature of the wife to the same, unless the mortgage was given to secure the payment of purchase money, or some portion of the same." Whether the money borrowed on the trust deed was "purchase money," within the legal definition, we are not called upon to consider, as the mortgage has never been properly or legally foreclosed.

It is claimed that this action, when commenced, was barred by the 15-year statute of limitation. The 15-year statute does not control, because the land was vacant and unoccupied from the time Adams left it, in 1859, until about 10 years prior to the commencement of this action. *Taylor v. Miles*, 5 Kan. 515; *Myers v. Coonradt*, 28 Kan. 211-215. Further, the 15-year statute of limitations was not pleaded or presented in any way to the trial court.

It is next claimed that the decree of foreclosure is conclusive, and not subject to any attack in the action brought by the heirs of John L. Adams, deceased. It appears, however, that Adams had been dead for more than a year before the foreclosure suit was commenced. Neither his heirs nor personal representatives were made parties. It was decided in *Richards v. Thompson*, 43 Kan. 200, 23 Pac. Rep. 106, that "where the holder of a mortgage, long after the death of the mortgagor, proceeds to foreclose his mortgage, making no person a party to the suit except the holder of the mortgage and the

mortgagor, and service of summons is obtained by publication, and the foreclosure proceedings are prosecuted to final determination, and a sheriff's deed is executed and recorded, held, that all the foreclosure proceedings, including the sheriff's deed, are void as against the heir of the mortgagor and the grantee of such heir, although no action was instituted questioning the validity of such proceedings or deed for more than five years after the sheriff's deed was executed and recorded." *Freem. Judgm.* § 117; *Crosley v. Hutton*, 98 Mo. 196, 11 S. W. Rep. 613; 1 Black, Judgm. § 203; *Mastin v. Gray*, 19 Kan. 458; *Head v. Daniels*, 38 Kan. 1, 15 Pac. Rep. 911.

Finally, it is claimed that G. W. and S. M. Craven were entitled to the possession of the land until the plaintiffs below had refunded the purchase money, with interest, under the provisions of section 613 of the Civil Code. A sufficient answer to this claim is that these parties never made any request to the court below for any relief under that section. It appears from the record that, after the judgment was rendered, the defendants, in open court, demanded the benefits of the occupant claimant's law for the valuation of improvements and the assessment of damages. The court granted the application. No further request was made about any other relief, and of course this court cannot consider a complaint of the kind now urged before the trial court has had the opportunity to act thereon. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 359)

## BROWN v. KINSLEY EXCH. BANK.

(Supreme Court of Kansas. May 6, 1893.)

BANKING—CONDITIONAL DEPOSIT—LIABILITY OF BANK.

The owner of a tract of land, desiring to sell the same, placed it in the hands of an agent, who made a conditional sale, and received from the proposed purchaser a sum of money, which was to constitute a part of the purchase money if the proposition to purchase was accepted and the conditional sale approved, and, if not, the money was to be returned to the proposed purchaser. The money so received was deposited in a bank, to be disposed of in accordance with these conditions, and the bank issued an ordinary deposit slip without any conditions written thereon, which was delivered to the owner of the land. He did not accept the proposition, nor ratify the sale, and the money was withdrawn by his agent, and returned to the proposed purchaser. Subsequently the owner brought an action against the bank on the deposit check, claiming that it was an unconditional agreement, and that the bank was absolutely liable for the amount deposited. *Held*, that the bank faithfully performed its trust, and that the landowner was not entitled to recover.

(Syllabus by the Court.)

Error from district court, Edwards county; J. C. Strang, Judge.

Action on a certificate of deposit by F. G. Brown against the Kinsley Exchange Bank. Defendant had judgment, and plaintiff brings error. Affirmed.

Davidson & Williams, for plaintiff in error. J. W. Rose, for defendant in error.

JOHNSTON, J. The purpose of this action, brought by F. G. Brown, was to recover from the Klusley Exchange Bank a deposit of \$500, alleged to have been placed there to the credit of Brown, and which was evidenced by a deposit check signed by the cashier of the bank. The answer of the defendant in effect was that L. B. Tewksberry was employed by Brown to sell a tract of real estate, and that he made a conditional sale, upon which \$500 was advanced by the purchasers; the conditions being that, if Brown should approve of the terms and conditions of the sale, the \$500 advanced was to be paid to him, and, if he failed to accept and ratify the sale, the money should be returned to the purchasers. Tewksberry deposited the money in the bank with this understanding, and upon these conditions, and subsequently, when Brown failed to approve and confirm the sale which had been made, Tewksberry withdrew the money, and returned it to the purchasers. The trial, which was with a jury, resulted in favor of the defendant, and the plaintiff complains.

The principal complaint is that the facts alleged in defendant's answer are not sufficient to constitute a defense to the action. It is argued that the issuance of the deposit check is admitted, and that, as it had been delivered to Brown without any conditions, it is to be treated as a written contract to pay the money to Brown upon demand, which cannot be contradicted, and that the bank became absolutely liable thereon, regardless of any conditions. It is true the deposit slip or check was issued, and finally came to the hands of Brown, but it is also true that he did not deposit the money, nor did he give anything to any one for the money which he claims. The testimony offered in the case substantially sustains the allegations of the answer, and together they form a complete defense to the plaintiff's action. Tewksberry negotiated a sale of land, and, not knowing whether the terms offered by the proposed purchasers would be accepted or approved by plaintiff, the advanced payment was taken and deposited in the bank, upon the express condition that, if the proposition was accepted by plaintiff, it should constitute a part of the purchase money, and be paid to plaintiff, but, if he refused to accept and approve the proposition, then the money was to be returned to the purchasers. Tewksberry was in fact the agent of both parties, and, having placed the money conditionally with the bank, was at liberty to withdraw it. He was so far the agent of the plaintiff that his withdrawal of the money would relieve the defendants from any liability to his principal. More than that, the conditions under which the bank received the money made it a trustee of the parties to the negotiation, and it became its duty to faithfully execute the trust according to the terms agreed upon by the parties. Brown did not accept the proposition; did not convey his land, nor suffer any loss. He gave no consideration

whatever for the \$500 which he claims. The bank, as trustee, has turned over this fund to the party entitled to the same, and should be exonerated from all liability on account of the deposit. Brown has no right, either in law or justice, to the claim which he makes. Tewksberry, who was his own agent, has received the money from the bank, and receipted for the same; and this was done strictly in accordance with the conditions under which the deposit was made.

It is contended that the preponderance of the evidence shows that the deposit was made without any conditions other than those expressed on the deposit slip; but that was a question of fact, which has been settled by the jury, and from a reading of the testimony, we think it was correctly settled.

Some criticism is made of the instructions, but there is nothing in the record showing that the testimony in the case is all preserved, and hence the objections which are made to the instructions are not available. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 350)

MARKLAND et al. v. McDANIEL.

(Supreme Court of Kansas. May 6, 1893.)

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSERS—WAIVER OF PROTEST—INSTRUCTIONS.

1. Where indorsers of a negotiable promissory note tell the holder before maturity not to do anything with the note, and that they will pay it, it is unnecessary, in order to charge them as such indorsers, that formal demand of payment be made on the maker, and notice given to the indorsers of his failure to pay, but demand and notice will be deemed waived.

2. It is not error to refuse an instruction which, though stating a correct principle of law, is inapplicable to the facts as disclosed by the testimony.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action on a promissory note by M. McDaniel against R. H. Markland and others. Plaintiff had judgment on demurrer to the petition, and defendants bring error. Affirmed.

Charles A. Hiller, for plaintiffs in error. Garver & Bond, for defendant in error.

ALLEN, J. This action was brought by the defendant in error, as plaintiff below, to recover from Markland, Dodge, and Moore as indorsers on a promissory note drawn to their order by George W. Wilson and wife, indorsed by them to Smith George, and by Smith George to plaintiff. A copy of the note and indorsements is attached to the petition. The execution of the note and its indorsement by the defendants is alleged, and also that the defendants requested plaintiff, before the note became due, not to have it protested, and agreed that, if plaintiff would not protest, the defendants would pay the amount thereof to the plaintiff; that plaintiff, relying upon this promise, did not have the note protested. There are other aver-



ments in the petition, which appear to us unnecessary. Among these is one with reference to the guaranty by the defendants of the payment of the note; also a statement with reference to the circumstances under which the note was executed. These matters were, however, merely surplusage. The only cause of action stated in the petition, when all its averments are construed together, is one against defendants as commercial indorsers who have waived protest of the note. The defendants demurred to the petition, and the overruling of this demurrer is assigned as error. This ruling was right. The petition stated a cause of action. Some evidence was received on the trial with reference to what transpired between Smith George and the defendants at the time the note was executed, which appears to us irrelevant, but as the case was tried on the theory that the defendants were commercial indorsers, and the jury were instructed only with reference to their liability as such, we do not think this evidence could have materially prejudiced the rights of the defendants. Counsel contends that a waiver of protest must be in writing, though he states that there are many authorities upholding the opposite view. The law is well settled, not only in this state, but generally, that a verbal waiver is sufficient. In the case of *Glaze v. Ferguson*, 48 Kan. 159, 29 Pac. Rep. 396, it was said: "That the presentment of a note, as well as protest and notice, can be dispensed with by agreement or waiver, is a familiar doctrine of the text-books. The waiver may be either verbally or by writing. It may be expressed in strict terms, or inferred from the words or acts of the party. It may result from any understanding between the parties which is of such a character as to satisfy the mind that a waiver is intended." See, also, the authorities cited in that case; also, *Gove v. Vining*, 7 Metc. (Mass.) 212; *Sigerson v. Mathews*, 20 How. 496.

The learned counsel for the plaintiff in error also complains of the charge of the court, because it ignores all the allegations of the petition, except those with reference to the liability of the defendants as indorsers. We think the court was right, and that no other cause of action was stated against defendants except as indorsers. The third instruction asked by the defendants, and refused by the court, may be conceded to be sound, but we do not see that any necessity existed for giving it in this case. It reads as follows: "The plaintiff in this action claims that demand, notice of nonpayment, and protest was verbally waived by the defendants, or one of them. Upon this point I charge you that, to establish such waiver, the evidence must be clear and unequivocal, and equivocal circumstances and agreements are not sufficient for this purpose." If the jury believed the testimony of the plaintiff and Smith George, there was sufficient evidence to sustain the finding of waiver. If they believed the testimony of the defendant Dodge, rather than the witnesses for the plaintiff, there was no waiver, for he denied in toto having had the conversation testified to by plaintiff's witnesses.

There was no middle ground to be considered by the jury, and therefore the instruction asked was not applicable. We do not think the testimony on behalf of plaintiff equivocal. It shows that before the note became due the plaintiff spoke to the defendant Dodge, and asked him what he was going to do about it, and that Dodge answered to let it stand just as it was; that they would see it was paid; that they expected to pay it any way; and that he would never lose a dollar. If such a statement was in fact made by a member of the defendant firm before the note fell due, we think the plaintiff had a right to rely on it, and that he was under no obligation to go through with the useless form and expense of making formal demand and giving notice of the nonpayment of this note. We perceive no error in the record. Judgment will be affirmed. All the justices concurring.

(61 Kan. 330)

## JONES et al. v. HOLLISTER.

(Supreme Court of Kansas. May 6, 1893.)

VENDOR AND PURCHASER—CONTRACT—WHEN TITLE PASSES—EJECTMENT—TITLE TO SUPPORT.

1. A written bond or contract for a deed of land, putting the purchaser thereof in immediate possession, and containing no provision for the forfeiture of the bond or contract if the purchaser fails to pay the installments of purchase money due thereon, passes the entire equitable estate to the purchaser. The legal title is merely held by the vendor as security for the payment of the balance of the purchase money.

2. Where possession is taken under such a bond for a deed, the purchaser has such an equitable title to the real estate as is sufficient to sustain an action to recover possession thereof against a party subsequently obtaining, without right, wrongful possession.

3. A purchaser holding under a bond or contract for a deed of land, where he has paid part of the purchase money, and has taken immediate possession thereof, has a better title thereto than a party who has taken subsequently possession under a void tax deed, although the original vendor of the land has made no effort to collect the money due upon the notes given for the purchase money, and the statute of limitations has run against them.

(Syllabus by the Court.)

Error from district court, Douglas county; A. W. Benson, Judge.

Action by Simpson Hollister against Valentine Jones and others to recover land. Plaintiff had judgment, and defendants bring error. Affirmed.

The other facts fully appear in the following statement by HORTON, C. J.:

On the 28th of March, 1888, Simpson Hollister, claiming to be the actual owner of the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 19, township 12, range 20, in Douglas county, commenced his action against Valentine Jones and J. P. Usher to recover the possession of the same. The defendants filed an answer, denying that Hollister was the owner of the premises. On the 6th of May, 1889, the death of J. P. Usher was suggested to the court below, and the action was revived against his heirs. Margaret A. Usher, his widow, filed an answer, alleging that she was the owner of the right,

title, and interest which J. P. Usher had at the time of his death. She further made a general denial of the allegations of the petition, and also alleged that, whatever rights or interest the plaintiff or his vendor may have had, they were barred by the statute of limitations long before this action was commenced. Before the commencement of the trial, T. A. Hurd appeared, and stated that, as trustee of the Union Pacific Railway Company, he held the legal title to the land, and asked leave to be made a party defendant. The court denied his request. Trial was had before the court at the May term for 1889, a jury being waived. After hearing all the evidence and the arguments in the case, the court made and filed the following conclusions of fact: "The lands described in the petition are a part of about 254,000 acres of land, commonly called the 'Delaware Trust Lands,' situated in Leavenworth, Douglas, Jefferson, and Wyandotte counties. The Leavenworth, Pawnee & Western Railroad Company, a corporation organized under the laws of Kansas territory, became entitled to said lands on February 23, 1863, by treaties between the United States and the Delaware Indians. The name of said corporation was afterwards changed to that of Union Pacific Railway Company, Eastern Division, to which company said lands were duly patented by the United States, on June 5, 1868. The name of the said Union Pacific Railway Company, Eastern Division, was changed to the Kansas Pacific Railway Company, April 6, 1869. The said Kansas Pacific Railway Company was afterwards consolidated with other companies to form the present Pacific Railway Company, and said last-named corporation is the legal successor of all the other companies above named. On February 23, 1863, the Leavenworth, Pawnee & Western Railroad Company, by its president and secretary, under its corporate seal, executed and delivered to E. H. Van Deusen and B. F. Hopper its written contract, whereby it undertook and agreed to convey to them the lands described in the petition for the sum of \$736, \$245.33 being paid in cash, and the balance secured by the four promissory notes of said Van Deusen and Hopper, due, respectively, in one, two, three, and four years thereafter, with six per cent. interest; the conveyance to be made when said notes were paid, according to their terms. Said Van Deusen and Hopper took possession of said lands a few days before the execution of said contract, having advanced said cash payment, and were awaiting the signing of the contract by the proper officers of the railroad company. They erected a house and saw-mill thereon at once, and occupied the same. They also fenced the land, and built several shanties thereon for workmen, and had from the date of their said occupancy full and exclusive possession thereof, under said agreement of purchase. On the 17th day of August, 1863, said Van Deusen duly assigned, in writing, all his interest in said contract and land to said Hopper, who continued in such possession until April 26, 1870, when he conveyed said land by quitclaim deed, and delivered pos-

session thereof, to Samuel K. Huson. Said deed recites, as part consideration, that the said Huson assumed payment of said four purchase-money notes to the railroad company above referred to, amounting to \$490.64. Said Huson immediately took possession undersaid deed by tenant, and held the same until his death, January 2, 1875. His administratrix continued in such possession, and rented said lands as a part of the estate. She executed a written lease to one White in 1875, who continued thereunder until and including 1879. After that year, John P. Devereaux, as trustee for said railroad company, claimed the rent and possession, as did also the Huson estate; and White paid rent to Devereaux for the years 1880 and 1881. He surrendered his possession to one Albert Moore, as a subtenant, who remained in possession until May, 1884, when he left the place; and it was then leased by J. P. Usher, then claiming title thereto, and who had obtained peaceable possession thereof, to Sam Lee, who remained in possession, as the tenant of said Usher, until March, 1886, when it was leased by said Usher to Valentine Jones, defendant, who still holds such possession under said lease. Said Usher's possession was not disturbed until this suit was brought. In the year 1879, the north 1-10 of said lot No. 4 was assessed for taxation, and, said taxes being delinquent, at the tax sales of 1880 the whole of said lot No. 4 was sold for such taxes to J. L. Briggs, and his certificate duly assigned to said J. P. Usher, who paid the taxes of 1881 thereon; and on the 21st day of July, 1884, the whole of said lot No. 4 was conveyed by tax deed to said J. P. Usher, and said deed was duly recorded January 7, 1886. In the year 1881 the 3-9-10 of said lot No. 4 was assessed for taxation, and, said taxes being delinquent, at the tax sales of 1882 the 9-10 of said lot [not specifying what 9-10] was sold for such delinquent taxes to J. L. Briggs, who assigned his certificate to J. P. Usher, and on the 7th day of September, 1885, the said 9-10 [not specifying what 9-10] of said lot was conveyed to J. P. Usher, and said deed placed upon the proper record in the register's office March 25, 1887. Both said tax deeds are void upon their face, and convey no title from the year 1879 to the year 1888, inclusive. Taxes have been paid on said property, and a schedule thereof shows the description by which said lot was assessed, the amount and dates of payments, and by whom made. The widow and heirs of said Samuel K. Huson never surrendered possession of said lands, and said Devereaux, as trustee, never took possession, except by receiving certain rents as hereinbefore stated, from the tenant of said Huson estate. The said Usher claimed said premises in fee simple under said tax sales ever since about the 1st of March, 1884, and his widow still claims the same in fee simple. John P. Usher died, intestate, April 13, 1889, leaving, his sole heirs, his widow, Margaret A. Usher, and three sons of full age, who have since his death conveyed all their right, title, and interest in said property to said Margaret A. Usher, who now owns all the right and ti-

tie which J. P. Usher had therein. On the 18th day of December, 1866, the Union Pacific Railway Company, by its deed of that date, duly executed, constituted and appointed said J. P. Devereaux and H. J. Jewitt, trustees, its attorneys in fact, to take, hold, and exercise full, exclusive, and absolute control of all said Delaware trust lands, [including the lands in suit, and the notes of said company or its corporate predecessors,] and to do and perform for said railroad company, in reference to said lands and notes, every act or thing that said company might or could do, with full power to make such instruments of conveyance, or other assurance, bonds, or writing, that the said trustees might require. The said J. P. Devereaux died in 1881, and on March 19, 1883, T. A. Hurd was duly appointed and constituted trustee in his place, with all the power that said Devereaux before that time had; and he has since acted, and still acts, as such trustee. And thereupon, on the 19th of March, 1883, the said Union Pacific Railway Company conveyed to him in trust all the unsold portion of said Delaware trust land, not including the lands in controversy; and on the 6th day of May, 1889, said company conveyed, in trust, to said Hurd, the lands in suit and some other lands. On the 10th day of March, 1887, the heirs at law of said Samuel K. Huson, deceased, conveyed said land, by quitclaim deed, to Simpson Hollister, plaintiff, who now owns all the right, title, and interest of said heirs therein. The said notes given by Van Deusen and Hopper have not been paid, but are long since barred by the statute of limitation. J. P. Usher, while in possession, and claiming title under his tax deeds, made lasting and valuable improvements on said property." And thereon the court made and filed the following conclusions of law: "(1) That said plaintiff should have and recover possession of the lands described in the petition, and costs. (2) Before being let into possession, said plaintiff is adjudged to pay said defendant Margaret A. Usher the sum of \$254.80, being the taxes paid by said J. P. Usher, and interest thereon as allowed by law in such cases. (3) The said tax deeds hereinbefore described are thereupon canceled, and held for naught." The defendants excepted, and bring the case here.

N. H. Loomis, for plaintiffs in error.  
Riggs & Nevison and D. S. Alford, for defendant in error.

HORTON, C. J., (after stating the facts.) The contract under which Hollister claims the land in controversy was made by the Leavenworth, Pawnee & Western Railroad Company to E. H. Van Deusen and B. F. Hopper, on February 23, 1863. \$245.33 was paid in cash at the date of the contract, and four notes, each for \$122.62, due in one, two, three, and four years, respectively, were given for the balance of the purchase price. The contract contained no terms of forfeiture, and excepting the reservation for the railroad company of a right of way, 80 feet in width, over the land, and the right to take gravel, earth,

and stone for the construction of its road, the provisions were merely to the effect that the company would execute to Van Deusen and Hopper, their heirs and assigns, a general warranty deed for the land sold, upon the payment of the notes and interest specified therein. Van Deusen and Hopper immediately went into possession of the land. Van Deusen afterwards assigned his interest in the contract to Hopper, and in 1870 Hopper quitclaimed his interest to Samuel K. Huson. In this conveyance Huson assumed the payment of the notes to the railroad company, none of which have been paid. Huson immediately took possession of the land by tenant, and continued in possession of the land until his death. He died January 2, 1875, leaving a widow and heirs, who continued, so far as they were able to do, to collect rent from the tenants occupying the land. Huson never paid the notes in question, or any part of them, and they still remained unpaid. In 1879 the heirs of Huson, deceased, ceased paying taxes upon the land. They did not pay the taxes for that year, or for any subsequent year. The land was afterwards sold for taxes, and deeded to J. P. Usher. Usher took possession in the spring of 1884, and continued in possession until his death. Since his death, Margaret A. Usher, his widow, has continued in possession of the land, and is now in possession of it, through Valentine Jones, her tenant. Usher placed lasting and valuable improvements upon the land, after he took possession of it. On March 10, 1887, the heirs of Mr. Huson quitclaimed their interest in the land to Simpson Hollister. The trial court held that Usher's tax deeds were void, and gave judgment in favor of Hollister, the plaintiff below, but preserved for the defendants all their rights for taxes and improvements under the statutes.

There is nothing in the evidence or findings showing, or tending to show, that the Leavenworth, Pawnee & Western Railroad Company, or any of its successors, ever forfeited, by judgment or otherwise, the contract for the sale of the land of the 23d of February, 1863. Under that contract, Van Deusen and Hopper and their subsequent grantees or assigns had an equitable title to the land. Under the contract, possession was taken by the purchasers, and such purchasers and their grantees or assigns continued in possession from 1869 until the spring of 1884, when Usher took possession under his tax deeds. There is a special finding of the trial court that the widow and heirs of Samuel K. Huson, who was in possession at his death, on January 2, 1875, never surrendered possession of the land, although Mr. Devereaux, who represented the interest of the Union Pacific Railway Company, Eastern Division, received certain rents from the tenant of the Huson estate.

The contention is that the finding of the trial court that Mrs. Huson never surrendered possession is not sustained by the evidence. William P. White was the last tenant from whom Mrs. Huson collected rent. He moved upon the land in 1874 as a tenant of Mr. Huson, and left the land

in 1881. After Mr. Huson died, he paid the rent to Mrs. Huson for two years, and then paid rent to Mr. Devereaux. But it does not appear that Mrs. Huson consented that White should pay any rent to Mr. Devereaux, or any one else. The record shows that the administratrix of the Huson estate brought suit in 1879 against White, and recovered judgment of \$175 for rent of the land. We think that there was enough evidence offered upon the trial to support all the findings of fact.

It is next contended that Hollister ought not to recover, unless he has a title to the land against the Leavenworth, Pawnee & Western Railroad Company, or the Union Pacific Railway Company, its successor, which would be recognized and protected in a court of equity. But the Leavenworth, Pawnee & Western Railroad Company, the original owner of the land, or its successor, is not here complaining. Mrs. Usher is not the representative in any way in this action of the Leavenworth, Pawnee & Western Railroad Company or the Union Pacific Railway Company, or any other person or party claiming title or interest from any railroad company. So far as this case is concerned, Usher, when living, and his widow, since his death, are strangers to all the railroad companies. At the trial, T. A. Hurd appeared, and asked permission to intervene, and file an answer as trustee of the Union Pacific Railway Company; but he is not a party to the proceedings in error, and he makes no complaint in this court of any ruling of the trial court. Therefore in this action we cannot, if we would, protect the rights, if any, of the Leavenworth, Pawnee & Western Railroad Company, or the Kansas Pacific Railway Company, its successor, or the rights, if any, of T. A. Hurd, the trustee. If the railroad companies have permitted the persons holding under the written contract in the purchase of this land to remain in possession thereof, without attempting to collect the balance of the purchase money, until it has been barred by the statute of limitations, that is a matter wholly between the companies and the parties holding under the written contract of purchase. This is no concern of Mrs. Usher or her tenant. Of course a plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of that of the defendant. *Mitchell v. Lines*, 36 Kan. 378, 13 Pac. Rep. 593. But when the Leavenworth, Pawnee & Western Railroad Company sold the land in dispute to Van Deusen and Hopper, and executed to them, as purchasers, a title, bond, or contract therefor, and received a part of the purchase money, taking several promissory notes for the deferred installments of the purchase money, and then put the purchasers in possession, (time not being the essence of the bond or contract,) the entire equitable estate of the land passed to Van Deusen and Hopper and their vendees or assignees. Everything passed to them, except the mere legal title, and that was held by the railroad company merely as a security for the payment of the notes. *Courtney v. Woodworth*, 9 Kan. 443. Under the Code an equitable title to real

estate is sufficient to sustain an action to recover possession. *Railway Co. v. McBratney*, 12 Kan. 9. In this state, in ejectment, the party having the better title may always recover, whatever that title may be,—legal or equitable. If the title of a plaintiff is better than that of a defendant, the plaintiff may recover, however weak his title may be. *O'Brien v. Wetherell*, 14 Kan. 616; *Duffey v. Rafferty*, 15 Kan. 9; *Mooney v. Olsen*, 21 Kan. 691. Upon the findings of fact, the plaintiff below was entitled to recover. We perceive no error in the record. The judgment of the district court must be affirmed. All the justices concurring.

(51 Kan. 341)

CULP et al. v. CULP et al.

(Supreme Court of Kansas. May 6, 1893.)

MORTGAGE—FORECLOSURE—LIMITATION—TAX SALES—REDEMPTION TO MINORS.

1. Where a promissory note secured by a mortgage is barred by the statute of limitations, an action to foreclose the mortgage cannot be maintained.

2. A creditor who must take affirmative action to obtain a right or remedy cannot safely sit still when he might act, nor long delay the taking of such initiatory steps as will enable him to maintain the action; and where he fails to act or take the essential steps within a reasonable time the statutory limitation will run. *Bauserman v. Charlott*, 26 Pac. Rep. 1051, 46 Kan. 480.

3. The maker of a note secured by a mortgage removed from the state after the maturity of the note, and was absent until his death. No administration was ever had upon his estate, nor were any steps taken to enforce the collection of the secured debt until about 10 years after his death, when an action to foreclose the mortgage was begun. *Held*, that the action was barred.

4. The statutory provision which affords minors the right to redeem lands from tax sale after they reach majority applies only to lands that are owned by minors, or in which they had an interest at the time of the tax sale. *Doudna v. Harlan*, 25 Pac. Rep. 883, 45 Kan. 484.

(Syllabus by the Court.)

Error from district court, Bourbon county; C. O. French, Judge.

Action by Daniel Culp and others against Myron Culp and others for the foreclosure of a mortgage. Defendants had judgment on demurrer to the petition, and plaintiffs bring error. Affirmed.

Cory & Hulbert, B. Hudson, and E. F. Ware, for plaintiffs in error. E. M. Hullett, Ed. C. Gates, and J. M. Humphrey, for defendants in error.

JOHNSTON, J. On March 13, 1899, the plaintiffs brought an action against the defendants in the district court of Bourbon county to foreclose a mortgage executed by S. H. Culp and wife upon 320 acres of land situate in Bourbon county. In the petition it is alleged that the mortgage was given to secure a promissory note executed by S. H. Culp in favor of Daniel Culp and Samuel Stauffer on April 1, 1872, by which he promised to pay, one year after date, the sum of \$3,000, with interest at 6½ per cent. It is alleged that

no part of the principal and interest has been paid, and that there is due thereon the sum of \$6,305. It is further alleged that S. H. Culp, the maker of the note, removed from Kansas in September, 1874, and was personally absent from the state ever afterwards, living in the state of Illinois until the year 1877, when he removed to Iowa, where he died in September, 1879, leaving as his only heirs his widow and seven children, among whom were two of the defendants,—Myron Culp, a son 22 years of age when this action was begun, and David E. Culp, who was then a minor under 21 years of age. All of the children were under the age of 21 years at the decease of S. H. Culp, and no administration was ever had upon his estate in Kansas. The widow, Rebecca Culp, and the children other than Myron and David E., have by quitclaim deeds conveyed their interests and title in one of the quarter sections of the land to the defendant S. A. Lotterer, and in like manner they conveyed the other quarter section to the defendant Benjamin Garrison. There is a further averment that, in obtaining quitclaim deeds from the heirs, Garrison acted, and is still acting and holding the same, as the trustee of the defendant John Bishop. It is alleged that the mortgage was duly executed and recorded; that the plaintiffs were still the owners and holders of the note secured by the mortgage; that default had been made in its payment; and that, while defendants and each of them claim an interest or equity in the land, it was junior and subordinate to the mortgage sought to be foreclosed. As an additional allegation it is alleged that Lotterer, Bishop, and Garrison claim under tax deeds of dates September 9, 1880, October 7, 1881, and October 10, 1881, each of which was recorded about the time of execution, and that defendants Myron Culp and David E. Culp are entitled to redeem the lands from tax sales and have the tax deeds set aside, upon tendering to the holders of said tax deeds the sum or sums prescribed by law, and the plaintiffs claim the right to avail themselves of the equities of the minor defendant. In the petition they state that they tender to the holders of the tax deeds the sums necessary to redeem. The prayer of the petition is that the defendants be required to set up the interest they claim in the land, and that it be adjudged subordinate to that of the plaintiffs; that their claim of \$6,305, with interest thereon, should be declared the superior lien upon the real estate, and for a decree directing its sale to satisfy the lien. They also ask for the cancellation of the tax deeds. Separate demurrers were filed by the defendants, alleging that the facts stated in the petition were insufficient to constitute a cause of action against any of them. The court sustained the demurrers, and gave judgment in favor of the defendants, and although the grounds of decision are not set forth in the record, it was stated in the argument that the court held the action was barred by the statute of limitations.

Plaintiffs ask for a foreclosure of the

mortgage, but no recovery was asked upon the note secured by the mortgage. The note upon its face appeared to be barred by the statute of limitations, and, as the mortgage is only an incident of the note, if the latter is barred, so also is the mortgage, and the interests of the defendants were such as to justify them in interposing this defense. *Schmucker v. Sibert*, 18 Kan. 104; *City of Ft. Scott v. Schulenberg*, 22 Kan. 648.

To avoid the bar of the statute plaintiffs allege the removal of the maker of the note from Kansas, and his absence from the state until the time of his death in 1879. The removal, absence, and death of the debtor do not amount to an indefinite suspension of the operation of the statute. A creditor, who must take affirmative action to obtain a right or remedy, cannot safely sit still when he might act, nor long delay the taking of such initiatory steps as would enable him to maintain an action, and avert the ordinary penalty of delay.

The facts in this case bring it within a line of decisions which fully sustain the ruling of the district court. The note secured by the mortgage matured more than 20 years ago, and was 17 months overdue before the maker removed from the state of Kansas. No steps were taken to enforce its collection until about 16 years after a right of action thereon accrued, nor until about 10 years after the death of the maker. Of course his death suspended the operation of the statute until an administrator could be appointed, and none could be appointed at the instance of the plaintiffs until the time expired within which the widow or next of kin are given the preferred right to take out letters. After the lapse of 50 days, plaintiffs could have procured administration, and it was their duty to have taken steps to that end at that time, or within a reasonable time thereafter. So it has been held that where preliminary steps are essential to the bringing of an action upon a claim, and such steps may be taken by the claimant, he cannot prevent the operation of the statute by unnecessary delay in taking such action, and that if he fails to act within reasonable time the statutory limitation will run. *Atchison, T. & S. F. R. Co. v. Burlingame Tp.*, 36 Kan. 628, 14 Pac. Rep. 271. The same principle was announced in *Rork v. Board*, 46 Kan. 175, 26 Pac. Rep. 391. The subject was carefully reconsidered and the authorities re-examined in the case of *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. Rep. 1051, which was an action brought against the administrator of Gen. Blunt upon a judgment theretofore obtained in Missouri during the lifetime of Blunt. No letters of administration were taken out until more than four years after the death of Blunt, and three years elapsed after such appointment before the creditor commenced his action. In that case it was said that, "if the plaintiff below had availed himself of the means which the law provides for prosecuting his claim, he could have taken action as soon as fifty days had elapsed after the death of his alleged debtor. If a creditor would save his debt from the statute bar, he

should take out administration himself. \* \* \* The reasonable time within which a creditor, having a claim against a decedent, and wishing to establish the same against his estate, should make application for administration, would be under the statute fifty days after the decease of the intestate, or at least within a reasonable time after the expiration of fifty days. But a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. The same subject was recently considered by the supreme court of the United States in the case of *Bauserman v. Blunt*, 13 Sup. Ct. Rep. 466. It was there held that, while the death of the debtor operated to suspend the statute of limitations, it was not an indefinite suspension, and the creditor could not extend the time of limitation by failing to apply for the appointment of an administrator within a reasonable time after his application could be made. The running of the statute, it was held, was postponed during the 50 days when the creditor could not apply for appointment, or at least for a reasonable time after the expiration of the 50 days, but the delay by the creditor in applying for the appointment of an administrator until more than 5 months and 20 days had passed is unreasonable, where there is no suggestion of ignorance of the death of the debtor or other excuse. The court reviewed and followed the decision of *Bauserman v. Charlott*, supra, stating that "the decision was evidently deliberately considered and carefully stated, for the purpose of finally putting at rest a question on which some doubt existed. It is supported by satisfactory reasons, and is in accord with well-settled principles, and there is no previous adjudication of that court to the contrary." We see no reason why the principle of these cases does not fairly control the decision in this. No exception can be made for the reason that this is simply an action of foreclosure, and no personal judgment on the note is asked for. The mortgage cannot live longer than the note which it secures, and of which it is an incident, and no action can be maintained upon the mortgage where the note is barred. *Schmucker v. Sibert*, supra. The long delay of the plaintiffs leaves no question as to the running of the statute or the completion of the bar. As we have seen, the statute had been running for some time before the debtor left Kansas, and nearly 10 years elapsed after his death before this action was begun. The five-years statute is the one which was applicable, and hence the case of *Andrews v. Morse*, 50 Kan. —, 32 Pac. Rep. 640, to which we have been cited, has no application. These conclusions practically dispose of the case. The defendants have not only the quitclaim deeds from some of the heirs, as stated in the petition, but they also have the tax deeds. It is argued that the tax deeds are void. Such a statement is found in the prayer, but not in the body of the petition, and even if it was material it could not be regarded as a statement of the cause of action.

The allegations in regard to redemption are unimportant. It does not appear that

redemption has been attempted or could be effected. From the averments of the petition the tax deeds were issued in the years 1880 and 1881, and presumably the deeds were based upon sales made in 1877 and 1878. At those times S. H. Culp was yet alive, and the minors, through whom plaintiffs would claim redemption, had no interest in the land sold. The statutory provision which affords minors the right to redeem after they reach majority applies only to lands that belong to minors, and in which they have an interest at the time they are sold for taxes, and not that in which they may subsequently acquire an interest. *Doudna v. Harlan*, 45 Kan. 484, 25 Pac. Rep. 883. We think the demurrers were rightly sustained by the court, and its judgment will be affirmed. All the justices concurring.

(51 Kan. 321)

DOLAN et al. v. TOPPING et al.

(Supreme Court of Kansas. May 6, 1893.)

SPECIAL SHERIFF—APPOINTMENT BY CLERK OF COURT—ATTACHMENT—WHO MAY MOVE TO DISOLVE.

1. A clerk of the district court appointed a special officer to serve process in an attachment proceeding upon an application which did not show that the court was not in session in the county, or that the judge was absent therefrom, and which failed to show that the sheriff and his deputies were interested in the proceeding, out of the county, or in any way disqualified to act, but it contained as an only reason that the plaintiffs' attorney had looked with diligence for the sheriff or his deputy, but in vain, and that it was important that papers should be served at once; in fact, the sheriff and his deputies were in the county, and several deputies were in the county seat, qualified and available to serve process, at the time the order of attachment was issued and placed in the hands of the special officer. *Held*, upon a motion to discharge the attachment levied by the special officer, that his appointment was unauthorized, and the levy invalid.

2. Under such circumstances, the service of the order of attachment, and the seizure of property by the appointee, cannot be regarded as the acts of a de facto officer.

3. Persons not parties to the action in which the attachment was issued, but who, in other actions, had procured the attachment of the property levied on by the appointee, are entitled to come into court and move to discharge the property from the attachment wrongfully levied by such appointee.

(Syllabus by the Court.)

Error from district court, Ness county; V. H. Grinstead, Judge.

Attachment by William F. Dolan & Co. against M. L. Peters and others. On the order overruling their motion to discharge a prior attachment levied on the same property at the suit of J. W. Topping, plaintiffs bring error. Reversed.

Buchan, Freeman & Porter and Thomas Berry, for plaintiffs in error. N. H. Stidger and Geo. S. Redd, for defendants in error.

JOHNSTON, J. This proceeding involves the question whether a person appointed as special sheriff by the clerk of the district court in a certain case, upon the mere statement by the plaintiff

that he had looked with diligence, but in vain, to find the sheriff or his deputy to serve the process, may legally serve an order of attachment. J. W. Topping began an action in the district court of Ness county against M. L. Peters, and procured the issuance of an order of attachment, which was directed to I. C. Cooper, as special sheriff. The following statement or application by an attorney of Topping was the only basis for the appointment: "State of Kansas, Ness county—ss.: N. S. Calhoun, Clerk of the District Court: I have looked in vain and with due diligence for sheriff or deputy to serve papers in case of J. W. Topping vs. M. L. Peters. It is of great importance that the papers be served at once, and I ask that, if sheriff be not found at once, a special officer be appointed to serve said papers. I am attorney for plaintiff. [Signed] E. C. Little." The application was verified. Indorsed upon the back of the application was the following: "State of Kansas, Ness county—ss.: To Whom It may Concern: For good reasons shown, I have this day appointed I. C. Cooper to serve the summons and writ of attachment in the action now pending in the district court of Ness county, Kansas, wherein J. W. Topping is plaintiff and M. L. Peters is defendant. Witness my hand and the seal of this office of this 19th day of October, 1887. [Seal.] N. S. Calhoun, Clerk of District Court." Cooper served the summons and order of attachment, seized the stock of goods belonging to Peters, locked up the store, and turned over the key to Topping. Three days afterwards W. F. Dolan & Co., the Ridenour-Baker Grocery Company, and, later, the William B. Grimes Dry Goods Company, brought attachment actions against M. L. Peters, and the sheriff of the county, with orders of attachment, proceeded to the store building where the goods were, and obtained the key from Topping, when the sheriff unlocked the building, and levied the attachments procured by the plaintiffs in error. The sheriff continued in the possession of the goods until they were turned over to a receiver appointed by the court. Afterwards the plaintiffs in error moved to discharge the attachment obtained by Topping, upon the grounds—First, that it was never served by the sheriff, nor by any deputy or undersheriff of the county, nor by any one else legally authorized to serve the same; and, second, that if Cooper had any authority to serve the attachment, it was abandoned by Cooper and Topping, and the attachment lien was lost. These motions were overruled, and the plaintiffs in error come to this court complaining of the rulings.

If Cooper had no authority to serve the order of attachment issued in behalf of Topping, the motion to discharge should have been sustained. In section 701 of the Civil Code it is provided that "an order for a provisional remedy or any other process in an action wherein the sheriff is a party or is interested shall be directed to the coroner. If both of these officers are interested, the process shall be directed to and executed by a person appointed

as provided in the next section." Section 702 provides that "the court or judge, or the clerk, in the absence of the judge from the county, for good cause may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the application of the party obtaining the process or order, and the return must be verified by affidavit. He shall be entitled to the same fees allowed to the sheriff for similar services." In the act relating to counties and county officers provision is made for the election of sheriff, and the giving of a bond by him for the faithful performance of his duties. He is authorized to appoint an undersheriff, and as many deputies as he may think proper, and he is held to be responsible on his official bond for the default or misconduct of his undersheriff or deputies. He and his undersheriff and deputies are authorized and required to serve and execute all process issued or made by lawful authority, and directed to the sheriff. Gen. St. 1889, pars. 1759-1769. Where there is no sheriff in a county, or when the sheriff is a party to a cause, or whenever affidavit is made that the sheriff will not, by reason of partiality, prejudice, consanguinity, or interest, faithfully perform his duties in any case commenced or about to be commenced, the clerk of the court directs the process to the coroner, who is required to execute it in the same manner as the sheriff might have done. Id. pars. 1777-1779. In this case neither the sheriff nor the coroner were parties to the cause, nor interested in the action. The sheriff did not appoint Cooper, nor did he know anything of his appointment until after he had attempted to serve the process, nor has he ever ratified the same. As a matter of fact, the sheriff was present in the county during the day on which the appointment of Cooper was made, and was in his office at the county seat a portion of the day. Two or more of his deputies were in the county seat during the day and at the time when the appointment was made.

We think the showing made to the district clerk was insufficient, and the appointment made by him without authority. The general theory of our law is that process shall be served by an officer who has given an undertaking as the statute requires for the protection of the rights of all persons who may be affected by his action. If the sheriff, or any of his deputies, or the coroner, acting in his stead, wrongfully seizes property, the party injured by their wrongful acts may have recourse upon their official bonds. When there is no sheriff in the county, or when he is a party, and is interested, or otherwise disqualified to serve process in a particular cause, it is provided that the process shall be directed to the coroner, who is required to furnish a bond with like conditions as that given by the sheriff. When all of these officers are disqualified to act, which can rarely be the case, provision is made for the appointment of a special officer. It will be observed, however, that in such cases the appointment is to be made by



the court or the judge, and the clerk is only permitted to exercise the authority of appointment in case of the absence of the judge from the county; and before he can act good cause must be shown. It will be observed in the present case that good cause was not shown. For all that appears the judge of the district court was in the county when the clerk undertook to appoint. It was not shown that the sheriff and his deputies were absent from the county or disqualified. Indeed, it appears that the sheriff and his deputies were qualified and available to serve the process which was directed to the special officer; and it further appears that the special officer knew of their presence when he proceeded to serve the papers. It will hardly do to permit a party, who may have some selfish purpose to subserve, to wait until the sheriff and his deputies are out of sight, and then pass by the court or judge, and obtain from the clerk the appointment of a special officer, who gives no bond, and may be wholly irresponsible, to levy an attachment, or seize and hold the property of others. Under the theory of the defendants in error their practice would be permitted, but the statutes, fairly interpreted, do not justify either such theory or practice. The case of *Mayer v. Wicks*, 15 Ohio St. 548, is cited to show that an appointment may be made by the clerk for any reason other than those enumerated in the statutes. That case is not an authority, as it simply held that the provisions of the Code did not take away from the court the inherent power to appoint special masters for the sale of real property. It is urged that, even if the clerk had no authority in law to make the appointment, yet, having made it, and the appointee having accepted and levied the writ, he thereby became clothed with all the power of a *de facto* officer, and his acts are therefore as binding as those of the regular sheriff or his deputies. There is no room for the application of the *de facto* theory in this case. No collateral attack is made on the authority of Cooper to serve the orders of attachment, but his right to serve the attachment is made in the action wherein the attachments were issued. There are no outside or innocent parties to be protected, but all who are interested or affected are proper parties to this proceeding, and the sufficiency of the attachment was a proper question for consideration. It appears that the sheriff was present, a qualified and available officer, and hence there was no room for a special or *de facto* officer.

There is some contention that the plaintiffs in error have no standing in court to contest the validity of an attachment in an action wherein they are not parties. Originally they were not parties to the action of *Topping v. Peters*, but, being interested in the property, and in discharging it from the attachment wrongfully levied thereon, they were entitled to come into court and make the motions which they did. *Long v. Murphy*, 27 Kan. 375; *Grocery Co. v. Records*, 40 Kan. 119, 19 Pac. Rep. 346; *Civil Code*, § 532. Limiting the decision to the facts in this case, we

hold that Cooper had no authority to levy an attachment, and that the motions to discharge should have been sustained. For this purpose the judgment will be reversed, and the cause remanded to the district court. All the justices concurring.

(51 Kan. 296)

#### STATE v. FALK.

(Supreme Court of Kansas. May 6, 1893.)

INTOXICATING LIQUORS—ILLEGAL SALES—SALES BY SERVANTS.

Where two bartenders in the employ of the owner or proprietor of a place of business containing a cigar store in front, and a "joint" in the back part, make sales of intoxicating liquors in violation of law, and the evidence proves that such sales were made with the knowledge or assent of the owner or proprietor, or by his direction and authority, such owner or proprietor is liable, on account of the sales so made, the same as if made by him in person.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; Henry L. Alden, Judge.

Rheinhardt Falk was convicted of selling intoxicating liquor unlawfully, and appeals. Affirmed.

Moore & Berger, for appellant. John T. Little, Atty. Gen., A. H. Cobb, and W. G. Holt, for the State.

HORTON, C. J. Rheinhardt Falk was convicted on two counts for selling intoxicating liquors in violation of the statute, and sentenced to 60 days' imprisonment in the county jail, to pay a fine of \$200, and to be imprisoned until the fine and costs were paid. He appeals.

It is contended that the prosecution failed to prove that any sale of intoxicating liquors was made by Falk, and, therefore, that the verdict is not sustained by any evidence. It appears from the record that two persons, named Fritz and John, made the sales testified to. It is argued on behalf of Falk, who was convicted, that there is no evidence in the record that he aided or abetted these persons in selling intoxicating liquor, or that he was present when the sales were made, or that he had any interest in the "joint" or place where the liquors were sold, or that the sales were made with his knowledge, assent, or direction. It was ruled in *State v. Skinner*, 34 Kan. 256, 8 Pac. Rep. 420, that "where a person acts as clerk or agent of another, in selling intoxicating liquors for him, with his knowledge and consent, in violation of law, the principal may be prosecuted and punished for such unlawful sales by his clerk or agent." There is evidence in the record showing that Falk occupied the place of business where the intoxicating liquors were unlawfully sold; that in his place of business there was a cigar store in front, and a saloon or joint in the back part; that John and Fritz were his "two bartenders there;" that he was present most of the time in the cigar store or in the joint; that he requested an officer to go to his place of business, and disperse the crowd standing in front of it. These and other

matters in the record were sufficient, we think, to authorize the jury to find that the bartenders, John and Fritz, were the clerks or agents of Falk in selling the intoxicating liquors, and that he was the owner or proprietor of the place of business, which included both the cigar store and the saloon or joint. The judgment of the district court will be affirmed. All the justices concurring.

(51 Kan. 297)

STATE v. NUGENT.

(Supreme Court of Kansas. May 6, 1893.)

INTOXICATING LIQUORS—ILLEGAL SALES—EVIDENCE—VARIANCE.

Where a defendant is charged with selling intoxicating liquors in violation of law, in a "certain building in the alley," between streets definitely named, and the evidence of the witnesses tended to show that the building where the intoxicating liquors were sold was on the corner of a lot adjoining the alley named, and also that it stood in the alley, and the other allegations of the information were fully supported, *held*, that the evidence justified a verdict of guilty, and that there was not sufficient variance in the proof from the allegations concerning the place where the liquors were sold as to mislead the defendant, or to prejudice his legal rights so as to demand a new trial.

(Syllabus by the Court.)

Appeal from district court, Wyandotte county; Henry L. Alden, Judge.

Owen Nugent was convicted of selling intoxicating liquors unlawfully, and appeals. Affirmed.

Hale & Fife, for appellant. John T. Little, Atty. Gen., and A. H. Cobb, for the State.

HORTON, C. J. Owen Nugent was convicted of having unlawfully sold intoxicating liquors in a certain building situated in the alley between Fifth and Sixth streets and Minnesota and Armstrong avenues in the city of Kansas City, in the county of Wyandotte, in this state. He was sentenced to pay a fine of \$100, and to be committed to the county jail for 30 days, and also to be committed until the fine and costs were paid. He appeals. It is contended that there was no evidence introduced upon the trial showing that Nugent sold intoxicating liquors in a "building situated in the alley." We have carefully read all of the evidence. One of the witnesses testified that the place of business of Nugent was on the "corner of the alley; some say it stands in the alley." This witness further testified that the place of business "was right in the two alleys." There was sufficient evidence before the jury to sustain the allegations of the information as to the building or place where the intoxicating liquors were sold. At least there was not such a variance in the proof from the allegations of the information as to mislead the defendant, Nugent, or prejudice him in any way in his legal rights.

Several instructions were requested upon the part of the defendant which were refused. Of this refusal complaint is made. The instructions refused are not embodied

in any bill of exceptions. They are not a part of the record in this case, and therefore cannot be examined or considered. *State v. McClintock*, 37 Kan. 40-43, 14 Pac. Rep. 511; *State v. Smith*, 38 Kan. 194, 16 Pac. Rep. 254. The judgment of the district court will be affirmed. All the justices concurring.

STATE v. BURWELL.

(51 Kan. 403)

(Supreme Court of Kansas. May 6, 1893.)

APPEAL—RECORD—SUFFICIENCY.

The certificate of the clerk of the district court, attached to the record brought up on appeal, stated that it was a true and complete copy of the original bill of exceptions, but failed to certify that it was a full and correct transcript of the record of the cause. *Held*, that the omission was fatal to the appeal. (Syllabus by the Court.)

Appeal from district court, Norton county; G. Webb Bertram, Judge.

O. J. Burwell was convicted of willfully and feloniously receiving stolen property, and appeals. Appeal dismissed.

John R. Hamilton, for appellant. John T. Little and L. H. Wilder, for the State.

JOHNSTON, J. O. J. Burwell was convicted for willfully and feloniously receiving stolen property. The penalty adjudged was imprisonment at hard labor in the state penitentiary for a period of five years. He appeals to this court, and alleges as the principal error a remark made by the trial judge upon an objection to incompetent testimony. The attorney general insists that the record is not in a condition to justify a review. An examination shows that it embraces nothing beyond what is called a "bill of exceptions." The certificate of the clerk, by which the sufficiency of the record is to be measured, is that it is a true and complete copy of the original bill of exceptions, but he does not certify that it is a full and correct transcript of the record of the cause. This is a fatal omission, and the appeal must be dismissed. *Nelswender v. James*, 41 Kan. 463, 21 Pac. Rep. 573; *Westbrook v. Schmaus*, 50 Kan. —, 32 Pac. Rep. 892. All the justices concurring.

(50 Kan. 275)

DEMAREE v. SCATES.

(Supreme Court of Kansas. May 6, 1893.)

ELECTION CONTEST—COUNTY COMMISSIONER—"ELIGIBLE."

Gen. St. 1889, par. 1622, provides that "no person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall be eligible to the office of county commissioner." Gen. St. Oct. 31, 1868, c. 25, § 12. *Held*, that the word "eligible," as used in the statute, means "legally qualified," that is, capable of holding office. The term "eligible," as used, does not mean "eligible to be elected" to the office of county commissioner at the date of the election, but "eligible or legally qualified" to hold the office after the election; that is, at the commencement of the term of office. *Privett v. Bickford*, 26 Kan. 52; *Smith v. Moore*, 90 Ind. 294; *Vogel v. State*,

107 Ind. 374, 8 N. E. Rep. 164; *Brown v. Go-ben*, 122 Ind. 113, 23 N. E. Rep. 519; *People v. Hamilton*, 24 Ill. App. 609; *McCrary, Elect.* § 311. *Allen, J.*, dissenting.  
(Syllabus by the Court.)

Original proceedings in quo warranto by T. E. Demaree against T. A. Scates to try title to the office of county commissioner. Judgment for plaintiff.

The other facts fully appear in the following statement by HORTON, C. J.:

At the general election held on the 8th day of November, 1892, T. E. Demaree was a candidate for the office of county commissioner of Seward county, from the third commissioners district. At the election he received the highest number of votes for the office, and was, by the board of canvassers, declared to be elected. About the 17th day of November, 1892, the county clerk of Seward county issued to him his certificate of election, and on the 3d day of December he subscribed to the oath of office, and gave the bond required by law. On the 9th day of January, 1893, being the second Monday of January, and the day prescribed for him to take his seat as a member of the board, he appeared, and demanded that the place be surrendered to him. T. A. Scates was the sitting member of the board of county commissioners from the third commissioners district, duly elected and qualified to that position for the term expiring on the 9th of January, 1893. When Demaree demanded that the office of county commissioner be surrendered to him, Scates refused to comply, alleging as the grounds for his refusal that Demaree, at the date of the general election, held a township office in Seward county, viz. the treasurer of the township of Fargo; that, at the date upon which he qualified for the office, he held the office of township treasurer, not having resigned therefrom; and that on the 9th day of January, 1893, when he demanded the office, he also held the office of treasurer of Fargo township. Scates further alleged, as a ground for his refusal to surrender the office, that Demaree, at the general election on the 8th day of November, 1892, gave and offered to give a bribe to an elector to vote for him for the office of county commissioner.

Edwin A. Austin and J. C. Ellis, for plaintiff. J. K. Beauchamp, for defendant.

HORTON, C. J., (after stating the facts.) The principal question in this case is whether T. E. Demaree was eligible to take office of county commissioner of Seward county on the 9th day of January, 1893. He was elected on the 8th day of November, 1892. At that time he was the treasurer of the township of Fargo, of his county. Paragraph 1622, Gen. St. 1889, reads: "No person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall be eligible to the office of county commissioner." The contention is over the meaning that should be given to the word "eligible," in the statute. This word is determined by law and other standard lexicographers thus: Black: "Capable of

being chosen;" "competency to hold office." Bouvier and Anderson: "This term relates to the capacity of holding, as well as that of being elected to, an office." Abbott: "The term 'eligible to office' relates to the capacity of holding, as well as the capacity of being elected." 19 Amer. & Eng. Enc. Law, 397: "Capable of being chosen;" "implying competency to hold the office, if chosen." Worcester: "Legally qualified;" "capable of being legally chosen." Webster: "That may be selected;" "legally qualified to be elected and to hold office." Some law writers define the word as "legally qualified; as, eligible to office;" "legally qualified to hold office;" "electable;" "proper to be chosen;" "qualified to be elected." Plaintiff contends that "legally qualified" is the proper definition of the word "eligible," as used in this statute. On the other hand, it is contended by the defendant that "eligible" means "proper to be chosen;" "qualified to be elected;" "that may be elected."—that is, the candidate for county commissioner must be eligible to the office at the time of the election.

It is a cardinal rule of construction that the words of a statute should be so construed as to carry out the purpose or intent of the lawmakers. Therefore, if a word in the statute has two or more definitions, according to the standard lexicographers, that definition should be given in its construction that will best subserve the general purpose for which it was enacted. The literal or strict meaning of a word sometimes gives way to its general import. "The sense and reason of the law are the soul of the law." *Intoxicating Liquor Cases*, 25 Kan. 751. In *Privett v. Bickford*, 26 Kan. 52, there was construed the provision of our constitution ordaining that no person who has ever voluntarily borne arms against the government of the United States shall be qualified to hold office in this state until such disability is removed by a vote of two thirds of all the members of both branches of the legislature. In that case it was said: "This provision operates upon the capacity of the person to take office, rather than as a disqualification to be elected to an office. The disqualification is to the holding of the office, and not to the election. There is a marked distinction between a person who is ineligible or incapable of being elected, and one who may hold the office. \* \* \* If our constitution provided that the plaintiff was ineligible to be elected, instead of being ineligible to hold office, the contention of the defendant would be good; but as the ineligibility is not to the election, but only to the holding of the office, such ineligibility is cured by the subsequent removal of the disqualification." Although the statute under consideration used the word "eligible," instead of the words "qualified to hold office," contained in the provision of the constitution referred to, yet if "legally qualified to hold office" is the meaning that may be given to "eligible," the statute and the provision of the constitution may be construed alike, without difference; that is, as going only to the holding of the office. If the statute is a pro-

bhibition merely against any person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county holds stock, from being elected to the office of county commissioner, then a person "eligible at the election"—that is, "capable of being legally chosen"—might be elected to the office of county commissioner, and afterwards accept a state, county, township, or city office, or become a stockholder in a railroad in which the county has stock. If "eligible" is to be construed as to the capacity of being chosen or elected, the statute would be of no actual benefit. It would permit that to be done which it was evidently the purpose of the lawmakers to prevent. They did not desire a county commissioner to hold another office, or that he should be a stockholder in a railroad in which his county is interested. They evidently intended to prohibit a county commissioner, while holding that office, from being a state, county, township, or city officer, and also intended to prohibit him, while holding such office, from being an employer, officer, or stockholder in any railroad in which his county owned stock. This was the evil sought to be avoided by the statute. Therefore, to construe the word "eligible" as meaning "legally qualified to hold office" seems to us to better subserve the spirit, as well as the letter, of the statute. Even if we should construe "eligible" as "electable," or "proper to be chosen," or "capable of being elected," then, to carry out the purpose of the statute, as already stated, we must also give "eligible" the additional definition of "legally qualified," or "capable of holding office," or of "acting as a member," because it will not comply with the spirit of the statute to rule that if a person is elected county commissioner, although eligible at the time of his election, he may after his election accept the other offices referred to in the statute, or become connected with a railroad in which the county owns stock. To give these two different definitions to the word "eligible," in the same statute, and at the same time, would be an unusual construction. Generally a word in the same statute is not construed in two different ways. "It has been the constant practice of the congress of the United States, since the Rebellion, to admit persons to seats in that body who were ineligible at the date of their election, but whose disabilities had been subsequently removed." *McCrory, Elect.* § 311. A person may therefore hold the office of county commissioner even if, when elected, he is disqualified under the provisions of the statute. If he becomes qualified after the election, and before the holding, it is sufficient.

Among the authorities which are generally cited to support the definition of "eligible" as meaning "the capacity of being elected" are *Carson v. McPhetridge*, 15 Ind. 327; *Howard v. Shoemaker*, 35 Ind. 111; and *Jeffries v. Rowe*, 63 Ind. 592. More recently (1883) these decisions have been carefully re-examined by the supreme court of Indiana in *Smith v. Moore*, 90 Ind. 294. In that case a provision of the constitution of Indiana was construed.

That provision reads: "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office." "Eligible" was defined as meaning "legally qualified," and "eligible to any office," as used in the provision of the constitution, was construed as having reference to the qualification to hold office, and not to the choosing or election to such office. One of the judges (*Elliott, J.*) dissented; but that judge, in the case of *Brown v. Goben*, (1890,) 122 Ind. 113, 23 N. E. Rep. 519, decided, under all the circumstances, it was best to adhere to the decision in *Smith v. Moore*, supra. He said in his opinion, among other things, that "we conclude, therefore, that it must be held to be the settled law of this state that the disqualification must exist at the time the term of office begins, and that the right of the claimant is not affected by the fact that at the time of his election he was ineligible." The syllabus in that case reads: "The disqualification must exist at the time the term of office begins, the right of the claimant not being affected by the fact that at the time of his election he was ineligible." In the case of *Vogel v. State*, (1886,) 107 Ind. 374, 8 N. E. Rep. 164, the judge writing the opinion, (*Zollars, J.*), speaking for the court, said: "The constitution provides that no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office. *Rev. St.* 1881, § 176. That the office of justice of the peace is a judicial office, under our constitution and statutes, is well settled. It was held in the case of *Smith v. Moore*, 90 Ind. 294, that a judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term; in other words, that the disability imposed by the constitution has reference to the taking and holding of the office, and not to the election. That case has been followed and approved in subsequent cases. Marks was eligible to take and hold the office of township trustee, if the term began after the expiration of his term as justice of the peace, although such term may not have expired at the time of the election." A part of the syllabus reads: "A judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term; the disability imposed by the constitution merely having reference to the taking and holding of the office." The court at that time consisted of five judges. The decision was unanimous. These decisions of Indiana referred to must be considered of greater force because the earlier decisions of that state construed "eligible to office" as relating "to the capacity of being elected." A more thorough examination of the whole subject induced that court to change its former decisions, and to construe "eligible" as "going only to the holding of the office," and not to mean "incapable of being chosen." The case of *People v. Hamilton*, 24 Ill. App. 609, is in line with the later Indiana cases, and "eligible to the

office of alderman" is construed to mean "legally qualified." The disqualification referred to in the statute in that case is construed to apply to the office, and not the election. In addition to the earlier Indiana cases, we are also cited to *Searcy v. Grow*, 15 Cal. 117, which was followed in *People v. Leonard*, 73 Cal. 230, 14 Pac. Rep. 853; *State v. Clarke*, 3 Nev. 566; *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. Rep. 802; and *In re Corliss*, 11 R. I. 638. The decisions in California and Nevada are commented upon in *Smith v. Moore*, 90 Ind. 294, and the reasoning by which the conclusions were reached in those cases was not satisfactory to that court. The same may be said of the reasoning in *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. Rep. 802, as applied to the statute under consideration. In the Nevada case, which construes the word "eligible" as meaning "incapable of being legally chosen," the judge writing the opinion says: "The etymology of the word, and the meaning generally given to it by the best English authors, would hardly justify this interpretation. But the word, as used in various state constitutions, seems to justify this broader and more comprehensive interpretation." *State v. Clarke*, 3 Nev. 566. In the Rhode Island case the language of the constitution is "that no person holding an office of trust or profit under the United States shall be appointed an elector." The supreme court of that state construed the election by the people as constituting an appointment. With this construction, the disqualification in the constitution of Rhode Island strikes at the beginning of the matter; that is, it forbids an appointment or the election of an ineligible candidate. That case is therefore not in conflict with the views of this court.

The other objections made to Demaree's holding the office of county commissioner were not well taken. In the case of *Rogers v. Slonaker*, 32 Kan. 191, 4 Pac. Rep. 138, Rogers' term of office, as coroner, did not expire until January 14, 1884. He attempted, while coroner, on January 12, 1884, before the expiration of his term, to act as county commissioner. He tried to hold two offices at the same time. This cannot be done. In *State v. Plymell*, 46 Kan. 294, 26 Pac. Rep. 479, Plymell was ineligible to the office of county commissioner because he continued to hold the office of city clerk. He attempted to discharge the duties of county commissioner. He also tried to hold two offices at the same time. Forbes, who was elected to the office of township trustee to succeed Demaree, was notified of his election about the 18th of November, 1892. He qualified December 31, 1892. The acts relating to township officers make no provision for any of the offices therein named becoming vacant on the refusal or neglect of the officer elected to give the official bond within the time prescribed by law. *Jones v. Gridley*, 20 Kan. 584. On the 9th of January, 1893, at the time that Demaree appeared and demanded his office as a member of the board of county commissioners of Seward county from the third commissioners district he was "eligible"—that is, he was "legally qualified"—to hold the office at that time.

He had fully complied with all the provisions of the statute, and Scates should have surrendered to him the office.

The claim that Demaree offered to give a bribe to E. D. Haines on the 8th of November, 1892, to procure his vote, we do not think is supported by the evidence. It is said that Demaree agreed with Haines to use his influence to relocate a schoolhouse near the center of his school district, in consideration that Haines would vote for him for county commissioner. Considering all the evidence, we do not think that Demaree bribed, or attempted to bribe, Haines by what he did about the relocation of the schoolhouse. Judgment of ouster will be rendered against the defendant, with costs.

JOHNSTON, J., concurs.

ALLEN, J. (dissenting.) The courts seem to have experienced some difficulty in defining the word "eligible," as used in statutory provisions similar to the one under consideration in this case, as well as in the various state constitutions. Taken by itself, the meaning of the word, to me, appears plain. Its derivation from the Latin word "eligere," to choose, with the suffix "ible," ordinarily signifying able, or capable of, would seem to give the word, naturally, the signification of able to be, or capable of being, chosen. This signification seems to correspond with its ordinary use in the English language. The definition given by Webster is: "(1) Proper to be chosen; qualified to be elected; legally qualified, as eligible to office; (2) worthy to be chosen or selected; desirable; preferable; as, an eligible situation for a house; the more eligible of the two evils." Worcester defines it thus: "That may be elected; fit to be chosen; worthy of choice; preferable; desirable. (Politics) Legally qualified; capable of being legally chosen." Black's Law Dictionary gives the following: "As applied to a candidate for an elective office, this term means capable of being chosen, the subject of selection or choice, and also implies competency to hold office, if chosen." Section 1, c. 104, of the General Statutes of 1889, contains the following: "In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: \* \* \* Second. Words and phrases shall be construed according to the context, and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such peculiar and appropriate meaning."

In the passage of the statutory provision under consideration, two purposes may have been in contemplation,—one, a prohibition on the officers, and other persons rendered ineligible by the statute from being candidates at the election, and from being voted for at all. The other, a prohibition on the holding by one person of two offices, of the kinds mentioned, at the same time. The intention of the legisla-

ture is to be gathered mainly from the language used. It is fair to presume that members of the Kansas legislature have generally a fair understanding of the English language, and especially of the forcible, simple words derived from the Saxon. If the intention had been merely to prevent the holding of the office of county commissioner by a state, county, township, or city officer, or an employer, officer, or stockholder in any railroad, I apprehend there could hardly have been a member of either house to whom the simple Anglo-Saxon word "hold" would not have suggested itself, and who would not have used it in preference to the word "eligible." The meaning of the section would then have been as the majority of this court construes it to be, but it would have read: "No person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall hold the office of county commissioner." Of course, it is not to be expected that the legislature will in every instance select words of the most clear and unequivocal meaning, yet it is not to be presumed that words are used in the statute without careful consideration of their force and meaning. On the contrary, it is to be presumed that they have selected the words they deem most apt to convey their meaning. The word "eligible" cannot fairly be said to have a technical meaning in the law, different from its ordinary signification in the language. I think that not only the weight of reason, but of authority as well, is to the effect that the word "eligible" has reference to the status of the candidate at the date of the election. The electors then make their choice. That choice should be made from those persons who are eligible; fit to be chosen; worthy of choice. It does not seem reasonable that they should be required to take into consideration changes of condition which may or may not arise between the date of the election and the commencement of the term of office, but that the person, at the time of the election, should belong to the class of persons who are eligible. To this effect are the following cases: *Searcy v. Grow*, 15 Cal. 117; *State v. Clarke*, 3 Nev. 566; *Waldo v. Wallace*, 12 Ind. 569; *Gulick v. New*, 14 Ind. 93; *Carson v. McPhetridge*, 15 Ind. 327; *In re Corliss*, 11 R. I. 638. In *Jeffries v. Rowe* it was said: "The term 'eligible' means, not only eligible to be elected to the office, but also eligible to hold it after the election." In *People v. Leonard*, 73 Cal. 230, 14 Pac. Rep. 853, the court refers to the case of *Searcy v. Grow*, supra, and says: "So it appears to us that when we come to consider the motive which must, of necessity, have actuated the constitutional assembly that enacted the provision which we are considering, and the cogent and powerful reasons which would occur to the mind of any earnest thinker why such a restriction should be placed on the holding of office by one man, at the same time, under more than one government, (such as that it would tend, if the duties of both offices were onerous, to the neglect of one or both, or to the undue influence of the office-

holder, as a powerful agent of some ambitious president or head of a department, if the federal office was a lucrative one, and the like,) that it was clearly intended that one holding a 'lucrative office' under the United States should not hold a 'civil office of profit' under the state." The conclusion reached in that case was that the inhibition applied both to the election, and to the holding of the office thereafter, and that if a person, though qualified at the time of the election, afterwards became disqualified by accepting a federal appointment, he could not hold both offices. In the case of *State v. Smith*, 14 Wis. 498, it was held that, although there was no statutory or constitutional provision in that state prohibiting an alien from holding the office of sheriff, a person who was still a subject of Great Britain was ineligible to that office. In the case of *State v. Murray*, 28 Wis. 96, it was held that a person who had not declared his intention to become a citizen at the date of the election, but who did so before his term of office commenced, might be elected clerk to the county board of supervisors. The court, however, says: "In other words, I think that in those cases, as in this, the disqualifications relate to the holding of the office, and not to the election thereto. As a matter of course, none of these remarks are intended to apply to a case where a different rule has been enacted by constitutional and statutory provision." This case can hardly be considered as upholding the views expressed in the opinion of the chief justice. In the case of *State v. Clarke*, supra, the court says: "We agree with the defendant that the framers of the constitution intended to prohibit one who was holding a lucrative federal office from holding a state office at the same time; but, instead of restricting the meaning of the word 'eligible' as defendant contends, we think, to carry out the intention of the constitutional convention, we ought, rather, to give it a more extended signification than is generally given, and that it means both incapable of being legally chosen, and incapable of legally holding." To my mind, the reasoning of Justice Elliott in his dissenting opinion in *Smith v. Moore*, 90 Ind. 307, is much more clear and convincing than that in the opinion of the majority of the court. The view of the supreme court of Minnesota, as appears in the case of *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. Rep. 802, meets my entire approval: "Our inquiry is as to the meaning of the word 'eligible,' as used in the constitution. In Webster's Dictionary its meaning is defined to be: 'Proper to be chosen; qualified to be elected.' In this, and the cognate words derived from the same source, (the Latin verb 'eligere,') the idea primarily involved is that of choosing, selecting. It is expressed in our words 'to elect,' derived from the same Latin word. This primary and strictly proper signification of the word 'eligible' is also its well-understood popular meaning. If we had adopted the form 'electable' for the adjective, instead of following more nearly the form of the verb from which it is derived, the meaning might have been more obvious, but it would not have been different.

In *State v. Murray*, 28 Wis. 96, it was considered to be a fundamental principle of popular government even, in the absence of any constitutional or statutory restriction, that one who is not a qualified elector cannot legally hold an elective office. According to the opinion of Ryan, C. J., in the later case of *State v. Trumpf*, 50 Wis. 103, 5 N. W. Rep. 376, and 4 N. W. Rep. 512, this proposition should, in principle, be more broadly stated, and only such persons as are themselves electors at the time of the election should be deemed eligible to office. We think that this must certainly be so considered under a constitution which, in effect, declares that only such persons shall be eligible to elective offices." I am entirely satisfied with the decision in *Privett v. Bickford*, 26 Kan. 52, because the provision there under consideration contained the term "qualified to hold office," which, of course, refers to the period covered by the term, rather than the time of the election. Neither of the other cases appears to me to be decisive of the question in this state. It appears to me that the legislature has plainly said, in substance, that no person holding a township office shall be elected county commissioner. If the spirit of this law requires the courts to hold that no person who, after election as county commissioner, though qualified at the time, shall hold both that and a township office at the same time, we still are not required to do away with the rule that is, in terms, declared in the statute. I perceive no inconsistency in the construction placed on the word by those courts which hold that the inhibition applies both to the time of the election, and to the term of office.

(4 Wyo. 5)

#### STIRLING v. WAGNER.

(Supreme Court of Wyoming. May 13, 1893.)

SALE—VALIDITY—FRAUD.

In replevin of merchandise attached by creditors of an insolvent, plaintiff, insolvent's brother, claimed the stock by prior bill of sale in satisfaction of a note executed by insolvent for an alleged valuable consideration. Insolvent obtained the stock by false representations as to his solvency, and by suppressing the facts that plaintiff held notes executed by him. *Held*, that such sale was void, as being a fraud on creditors.

On rehearing.

For former report, see 31 Pac. Rep. 1032.

CONAWAY, J. Defendant in error asks for a rehearing on the ground that the court erred in its conclusion that the consideration of the \$19,000 note in question in the cause could be no more than the Laramie store. The testimony of defendant in error himself is explicitly and positively to this effect. In answer to the question, "You may state for what the note was given," he says, "It was given for a stock of merchandise that I owned in the city of Laramie." And again, speaking of the sale of this store to E. J. Wagner on February 1, 1888, he says, "I said to him, 'I will sell this stock of goods for \$19,000,' and I sold it to him." This is from the record. In attempting to

subvert this positive testimony of defendant in error by their constructions of other portions of his testimony, his counsel have undertaken a task too great for human ingenuity to accomplish. In accepting this uncontradicted testimony of defendant in error as true, his counsel urge that the court erred, and acted upon "theories of construction peculiar to itself," and "reached its conclusion upon considerations dehors the record." Also that this action of the court was a surprise to them. It is very frank in counsel to admit their surprise that the testimony of their client should be accepted as absolutely true. But when, on behalf of the same client, they urge that this is error, the surprise of counsel and court become mutual. If the testimony of the client is untrue, there are some ugly doctrines of estoppel standing in his way when he seeks to allege his own untruthfulness. It is not necessary to go outside of the record to find uncontradicted and satisfactory evidence that the consideration of the \$19,000 note, and of the repurchase by defendant in error in September, 1888, of the stock of goods, with its large additions of new and valuable goods, was grossly inadequate, or entirely wanting. Indeed, it is quite apparent that the untruthfulness of defendant in error consisted, not in stating the consideration less than it actually was, but in stating that there was any consideration whatever. Neither is it necessary to go outside of the record to find evidence forcing the fair and disinterested mind to the conclusion that defendant in error was a party to numerous frauds perpetrated by E. J. Wagner as the active agent. During the summer of 1888, E. J. Wagner bought large bills of goods upon false and fraudulent representations of his solvency. Defendant in error himself testifies that E. J. Wagner told him at that time that he had established a good credit, and was buying goods upon credit. Defendant in error does not state whether or not E. J. told him that he represented himself as solvent in order to obtain credit. As a business man he would know that without telling. At the same time he was holding E. J.'s notes for \$41,500, \$34,000 of which was payable on demand, with which to gobble up whatever goods E. J. could get by the use of his credit in advance of the claims of those who furnished the goods. The litigation in this cause arises from his attempt to use this \$19,000 note for such purpose. The principal element in the frauds of E. J. Wagner was his suppression, in his statements of his financial condition, of the fact of the existence of these notes. To accomplish his frauds he needed the co-operation of defendant in error, and he had it. When, in the accomplishment of a fraud, different parties perform essential and important parts, how can either deny his responsibility? The part of E. J. Wagner was to establish a credit, and buy the goods on credit, by false representations of his solvency. He did so. By suppressing the notes held by the defendant in error he could and did represent himself to be worth about \$8,000 above his liabilities. The part of defendant in error was to se-



cretly hold these notes, and, when E. J. Wagner's credit failed, to take the goods in advance of bona fide creditors. This was as necessary to the consummation of the fraud as it was for E. J. Wagner to obtain the goods. Defendant in error did not fail to perform his part. Much of the evidence of E. J. Wagner's frauds was rejected by the trial court as being evidence of transactions not brought to the knowledge of defendant in error. This evidence should have been considered. It was not necessary, in order to render defendant in error responsible for his participation in these frauds, that he should have knowledge of every step taken by his accomplice in consummating the frauds.

We prefer to deal tenderly with defendant in error and his cause, and to place the decision upon the ground of want of consideration for his purchase of the Laramie store in September, 1888. This is a good and sufficient reason for the decision, and one good reason is enough. We have now added another good reason, and the record is not yet exhausted. The further point is presented that no right of possession of the property in question was shown in plaintiff in error by virtue of writs of attachment or otherwise. This contention is not sustained by the record.

We will say further that it would have been in better taste if, instead of asserting that the court acted upon "theories of construction peculiar to itself," counsel had shown in what the peculiarity—that is, the departure from the accepted theories of the law and the consequent error—consisted. In regard to this, as well as to the assertion that the court reached its conclusion upon considerations dehors the record, we will simply adopt the language of the supreme court of Washington in a similar case. Counsel had said in the case referred to: "The rule announced by this court in its opinion, if that opinion is permitted to stand, strikes at the heart of all authority, overrules all principles of construction, and establishes an arbitrary system that can neither be followed with safety nor looked to with confidence." The court says: "Vehement declarations like this prove nothing, and are so far out of place in a communication by an attorney addressed to a court that it would be justified in striking the paper in which they were contained from the files without any consideration thereof upon the merits; and even a more severe penalty might well be imposed." *State v. Board, etc., of Whatcom Co.*, 32 Pac. Rep. 775.

Rehearing denied.

GROESBECK, C. J., and CLARK, J., concur.

(3 Idaho [Hasb.] 620)

#### STATE v. JORGENSEN.

(Supreme Court of Idaho. April 8, 1893.)

CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY FOR FAILING TO AGREE—DISCRETION OF COURT.

1. The discharge of a jury, by reason of their inability to agree, is entirely within the sound discretion of the court.

2. The supreme court will not reverse a judgment of the court below for an abuse of discretion in discharging the jury, unless it is affirmatively shown by the record that there has been such abuse of discretion. Without such affirmative showing, the presumption of this court is that the jury was properly and legally discharged.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

Peter Jorgenson was convicted of grand larceny, and from an order denying a new trial he appeals. Affirmed.

The other facts fully appear in the following statement by MORGAN, J.:

The defendant, Peter Jorgenson, was indicted by the grand jury of Bingham county, on the 7th day of January, 1892, for the crime of grand larceny, and on the 27th day of June, 1892, was put upon his trial, on a plea of not guilty. A jury was regularly impaneled and sworn to try the cause, and the cause was submitted to them, on said date. The jury, having been called into court on the same day, and asked if they had agreed upon a verdict, replied that they had not. As appears by the record in the minutes of the court, the jury were then discharged from the further consideration of this cause. On the 29th day of June the cause again came regularly on for trial before the court and a jury, whereupon the defendant, by his counsel, entered the following additional pleas: "The defendant pleads that he has already been discharged by the district court of the fifth judicial district of Idaho, in and for Bingham county, on the 27th day of June, 1892. (2) The defendant pleads that he has been once in jeopardy for the offense charged in the indictment, on the 27th day of June, at the courthouse at the town of Blackfoot, in the district court of Idaho in and for Bingham county." The trial proceeded, and the cause was finally submitted to the jury. A verdict of guilty was returned by the jury, and judgment of imprisonment duly pronounced. Motion for new trial was made, which was denied by the court, and appeal taken to this court from the order overruling the motion for new trial.

Hawley & Reeves, for appellant.  
George M. Parsons, Atty. Gen., for the State.

MORGAN, J., (after stating the facts.) The first assignment of error is that the evidence does not show, or tend to show, that the crime of grand larceny was committed. In this the court cannot agree with counsel. The evidence is strongly against the defendant, and was properly submitted to the jury; and it was for the latter to determine whether the evidence was, beyond a reasonable doubt, sufficient to work a conviction of the defendant.

The second assignment of error appears to be the main reliance of the counsel. It is that the evidence shows that on the 27th day of June, 1892, the defendant was placed in jeopardy under this indictment,—in other words, because the

court discharged the jury to which the cause was first submitted without the express consent of the defendant,—claiming, also, that the record of the court must show such express consent, or that the record should show affirmatively the necessity inducing the court to discharge the jury. We are unable to agree with counsel for appellant. The power of the court to discharge the jury is expressly given by the statute, (Rev. St. Idaho, § 7905,) which says: "Except as provided in the last section, the jury cannot be discharged, after the cause is submitted to them, until they have agreed upon their verdict, unless by consent of both parties, entered on the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." The exercise of this power is discretionary with the court. *Id.* § 7905; *People v. Stock*, 1 Idaho, 218. There is no limitation, either by statute or common law, for keeping the jury together. The time is entirely within the discretion of the court. *People v. Stock*, *supra*; *People v. Goodwin*, 9 Amer. Dec. 203. In *U. S. v. Perez*, 9 Wheat. 579, Justice Story says: "They [the courts] are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and, conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office, and such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." When exercised, in the absence of any affirmative showing to the contrary, the presumption of this court is that it was properly and legally exercised. It must be affirmatively shown that the court has abused this discretion, because this court can reverse a judgment of conviction on that ground. There is no such affirmative showing in this case. We do not think we would be justified in reversing a cause, and discharging a prisoner convicted of a crime by an impartial jury, unless it should be affirmatively shown by the record that he had been deprived of some substantial right, to his prejudice. We cannot hold that the lower court has abused the discretion conferred upon it, of which we have no affirmative evidence. It is true it would be the better practice, in such cases, that the record should show, in brief, the reason for the discharge of the jury; but we cannot undertake to hold that, because the clerk neglected this in making up his record, there was an abuse of discretion. We are cited to the case of *Dobbins v. State*, 14 Ohio St. 493, by counsel for appellant. In that case the court say: "But while a case of urgent necessity must exist, and must be found to be such by the court,

before a jury once sworn in a criminal case can be discharged without having rendered a verdict, we do not concur in the position that all the facts and circumstances upon which this finding is predicated must appear in the record." And again the court said, (*Id.* 503:) "It is, however, undoubtedly true that an inquiry into the sufficiency of the facts upon which an order of this kind is made would involve even greater difficulty than one made upon evidence, merely; and, still more imperatively, the settled application of the rule that it should not be disturbed unless it plainly and manifestly appeared that no fair consideration of the facts would have warranted the decision. But when it is made plain and manifest that the jury has been discharged, without the consent of the accused, for a reason which the law does not recognize as a necessity, or when, for a reason apparently such, it is made clear that the facts did not establish its existence, we know of no way in which the integrity of the constitutional provision can be preserved, short of holding that the prosecution was there legally ended." The court here clearly hold that there must be affirmative evidence of the abuse of this discretion to authorize the supreme court to reverse a judgment of the lower court for this reason. In the case at bar there is no evidence of such abuse. It does not appear that the defendant or his attorney objected to the discharge of the jury. For aught that this court knows, the jury might have been striving to agree for one day or one week, and, for aught that appears, the court may have had abundant evidence that the jury could not agree. Had the defense considered the evidence too slight to justify the discharge of the jury, they should have objected thereto, and brought the evidence here, embodied in a bill of exceptions, or in the statement, in order that this court might have had facts upon which to base a judgment. The case of *People v. Goodwin*, 9 Amer. Dec. 203, is a still stronger case in favor of the exercise of this discretion, in a proper case, by the lower court. So, also, is the case of *State v. Moor*, 12 Amer. Dec. 541. See, also, a large number of cases there cited. To the same effect is the case of *People v. Olcott*, 1 Amer. Dec. 168. The judgment of the lower court must be affirmed, and it is so ordered.

HUSTON, C. J., and SULLIVAN, J., concur.

(3 Idaho [Hasb.] 662)

SABIN v. CURTIS, County Treasurer.

(Supreme Court of Idaho. May 18, 1893.)

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS  
— CREATION OF COUNTIES — APPOINTMENT OF  
COUNTY OFFICERS BY GOVERNOR — REPRESENTATION  
— SENATORIAL AND REPRESENTATIVE DISTRICTS.

1. The act creating Bannock county (2d Sess. Laws, p. 170) is not in conflict with the provisions of section 19, art. 3, of the constitution.

2. The legislature has power to create new

counties, and may authorize the governor to appoint county officers therefor, to serve until the election of county officers at the first biennial election held thereafter, and until such officers, so elected, qualify as by law required.

3. Said act does not deprive Bannock county of representation. It remains a part of the Bingham county representative district, and a part of the district composed of Bingham, Logan, and Alturas counties, and its electors are entitled to vote for the same number of representatives as they were prior to the creation of Bannock county.

4. The act creating Bannock county is not an apportionment law, in any sense, and neither grants nor takes away legislative representation from said county, nor changes the boundaries of any senatorial or representative district.

5. Said act does not segregate the eleventh senatorial district. By the creation of Bannock county the tenth and eleventh senatorial districts are in no wise changed. The electors of Bannock county have the same right in the election of senators in said districts as they had prior to the creation of said county.

(Syllabus by the Court.)

Original application by E. C. Sabin for mandamus to H. W. Curtis, treasurer of Bingham county. Petition granted.

Stewart & Dietrich, for plaintiff. H. W. Smith, for defendant.

SULLIVAN, J. This is an application made by the plaintiff for a writ of mandate to compel the defendant, as treasurer of Bingham county, to pay over to the treasurer of Bannock county certain school money which is admitted to be in the hands of the defendant, as treasurer of Bingham county, and which, plaintiff claims, has been apportioned to certain school districts in Bannock county. The defendant denies the existence of Bannock county. The plaintiff contends that Bannock county was created by an act of the second legislature of Idaho, entitled "An act to create and organize the county of Bannock; to fix the county seat of said county; to provide for the apportionment of the indebtedness of Bingham county between Bingham county and Bannock county; and to provide for the apportionment of officers in said county, and for transcribing a portion of the records of Bingham county; and for other purposes." 2d Sess. Laws, p. 170. It is contended that the act creating Bannock county is in conflict with certain provisions of the constitution, and that said county has no legal existence, for that reason. The rules by which we are guided in the determination of this case are well settled. The conflict or repugnancy between the statute and the constitutional provisions must be clear, and so contrary to each other that they cannot be reconciled. Only when the court is clearly satisfied that such conflict exists will they declare the statute unconstitutional. In cases of doubt as to the constitutionality of a statute, the statute is sustained. Courts interfere only in cases of unquestioned violation of the constitution. With these principles to guide us, we will proceed to determine the three points urged by the defendant against the constitutionality of said act.

The first point is that section 4 of said act provides that the governor, by and

with the consent of the senate, shall appoint the officers of said Bannock county. It is contended that said section 4 of said act is special legislation, and in conflict with the following provisions of section 19, art. 3, of the constitution, to wit: "The legislature shall not pass local or special laws in any of the following cases, that is to say: \* \* \* Regulating county business, or the election of county or township officers; \* \* \* creating offices, or prescribing the powers and duties of officers, in counties, cities, townships, election districts, or school districts, except as in this constitution otherwise provided." The act in question does not regulate county business, nor does it regulate the election of county or township officers, nor create any offices in addition to those prescribed by the constitution, and designated as "county offices," nor does it prescribe the powers and duties of county officers. The constitution does not prohibit the creation of new counties by the legislature. The power of the legislature to create new counties is recognized by sections 3 and 4 of art. 18 of the constitution. Section 6, article 18, of the constitution, provides that the legislature shall, by general and uniform laws, provide for the election, biennially, in each of the several counties of the state, of the county officers to fill the county offices named in said section. The legislature has complied with that provision. See 1st Sess. Laws, p. 59. Section 12 of the act creating Bannock county places said county under the general and uniform laws provided for the biennial election of county officers; and, as no biennial election would occur in this state prior to the fall of 1894, the legislature is not prohibited by the constitution from making provision for the appointment of the county officers of said county by the governor, to hold their offices until the first biennial election after the creation of said county. The provisions of said section 6, so far as they apply to the election of county officers under general and uniform laws, do not require the election of the officers of a new county prior to the first biennial election held after the creation of such county. *State v. Irwin*, 5 Nev. 111.

The second contention is that said act fails to provide Bannock county with any representation in the lower house of the legislature. Said act is not an apportionment act, and neither grants nor refuses representation to Bannock county. By the provisions of article 19 of the constitution, the state was divided into senatorial and representative districts, and by the provisions of section 4, art. 3, of the constitution, the legislature may redistrict the state, and reapportion the legislative representation of the state, whenever it may deem it advisable to do so. The legislature has made no apportionment since that made by the provisions of said article 19 of the constitution. The constitutional apportionment was made on the basis of the votes cast for delegate to congress at the election next preceding the adoption of the constitution. The basis of representation was the voting popula-

tion. Electors, alone, are represented. A given number in one county exercises the same political power as a like number in any other. Some departure, however, is made from said basis of representation by the proviso of section 4, art. 3, of the constitution, which provides that each county shall have at least one representative, in all future apportionments. But this does not change the basis of representation from the voting population to the county itself. The voting population was the basis of representation under the constitutional apportionment,—not the county, as a county. Article 19 of the constitution fixes the representative districts, and declares the representation that each district is entitled to until the same is changed as provided by law. The legislature may enact an apportionment law whenever it may deem proper to do so, but until the legislature passes an apportionment law the constitutional apportionment stands. Under the proviso of section 4, art. 3, of the constitution, each county in existence at the date of the enactment of an apportionment law is entitled to one representative, at least. The real contention is that the act creating Bannock county deprives the electors of that county of any voice whatever in electing members to the house of representatives, and is for that reason unconstitutional. By the constitutional apportionment, Bingham county—the county out of a part of which said Bannock county was created—is given three members of the house of representatives, and a joint member with Logan and Alturas counties. Thus the electors of Bingham county were empowered to participate in the election of four representatives. The representative district composed of Bingham county included all territory within its boundaries, and the act creating Bannock county out of a part of Bingham county leaves Bannock county still a part of said district. The boundaries of said Bingham county representative district remain as fixed by the constitutional apportionment until changed by a new apportionment, regardless of the creation of new counties out of a portion of the county composing such district. *Ohio v. Dudley*, 1 Ohio St. 437; *County of Bay v. Bullock*, (Mich.) 16 N. W. Rep. 896. The electors of Bannock county have not been deprived of representation. They may participate in the election of four representatives, the same as they did prior to the creation of Bannock county. In support of the last-mentioned contention, *McCrary, Elect.* (2d Ed.) § 191; *Paine, Elect.* § 331; and *Cooley, Const. Lim.*, (5th Ed.) side p. 616,—are cited. These authorities would be in point if this court took the view that the act creating Bannock county deprived the electors of the right of voting for representatives, but are not applicable, in our view of this case, above set forth. The authorities above cited rely for support on the cases of *People v. Maynard*, 15 Mich. 463, and *Lanning v. Carpenter*, 20 N. Y. 447. The latter case holds as follows: "The legislature cannot form any part of the existing territory of the state into a county, except at

a time when it has the power to provide for its taking its place, as an entirety, in the political and judicial divisions of the state, without the aid of any further enactment of a future legislature,"—and is not in point. The tenth section of the act in question declares Bannock county to be a part of the fifth judicial district of the state; and the eleventh section declares said Bannock county to be within, and a part of, the tenth senatorial district of the state. In *People v. Maynard*, supra, it was held as follows: "An act purporting to organize a new county out of territory detached from an old one, but which contains no organized townships, and makes provisions for none, is inoperative and void, as without such townships there can be no legal elections." This case is not in point, for the reason that the electors of Bannock county have not been deprived of any rights whatever by reason of said act. Section 5, art. 3, of the constitution, provides, among other things, that, in the formation of senatorial or representative districts, no county shall be divided. Bannock county, as created, is wholly within the same senatorial and representative districts in which its territory was situated before the creation of Bannock county. Said act does not divide either of said counties, leaving a part in one senatorial or representative district, and a part thereof in another; hence, is not obnoxious to that provision of the constitution providing that no county shall be divided in the creation of senatorial or representative districts. Said section, however, applies to an apportionment law, and not to an act creating a new county.

The third contention of defendant is that said act segregates the eleventh senatorial district, and is void for that reason. In our view of the case, said act does not segregate the eleventh senatorial district. The tenth senatorial district was composed of Bingham county as it existed at the date of the constitutional apportionment. The eleventh district consists of Bingham as it existed at the date of the constitutional apportionment, and Bear Lake and Oneida counties. The act creating Bannock county declares that it shall remain a part of the tenth senatorial district. The tenth district, in connection with Bear Lake and Oneida counties, form the eleventh senatorial district. There is no change in districts by reason of the act creating Bannock county. As the matter now stands, Fremont county, a new county created out of the northerly part of Bingham county, and Bannock county, a new county created out of the southern portion of said Bingham county, and Bingham county as changed by the creation of said two new counties, now compose the tenth senatorial district. The three last-mentioned counties include the exact territory included within the boundaries of Bingham county at the date of the formation of the tenth senatorial district under the constitutional apportionment. The same territory now comprises the tenth senatorial district. No change has been made in said district since the constitutional apportionment. The eleventh senatorial district was composed of

Bingham county as it existed at the date of the constitutional apportionment, and Bear Lake and Oneida counties, and is now composed of Fremont, Bannock, Bingham, Bear Lake, and Oneida counties. The boundaries of the tenth and eleventh senatorial districts have not been changed by the creation of said new counties. Bannock, Fremont, and Bingham counties, composing the tenth senatorial district, are empowered to elect one senator at the next biennial or regular election, and may assist in the election of a joint senator, with Bear Lake and Oneida counties, provided no new apportionment law is enacted before said election takes place.

We hold the act creating the county of Bannock to be constitutional and valid. The prayer of the plaintiff is granted, and the writ will issue as prayed for in the petition, costs in favor of the plaintiff.

HUSTON, C. J., and MORGAN, J., concur.

(3 Idaho [Hasb.] 671)

ALLEN v. CURTIS, County Treasurer.

(Supreme Court of Idaho. May 18, 1893.)

Original application by E. F. Allen, treasurer of Fremont county, for mandamus to H. W. Curtis, treasurer of Bingham county. Judgment for plaintiff.

Stewart & Dietrich, for plaintiff. H. W. Smith, for defendant.

SULLIVAN, J. This is an application for a writ of mandate to compel the defendant, as treasurer of Bingham county, to pay over certain school money to the plaintiff, as treasurer of Fremont county. The validity of the act entitled "An act to create and organize the county of Fremont, and to define the boundaries of Bingham county," (2d Sess. Laws, p. 94.) is called in question. This case was submitted to abide the decision of this court in the case of *Sabin v. Curtis*, 32 Pac. Rep. 1130, (decided at this term of court.) The facts are substantially the same in both cases, except it is not claimed by defendant that the act creating Fremont county segregates the eleventh senatorial district. For the reasons given in the said case of *Sabin v. Curtis*, supra, upon the points in that case that are the same as the points raised in this case, we are of the opinion that the act creating Fremont county is valid, and not in conflict with any provisions of the constitution. The writ is granted as prayed for in the petition, with costs in favor of the plaintiff.

HUSTON, C. J., and MORGAN, J., concur.

(3 Idaho [Hasb.] 627)

VAN HOOK et al. v. WEST.

(Supreme Court of Idaho. April 17, 1893.)

APPEAL—EVIDENCE.

Where the evidence is simply contradictory, the appellate court will not disturb a verdict.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by John Van Hook and others against N. A. West. Plaintiffs had judgment, and defendant appeals. Affirmed.

Freund & Loughary, for appellant. Forney & Tillinghast, for respondents.

HUSTON, C. J. This is an action brought by the plaintiffs against the defendant to recover the sum of \$260, the price and value of certain threshing of wheat done and performed by the plaintiffs for the defendant, at his request. There is no denial of the performance of the services by plaintiffs, nor is any objection raised by defendant to the manner in which the work was done. The sole defense is that the service was performed, not for the defendant, but for his son, who, it seems, has left the country. The land upon which the wheat threshed was grown was owned and occupied by defendant at the time the services were performed. The defendant was present during a portion of the time the work was being done. The case was tried with a jury, and a verdict rendered for the full amount, in favor of plaintiffs. The evidence is conflicting. Although variously stated in the specifications of error, the only error assigned is that the verdict is not warranted or sustained by the evidence. We do not think the record supports this assignment of error. The case of the plaintiffs was clearly made out by the evidence produced on their behalf; and while it is true, as shown by the record, that such evidence was disputed, upon nearly every material point, by the defendant and the various members of his family, yet the jury and the judge who presided seem to have been satisfied that there was a preponderance of evidence in favor of the plaintiffs. It is unnecessary to cite authorities upon the well-established rule that where the evidence is simply contradictory the appellate court will not disturb the verdict. Judgment of district court affirmed, with costs.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Hasb.] 624)

O'NEILL v. WHITCOMB et al.

(Supreme Court of Idaho. April 10, 1893.)

CLAIM AND DELIVERY—WHO MAY MAINTAIN.

Mortgagee of personal property, to whom delivery of mortgaged property has been made, can maintain claim and delivery for the wrongful taking thereof by a third party.

(Syllabus by the Court.)

Appeal from district court, Nez Perces county; W. G. Piper, Judge.

Action in claim and delivery by Eugene O'Neill against William J. Whitcomb and the Pacific Elevator Company. Defendants had judgment, and plaintiff appeals. Reversed.

James E Babb, for appellant. James W. Reid and Rand & Howe, for respondents.

HUSTON, C. J. One Leachman executed and delivered to plaintiff his note for

\$1,000, and at same time executed and delivered to plaintiff a chattel mortgage upon a growing crop of wheat, to secure said note. After the crop of wheat was harvested by L., the mortgagor, he delivered the same to the plaintiff, to be sold by him in satisfaction of said debt, according to the terms of said chattel mortgage. After such delivery, and before the sale thereof by plaintiff, defendant Whitcomb took and carried away from the possession of plaintiff 368 sacks of said wheat. Demand for possession having been made by plaintiff, and refused by defendants, plaintiff brings his action of claim and delivery to recover possession of said wheat. A motion to strike out certain portions of the complaint was allowed by the court, but, as no error is assigned in the record in such action by the court below, we cannot consider it here. Defendants then filed a general demurrer to plaintiff's complaint, which was sustained by the court, and, plaintiff declining to amend, a judgment of dismissal was entered in favor of defendants, and against plaintiff, from which judgment this appeal is taken.

It is claimed by respondent (and this seems to have been the view of the district court, and upon which said court predicated its judgment) that under the provisions of section 4520 of the Revised Statutes of Idaho this action is not maintainable. The portion of the section relied upon by respondent to sustain his contention is as follows: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter." It is a sufficient answer to this claim to say that this is not an action "for the recovery of any debt, or the enforcement of any right secured by mortgage," but it is an action to recover the possession of the security of which the mortgagee has been wrongfully deprived, in order that thereby he may, by a foreclosure and sale, under the provisions of the mortgage, recover the debt, and enforce the rights secured him by the mortgage. Mortgages upon personal property have always been considered, and of necessity are, unstable securities, but the rule contended for by respondent would make them utterly worthless. We have found no authority which sustains the rule contended for by respondent, and, if we had, we certainly should not follow it, as such a rule has no basis in law, equity, or good conscience. Of what avail would it be to the mortgagee of personal property to foreclose his mortgage upon property not in his possession, and of the very existence of which he has no assurance. Under the terms of the mortgage, the mortgagee is entitled to the possession of the mortgaged property. By the terms of the mortgage as set forth in the record the mortgagor agrees "that he will well and carefully tend, take care of, and protect the said crop while growing and until fit for harvest, and then faithfully and without delay harvest, thresh, clean, and sack the same, and deliver the same immediately into the pos-

session of the said party of the second part, or his assigns, to be by him held and disposed of for the payment of the debt hereby secured." The complaint alleges the harvesting of the crop by Leachman, and its delivery by him to the plaintiff, in accordance with the terms of the mortgage; that, after such delivery, defendants, or one of them, wrongfully took the same from the possession of the plaintiff; and we are gravely told that the plaintiff is remediless, for any remedy which would fail to secure to him the possession of the property which he held as security for his debt would be valueless. Such a proposition is not maintainable. The judgment of the district court is reversed, with costs.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Habb.] 640)

JONES v. QUAYLE et al.

(Supreme Court of Idaho. May 9, 1893.)

APPEAL—RECORD—CONTENTS OF—REVIEW—RECEIVER—APPOINTMENT OF.

1. Where no bill of exceptions or statement, agreed to and signed by the attorneys, or settled and signed by the judge, appears in the record, this court cannot review the evidence in an appeal taken from the judgment.

2. An order denying motion to discharge a receiver, overruling a demurrer, or adopting the report of a referee, is not appealable under our statute.

3. Where a party has property in his possession and under his control which he allows to depreciate in value, or wrongfully disposes of, in which another party has an interest, it is proper for the court to appoint a receiver.

4. This court will not supply deficiencies in a record by inference or supposition.

(Syllabus by the Court.)

Appeal from district court, Bear Lake county; D. W. Standrod, Judge.

Action by Jacob Jones against William Quayle and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Spence & Chalmers, S. J. Rich, and Kimball & Allison, for appellants. Smith & Smith, Hawley & Reeves, and J. C. Rich, for respondent.

HUSTON, C. J. This purports, by the notice of appeal in the record, to be an appeal from a judgment "entered on the --- day of --- 188-; \* \* \* also from the order denying defendants' motion to discharge receiver, made herein on the minutes of the court; also from the order adopting the report of the referee made and entered on the 29th day of April, 1892; also from the order denying defendants' motion to stay execution on said judgment, made and entered on the 16th day of November, 1892." The notice of appeal was filed November 22, 1892. There is no proof of service of the notice of appeal. There is no bill of exceptions in the record, nor does it appear that any statement was ever agreed to or signed by the attorneys of the parties, or settled or signed by the judge of the district court or by the referee. The appeal from the judgment

not having been taken within 60 days after entry of the judgment, we could not review the evidence, were it properly before us, which it is not.

What purports to be the report of the referee appears in the record, but it does not appear in any bill of exceptions or statement prepared as required by the Code of Procedure. The order denying the defendants' motion to discharge the receiver is not an appealable order, nor is the order overruling defendants' demurrer to the complaint, nor the order adopting the report of the referee.

No motion for a stay of execution, or any order therein by the district court, appears in the record. The record shows that the default of the defendants, for want of answer, and judgment thereon, was entered by the clerk on November 17, 1891; and, while there does not appear any action by the court in relation thereto, it seems to have been treated as a nullity in the subsequent proceedings in the case. We do not understand why it appears in the record. The most and all this court can properly do upon this record is to review the case upon the judgment roll, and in so doing the first question that arises is on the sufficiency of the complaint. Defendants filed a demurrer to the complaint, in which various grounds of demurrer are set forth, but the record does not show what the action of the court upon the demurrer was, whether it was overruled or sustained, or whether any action at all was had upon it. How can we be called upon to review the action of the district court when the record fails to show what the action of the court was, or whether it took any action in the matter? We are not at liberty to infer what the action of the district court was, and predicate our decision upon such inference. Such a course would be palpably unjust to the lower court, and would, moreover, recognize and encourage a laxity in practice which seems to have been carried to the ultimate in this case. We have, however, carefully examined the complaint in the record, and we do not find that any of the objections raised by the demurrer are well taken.

It is objected by appellants that the referee made and filed conclusions of law, when the order of the court simply required of him that he take the proofs, and make return of findings of fact. But the record shows that the court ignored the conclusions of law reported by the referee, and made its own conclusions of law. We see no force in this objection.

The next and only remaining question we are called upon to consider upon the record in this case is the order of the district judge in denying the motion of defendants to vacate the order appointing a receiver. We see no error in this action of the district court. The case made by the complaint was clearly one in which the appointment of a receiver was eminently proper. A large amount of property, in which the plaintiff claimed an interest, and which was at the time in the possession and under the control of the defendants, was being absorbed and disposed of, or allowed to depreciate in value, through

their remissness. We see no error in the action of the district court in refusing the motion to set aside the order appointing the receiver. We have given the record in this case more consideration than it is entitled to in the condition in which it comes before us. The statutes and the rules of the court in regard to appeals are plain and simple, and, unless counsel pay attention to them in bringing their cases here for review, they must abide the consequences of their own laches. It is not the province of the court to supply the deficiencies in a record by inference or supposition. The judgment of the district court is affirmed, with costs.

MORGAN and SULLIVAN, JJ., concur.

(3 Idaho [Hasb.] 644)

FAHEY et al. v. BELCHER.

(Supreme Court of Idaho. May 13, 1893.)

DISMISSAL OF APPEAL—EFFECT OF.

A dismissal of an appeal for failure to file transcript is a bar to another appeal, unless such dismissal is made without prejudice to a second appeal.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; D. W. Standrod, Judge.

Action by Jeremiah Fahey and others against Byron Belcher. Defendant had judgment, and plaintiffs appeal. Appeal dismissed.

Hawley & Reeves, for appellants. R. P. Quarles, for respondent.

SULLIVAN, J. In this case judgment was rendered by the court below on the 29th day of May, 1891. An appeal to this court was perfected on the 14th day of September, 1891. On the 11th day of January, 1892, respondent moved to dismiss the appeal, on the ground that a transcript of the record had not been filed within the time required by rule 4. The motion was granted, and the case dismissed on January 12, 1892. On the 25th day of January, 1892, appellants moved to reinstate the cause, and on February 15, 1892, the application to reinstate was denied. The decision denying said application is reported in 29 Pac. Rep. 112. It appears that on the 5th day of April, 1892, appellants presented the transcript in this case to the clerk of this court, and requested that he file the same, which was done. The cause was thereafter placed on the calendar for hearing. On March 14, 1893, it was submitted on the brief of appellants, and taken under advisement. The order made on January 12, 1892, dismissing the appeal, did not expressly provide that said cause was dismissed without prejudice to another appeal. Section 4823, Rev. St. 1887, provides as follows: The dismissal of an appeal is, in effect, an affirmation of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal. In *Spinetti v. Brignardello*, 54 Cal. 521, under a statute identical



with the section above quoted, the court held that "the dismissal of an appeal for failure to file the requisite papers—unless expressly made without prejudice—is a bar to another appeal." See, also, *Shannon v. Dodge*, (Colo. Sup.) 32 Pac. Rep. 61; *Garibaldi v. Garr*, (Cal.) 32 Pac. Rep. 170. The dismissal of the former appeal was, in effect, an affirmance of the judgment. Section 4823, *supra*.

The court denied appellants' application to restore this cause to the calendar,

and in defiance of such denial the counsel for appellants procured the filing of the transcript, and the placing of the case on the calendar. This kind of practice cannot be tolerated. The order submitting the case upon its merits is set aside, this appeal dismissed, and the judgment of the court below affirmed; costs of this appeal in favor of respondent.

HUSTON, C. J., and MORGAN, J., concur.

END OF VOLUME 32.







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